Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 7 - Misrepresentation [1]

Section 1. - In General

Preliminary

7-001

The modern law relating to misrepresentation is a somewhat complex amalgam of rules of common law, equity and (since the coming into force of the Misrepresentation Act 1967) [2] statute law. It is also complicated by the fact that misrepresentation may constitute an actionable tort in certain circumstances, as well as providing grounds for relief in the law of contract. Prior to the enactment of the Misrepresentation Act 1967, the position broadly speaking was that a misrepresentation which induced a person to enter into a contract gave the representee the right to rescind the contract, subject to certain conditions, but generally gave him no right to damages unless the misrepresentation was fraudulent, or, in some cases, negligent, or unless the representation amounted to a term of the contract. Since the coming into force of the Misrepresentation Act the representee who entered a contract as the result of a misrepresentation will always be able to claim damages for negligent misrepresentation in circumstances in which he could have recovered damages had the misrepresentation been fraudulent. In addition the Act gives the court a discretion to refuse to permit a representee to rescind a contract, but to award him damages in lieu of rescission, if the misrepresentation is negligent or wholly innocent; but it leaves the representee with an absolute right to rescind where the misrepresentation is fraudulent. The Act of 1967 does not, however, alter the rules as to what constitutes an effective misrepresentation. It has been said that the rules on misrepresentation have developed piecemeal, and that some of the rules, which were developed when the remedies for misrepresentation were narrower than they now are, may not now operate well. Given the present state of the law, especially in the light of the decision in *Royscot Trust Ltd v Rogerson* [3] that the rules of fraud attach to liability for "negligent" misrepresentation under the Misrepresentation Act 1967 s.2(1), it has been said that the court should not be too ready to find that a misrepresentation has been made [4]; but this statement has also been doubted. [5]

Prohibitions on misrepresentations in consumer cases

7-002

The Unfair Commercial Practices Directive [6] requires Member States to prohibit, and to provide "adequate and effective" means to combat, unfair commercial practices. These are defined so as to include misleading actions [7] and misleading omissions. [8] However unfair commercial practices within the meaning of the Directive will not necessarily give rise to civil remedies for individual consumers, as the Directive is "without prejudice to contract law and, in particular, to the rules of validity, formation or effect of a contract". [9] Accordingly the Regulations made in 2008 [10] to implement the Directive prohibit unfair commercial practices, but originally provided that an agreement shall not be void or unenforceable by reason only of a breach of the Regulations. In many cases the consumer would have a remedy under the general law of misrepresentation, but not all unfair commercial practices will amount to a misrepresentation. The question of whether a remedy for unfair commercial practices should be given to individual consumers was referred to the Law Commissions, which recommended that consumers who are the victims of misleading or aggressive practice by a trader should have a civil law remedy, including the right to "unwind the contract" if the consumer acts

quickly or, if the consumer waits more than three months or the goods or services supplied have been fully consumed, the right to a "discount"; and damages for further loss unless the trader can show that it used due diligence. These remedies should replace those under the Misrepresentation Act 1967 so far as the latter apply to business to consumer cases; other common law and statutory remedies should not be affected. [11] The Law Commission's recommendations have now been implemented by the Consumer Protection (Amendment) Regulations 2014, [12] which amend the Consumer Protection from Unfair Trading Regulations 2008. The amendments apply to any contract made on or after October 1, 2014. The new remedies are explained in Vol.II, Ch.38. [13]

Criminal fraud

7-003

Fraudulent misrepresentation may also be an offence under the Fraud Act 2006. The definition of fraud for the purposes of the criminal law is different from the civil law definition. [14]

Misrepresentation and contractual terms

7-004

Before the Misrepresentation Act was passed, the law relating to misrepresentation was generally concerned solely with misrepresentations made before the contract was entered into, and not to misrepresentations which actually constituted contractual terms. Although the word "misrepresentation" is literally applicable to a contractual term which consists of a false statement of fact (as opposed to a promise of future conduct), the term was commonly confined to misrepresentations which did not constitute contractual terms, simply because the law relating to contractual terms (whether promises as to future conduct or misrepresentations of fact) differed from the law relating to misrepresentations which were not contractual terms. Moreover, there was also some authority for the proposition that if a misrepresentation was made before a contract was entered into, and the misrepresentation was subsequently incorporated into the contract as a contractual term, the law relating to misrepresentation was not applicable, and the case had to be dealt with as one involving a contractual term and nothing else. [15] Since the passing of the Act of 1967 this is no longer the case, [16] and it will often be necessary in any one situation to inquire carefully as to the effect of a misrepresentation both as a precontractual statement *and* as a contractual term. Where these effects differ (as they often do) it is in some cases a matter of considerable difficulty to determine with any certainty the effect of the Misrepresentation Act on the law relating to contractual misstatement. [17]

Terminology

7-005

For many years it was usual to divide misrepresentations into two categories, fraudulent and innocent misrepresentation. The latter category included misrepresentations that were made negligently, for, at least until the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [18] it was thought that there was generally no difference between a negligent and a completely innocent misrepresentation. But since that decision, and the passing of the Misrepresentation Act, which also distinguishes in some respects between negligent (or more accurately, those which were made without reasonable grounds, but it is convenient to refer to them as negligent [19]) and completely innocent misrepresentations, it has clearly become necessary to recognise that there are now three categories of misrepresentations. It seems better, therefore, to reserve the term "innocent misrepresentation" for representations which are neither fraudulent nor negligent, though it must be appreciated that there are many cases in which the term has been used to include negligent misrepresentation.

1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

2. The Act was based on the recommendations in the Law Reform Committee's Tenth Report, Cmnd.1782 (1962) but with one important change, as to which see below, para.7-142. For a full appraisal of the Act, see Atiyah and Treitel, "Misrepresentation Act 1967" (1967) 30 M.L.R. 369.

3. *[1991] 2 Q.B. 297*; see below, para.7-078.

4. *Avon Insurance v Swire [2000] 1 All E.R. (Comm) 573, 633*, Rix J.

5. *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701* at [223], Hamblen J. ("The fact that Parliament (as interpreted by the Court of Appeal) has thought it right to provide a broad measure of compensation where a contract has been made as a result of a misrepresentation should not affect the prior question whether there has been a misrepresentation.") Hamblen J. referred to the decision in *Royscot Trust Ltd v Rogerson [1991] 2 Q.B. 297* as controversial; see below, para.7-078.

6. Directive 2005/29 on unfair commercial practices [2005] O.J. L149/22. A useful summary of the Directive and its impact will be found in Twigg-Flesner (2005) 121 L.Q.R. 386.

7. Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.29; Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276) reg.29. See now below, Vol.II, paras 38-145 et seq.

8. Directive 2005/29 art.7.

9. Directive 2005/29 art.3(1).

10. Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) and Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276).

11. Law Commission and Scottish Law Commission Report: Consumer Redress for Misleading and Aggressive Practices (Law Com. No.332, Scot Law Com. No.226 (2012)).

12. SI 2014/870.

13. See below, Vol.II, para.38-160.

14. See below, para.7-051 n.25a.

15. *Pennsylvania Shipping Co v Compagnie Nationale de Navigation [1936] 2 All E.R. 1167, 1171*; *Leaf v International Galleries [1950] 2 K.B. 86*.

16. Misrepresentation Act 1967 s.1(a): see below, para.7-112.

17. Below, paras 7-116 and 7-153.

18. *[1964] A.C. 465*.

19. See below, para.7-076.

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Section 2. - What Constitutes Effective Misrepresentation

(a) - False Statement of Fact

Statements of fact

7-006

The traditional rule is that a misrepresentation must be a false statement of fact, [20] past or present, as distinct from a statement of opinion, a statement of intention or a mere commendatory statement. However, the distinction between a statement of fact on the one hand and a statement of opinion or intention on the other, is not clear cut. We shall see that a statement of opinion or of intention may itself be a misrepresentation if the maker does not in fact hold the opinion or have the intention stated. Also a statement of opinion may amount to a implied representation that the maker has reasonable grounds for the opinion, [21] and a statement of intention that he reasonably believes that he can carry out his intentions. [22] Conversely, a statement that on the face of it is one of fact may only amount to statement of opinion if the person to whom it is made knows that the maker is not in possession of the facts and thus can only be giving his opinion. [23] The question is whether the statement is one "upon which the representee was intended, [24] and was entitled, to rely". [25] "In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used". [26]

Puffs and statements of opinion

7-007

Mere "puffs" do not amount to representations. [27] A mere statement of opinion which proves to have been unfounded, will not be treated as a misrepresentation [28]; for as a general rule these cannot be regarded as representations of fact, except in so far as they show that the opinion or intention is held by the person expressing it. [29] The statement must be construed as it would reasonably be understood by the recipient in the context in which the statement was made. [30]

Statement of opinion amounts to statement of fact if not honestly held

7-008

However, in certain circumstances a statement of opinion (or of intention) may be regarded as a statement of fact, and therefore as a ground for avoiding a contract if the statement is false. Thus, if it can be proved that the person who expressed the opinion did not hold it, or could not, as a reasonable man having his knowledge of the facts, honestly have held it, the statement may be regarded as a statement of fact. [31] If a person states as his opinion something which he does not in fact believe, or which given the facts known to him, he could not honestly hold, he makes a false

statement of fact. So where, at a sale of property, the vendor described the occupier as “a most desirable tenant”, while in fact he knew that the rent was considerably in arrear, this was held to entitle the purchaser to rescind the contract. [32]

Statement of opinion may carry implication that grounds for belief

7-009

In *Brown v Raphael*, [33] the purchaser of an absolute reversion in a trust fund expectant on the death of an annuitant was likewise held entitled to rescind: the particulars of sale stated that estate duty would be payable on the death of the annuitant, “who is believed to have no aggregable estate”; the vendor’s solicitors honestly believed this to be true but had no reasonable grounds for this belief. The Court of Appeal held that as the vendor was in a far stronger position than the purchaser to ascertain the facts, there must be implied a further representation that the former had reasonable grounds for his belief. [34] If, on the other hand, it is clear that the person who expressed the opinion had no real way of knowing whether or not it was correct, no such implication can be made. [35] In *Economides v Commercial Union Assurance Co Plc* [36] it was held that a statement by an insured, a private person with no specialist knowledge, of the value of the contents of a flat which contained his parents’ belongings as well as his own, did not carry an implication that he had an objectively reasonable basis for the value stated. Thus a statement of the value which the insured made honestly was not a misrepresentation even though it was inaccurate. Equally, propositions put forward by parties engaged in negotiating the settlement of a dispute are likely to be treated as mere statements of opinion and, at least when the negotiations are conducted by experienced professionals in good faith, are unlikely to be treated as including a representation that they are based on reasonable grounds. [37] The fact that there was a relationship between the parties is not enough, as a matter of law, to create an implied representation that there is a reasonable basis for the opinion. [38] Subject to the principle illustrated by *Brown v Raphael*, [39] an opinion expressed in good faith is not to be held to be a misrepresentation merely because it turns out to be incorrect. [40] But a statement of opinion which is published as if it were a fact may be regarded as a statement of fact. [41]

Apparent statement of fact may be no more than expression of opinion

7-010

Conversely, a statement that taken in isolation might seem to be one of fact may in the circumstances only amount to an expression of opinion, and one without any implied representation that the maker of the statement has facts to back it up. The statement must be construed as it would reasonably be understood by the recipient in the context in which the statement was made. [42] Thus a statement as to the nature of a policy made to an experienced loss adjuster who had a copy of the policy schedule that described it correctly, and who was thought to have a copy of the policy itself, was regarded as “a contention, not as a representation” [43]—in other words, it was merely an expression of opinion. The terms of the contract may also create a contractual estoppel to the effect that a statement which might otherwise amount to one of fact will be treated as merely one of opinion. [44] On the other hand, the fact that the party who makes a statement is known not to have personal knowledge does not prevent the statement from being one of fact if he can reasonably be expected to obtain the information and to pass it on. [45]

Information passed on

7-011

If a person passes on information which has been supplied to him,

> “he may simply pass it on as information, or he may adopt it as his own statement of fact.

> If he passes it on merely as information, he may be guilty of a misrepresentation if he does not fairly set out the information (e.g. where he passes on parts of a surveyor's report but omits qualifications to the surveyor's opinion). But otherwise he does not adopt it as his own. He may also make implicit representations by passing on the information",

such as that he is not aware of anything that prevented it from being accurate. [46] Whether the party is passing the information on or adopting it is a question of interpretation on the facts. [47]

Statement of intention not honestly held

7-012

A statement of intention may be looked upon as a misrepresentation of existing fact if, at the time when it was made, the person making the statement did not in fact intend to do what he said or knew that he did not have the ability to put the intention into effect; for the promisor's state of mind was not what he led the other party to believe it to be. [48] Thus, where a man ordered goods having at the time the intention not to pay for them, he was held to have made a fraudulent misrepresentation. [49] Equally, if a person makes a statement of an intention that he should have known he was not able to carry out, in appropriate circumstances he may be held to have made an implied representation that he did have that ability. [50] There is no doubt that a statement as to the intentions of a third party is a statement of fact and can constitute a misrepresentation in the ordinary way. [51]

Statement as to future may carry implication of fact

7-013

A statement of intention or as to the future may carry the implication that the party making it does not know of facts that will make it impossible to carry out the intention. [52] But "there is no rule of law that any particular statement carries with it any particular implication. All depends upon the particular statement in its particular context". [53]

Implied representations

7-014

Brown v Raphael [54] could be regarded as a case of an implied representation; there are a number of other cases which can also be regarded as instances of implied representations, though this category overlaps with that of representations by conduct. [55] Thus in *Spice Girls Ltd v Aprilia World Service BV* [56] it was held that a pop group had made an implied misrepresentation when they continued with arrangements to publicise the defendant's products when they knew that one member of the group was intending to leave the group shortly, which would prevent the contract being carried out and the defendants deriving any benefit from the arrangement. It has been held that a description of premises as "offices" may amount to an implied representation as to the availability of the appropriate planning consents. [57] The essential issue is whether in all the circumstances it has been impliedly represented that there exists some state of facts different from the truth. In the case of an implied statement,

> "the court has to … consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context." [58]

In evaluating the effects of the statement or conduct in such circumstances, a helpful test is whether a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would in all circumstances necessarily have been informed of it. [59]

Liability in tort for incorrect opinions and forecasts

7-015

This form of liability is considered later, [60] but it is mentioned here in order to stress that in an action in tort it is not necessary to show that the statement complained of was a representation in the sense which this term has traditionally borne in the law of contract. Thus, where there is a sufficient "special relationship" to give rise to liability in tort under *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, [61] it would seem immaterial that the statement consists of mere opinion or even of a proposition of abstract law. [62] Certainly the distinction between statements of existing facts and predictions seems less important in tort cases. For instance, in *Esso Petroleum Co v Mardon* [63] an action for damages for negligent misrepresentation succeeded where a petrol company, negotiating with a prospective tenant about a lease of a filling station, had offered a forecast of the probable sales potential of the filling station. In *McNally v Welltrade International Ltd* [64] an employment agency was held liable to an employee for implied representations as to the plaintiff's suitability for a job from which he was dismissed. And in *Box v Midland Bank Ltd* [65] it was said that the distinction between fact and opinion had become much less important since *Esso Petroleum Ltd v Mardon*. However, it is submitted that in these cases liability is based on an assumption of responsibility to take reasonable care and failure to do so; whether the defendant assumed responsibility to give factual information or an opinion does not matter. [66] Cases in which an incorrect forecast has given rise to a remedy for misrepresentation, as opposed to negligent misstatement on the *Hedley Byrne* principle, can be explained as involving implicit representations of existing fact, such as that the speaker has taken reasonable care in making the forecast. [67]

Statements of law

7-016

It used commonly to be said that a statement of law cannot be treated as a misrepresentation. [68] But the proposition was always in need of qualification and it is now more accurate to say that a statement of law will amount to a misrepresentation unless, in the circumstances, it reasonably appeared that the statement was put forward as nothing more than an opinion on which it would not be reasonable to rely. First, a statement of law may be regarded as a statement of opinion, but just as a statement of opinion may be a representation of fact, so too a statement of law may amount to a representation, or misrepresentation, as the case may be. So a wilful misstatement of law would always amount to a misrepresentation [69] and even an innocent misstatement of law may do so where it carries an implication of fact which is itself untrue. Secondly, the question whether a statement is one of law or fact gives rise to no small difficulty, [70] especially as statements of law and of fact are so frequently intermingled. It has been said that the dichotomy between statements of fact and statements of law is too neat, and is apt to mislead. [71] It seems that the courts tend to regard statements of mixed law and fact, and statements capable of having either meaning, as statements of fact, [72] and therefore as representations; that they also regard statements as to the purport, effect and objects of documents as representations [73]; and in *Cooper v Phibbs*, [74] a statement as to private rights, as distinct from the general law, was regarded as a statement of fact. [75] So a representation that planning permission exists for a particular use is a representation of fact, and not of law [76]; similarly with a representation by a landlord that he accepts liability for repairs under a lease. [77] On the other hand a statement of law made separately from a statement of fact was held not to be a misrepresentation. [78] This seems to rest on a distinction between a statement of an abstract proposition of law, which was not regarded as a misrepresentation, and a statement applying the law to the facts of a particular situation which, at least in some circumstances, may constitute a misrepresentation. [79] But thirdly, in the law of restitution the distinction between a payment made under a mistake of fact and one made under a mistake of law has been held by the House of Lords not to be part of English law, [80] and, in the light of this, it was held in *Pankhania v Hackney LBC* [81] that the "misrepresentation of law" rule is no longer good law. Thus, for the purposes of the law of misrepresentation, the distinction between statements of law and statements of fact is no longer maintainable and that even an incorrect statement of an abstract proposition of law may amount to a misrepresentation unless it is apparent that all that is being offered is an opinion without implication

that the speaker has reasonable grounds for that opinion. [82] ❗ It is submitted that the underlying principle here is the same as that suggested in the previous paragraph, viz that even a statement as to the law may be a misrepresentation if it was reasonable, in all the circumstances, for the representee to rely upon it. [83] ❗ In any event a statement of foreign law is here (as elsewhere in the law) treated as a statement of fact. [84]

Non-disclosure

7-017

The general rule is that mere non-disclosure does not constitute misrepresentation, for there is, in general, no duty on the parties to a contract to disclose material facts to each other, however dishonest such nondisclosure may be in particular circumstances. [85] So, for example, in *Percival v Wright*, [86] a company director who had inside information about certain facts likely to enhance the value of the company's shares was held to be under no duty to disclose this fact to a shareholder from whom he bought some shares. For the same reason it is not possible to set up an estoppel on the basis of an omission to disclose unless a duty to disclose can be established in the particular circumstances of the case. [87] Tacit acquiescence in another's self-deception does not itself amount to a misrepresentation, provided that it has not previously been caused by a positive misrepresentation. [88] But there are exceptions to the general rule that there is no duty to disclose. First, there are many statutory exceptions. [89] Secondly, there are exceptions at common law where in particular types of contract there has been held to be a duty of disclosure (often categorised as contracts uberrimae fidei). [90] These include cases where there is a fiduciary relationship between the parties [91] and where the relationship between the parties is one of trust and confidence. [92] There may also be a duty to disclose where failure to disclose some fact distorts a positive representation. It is also possible for a person to be guilty of misrepresentation by conduct. [93] The first two exceptions at common law are dealt with later. [94] Misrepresentation by conduct and cases in which a failure to disclose a fact distorts a positive misrepresentation are dealt with in the following paragraphs.

Misrepresentation by conduct

7-018

As previously mentioned, a person may be guilty of misrepresentation by conduct. [95] It is sometimes hard to distinguish misrepresentation by conduct from implied representation, but normally it is unnecessary to do so. [96] In the simplest case, conduct may be intended to convey information in precisely the same way as the written or spoken word. Thus a person who goes into a shop in a university town wearing cap and gown may (if such costume is still customary) be representing that he is an undergraduate, [97] a person who sits down in a restaurant and orders a meal impliedly represents that he has the means to pay, [98] and more generally it has been said in a well-known dictum that "a nod or a wink or a shake of the head or a smile" [99] may amount to a representation if it is intended to induce the other party to believe in a certain state of facts. It is well established that a mere ordering of goods in the course of business carries a representation that the buyer is not aware that he will be unable to pay for them [100]; a mere payment of money by A to B may in appropriate circumstances (e.g. where A is B's employer) amount to a representation by A that B is entitled to the money so paid [101]; and it has been held in a criminal case that tendering of obsolete foreign bank notes to a currency dealer is a representation that the notes are current tender of some value. [102] Other important criminal cases concerning representations by conduct relate to the use of bank (cheque) cards and credit cards. In *R. v Charles* [103] the House of Lords held that use of a cheque card amounts to a representation that the user has authority, as between himself and his bank, to use his card. Thus, even though payment of the cheque may be guaranteed by the bank, and may in fact be made by the bank, the use of the card will amount to a false representation if it is, in the circumstances, unauthorised by the bank. In *R. v Lambie* [104] the House of Lords likewise held that use of a credit card to purchase goods amounts to a representation that the user has the authority of the credit card company to use the card. So even if the credit card company has a previous contract with the seller whereby it undertakes to pay for goods acquired with the use of the card, irrespective of amount, there will be a false representation if the user exceeds the limits agreed between him and the credit card company. The importance of these decisions for the civil law is that they justify the seller

or supplier in rescinding the contract of sale and reclaiming the goods in the event of the fraud being discovered while the goods are still in the possession of the buyer.

Conduct intended to conceal facts

7-019

But there is also another class of case where conduct may amount to a representation, and that is where the conduct is not so much intended to convey information as to conceal facts from the other party. There does not appear to be any modern authority illustrating this type of misrepresentation, but there are some nineteenth-century cases in which a seller of goods was held guilty of misrepresentation where it was shown that he had deliberately concealed defects in the goods being sold, as, for instance, by nailing down planks and closing the seams of a rotten ship, [105] or by plugging a hole in a gun with soft metal. [106] This principle has not been fully developed by the courts, and it is uncertain whether it would extend to conduct which is not intended solely to conceal defects; it is, for instance, not clear whether the vendor of a house could be held guilty of misrepresentation if he papered a room, partly to hide the defective state of the plaster, but partly because it needed decorating in any event.

Partial non-disclosure [107]

7-020

Although total non-disclosure does not amount to a misrepresentation, a partial non-disclosure may do so. This may happen in a number of different ways. Thus a statement may be a misrepresentation even though it is literally true if it implies certain additional facts which are themselves false. A striking instance of this possibility is *Goldsmith v Rodger* [108] in which the defendant who was negotiating for the purchase of the plaintiff's yacht informed the plaintiff, after paying a visit to the yacht, that she had rot in her keel. The Court of Appeal held that this statement implied that the defendant had actually examined the keel, and as he had not done so, this was itself a misrepresentation, whether or not the yacht did have rot in her keel. Again, a statement may amount to a misrepresentation if facts are omitted which render that which has actually been stated false or misleading in the context in which it is made. [109] So, for example, where a shop assistant told a customer that a receipt for the cleaning of a dress which she was required to sign excluded liability for damage to beads and sequins, and in fact the receipt excluded all liability, this was held to be a misrepresentation. [110]. It will be observed that these cases of partial non-disclosure can either be explained as cases of actual misrepresentation, or as cases in which there is a duty to disclose certain facts by reason of the facts actually stated. Until the passing of the Misrepresentation Act 1967, it was immaterial which explanation was adopted since the effect of an actual misrepresentation and the breach of a duty to disclose (where such a duty exists) were generally the same. But since the passing of this Act this is no longer the case as the Act applies to misrepresentations, but not to the breach of duties of disclosure. It is thought that cases of partial non-disclosure will normally be treated as cases of actual misrepresentation falling within the Act, but it has been held that cases of complete non-disclosure will not. [111]

Representation ceases to be true

7-021

A statement may be made which is true at that time but which subsequently ceases to be true to the knowledge of the representor before the contract is entered into. In such circumstances a failure to inform the representee of the change in circumstances will itself amount to a misrepresentation, [112]

unless in the context it is quite clear to the reasonable recipient of the information that the party who gives it accepts no responsibility for its accuracy or for reviewing it. [113]

Withdrawals and corrections.

7-021A

A misrepresentation will cease to have effect if it is withdrawn or corrected before the contract is made, as then it will not have induced the contract. [114] The burden of establishing a correction or withdrawal rests on the person making the correction and the correction must be sufficiently clear in all the circumstances of the case. [115]

Continuity of representations

7-022

Representations are treated for many purposes as continuing in their effect until the contract between the parties is actually concluded. This is one reason why a statement which is true when made, but which ceases to be true to the knowledge of the representor before the contract is concluded, is treated as a misrepresentation unless the representor informs the representee of the change in circumstances. [116] This principle may have other effects as well. First, as we have just seen, if a representation is made innocently but falsely, and facts later come to the knowledge of the representor which show that the statement was false, a failure to inform the representee of the truth may convert what was originally an innocent misrepresentation into a fraudulent one. [117] Again, if a man truthfully states that he intends to do something but changes his mind at a later stage he may come under a duty to disclose that change. [118] The principle is also recognised by s.2(1) of the Misrepresentation Act which extends the right to damages for negligent misrepresentation, [119] for a misrepresentation falls within this subsection unless the representor had reasonable grounds to believe and did believe *up to the time the contract was made* that the facts represented were true. [120] Another consequence of the principle that representations are continuous in their effect is that if a representation is made by an agent who is acting without authority, and he subsequently obtains the authority of his principal to continue the negotiations, the principal will become responsible for the representations previously made by the agent. [121] Conversely, if the contract is ultimately concluded not between the representor and the original representee but between the representor and a third person (on the facts of the case, a company formed for the purpose only after the original representation had been made), the representation may be treated as being made to the third party. [122] On the facts of the case the original representee continued to act as agent of the third person, so the representation could be regarded as continuing to be made to him, though in a different capacity. It is submitted that this is not a necessary condition, at least if the representor knows that the statement made earlier is likely to be passed on to the third person and does nothing to withdraw it or to indicate that there should be a fresh start to the negotiations, so that "the earlier misrepresentation is to be regarded as water under the bridge". [123] There are some circumstances in which a contract may be treated as commercially binding before it becomes legally binding, and in such a case it seems that the principle of continuity of representations does not operate beyond the time when the contract becomes commercially binding. So, for instance, an insured was held not to be obliged (despite the general duty of disclosure in insurance contracts) [124] to disclose facts coming to his notice after the insurer had initialled a slip indicating that he was at risk, although there was no binding legal contract until a policy was issued later. [125]

Statement must be false

7-023

It is an obvious requirement of misrepresentation that the statement relied on be false. As to what amounts to falsity, in *Avon Insurance v Swire* [126] Rix J. adopted as representing the common law the test laid down in Marine Insurance Act 1906 s.20(4), so that a statement will be treated as true if it is substantially correct and the difference would not have induced a reasonable person to enter the contract. The last phrase reflects the requirement of materiality discussed below. [127] This test has also been adopted outside the context of insurance. [128]

1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

20. Traditionally relief was only given for misrepresentations of fact, not of law. But see now below, para.7-016.

21. See below, para.7-009.

22. See below, para.7-013.

23. See below, para.7-010.

24. On the question of intention, see below, para.7-033.

25. *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123* at [86]; see also *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm)* ("A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true …": Hamblen J. at [215]; *Standard Chartered Bank v Ceylon Petroleum Corp [2011] EWHC 1785 (Comm)* at [552]–[556]) It has been said that whether the representee was entitled to rely on the representation is partly a question of reasonableness: *Monde Petroleum SA v WesternZagros Ltd [2016] EWHC 1472 (Comm)* at [219]. A party is not entitled to rely on a statement that the party was reasonably expected to have checked by its lawyers: *Co-operative Bank Plc v Hayes Freehold Ltd [2017] EWHC 1820 (Ch)* at [119]–[122].

26. *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264*, per Toulson J at [50] (affirmed without comment on this point *[2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*). Toulson J.'s statement was adopted by the Court of Appeal in *Webster v Liddington [2014] EWCA Civ 560* at [40]. See also the dictum of Mance J. in *Bankers Trust International v PT Dharmala Sakti Sejahtera [1996] C.L.C. 518* at 531, referring to "the potential relevance of the parties' relationship and the surrounding circumstances to a decision whether any and if so what representation was made in the particular case. The meaning and effect of words never falls to be viewed in a vacuum. It is shaped by the context of their communication, including the parties' respective positions, knowledge and experience. A description or commendation which may obviously be irrelevant or may even serve as a warning to one recipient, because of its generality, superficiality or laudatory nature, or because of the recipient's own knowledge and experience, may constitute a material representation if made to another less informed or sophisticated receiver". See also (in the context of materiality: below, para.7-041) *MCI WorldCom International Inc v Primus Telecommunications Inc [2004] EWCA Civ 957* ("judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee": per Mance L.J., at [30]); *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm)* at [90]; *Mabanga v Ophir Energy Plc [2012] EWHC 1589 (QB)* at [26]–[27]. As Christopher Clarke J. pointed out in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm)* at [87], the claimant must show that he understood the statement in the sense (so far as material) which the court ascribes to it and that, having that understanding, he relied on it. See further Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.3-06.

27. *Dimmock v Hallett (1866) L.R. 7 Ch. App. 21, 27*. See also, for an analogous criminal law case, *West Yorkshire Metropolitan CC v MFI Furniture Centre [1983] 1 W.L.R. 1175*; *Chartered Trust v Davies [1997] 2 E.G.L.R. 83, 86* ("prestigious retail development"). The expression *"puffery"* does not include communications which the recipient is expected to take seriously: *Shaftsbury House (Developments) Ltd v Lee [2010] EWHC 1484 (Ch)* at [35].

28. This passage was cited with approval in *Hummingbird Motors Ltd v Hobbs [1986] R.T.R. 276*. Nor will a simple statement of intention which is not put into effect be treated as a misrepresentation: cf. below, para.7-012.

29. See *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd (No.2) (1997) 87 B.L.R. 52*.

30. *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264* at [50]; affirmed without comment on this point *[2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*. See also *Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705* at [120]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701* ("In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee": Hamblen J. at [215]). As Christopher Clarke J. pointed out in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123* at [87], the claimant must show that he understood the statement in the sense (so far as material) which the court ascribes to it and that, having that understanding, he relied on it.

31. ! *Connolly Ltd v Bellway Homes Ltd [2007] EWHC 895, [2007] All E.R. (D) 182 (Apr)*. The sentences in this paragraph were cited with approval in *Economides v Commercial Union Assurance Co Plc [1998] Q.B. 587*, by Simon Brown L.J. at 598 (who considered that *Brown v Raphael [1958] Ch. 636*, below, para.7-009, fell into a different category) and Sir Iain Glidewell (who considered that the statement summarised that case accurately also), 608–609. Another way to put the same point is that if a person states that he holds an opinion that in fact he does not hold, or that he has an intention that in fact he does not have, he makes a false statement of fact. See Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.3-17.

32. *Smith v Land and House Property Corp (1884) 28 Ch. D. 7*.

33. *[1958] Ch. 636*; *Crédit Lyonnais Bank Nederland v Export Credit Guarantee Department [1996] 1 Lloyd's Rep. 200* (bank's statement that a management was "respectable and trustworthy" a misrepresentation as it was contrary to the bank's actual experience of the management). See also *Patterson v Landsberg & Son (1905) 7 F. 675*.

34. ! It is possible that *Smith v Land House Property Corp (1889) 28 Ch. D. 7* was also decided on the basis that the vendor was impliedly representing that he had reasonable grounds for his belief, or at least that he knew of nothing which might be inconsistent with it: Bennett (1998) 61 M.L.R. 886, 888. See also *Highland Insurance Co v Continental Insurance Co [1987] 1 Lloyd's Rep. 109*; *Crédit Lyonnais Bank Nederland v Export Credit Guarantee Department [1996] 1 Lloyd's Rep. 200*; *Barings Plc (In Liquidation) v Coopers & Lybrand [2002] EWHC 461 (Ch), [2002] 2 B.C.L.C. 410* at [50]–[51]. A party who merely gives a contractual warranty does not necessarily represent that the fact warranted is true (see *Sycamore Bidco Ltd v Breslin [2012] EWHC 3443 (Ch)* at [203]–[209] and *Idemitsu Kosan Co Ltd v Sumitomo Corp [2016] EWHC 1909 (Comm)*, declining to follow the unreported decision in *Invertec Ltd v De Mol Holding BV [2009] EWHC 2471 (Ch)*). Merely offering for signature a document containing the warranty is not a representation of the truth of the facts warranted: *[2016] EWHC 1909 (Comm)* at [28]–[30]. If there was a previous representation, followed by a warranty, the fact of the warranty does tend to imply that the party giving the warranty has reasonable grounds for believing the facts warranted: *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd [2012] EWHC 2198 (Ch)* at [133].

35. *Bisset v Wilkinson [1927] A.C. 177*; *Hummingbird Motors Ltd v Hobbs [1986] R.T.R. 276*.

36. ! *[1998] Q.B. 587*. Simon Brown and Peter Gibson L.JJ. expressed the view that under the Marine Insurance Act 1906 s.20(5), which states that a representation as to a matter of expectation or belief is true if it be made in good faith, there is no room for such an implication,

doubting a dictum to the contrary by Steyn J. in *Highlands Insurance Co v Continental Insurance Co [1987] 1 Lloyd's Rep. 109, 112–113*. Sir Iain Glidewell preferred to leave the matter open. But see Bennett (1998) 61 M.L.R. 886; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.3-16. See further below, paras 7-012 and 42-038. Section 20 will be repealed when the Insurance Act 2015 comes into force (see below, para.7-159): s.21(2).

37. *Kyle Bay Ltd (trading as Astons Nightclub) v Underwriters subscribing under policy 019057/08/01 [2006] EWHC 607 (Comm), [2006] All E.R. (D) 433 (Mar)*, Jonathan Hirst Q.C. at [45]–[47], [52]–[54]. On appeal, this was accepted as the correct approach in principle: *[2007] EWCA Civ 57, [2007] 1 C.L.C. 164* at [31]; see above, para.7-006. Likewise, when a party had expressly stated that it was giving no representation as to the accuracy of the information provided, there was no implication that it had no further information suggesting that what was stated might not be correct. The question is what would the reasonable person in the context have inferred was being implicitly represented: *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264 at [50]; affirmed [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*. There might be an implied representation that the information was supplied in good faith, but not one that the party knew of nothing that might possibly cast doubt on it: *[2006] EWCA 2887* at [60].

38. *Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705* at [121].

39. *[1958] Ch. 636*.

40. *New Brunswick and Canada Ry and Land Co v Conybeare (1862) 9 H.L.C. 711*; *Anderson v Pacific Insurance Co (1872) L.R. 7 C.P. 65*; *Bisset v Wilkinson [1927] A.C. 177*; *Sanders v Gall [1952] Current Property Law 343*.

41. See *Reese River Silver Mining Co Ltd v Smith (1869) L.R. 4 H.L. 64*.

42. *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264 at [50]; affirmed [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*. See also *Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705*, at [120]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701* ("In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee": Hamblen J. at [215]).

43. *Kyle Bay Ltd (t/a Astons Nightclub) v Underwriters Subscribing under Policy No.019057/08/01 [2007] EWCA Civ 57, [2007] 1 C.L.C. 164* at [33]–[35]; distinguishing *Wauton v Coppard [1899] 1 Ch. 92*. In that case the statement was by a vendor's agent as to the effect of a restrictive covenant to a lay person who, as a prospective purchaser, did not (to the knowledge of the vendor's agent) have a copy of the covenant. In *Hayward v Zurich Insurance Co Plc [2015] EWCA Civ 327* at [24] Underhill L.J. drew a parallel with *Kyle Bay* in a case in which it was decided that a party to a settlement cannot claim to rescind the settlement even if it can now show that the claims put forward by the other side were in fact false, if at the time of the settlement it did not believe the claims put forward by the other side but was influenced by a fear that they might be believed by the court. The suggestion seems to be that claims made in negotiating a settlement should not necessarily be treated as statements of fact rather than contentions. It might be different if the claim had been accepted as honest and later had been found to be fraudulent (at [19]; see also per Briggs L.J. at [30]). The actual decision rested on the absence of reliance, see below, para.7-035.

44. See below, paras 7-144 and 7-145.

45. *Highlands Insurance Co v Continental Insurance Co [1987] 1 Lloyd's Rep. 109, 111–112*; *Sirius International Insurance Corp v Oriental Insurance Corp [1999] 1 All E.R. (Comm) 699, 709* (statements by reinsureds or brokers to reinsurers).

46. *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)* at [218].

47. *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887, [2007] 1 Lloyd's Rep. 264*, per Toulson J. at [54] (affirmed without comment on this point *[2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*). See also *Webster v Liddington [2014] EWCA Civ 560* (party may warrant the accuracy of the information; may adopt it as his own; may represent that he believes on reasonable grounds that it is accurate; or may merely pass it on as material about which he has no knowledge or belief (at [46], Jackson L.J.)).

48. See *Edgington v Fitzmaurice (1885) 29 Ch. D. 459*; *Angus v Clifford [1891] 2 Ch. 449, 470*; *Goff v Gauthier (1991) P. & C.R. 388*; *C21 London Estates Ltd v Maurice Macneill Iona Ltd [2017] EWHC 998 (Ch)* at [44], applying this paragraph (but in that case it was not shown that the representation was false).; cf. *Lewin v Barratt Homes Ltd [2000] Crim. L.R. 323* (a case under Property Misdescriptions Act 1991 s.1). As David Richards J. said in *Abbar v Saudi Economic & Development Co (SEDCO) Real Estate Ltd [2013] EWHC 1414 (Ch)* at [197], it is difficult to see how a party could negligently, as opposed to fraudulently, misrepresent his own intentions. Nonetheless, the judge could see the possibility that a party might state its current intention yet negligently omit to reveal that his intention was qualified in that he had considered reviewing it at a later date: at [207].

49. *Re Shackleton Ex p. Whittaker (1875) L.R. 10 Ch. App. 446*; *Ray v Sempers [1974] A.C. 370*; *Re Gerald Cooper Chemicals Ltd [1978] Ch. 262*.

50. cf. *Brown v Raphael [1958] Ch. 636* above, para.7-009.

51. *Smelter Corp of Ireland Ltd v O'Driscoll [1977] I.R. 305*.

52. See *Spice Girls Ltd v Aprilia World Service BV [2002] E.M.L.R. 27, 29*; *Fitzroy Robinson Ltd v Mentmore Towers Ltd [2009] EWHC 1552 (TCC)* at [160]; *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)* at [198].

53. *Jaffray v Society of Lloyd's [2002] EWCA Civ 1101* at [59].

54. *[1958] Ch. 636*; above, para.7-009.

55. See below, para.7-018.

56. *[2002] EWCA Civ 15, [2002] E.M.L.R. 27* at [54].

57. *Laurence v Lexcourt Holdings Ltd [1978] 1 W.L.R. 1128*. In the criminal law the concept of an implied representation is widely relied upon in prosecutions under the Theft Act; for instance, it has been held that a minicab driver who solicited a customer at a London airport, saying, "yes, I am an airport taxi", and subsequently assured the customer that £27.50 was the "correct fare" was guilty of representing that he was an officially licensed taxi driver and that the fare was somehow at an officially approved rate: *R. v Banaster [1979] R.T.R 113*. See also below, para.7-018.

58. *IFE Fund SA v Goldman Sachs International [2007] 1 Lloyd's Rep. 264*, per Toulson J. at [50] (affirmed without comment on this point *[2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*); *Merrill Lynch International v Amorim Partners Ltd [2014] EWHC 74 (QB)* at [43], referring to a dictum of Mance J. in *Bankers Trust International v PT Dharmala Sakti Sejahtera [1996] C.L.C. 518* at 531, cited above, para. 7-006 n.26.

59. *Geest Plc v Fyffes Plc [1999] 1 All E.R. (Comm) 672, 683*. See also *Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm)* at [84]–[85]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm)* at [215]; *Cavendish Corporate Finance LLP v KIMS Property Co Ltd [2014] EWHC 1282 (Ch)* at [113]; *Deutsche Bank AG v Unitech Global Ltd [2013] EWHC 471 (Comm)* at [27] (that bank that is a member of the LIBOR panel enters into a financial transaction linked to

LIBOR does not imply representation that nothing has been done in the past, or is now being done, by the bank, to manipulate the rate).

60. Below, paras 7-086—7-096.

61. *[1964] A.C. 465*; below, para.7-089.

62. On statements of law, see below, para.7-016.

63. *[1976] Q.B. 801*, below, para.7-093.

64. *[1978] I.R.L.R. 497*.

65. *[1979] 2 Lloyd's Rep. 391*; in the Court of Appeal (on costs only) *[1981] 1 Lloyd's Rep. 434*.

66. ❗See Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.6-12.

67. *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)* at [207].

68. *Beattie v Ebury (1872) L.R. 7 Ch. App. 777, 802*; *Beesly v Hallwood Estates Ltd [1960] 1 W.L.R. 549, 560*.

69. *West London Commercial Bank v Kitson (1884) 13 Q.B.D. 360, 362–363*; *Oudaille v Lawson [1922] N.Z.L.R. 259*.

70. See *Solle v Butcher [1950] 1 K.B. 671*.

71. *Brikom Investments Ltd v Seaford [1981] 1 W.L.R. 863*.

72. *Reynell v Sprye (1852) 1 De G.M. & G. 660*; *West London Commercial Bank v Kitson (1884) 13 Q.B.D. 360*; *Hughes v Liverpool Victoria Legal Friendly Society [1916] 2 K.B. 482*.

73. *Hirshfeld v L.B. & S.C. Ry (1876) 2 Q.B.D. 1*; *De Tchihatchef v Salerni Coupling Ltd [1932] 1 Ch. 330*; *Curtis v Chemical Cleaning & Dyeing Co [1951] 1 K.B. 805*.

74. *(1867) L.R. 2 H.L. 149*.

75. *(1867) L.R. 2 H.L. 149* at 170.

76. *Laurence v Lexcourt Holdings Ltd [1977] 1 W.L.R. 1128*.

77. *Brikom Investments Ltd v Seaford [1981] 1 W.L.R. 863*. But cf. *China Pacific SA v Food Corp of India [1981] Q.B. 403, 429 (reversed on different grounds [1982] A.C. 939)* where an admission of liability was said to be a representation of law.

78. *Rashdall v Ford (1866) L.R. 2 Eq. 750*; *Harse v Pearl Life Assurance Co [1904] 1 K.B. 558*.

79. See also, below, paras 29-044—29-049.

80. *Kleinwort Benson Ltd v Lincoln City Council [1999] 2 A.C. 349*. See below, para.29-045.

81. *[2002] EWHC 2441(Ch)*. See also above, para.6-052.

82. ❗cf. above, para.7-010. It has rightly been remarked that the reasons often given for refusing relief on the grounds of a mistake of law—for example, that it would be easy to claim a mistaken belief in the law and hard to disprove it—have much less weight when the mistake was the result of a misrepresentation by the other party: Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.3-30.

83. ❗See Cartwright, *Misrepresentation, Mistake and Non-disclosure* 4th edn (2016), para.3-39.

84. *André & Cie SA v Ets Michel Blanc & Fils [1977] 2 Lloyd's Rep. 166*.

85. *Ward v Hobbs (1878) 4 App. Cas. 13*. In *Hurley v Dyke [1979] R.T.R. 265, 303* Lord Hailsham suggested Ward v Hobbs might need reconsideration in the light of recent developments in negligence but expressed no concluded opinion. Certain statutes may impose duties of disclosure in particular circumstances: e.g. Housing Act 1985 (as amended) s.125(4A): see *Payne v Barnet LBC (1998) 30 H.L.R. 295* (no duty at common law should be superimposed on statutory scheme).

86. *[1902] 2 Ch. 421*; cf. *Coleman v Myers [1977] 2 N.Z.L.R. 225*, and see also *Gething v Kilner [1972] 1 W.L.R. 237*; *Prudential Insurance Co Ltd v Newman Industries Ltd [1981] Ch. 257, 295* . Such conduct could constitute an offence under the Criminal Justice Act 1993 s.52, but s.63(2) provides that no contract shall be void or unenforceable by reason only of s.52.

87. *Moorgate Mercantile Co Ltd v Twitchings [1977] A.C. 890*.

88. See *Keates v Cadogan (1851) 10 C.B. 591*; *New Brunswick and Canada Ry and Land Co v Conybeare (1862) 9 H.L.C. 711*; *Smith v Hughes (1871) L.R. 6 Q.B. 597*; *Turner v Green [1895] 2 Ch. 205*; see also *Jewson & Son Ltd v Arcos Ltd (1933) 39 Com. Cas. 59*; *Wales v Wadham [1977] 1 W.L.R. 199*. This sentence of the text was cited with approval in *Donegal International Ltd v Zambia [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397* at [465].

89. See e.g. below, para.7-169.

90. See below, paras 7-155 et seq. Whether the label uberrimae fidei is useful is discussed below, para.7-155.

91. See below, paras 7-087—7-088.

92. See below, para.7-181.

93. In certain circumstances failing to disclose information may be a criminal offence, e.g. Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) reg.12, replacing Timeshare Act 1992 s.1A (inserted by Timeshare Regulations 1997 (SI 1997/1081)).

94. See below, paras 7-088 and 7-157.

95. See above, para.7-014. The representation in *Spice Girls Ltd v Aprilia World Service BV, The Times, April 5, 2000 Ch D* (reversed in part on other grounds *[2002] EWCA Civ 15*), referred to in that paragraph, may equally well be interpreted as one of representation by conduct. There may also be a misrepresentation by conduct when a master agreement between the parties provides that each time one party enters a transaction under the agreement, it makes a representation that particular facts exist or have not occurred: see *TMT Asia Ltd v Marine Trade SA [2011] EWHC 1327 (Comm)*.

96. But it was necessary where the question was whether there is a representation in writing sufficient to satisfy the Statute of Frauds (Amendment) Act 1828 (Lord Tenterden's Act) (see below, para.7-046): *Contex Drouzhba v Wiseman [2007] EWCA Civ 1201, [2007] All E.R. (D) 293 (Nov)* (representation implied by a written statement would suffice but representation by conduct would not).

97. *R. v Barnard (1837) 7 C. & P. 784*.

98. *Ray v Sempers [1974] A.C. 370*.

99. *Walters v Morgan (1861) 3 De G.F. & J. 718, 723*. See also *Gill v M'Dowel [1903] 2 Ir.R. 463*.

100. *Re Shackleton Ex p. Whittaker (1875) L.R. 10 Ch. App. 446*; *Re Gerald Cooper Chemicals Ltd [1978] Ch. 262*; *Ray v Sempers [1974] A.C. 370*.

101. *Avon CC v Howlett [1981] I.R.L.R. 447*.

102. *R. v Williams [1980] Crim. L.R. 589*.

103. *[1977] A.C. 177*.

104. *[1982] A.C. 449*.

105. *Baglehole v Walters (1811) 3 Camp. 154*; *Schneider v Heath (1813) 3 Camp. 506*. For a case under the Trade Descriptions Act 1968, see *Cottee v Douglas Seaton (Used Cars) Ltd [1972] 1 W.L.R. 1408*. In *Taittinger v Allbev (1993) 12 Tr.L.R. 165*, a passing-off case, it was held that the labelling and "get-up" of a bottle constituted a false representation.

106. *Horsfall v Thomas (1862) 1 H. & C. 90*, but it was held in this case that as the buyer had not examined the gun he had not been influenced by the misrepresentation. See below, para.7-035.

107. See Hudson (1969) 85 L.Q.R. 524.

108. *[1962] 2 Lloyd's Rep. 249*.

109. *Oakes v Turquand (1867) L.R. 2 H.L. 325*; *Barwick v English Joint Stock Bank (1867) L.R. 2 Ex. 259*; *Peek v Gurney (1873) L.R. 6 H.L. 377, 403*; *Arkwright v Newbold (1881) 17 Ch. D. 301, 318*; *R. v Kylsant [1932] 1 K.B. 442*; *Jewson & Sons Ltd v Arcos Ltd (1933) 39 Com. Cas. 59*; *R. v Bishirgian [1936] 1 All E.R. 586*.

110. *Curtis v Chemical Cleaning and Dyeing Co Ltd [1951] 1 K.B. 805*. Denning L.J. said (at 809–810) that the company could not rely on the clause, but it seems that the majority took the view that because of the misrepresentation, the clause was never incorporated into the contract: see the judgment of Rix L.J. in *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1* at [100]–[105]; see below, para.15-146

111. *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665, 787–789, affirmed on other grounds [1991] 2 A.C. 249*; cf. Hudson (1969) 85 L.Q.R. 524.

112. *Traill v Baring (1864) 33 L.J.Ch. 521*; *With v O'Flanagan [1936] Ch. 575*; *Ray v Sempers [1974] A.C. 370*; *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)* at [208]–[212]; cf. *Wales v Wadham [1977] 1 W.L.R. 199* (see below, para.7-171). It has been said that if a person who has made a representation of fact which, before the contract is made, he discovers to be untrue, he is not fraudulent in failing to correct the representation, as he will not be dishonest: *Thomas Witter Ltd v TBP Industries Ltd [1994] Tr.L.R. 145*. It is submitted that there may still be fraud if the person knows that he should tell the other party but fails to do so; see *(1995) 111 L.Q.R. 385*; *Abu Dhabi Investment Company v H Clarkson and Co Ltd [2007] EWHC 1267 (Comm)* at [232] (rev'd on other grounds *[2008] EWCA Civ 699*). A failure to reveal that a fact stated was no longer true was held to be fraudulent in *Fitzroy Robinson Ltd v Mentmore Towers Ltd [2009] EWHC 1552 (TCC), 125 Con. L.R. 171*; and see *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)* at [213]–[214] (fraud if knows of change and of its significance). If a senior executive of a company knows that a forecast has been falsified by events to which he is privy but remains silent intending that the forecast should be relied on by persons to whom the forecast is directly communicated, dishonesty on the part of that individual will have been proved without it being necessary distinctly and separately to show a conscious awareness of a duty to correct the statement: *GG 132 Ltd v Hampson Industries Plc [2011] EWHC 1137 (Comm)* at [43]. Where statements in listing particulars or in a prospectus become incorrect, supplementary particulars or a supplementary prospectus may have to be issued: Financial Services and Markets Act 2000 ss.81, 87G. Section 87G applies to both listed and unlisted securities. See further below, para.7-098.

113. *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 26* at [60]; *[2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*, see at [35], [38] and [74]. See above, para.7-010.

114. *Cramaso LLP v Viscount Reidhaven's Trustees [2014] UKSC 9, [2014] 2 W.L.R. 317* at [20]. On inducement see Vol.I, paras 7-035 et seq.

115. *Mortgage Express v Countrywide Surveyors Ltd [2016] EWHC 224 (Ch)* at [194], referring to *Arnison v Smith (1889) 41 Ch. D. 348, 370, 373* and *Abu Dhabi Investment Company v H Clarkson and Co Ltd [2007] EWHC 1267 (Comm)*.

116. Above, para.7-021.

117. *Davies v London Provincial Marine Insurance Co (1878) 8 Ch. D. 469*.

118. *Ray v Sempers [1974] A.C. 370*. But contrast *Wales v Wadham [1977] 1 W.L.R. 199, 211* (wife not obliged to reveal change of intention not to marry; overruled on another ground but apparent approval given to the decision on this point, *Livesey v Jenkins [1985] A.C. 424, 439*); see Cartwright, *Unequal Bargaining*, pp.84–88.

119. This is dealt with fully below, paras 7-075 et seq.

120. *Corner v Munday [1987] C.L.Y. 479*.

121. *Briess v Woolley [1954] A.C. 333*.

122. *Cramaso LLP v Viscount Reidhaven's Trustees [2014] UKSC 9, [2014] 2 W.L.R. 317*.

123. *[2014] UKSC 9* at [56].

124. Below, paras 7-157 et seq.

125. *Cory v Patton (1872) L.R. 7 Q.B. 304*; cf. *Berger and Light Diffusers Pty Ltd v Pollock [1973] 2 Lloyd's Rep. 442, 460–461*.

126. *[2000] 1 All E.R. (Comm) 573*.

127. See para.7-041.

128. *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123* at [149]; *Bonham-Carter v SITU Ventures Ltd [2012] EWHC 3589 (Ch)* at [120].

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Part 2 - Formation of Contract

Chapter 7 - Misrepresentation [1]

Section 2. - What Constitutes Effective Misrepresentation

(b) - Statement By or Known to Other Party

The representor

7-024

In order to ground relief to a person who has entered into a contract as a result of a misrepresentation, it is normally necessary that the misrepresentation should have been made either by the other party to the contract, [129] or by his agent acting within the scope of his authority, [130] or that the other party had notice of the misrepresentation. [131] A person who has been induced to enter into a contract with A as a result of a misrepresentation made to him by B and of which A had no notice has no ground of relief against A unless B was A's agent. [132] It is, however, not necessary to show that the misrepresentor was the agent of the other contracting party for the purpose of concluding the contract, or even for the purpose of conducting negotiations; it is sufficient if the misrepresentor was the agent of the other contracting party simply for the purpose of passing on the misrepresentation to the misrepresentee. [133]

Third party representor may be liable in damages

7-025

Although, apart from cases of notice or of agency, a misrepresentation made by one person will not found relief against another, nevertheless where the representee has been induced to enter into a contract with a third party, the representor may himself be liable in damages to the representee, either in tort, if the misrepresentation was fraudulent or, in some cases, negligent [134] or on the grounds of a collateral contract between the representor and the representee. [135]

Sureties and misrepresentation by debtor

7-026

In a number of cases a recurring situation has arisen. A husband has wanted to borrow money from a creditor who has refused to proceed without having a guarantee secured by a charge over the matrimonial home, or similarly a charge without a guarantee, from the wife. The wife's consent has been secured by misrepresentation [136] or undue influence [137] by the husband. Can the creditor enforce the guarantee? In a number of cases it was held that if the creditor had "left it to the husband" to get the wife's signature, the husband was acting as agent for the creditor [138] and it was therefore responsible for his misconduct. In *Barclays Bank Plc v O'Brien*, [139] a case where the husband had by misrepresentation secured his wife's signature to a charge over the matrimonial home to secure the debts of his business, this approach was rejected as artificial. However, the bank was prevented from enforcing the charge on the ground that it had constructive notice of the husband's misrepresentation even though it had no actual knowledge of it. Lord Browne-Wilkinson, delivering the only full speech in the House of Lords, pointed out that there is a substantial risk that the wife may act as surety when

the transaction is not to her advantage because of some legal or equitable wrong by the husband. Where the creditor is aware that the debtor and the surety are husband and wife, and the transaction is on its face not to the financial advantage of the surety as well as of the debtor, the creditor will be fixed with constructive notice of any undue influence, misrepresentation or other legal wrong by the debtor unless it has taken reasonable steps to satisfy itself that the surety has entered into the obligation freely and with knowledge of the true facts. [140] The decision in *Barclays Bank v O'Brien*, and many other decisions that followed it, must be read in the light of the subsequent decision of the House of Lords in *Royal Bank of Scotland v Etridge (No.2)*. [141] That case applied a similar approach wherever "the relationship between the surety and the debtor is non-commercial", and considered in detail the steps that the lender should take if, instead of itself ensuring that the wife was not the victim of misrepresentation or undue influence, it chooses to rely on a confirmation from a solicitor that the wife has received advice. [142] Since *Etridge* and most of the decisions following *O'Brien* were cases of alleged undue influence rather than misrepresentation, the topic is treated in detail in Ch.8. [143]

Application to cases of misrepresentation

7-027

As far as cases of misrepresentation by the debtor are concerned, the bank cannot rely on a solicitor to give advice if it has material information which is not made available to the solicitor. Lord Nicholls said:

> "… the solicitor should obtain from the bank any information he needs. If the bank fails for any reason to provide information requested by the solicitor, the solicitor should decline to provide the confirmation sought by the bank … [144] It should become routine practice for banks, if relying on confirmation from a solicitor for their protection, to send to the solicitor the necessary financial information. What is required must depend on the facts of the case. Ordinarily this will include information on the purpose for which the proposed new facility has been requested, the amount of the husband's indebtedness, the amount of his current overdraft facility, and the amount and terms of any new facility. If the banks' request for security arose from a written application by the husband for a facility, a copy of the application should be sent to the solicitor … Exceptionally there may be a case where the bank believes or suspects that the wife has been misled by her husband … If such a case occurs the bank must inform the wife's solicitor of the facts giving rise to its belief or suspicion." [145]

Where there has been a misrepresentation by the husband of the kind which occurred in *O'Brien*'s case (as to the extent and duration of the guarantee), there should be no problem, as the solicitor will always be informed of the terms of the guarantee or charge. What might be more problematic is if there has been some misrepresentation by the husband as to some other matter, such as the state of his business affairs, [146] but it is submitted that the information required of the bank should reveal many such misrepresentations. Lord Nicholls said that the protection of surety wives did not require a review of the rule that a creditor does not normally have any duty to disclose to a surety any unusual risks relating to the debtor, [147] let alone normal ones. The possibility that the husband has lied to both the bank and his wife will remain. Moreover, if there is a relationship of trust and confidence between the husband and the wife, the husband may be required to disclose relevant information to the wife. [148]

Effect of constructive notice

7-028

After *O'Brien*'s case there was some uncertainty as to the position when, as in that case, the husband had misrepresented the extent of the charge and the bank had constructive notice of the misrepresentation. Is the charge completely unenforceable against the wife or enforceable to the extent she was given to believe? (In *O'Brien*'s case it seems that £60,000, the sum which the wife had been led to believe was the limit of her liability, had been paid before the final decision, which did

not discuss its fate.) In *TSB Bank Plc v Camfield* [149] the Court of Appeal held on similar facts that the charge was completely unenforceable. As against the husband the wife would have the right to set aside the whole charge. [150] The bank took subject to the equity in favour of the wife and could not be in a better position. However, in that case the wife had not received any benefit under the agreement. If she had done so, her right to rescind would have been conditional on her making counter-restitution of the benefit received. [151] Where a later security is unenforceable by reason of undue influence, that may still leave an earlier, untainted one in force. [152]

Need the party who made the misrepresentation be a party to the trans-action?

7-029

In *TSB Bank Plc v Camfield* [153] the bank was treated as having constructive notice of the wife's right to set aside the charge as against the husband. What would be the position if the husband were not a party to the charge? As a matter of principle, it seems that a party to a contract who has actual notice that the other party has entered the contract as the result of a misrepresentation by a third party should be unable to enforce it, and it is submitted that the same should apply in cases of constructive notice. In *Banco Exterior Internacional SA v Thomas* [154] (a case of alleged undue influence) Sir Richard Scott V.C. expressed the view that it could not have made a difference if in O'Brien's case the wife had been sole owner of the home, but the case was decided on other grounds, Roch L.J. reserving this question. More recent authority treats the two situations in the same way. [155]

Procedure

7-030

It will be for the wife or other surety to show that the bank had notice of the non-commercial relationship between her and the debtor, and that the transaction was, on its face, not to her advantage. The burden will then be on the bank or other lender to show that it has taken sufficient steps to prevent it being fixed with constructive notice. [156]

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

129. *Hasan v Willson [1977] 1 Lloyd's Rep. 431*.

130. But an agent who seeks to enforce in his own name a contract made by him as such is affected by a misrepresentation made by his principal: *Garnac Grain Co Inc v H.M. Faure & Fairclough Ltd [1966] 1 Q.B. 650*, reversed on the facts *[1966] 1 Q.B. 658* and *[1968] A.C. 1130n*. See also *U.B.A.F. Ltd v European American Banking Corp [1984] Q.B. 713*.

131. *Barclays Bank Plc v O'Brien [1994] 1 A.C. 180*; *Bank of Credit and Commerce International SA v Aboody [1990] 1 Q.B. 923, 973* (undue influence: see below, para.8-108).

132. For an extreme example, see *Foote v Hayne (1824) 1 C. & P. 545* (defendant liable for breach of promise of marriage despite fraud of plaintiff's father with respect to plaintiff's illegitimate child).

133. *Pilmore v Hood (1838) 5 Bing. N.C. 97*. An agent may have authority to make representations in relation to a particular transaction even though he has no authority to conclude the transaction: *First Energy v HIB [1993] 2 Lloyd's Rep. 194, 204*; *MCI Worldcom International Inc v Primus Telecommunications Plc [2004] EWCA Civ 957, [2004] 2 All E.R. (Comm) 833* at [25]. For examples see Vol.II, para.31-012.

134. That is, if the case falls within the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C. 465*, below, para.7-089.

135. See, e.g. *Wells (Merstham) Ltd v Buckland Sand & Silica Co Ltd [1965] 2 Q.B. 170*, below, para.13-007.

136. e.g. *Kings North Trust Ltd v Bell [1961] 1 W.L.R. 119*.

137. e.g. *CIBC Mortgages Plc v Pitt [1994] 1 A.C. 200*.

138. See *Coldunell Ltd v Gallon [1986] Q.B. 1184*.

139. *[1994] 1 A.C. 180*.

140. *[1994] 1 A.C. 180*, at 196.

141. *[2001] UKHL 44, [2002] 2 A.C. 773*. This case and seven other appeals were heard together.

142. *[2001] UKHL 44* at [87].

143. See below, paras 8-108 et seq. The principles laid down in the *Etridge* cases apply equally when there has been misrepresentation by the debtor: *Royal Bank of Scotland Plc v Chandra [2011] EWCA Civ 192* at [30]; *Annulment Funding Co Ltd v Cowey [2010] EWCA Civ 711* at [64].

144. *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773*, at [67], per Lord Nicholls, with whose speech the rest of the House concurred: see below, para.8-113.

145. *[2001] UKHL 44* at [79]. Lord Nicholls pointed out that the bank may need to get the customer's consent to the circulation of this confidential information and, if consent is not forthcoming, the transaction will not be able to proceed. The steps described were said to be applicable to future transactions: at [80].

146. cf. *Massey v Midland Bank Plc [1995] 1 All E.R. 929*.

147. *Crédit Lyonnais Bank Nederland v Export Credit Guarantee Department [1996] 1 Lloyd's Rep. 200*; *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [81]; below, para.7-174.

148. See below, paras 7-181 and 8-069.

149. *[1995] 1 W.L.R. 430*. See further below, para.7-126.

150. This was said to be implicit in Misrepresentation Act 1967 s.2(2), which also implies that the court had no discretion save under that subsection. (On partial rescission see below, para.7-126.) The subsection does not apply as between a misrepresentee and a third party.

151. *Dunbar Bank Plc v Nadeem [1998] 3 All E.R. 876*; *Midland Bank Plc v Greene (1995) 27 H.L.R. 350*. See further below, paras 7-126 and 8-102.

152. *Barclays Bank Plc v Caplan [1998] 1 F.L.R. 532*.

153. *[1995] 1 W.L.R. 430*.

154. *[1997] 1 W.L.R. 221*.

155. *Royal Bank of Scotland v Etridge (No.2) [1998] 4 All E.R. 705 CA, 717–718; [2001] UKHL 44* at [39]. See also Proksch [1997] R.L.R. 71 and below, para.8-124.

156. *Barclays Bank Plc v Boulter [1999] 1 W.L.R. 1919*. Lord Hoffmann, delivering the only full

judgment, said that enough facts must be pleaded to give rise to the presumption of constructive notice; but it would not be adequate to rely on inferences derived from statements tucked away in documents that were pleaded. However, the Court of Appeal should be slow to intervene in the decision that an arguable defence had been raised: *National Westminster Bank Plc v Kostopoulos, The Times, March 2, 2000*.

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(c) - Other Requirements

The representee or person intended to act on the representation

7-031

In order to be entitled to relief in respect of misrepresentation, the person seeking relief must be able to demonstrate that he is a representee; for, subject to the transmission by operation of law of claims on death, bankruptcy and assignment, the person or persons who in law come within the category of representees are alone entitled to a remedy. To put the matter another way, the claimant must show that it was intended that he should act on the representation, rather than it being aimed solely at someone else. [157] There may be said to be three types of representees [158]: first, persons to whom the representation is directly made and their principals; secondly, persons to whom the representor intended or expected the representation to be passed on [159]; and thirdly, members of a class at which the representation was directed. [160] If the representation is directed at a particular class of persons, the alleged representee must be able to bring himself within that class. *Peek v Gurney* [161] illustrates this point. The plaintiffs bought shares in the market in reliance on the terms of a fraudulent prospectus issued by the promoters. The House of Lords held that the plaintiffs could not recover from the promoters: the purpose of issuing a prospectus was said to be to induce people to apply for shares, and not to induce them to buy in the market shares already issued; therefore the function of the prospectus was exhausted with the allotment, and the plaintiffs could not show that they came within the class of persons at which it was directed. [162] Similarly, in *Gross v Lewis Hillman Ltd* [163] it was held that the right of a purchaser of certain land to rescind the contract for misrepresentation did not "run with the land" so as to be available to a subsequent purchaser; the subsequent purchaser was not himself a representee of the original vendor. On the other hand, where a person makes a false statement in a document (such as a bill of lading) which he knows is going to be passed on to other people and relied on by them, any person who does in fact rely on the document will be a representee. [164] Nor is it always necessary that the actual representation should reach the representee. If a person asks an agent to find some property for him, and the agent, relying on the fraudulent inducements of the vendor, recommends the vendor's property, the buyer will be entitled to relief for misrepresentation even though the agent did not actually pass on the fraudulent statements. [165]

Tort actions for misrepresentation

7-032

In tort actions based on negligent misrepresentation, there seems to be a tendency to apply rules which may be somewhat more favourable to a party claiming to be a representee. This is because in such actions the defendant's liability turns on whether he owed a duty of care to the claimant, and that in turn may depend largely upon whether he ought to have foreseen that the statement would be acted upon by the claimant. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [166] a case of negligent misrepresentation in tort, the plaintiffs asked their bankers to obtain a reference from the defendants,

who were also bankers, about a client with whom the plaintiffs were proposing to do business. Although the action failed on other grounds, it was held that it was no defence that the defendants did not know anything about the plaintiffs personally, for it was enough that they must have realised that the reference was wanted by some customer of the bank who would most probably act upon it. The Australian High Court has held that a bank giving a reference to another bank must have known that the reference would be passed on to the second bank's client even though it was prefaced with the words "[t]his opinion is confidential and for your private use". [167] In *Smith v Eric S. Bush* [168] a surveyor instructed by a building society to value a house for mortgage purposes knew that the prospective purchaser, who had in effect paid for the valuation, would probably rely on it in deciding whether or not to purchase. The surveyor was liable in tort to the purchaser even though the purchaser's application form for the mortgage contained a disclaimer of responsibility on the part of the surveyor towards the purchaser; the clause was held not to be fair and reasonable under the Unfair Contract Terms Act 1977. [169] It would seem, therefore, that it is sufficient if the representor either intended the representee to act on the statement or at least should have realised that he would probably do so. [170] On the other hand, in *Caparo Industries Plc v Dickman* [171] it was held that there will be no liability in tort for negligent misrepresentation unless the maker of the statement knew that the statement would be communicated to the person relying on it, either as an individual or as a member of a specified class, specifically in connection with a particular transaction or a transaction of a particular kind. [172] In relation to misrepresentation as between contracting parties, the second requirement appears to mean that the misrepresentation must have been made in connection with the contract in respect of which relief is sought, or at least that reliance on the representation in connection with the contract was likely.

Intention

7-033

It is also sometimes said that a misrepresentation will not be effective to create liability for deceit unless it was intended to be acted on by the representee. [173] If this means no more than that the representee cannot complain unless the misrepresentation was addressed to him, or to a class of persons to whom he was one, the statement is doubtless correct. This point has been dealt with earlier. [174] But if the statement that the representor must have intended the representee to act on the representation means that the representor will not be liable if he did not intend that the person to whom he was deliberately giving the false information should act on it at all, or not in the way he did, the proposition must be treated with some caution. First, it seems that any requirement of intention applies only to cases of fraud [175] and perhaps (because of the "fiction of fraud") to cases in which it is claimed that the misrepresentor is liable in damages under Misrepresentation Act 1967 s.2(1). [176] In cases of liability in tort for negligence, the test is one of reasonable foreseeability. [177] It is submitted in cases in which the claimant seeks to rescind on the grounds of a non-fraudulent misrepresentation it will suffice that the misrepresentor should have realised that the misrepresentee might, not unreasonably, act on the representation, as then the statement will be one on which the misrepresentee was entitled to rely. [178] Secondly, even in fraud cases the authorities are not clear on whether it suffices that it must have been obvious that the claimant or someone in his position might rely on the statement. In *Cullen v Thomson* [179] three company directors were responsible for reading a report to a shareholders' meeting which contained a completely fraudulent account of the company's financial condition. It seems probable that the report was merely intended to conceal the company's financial condition from the shareholders, but the plaintiff, himself a shareholder, purchased additional shares in reliance on this report. It was held that the directors were liable for their fraudulent misrepresentations if they were made:

> "… with the real intent to cause the [representee] to act on that representation, or under such circumstances as they must have supposed would probably induce a person in the situation of the [representee] to act upon it." [180]

In *Tackey v McBain* [181] it was held that a manager of a company who said that he had no information to a broker about an important find of oil when in fact he did was not liable to a party who as a result

sold his shares at a low price, whether or not the plaintiff was within the class to whom the statement was addressed, because the manager did not intend anyone to act as the plaintiff did and therefore had no fraudulent intent. [182] The likelihood of reliance was not discussed.

7-034

Thus it is possible that a representor may escape liability for damages by proving that he genuinely had no intention that the representee should act on the statement, for example if a vendor says something untrue about a property honestly believing that the purchaser will not rely on it at all but will get his own survey and inevitably discover the truth. But we will see that the law seems to take a harsh approach to fraud, not even requiring that the fraud be a "but for" cause of the representee entering the contract. [183] In the light of that, it is doubtful whether a court would allow a party who had knowingly made a false statement to another to rely on a defence that the representee was not meant to act on the statement unless the representee's action was quite unforeseeable. Further, it is unclear whether "intention" in the sense discussed needs to be shown when the claimant is seeking to rescind on the basis of fraudulent misrepresentation. [184]

Inducement

7-035

It is essential if the misrepresentation is to have legal effect that it should have operated on the mind of the representee. [185] It follows that if the misrepresentation did not affect the representee's mind, because he was unaware that it had been made, [186] or because he was not influenced by it, [187] or because he knew that it was false, [188] he has no remedy. [189] Thus in *Horsfall v Thomas* [190] a seller delivered to a buyer a gun which was defective, for after being fired it exploded, and the buyer was injured; the buyer had not examined the gun, but he alleged that the sale had been procured by fraudulent misrepresentation and that the defect had been concealed. The court rejected his claim because, if any attempt to conceal the defect had been made, it had had no effect on the buyer's mind because he had never examined the gun. [191] Where an estate agent's particulars misrepresented the size of a garage, and the buyer had examined the whole property thoroughly on two separate occasions, it was held that the misrepresentation had had no effect. [192]

Burden of proof

7-036

The burden of proving that the claimant had actual knowledge of the truth, and therefore was not deceived by the misrepresentation, lies on the defendant; if established, knowledge on the part of the representee is of course a complete defence, because he is then unable to show that he was misled by the misrepresentation. [193] It has also been held that a defence is made out if the truth was known to the agent of the claimant, at least where the facts had deliberately been communicated to the agent. [194]

Need not be sole inducement

7-037

It is not necessary that the misrepresentation should be the sole cause which induced the representee to make the contract. It is sufficient if it can be shown to have been one of the inducing causes. [195] Thus in *Edgington v Fitzmaurice* [196] the plaintiff was induced to take debentures in a company partly because of a misrepresentation in the prospectus, but also because of a mistaken belief of his own that the debentures conferred a charge on the company's property. He was held to be entitled to have the contract rescinded, and Cotton L.J. said, "[i]t is not necessary to show that the

misstatement was the sole cause of his acting as he did". [197] The plaintiff appears to have agreed to take the debentures because of a combination of the misrepresentation and his own mistake. [198] What is required is that the misrepresentee would not have entered the contract but for the misrepresentation. [199]

"But for" causation normally required

7-038

It seems to be the normal rule [200] that, where a party has entered a contract after a misrepresentation has been made to him, he will not have a remedy unless he would not have entered the contract (or at least not on the same terms) but for the misrepresentation. [201] Certainly this is the case when the misrepresentee claims damages in tort for negligent misstatement; and it seems also to be required if damages are claimed for fraud. [202] It seems likely that the same rule applies if he seeks to rescind on the ground of an innocent or negligent misrepresentation. [203]

"But for" causation not required for rescission for fraud

7-039

In cases of fraud, in contrast, if the representee seeks to rescind, it is no defence for the representor to show that if the misrepresentation had not been made, the misrepresentee would still have made the contract. [204] It is sufficient if there is evidence to show that he was materially influenced by the misrepresentation merely in the sense that it had some impact on his thinking, "was actively present to his mind". [205] As Lord Cross put it in a case of duress to the person [206]:

> "… [i]n this field the court does not allow an examination into the relative importance of contributory causes.
>
> > 'Once make out that there has been anything like deception, and no contract resting in any degree on that foundation can stand':
>
> per Lord Cranworth L.J. in *Reynell v Sprye*." [207]

The Privy Council applied this "fraud rule" when B had entered a contract with A after A had made threats against B's life. It held that B was entitled to relief even though he might well have entered into the contract if A had uttered no threats. It was only if it were shown that B did not allow the threat to affect his judgment at all that relief would be denied. [208] This does not seem to be merely a reversal of the usual burden of proof but a special rule that in fraud cases that, provided the misrepresentation had some influence, it is no defence that the misrepresentee would have entered the contract even if the statement had not been made. [209] The rule is intended to deter fraud. [210] The same approach has been applied by the Court of Appeal in a case of "actual" undue influence, [211] which is seen as a "species of fraud". [212] The rule applies only to fraud, [213] and only when the remedy sought is rescission. The victim of fraud cannot recover damages unless the loss for which damages are claimed would not have been suffered but for the fraud. [214]

Material misrepresentation and a presumption of inducement

7-040

Once it is proved that a false statement was made which is "material" in the sense that it was likely

to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was influenced by the statement, [215] and the inference is particularly strong where the misrepresentation was fraudulent. [216] ❗ There is no set list of matters that might rebut the presumption which arises from a fraudulent statement. One is to show that the misrepresentee had already firmly made up his mind, but even then the misrepresentation might have induced him not to change his mind. [217]

Materiality

7-041

❗ It is sometimes said that a misrepresentation will not be effective to ground relief in law unless it was material, in the sense that a reasonable man would have been influenced by it in deciding whether to enter into the contract. [218] ❗ It is true that courts have sometimes used language which would support this contention [219] and it is also true that if the representation is not material in this sense, the representee may have considerable difficulty in satisfying the court that he was in fact influenced by it. There is no clear authority denying relief to a representee who has in fact been influenced by a misrepresentation which would not have influenced a reasonable person, [220] but this may be one reason why a mere "puff" or sales talk does not ground relief. [221] It is submitted that a remedy will be given where the representor knows that the representee is likely to act on the misrepresentation, [222] or ought to know that the misrepresentee, not unreasonably, is likely to do so—in other words, when the representee was entitled to rely on it. [223] In contrast, save in cases of fraud, if the representor has no reason to know that the representee regards as relevant some fact which the reasonable person would think was immaterial, there will be no remedy for misrepresentation:

> "… whether there is a representation and what its nature is must be judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee … The position in the case of a fraudulent misrepresentation may of course be different." [224]

In cases of fraud, the representor is not permitted to argue that it was unforeseeable that the representee would be influenced by the lie. [225]

Unforeseeable reliance

7-042

❗ The question may arise whether relief may be given when the in the circumstances the representee was unlikely to act on the representation, even though it was a statement that was material in the sense that objectively speaking it was relevant: in other words, a question of whether reliance has to be reasonable or at least foreseeable. This, it is respectfully submitted, is a different question from whether the statement is material. [226] ❗ A person who has entered a contract as a result of a fraudulent misrepresentation may be entitled to rescind even though one would not have expected a reasonable person to enter the contract at that stage because, for example, he has not yet secured finance for the transaction [227] or because he was expected to take the opportunity to check the facts for himself. It is not clear whether the same would apply if the party unforeseeably entered into a transaction as the result of an innocent or negligent misrepresentation, rather than a fraudulent one which was intended to induce the other to act quickly. It depends to some extent on the cases to be discussed in the next paragraph. We will see that the misrepresentee may be permitted to rescind even though he passed up an opportunity to discover the truth for himself, but it is not quite clear whether that applies if it was unforeseeable (as opposed to being merely unreasonable) that he would do so.

Representee could have discovered truth: rescission

7-043

If the representee did not know that the representation was false, it is no defence to an action for rescission that the representee might have discovered its falsity by the exercise of reasonable care. [228] Thus it is irrelevant that the true position is stated in the contract signed by the misrepresentee unless he was actually aware of the "correction" in the contract document [229]; "it is not enough to show that the claimant could later have discovered the truth, but that he did discover it". [230] It has been argued that the rule that a misrepresentee's failure to take advantage of an opportunity to discover the truth is no bar to rescission may require reconsideration in the light of indications in cases of claims for damages for negligent misstatement to the effect that buyers of expensive or commercial properties would be expected to have their own survey done, and thus would fail in a claim for negligent misrepresentation against a surveyor employed by the lender [231]; it is suggested that the rule should be limited to cases in which it was reasonable not to take the opportunity. [232] It is not clear, however, that the same approach should apply as between contracting parties when the misrepresentee is seeking to rescind, as is taken when a party claims damages for a negligent misstatement by a person with whom he is not in a contractual relationship. When the misstatement leads to a contract with the misrepresentor, there is at least the possibility that the misrepresentor will have benefited from his misstatement, for example by obtaining a better price for the property he is selling. The fact that he was innocent, and the other party careless of his own interests, does not necessarily justify allowing the misrepresentor to retain the advantage gained. [233] It is possible, however, that relief might be denied if it was unforeseeable that the victim of an nonfraudulent misrepresentation would not check the accuracy of the statement for himself before entering the contract. It was submitted earlier that when a misrepresentee seeks to rescind on the ground of a non-fraudulent misrepresentation, there may be a requirement that his reliance on it was at least foreseeable. [234] If there is such a requirement, it would not be fulfilled if it was unforeseeable that the misrepresentee would act without checking first.

Representee could have discovered truth: damages

7-044

As will be seen later, the victim of a fraudulent or negligent misrepresentation may have a claim for damages. We saw in the previous paragraph that the fact that the misrepresentee could have discovered the truth is no defence to a claim for rescission if he did not do so. [235] Can the damages be reduced on the ground that the representee was contributorily negligent in not discovering the truth? Contributory negligence is not a defence to an action of deceit and the Law Reform (Contributory Negligence) Act 1945 [236] does not apply. [237] There are also dicta in cases in which the misrepresentee was claiming damages for negligence to the effect that it is irrelevant that the representee could have discovered the truth for himself. [238] It has been held that damages for negligent misrepresentation under the Misrepresentation Act 1967 s.2(1) [239] may be reduced if the loss was partly the fault of the representee, at least when there is concurrent liability under that section and in tort for negligent misrepresentation under the principle of *Hedley Byrne v Heller* [240]; but it would not be just and equitable to reduce the damages when the representor had intended, or should be taken as having intended, that the representee should act in reliance on the answers which had been given to his questions. [241]

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

157. Compare below, para.7-033.

158. See *Swift v Winterbotham (1873) L.R. 8 Q.B. 244, 253*; the rule there stated was applied in *Richardson v Silvester (1873) L.R. 9 Q.B. 34, 36*; see also *Commercial Banking Co of Sydney Ltd v R.H. Brown & Co (1972) 126 C.L.R. 13*, below, para.7-032.

159. This category includes third persons to whom the original representee passes on the representation to the knowledge of the representor (see *Pilmore v Hood (1838) 5 Bing.N.C. 97* which was applied in *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd [2001] Q.B. 488 CA*; *Yianni v Edwin Evans & Sons [1982] Q.B. 438*), but excludes persons to whom the representor does not intend any communication to be made (see *Peek v Gurney (1873) L.R. 6 H.L. 377*), unless (semble) he ought to foresee such communication, see below.

160. The class may amount to the public at large (cf. *R. v Silverlock [1984] 2 Q.B. 766*), for if a representation is made to the public generally with the intention that it should be acted upon, any member of the public may be a representee, though it does not follow that a legal remedy exists in respect of it. This is particularly so in cases of liability in tort for negligence, where (even if any member of the public is a representee) the absence of a duty of care may be fatal to a claim for damages, below, paras 7-089—7-091.

161. *(1873) L.R. 6 H.L. 377*.

162. ⚠It might be thought that the actual decision in this case would no longer be the common law because a prospectus today is intended to be addressed to would-be purchasers in the market just as much as to purchasers from the company (cf. *Taberna Europe CDO II Plc v Selskabet [2015] EWHC 871 (Comm)* at [115]–[118]); in the Court of Appeal Moore-Bick L.J. said (*[2016] EWCA Civ 1262* at [11]) that "In an age when most commercial documents exist primarily in electronic form and can be made available to a wide audience at the touch of a button it is important not to allow inroads to be made too easily into the principles enunciated in cases such as *Peek v Gurney* … In order for a representation in a document to be actionable at the suit of the recipient there has to be a connection between the maker and the recipient of a kind that enables the court to be satisfied that the maker was intending the recipient to rely on the document in a particular way". On the facts, the defendant had encouraged the party selling the investments to direct the investor to the information on the defendant's website, but in *Al Nakib Investments Ltd v Longcroft [1990] 1 W.L.R. 1390* it was applied in a case of alleged negligent misstatement. Now, however, under Financial Services and Markets Act 2000 s.90, compensation is payable to any person who has acquired securities relying on incorrect or incomplete statements in the prospectus or listing particulars. See Gower & Davies, *Principles of Modern Company Law*, 10th edn, 2016, para.25-32.

163. *[1970] Ch. 445, 460*.

164. See, e.g. *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd [1957] 2 Q.B. 621*.

165. *Gross v Hillman Ltd [1970] Ch. 445, 461*. This paragraph was quoted in *Brown v InnovatorOne Plc [2012] EWHC 1321 (Comm)* at [883].

166. *[1964] A.C. 465*.

167. *Commercial Banking Co of Sydney Ltd v R.H. Brown & Co (1972) 126 C.L.R. 13*.

168. *[1990] 1 A.C. 831*.

169. s.2(2); see below, para.15-128.

170. cf. *McCullagh v Lane Fox and Partners Ltd [1996] 1 E.G.L.R. 35*, where at the time the information was given the surveyor did not know that the purchaser would act without getting his own survey, and by the time the surveyor did know he had issued a disclaimer.

171. *[1990] 2 A.C. 605*, below, para.7-090.

172. cf. *Morgan Crucible Co Plc v Hill Samuel Bank Ltd [1991] Ch. 295*; *Galoo Ltd (In Liquidation) v*

Bright Grahame Murray [1994] 1 W.L.R. 1360.

173. Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.5-19; Compare Clerk & Lindsell on Torts, 21st edn (2014), para.18-30.

174. See above, para.7-031.

175. Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.3-49. In a case of fraud it is necessary only that the representor intended the representation to be acted on: *Goose v Wilson Sandford (No.2) [2000] All E.R. (D) 324* at [48]; *Mead v Babington (formerly t/a Babington Estate Agents) [2007] EWCA Civ 518* at [16].

176. See below, para.7-078; *Banque Keyser Ullman SA v Skandia (UK) Insurance Ltd [1990] 1 Q.B. 665, 790 (affirmed on other grounds [1991] 2 A.C. 249)*.

177. See above, para.7-032.

178. See above, para.7-006.

179. *(1862) 6 L.T. 870*.

180. *(1862) 6 L.T. 870, 874*.

181. *[1912] A.C. 186 PC*.

182. See also *Banque Keyser Ullman SA v Skandia (UK) Insurance Ltd [1990] 1 Q.B. 665, 790 (affirmed on other grounds [1991] 2 A.C. 249)*. In *Gabriel v Little [2013] EWCA Civ 1513* it was held that "whilst the motive of the representor is irrelevant, an intention to influence the mind of the representee must be shown if the requisite dishonest intention is to be established" (at [33]).

183. Below, para.7-039.

184. It may matter whether the misrepresentation was fraudulent or innocent for the purposes of Misrepresentation Act 1967 s.2(2): below, para.7-104.

185. See generally Handley, "Causation in misrepresentation" (2015) 131 L.Q.R. 274.

186. *Horsfall v Thomas (1862) 1 H. & C. 90*.

187. *Attwood v Small (1838) 6 Cl. & F. 232*; *Jennings v Broughton (1853) 5 De G.M. & G. 126*; *Smith v Chadwick (1884) 9 App. Cas. 187*; *Holmes v Jones (1907) 4 C.L.R. 1692*.

188. *Cooper v Tamms [1988] 1 E.G.L.R. 257*. In *Hayward v Zurich Insurance Co Plc [2016] UKSC 48* the Supreme Court, reversing the decision of the Court of Appeal (*[2015] EWCA Civ 327*) held that a settlement of an insurance claim could be avoided by the insurer when it discovered that the amount of loss had been exaggerated fraudulently, even though at the time the insurer had doubts over the extent of the claim. It was sufficient that the false claim influenced the insurer in the sum offered in settlement. It is not necessary that the insurer believed that the claim made was true.

189. Cited with approval, *Brown v InnovatorOne Plc [2012] EWHC 1321 (Comm)* at [883]. If it would have been unreasonable of the representee to rely upon the representation, that may go to show that the representee did not in fact rely on it: *Monde Petroleum SA v WesternZagros Ltd [2016] EWHC 1472 (Comm)* at [219].

190. *(1862) 1 H. & C. 90*. The judgment of Bramwell B. was criticised in *Smith v Hughes (1871) L.R. 6 Q.B. 597, 605* by Cockburn C.J.

191. An action for breach of the implied terms as to quality and fitness would probably lie in such circumstances today. See Vol.II, paras 44-094—44-112.

192. *Hartlelid v Sawyer & McClockin Real Estate Ltd [1977] 5 W.W.R. 481*.

193. *Dyer v Hargrave (1805) 10 Ves. 505*; *Attwood v Small (1838) 6 Cl. & F. 232*; *Vigers v Pike (1842) 8 Cl. & F. 562, 650*.

194. *Strover v Harrington [1988] Ch. 390*; compare *Markappa Inc v N.W. Spratt & Son Ltd [1985] 1 Lloyd's Rep. 534*. However, the information must be received by a person authorised and able to appreciate its significance: *Malhi v Abbey Life Assurance Co Ltd [1996] L.R.L.R. 237*.

195. ! *Western Bank of Scotland v Addie (1867) L.R. 1 Sc. & Div. 145, 158*; *Geest Plc v Fyffes Plc [1999] 1 All E.R. (Comm) 672*; *Brown v InnovatorOne Plc [2012] EWHC 1321 (Comm)* at [883]; *Taberna Europe CDO II Plc v Selskabet [2015] EWHC 871 (Comm)* at [153], citing this paragraph in the 31st edn (reversed on other grounds *[2016] EWCA Civ 1262*).

196. *(1885) 29 Ch. D. 459*.

197. *(1885) 29 Ch. D. 459, 481*.

198. See the judgment of Fry L.J. at 483. Bowen L.J. seems to have applied a slightly different test; see n.203 below.

199. See next paragraph.

200. Except where the misrepresentee seeks to rescind on the basis of a fraudulent misrepresentation: see next paragraph.

201. ! *Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 All E.R. (Comm) 140*; *Taberna Europe CDO II Plc v Selskabet [2015] EWHC 871 (Comm)* at [153], citing this paragraph in the 31st edn (reversed on other grounds *[2016] EWCA Civ 1262*). This is consistent with the decision of the House of Lords in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 A.C. 501* (see n.201 below) and *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123* at [163]–[173]. The test is whether the misrepresentee would have entered the contract had the representation not been made, rather than what he would have done had he known the truth: *[2010] EWHC 1392 (Comm)* at [174]–[191].

202. *Barings Plc (In Liquidation) v Coopers & Lybrand [2002] EWHC 461 (Ch), [2002] 2 B.C.L.C. 410* at [127]–[130], relying on statements from the speech of Lord Steyn in *Smith New Court v Scrimgeour Vickers (Asset Management) Ltd [1997] A.C. 254, 284*. (For the Smith New Court case see below, para.7-062.) Thus there would be no inducement if the representee would have gone ahead even if he had been told the truth: *Dadourian Group International v Simms [2006] EWHC 2973 (Ch), [2006] All E.R. (D) 351 (Nov) at [548]; affirmed [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep. 601*, including the trial judge's statement that "the presumption of inducement is rebutted by the representor showing that the misrepresentation did not play a real and substantial part in the representee's decision to enter into the transaction; the representor does not have to go so far as to show that the misrepresentation played no part at all": see at [99]–[101]. On the last point, compare the test when the representee seeks to rescind on the ground of fraud: below, text at n.202.

203. In *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 A.C. 501*, a case of nondisclosure in insurance (see below, para.7-157), Lord Mustill spoke of inducement both "in the sense in which that expression is used in the general law of misrepresentation" and (549) "in the sense in which it is used in the general law of contract" without apparently seeing any difference between the two. As the "but for" test is applied generally to breach of contract, his statements and an overall reading of his speech suggest that he thought that the insurer's decision as to whether to enter the contract or at what premium must have been influenced by

the non-disclosure in the sense that "but for" causation is required. cf. Bennett (1996) 112 L.Q.R. 405, 408.

204. See *Re Leeds Bank (1887) 56 L.J. Ch. 321*.

205. Bowen L.J. in *Edgington v Fitzmaurice (1885) 29 Ch. D. 459, 483*; *Brown v InnovatorOne Plc [2012] EWHC 1321 (Comm)* at [883]. Bowen L.J. seems to have applied this test to a claim for damages for fraud, but he seems to have been in the minority; see above, n.196.

206. *Barton v Armstrong [1976] A.C. 104 PC* at 118–119.

207. *(1852) 1 De G.M. & G. 660, 708*. See also *Arnison v Smith (1889) 41 Ch. D. 348, 369*, where Lord Halsbury L.C. said, "[y]ou cannot weight the elements by ounces".

208. *[1976] A.C. 104* PC at 118–119.

209. The rule is usefully discussed in Burrows, *Law of Restitution*, 3rd edn (2011), pp.94–95.

210. cf. below, para.7-064.

211. *UCB Corporate Services Ltd v Williams [2002] EWCA Civ 555* at [86].

212. See below, para.8-070.

213. *Ross River Ltd v Cambridge City Football Club Ltd [2007] EWHC 2115 (Ch), [2008] 1 All E.R. 1004* at [202], referring to this paragraph in an earlier edition; *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm)* at [198]. The but for test is said to apply to non-disclosure where there is a duty to disclose: *Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 All E.R. (Comm) 140* at [59], [187], but note the doubts of Ward L.J. at [218].

214. See above, n.200.

215. *Smith v Chadwick (1884) 9 App. Cas. 187, 196*; also *(1882) 20 Ch. D. 27, 44–45*; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1992] 1 Lloyd's Rep. 101, 112–113* (affirmed without reference to this point, *[1993] 1 Lloyd's Rep. 496*, and by the House of Lords, where Lord Mustill refers to the "presumption of inducement" in the case of fraud, but he does not deny that there may be a similar presumption in other cases of positive misrepresentation: *[1995] 1 A.C. 501, 542*); *Dadourian Group International Inc v Simms [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep. 601* at [99]–[101]; *Edwards v Ashik [2014] EWHC 2454 (Ch)* at [19]. There is not unanimity as to the weight of any presumption. The following passage from Halsbury's Laws of England, 4th edn, Vol.3, para.1067: "Inducement cannot be inferred in law from proved materiality, although there may be cases where the materiality is so obvious as to justify an inference of fact that the representee was actually induced, but, even in such exceptional cases, the inference is only a prima facie one and may be rebutted by counter-evidence", was approved in *St Paul Fire and Marine Insurance Co Ltd v McConnell Dowell Constructors Ltd [1996] 1 All E.R. 96, 112*; but the same case refers simply to a "presumption". See Bennett (1996) 112 L.Q.R. 405. A material representation was said to create a presumption in *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd (1997) 13 Const. L.J. 418*.

216. *Ross River Ltd v Cambridge City Football Club Ltd [2007] EWHC 2115 (Ch), [2008] 1 All E.R. 1004* at [241] (Briggs J.). *Hayward v Zurich Insurance Co Plc [2016] UKSC 48* at [34], quoting this paragraph, and [37].

217. *County Natwest Bank Ltd v Barton, The Times, July 29, 1999*; *Edwards v Ashik [2014] EWHC 2454 (Ch)* at [20]–[25]. "[I]t is sufficient inducement if, in consequence of the misrepresentation, the claimant abstains from doing something bearing on his material interests": *Parabola Investments Ltd v Browallia Cal Ltd [2009] EWHC 901 (Comm)* at [107] (affirmed without reference to this point, *[2010] EWCA Civ 486, [2011] Q.B. 477*).

218. Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.9-020.

219. *Jennings v Broughton (1854) 5 De G.M. & G. 126, 130*; *Smith v Chadwick (1884) 9 App. Cas. 187*. The Marine Insurance Act 1906 s.20(2) incorporates the requirement of materiality, and it is frequently said that the Act represents the common law, at least in part (e.g. *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 A.C. 501, 518, 553*). It is possible that the requirements of the Act are influenced by the fact that it also applies to non-disclosure. A requirement of materiality is a necessary part of a rule requiring disclosure; it is not a necessary part of a rule affording relief for active misrepresentation. However, it seems clear that in insurance cases, the requirement of materiality applies to misrepresentation as well as non-disclosure. Note the current definition of materiality in relation to non-disclosure in insurance: *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 A.C. 501* (material if it "would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk"), below, para.7-160. This definition is also used in the Insurance Act 2015, s.7(3); see below, para.7-161. The Consumer Insurance (Disclosure and Representations) Act 2012 does not refer to materiality. The consumer has a duty not to make careless representations; and it is doubtful whether a consumer who without fraud says something that is incorrect but seemingly irrelevant to the insurer will be careless. On the other hand, the Act provides that a misrepresentation that is made dishonestly is always to be taken to show lack of reasonable care (s.3(5)), so it seems that the insurer may have a remedy if the consumer makes a deliberate misstatement, even if the statement did not seem material in the sense discussed, provided the insurer can show that without the misstatement it would not have entered the contract at all, or would have done so only on different terms (s.4(1)(b)).

220. In *Avon Insurance v Swire [2000] 1 All E.R. (Comm) 573* Rix J. held that a statement will be treated as true if it is substantially correct and the difference would not have induced a reasonable person to enter the contract (above, para.7-023). This might seem to support the requirement of materiality.

221. Above, para.7-007.

222. It has been so held in Australia: *Nicholas v Thompson [1924] V.L.R. 554*. In *Cuthbertson v Friends' Provident Life Office (2006) S.L.T. 567, (2006) S.C.L.R. 697* Lord Eassie pointed out that the materiality test in insurance (set out in s.20(2) of the Marine Insurance Act) would be satisfied if the proposer actually appreciated that the fact stated would be relevant to the insurer. In *Museprime Properties Ltd v Adhill Properties Ltd [1990] 2 E.G.L.R. 196* it was said that materiality was really a question of the burden of proof: if the statement would not have influenced a reasonable person, the burden of proving that it did induce the contract will be on the representee, but relief may still be obtained if the burden is discharged. However, the case did not involve materiality in the sense discussed here; see next paragraph.

223. See above, para.7-006.

224. Mance L.J. in *MCI Worldcom International Inc v Primus Telecommunications Plc [2004] EWCA Civ 957, [2004] All E.R. (Comm) 833* at [30]. He said that the version of this paragraph in the 29th edition "appears … to put the position too cautiously".

225. *Smith v Kay (1859) 7 H.L.C. 750*. It is no defence that the maker of a fraudulent statement thought that it was irrelevant or unimportant: *Standard Chartered Bank v Pakistan National Shipping Corp (No.2) [2000] 1 Lloyd's Rep. 218, 225* (reversed in part on other grounds, *[2002] UKHL 43, [2002] 3 W.L.R. 1547*: see below, para.7-071). See also *Dadourian Group International Inc v Simms [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep. 601* at [101]. In *Bonham-Carter v SITU Ventures Ltd [2012] EWHC 3589 (Ch)* it seems that both parties agreed that materiality was an essential ingredient of a claim for deceit, relying on a dictum of Hobhouse L.J. in *Downs v Chappell [1997] 1 W.L.R. 426, 433*: see at [121]. In *Downs v Chappell* the false statement was clearly material: see *[1997] 1 W.L.R. 426, 433*. In *Edwards v Ashik [2014] EWHC 2454 (Ch)* Hamblen J. (at [25]) pointed out that Hobhouse L.J. was concerned with what the representee needs to prove in order to establish a cause of action in deceit, not what the representor needs to prove in order to show that the representee was not induced to enter into a contract by the representation. On the latter, Hamblen J. said the correct

approach was that in *County Natwest Bank Ltd v Barton, The Times, July 29, 1999*, see above, para.7-040.

226. ⚠It is submitted that this was the question in *Goff v Gauthier (1991) 62 P. & C.R. 388*, although the court referred to an earlier version of the previous paragraph of this work. It was also the question in *Museprime Properties Ltd v Adhill Properties Ltd [1990] 2 E.G.L.R. 196* (representee did not take opportunity to check accuracy.) cf. Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.9-020.

227. *Goff v Gauthier (1991) 62 P. & C.R. 388*.

228. *Dyer v Hargrave (1805) 10 Ves. 505*; *Dobell v Stevens (1825) 3 B. & C. 623*; *Reynell v Sprye (1852) 1 De G.M. & G. 660*; *Central Ry of Venezuela v Kisch (1867) L.R. 2 H.L. 99, 120*; *Redgrave v Hurd (1881) 20 Ch. D. 1*; *Nocton v Ashburton [1914] A.C. 932, 962*; *Laurence v Lexcourt Holdings Ltd [1977] 1 W.L.R. 1128*.

229. *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511*. However, the misrepresentee must still prove inducement. If the misrepresentation was in very "rough and ready terms", while the contract was a detailed financial instrument which the investor would be expected to read in order to discover the details which he claimed were of importance to him, but the investor signed the contract without reading it, he may be held not to have relied on the misrepresentation. See similarly *Reinhard v Ondra LLP [2015] EWHC 1869 (Ch)* at [112]–[118].

230. *[2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511* at [40]. The case involved a claim for damages under Misrepresentation Act 1967 s.2(1).

231. *Smith v Eric S. Bush [1990] 1 A.C. 831, 854, 872*.

232. ⚠Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.9-028.

233. See Jessel, M.R. in *Redgrave v Hurd (1881) 20 Ch. D. 1, 13*.

234. Above, para.7-033.

235. *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd [2006] EWCA Civ 386* at [40] (damages under Misrepresentation Act 1967 s.2(1)).

236. See below, para.7-071.

237. *Alliance and Leicester Building Society v Edgestop Ltd [1994] 1 All E.R. 38*; *Standard Chartered Bank v Pakistan National Shipping Corp (No.2) [2002] UKHL 43, [2003] 1 A.C. 959*.

238. ⚠*Nocton v Ashburton [1914] A.C. 932, 962*; *The Arta [1985] 1 Lloyd's Rep. 534*; and *Strover v Harrington [1988] Ch. 390, 410*: see *Taberna Europe CDO II Plc v Selskabet [2015] EWHC 871 (Comm)* at [181]; *[2016] EWCA Civ 1262, [2017] Q.B. 633* at [51].

239. See below, para.7-082.

240. See below, para.7-089.

241. *Gran Gelato Ltd v Richcliff (Group) Ltd [1992] Ch. 560*, especially at 574. See further below, para.7-082. In *Smith v Eric S. Bush [1990] 1 A.C. 831* (where there was no contract between plaintiff and defendant) the plaintiff recovered although she might have had her own survey of the house she bought; but it was not reasonable to expect her to have her own survey of a modest property. Had the property been more expensive it might have been different and a disclaimer of liability might have been reasonable: *Smith [1990] 1 A.C. 831, 854, 872*. See above, para.7-032 and below, para.15-104.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 7 - Misrepresentation [1]

Section 3. - Damages for Misrepresentation

Preliminary

7-045

Damages are always recoverable for a fraudulent misrepresentation, [242] subject to the exception noted in the next paragraph. Under s.2(1) of the Misrepresentation Act 1967 damages are recoverable for (in effect) [243] a negligent misrepresentation if they would have been so recoverable in fraud, where the representee enters into a contract with the representor as a result of the misrepresentation. [244] Damages for negligent misrepresentation are also recoverable in some circumstances at common law, quite apart from the Act of 1967. [245] Damages are not generally recoverable for innocent misrepresentation unless the representation is, or becomes, a contractual term, but there are a number of important exceptions to this principle. [246]

Lord Tenterden's Act

7-046

Exceptionally, no action may be brought on a fraudulent misrepresentation as to a person's "relating to the character, conduct, credit, ability, trade, or dealings of any other person" unless the representation is in writing and signed by the representor: Statute of Frauds Amendment Act 1828 (Lord Tenterden's Act) s.6. This applies only to claims of fraud [247] and possibly to claims under Misrepresentation Act 1967 s.2(1). [248]

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

242. Below, paras 7-047—7-073.

243. See below, para.7-076.

244. Below, paras 7-075—7-085.

245. Below, paras 7-086—7-097.

246. Below, paras 7-102—7-109.

247. *Banbury v Bank of Montreal [1918] A.C. 626 (HL)*. The Act may be satisfied by a representation implied by a signed writing but a representation by conduct would not suffice: *Contex Drouzhba v Wiseman [2007] EWCA Civ 1201, [2007] All E.R. (D) 293 (Nov)*. The representation may be made in an email, provided that the email includes a written indication of who is sending the

email and some form of “signature”: *J Pereira Fernandes SA v Mehta [2006] EWHC 813 (Ch), [2006] 1 W.L.R. 1543*; *Lindsay v O’Loughnane [2010] EWHC 529 (QB), [2012] B.C.C. 153* at [95].

248. *UBAF Ltd v European American Banking Corp [1984] Q.B. 713 CA*: see further below, para.7-078.

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Section 3. - Damages for Misrepresentation

(a) - Fraudulent Misrepresentation

Claims for damages for fraud

7-047

Where a person has been induced to enter into a contract as a result of a fraudulent misrepresentation by the other contracting party, he may rescind the contract, or claim damages, or both. [249] Rescission is dealt with in the next section. [250] In cases in which the parties have entered a contract as the result of the misrepresentation, damages for fraud are perhaps less important than they used to be, as a result of the Misrepresentation Act 1967: claims for damages by a person who has been induced to enter into a contract by the misrepresentation of another party thereto may now be based either on fraud or on (in effect) [251] negligence. As will be seen in detail below, [252] s.2(1) of this Act allows a person who has been induced to enter into a contract by a misrepresentation to make a claim for damages as of right, as though the representation had been fraudulent, unless the representor "proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true". In an action under this subsection, it is for the representor to disprove negligence, whereas in an action in fraud it is for the representee affirmatively to prove the fraud—and the burden is no light one. [253] However, claims for damages against a representor who does not subsequently enter into a contract with the representee may have to be brought in fraud, for although even here negligence may sometimes suffice, it will not always do so. [254] Further, as will be seen below, the Misrepresentation Act has created a new distinction of some importance between fraudulent and other misrepresentations in connection with rescission. [255]

Definition of fraud

7-048

The common law relating to fraud was established by the House of Lords in *Derry v Peek*. [256] It was there decided that in order for fraud to be established, it is necessary to prove the absence of an honest belief in the truth of that which has been stated. [257] In the words of Lord Herschell:

> "… fraud is proved when it is shown that a false representation has been made: (1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false." [258]

The converse of this is that however negligent a person may be, he cannot be liable for fraud, provided that his belief is honest; mere carelessness is not sufficient, although gross carelessness may justify an inference that he was not honest. [259]

Absence of honest belief

7-049

That the claimant who alleges fraud must prove the absence of an honest belief is demonstrated by *Derry v Peek* itself. A company issued a prospectus stating that it was entitled to use steam power to run trams; the respondents obtained shares on the strength of this representation, which was in fact false, although at the time the company had reason to believe that permission would be granted by the Board of Trade as a matter of course. Permission to use steam power was, however, not granted and the company was wound up. In an action for deceit the House of Lords held that the directors were not liable in damages for fraudulent misrepresentation. The decisive factor, in Lord Herschell's words, was that "they honestly believed that what they asserted was true". [260]

Defendant's knowledge of falsity of statement

7-050

The requirement of proof of the absence of honest belief does not, however, mean that the claimant must prove the defendant's knowledge of the falsity of the statement. It is enough to establish that the latter suspected that his statement might be inaccurate, or that he neglected to inquire into its accuracy, without proving that he actually knew that it was false. Thus where directors issued a prospectus setting out the advantages of working a particular mine, without having ascertained the truth of these representations, they were held to have committed a fraud. [261] Lord Cairns expressed the principle as follows:

> "… if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they know to be untrue." [262]

Motive irrelevant

7-051

Further, it is not necessary to establish that the defendant's motive was dishonest. [263] However, it must be shown that the representor intended the representee to act on the representation, if the requisite dishonest intention is to be shown. [264]

Ambiguity

7-052

If the statement is ambiguous, the representee must first prove that he understood the statement in a sense in which it is in fact false. [265] If the representor intended the statement to be understood in that sense, he will be guilty of fraud. But a person who makes a statement honestly believing it to be true in the sense which he understands it to bear is not guilty of fraud merely because the representee understands it in a different sense which is false to the knowledge of the representor. [266] And this is still the case even though the court may agree that the sense in which the representee understands the statement is the meaning which, on its true construction, it ought to bear. [267] To hold a person guilty of fraud it must be shown that he intended, or at least was willing, that the representation should be understood in a sense which is false. [268]

Principal and agent

7-053

Much difficulty has arisen in dealing with cases where responsibility for a statement is divided between principal and agent, or between several agents of one principal. It has been held that the law does not recognise any conception of "composite fraud", i.e. an action in fraud will not lie where a statement is made by an agent who honestly believes it to be true, merely because the principal, or another agent, knew the statement to be false. [269] But a principal is vicariously liable for the fraud of an agent, so that if an agent makes a statement in the scope of his authority, and the agent is himself fraudulent, the principal will be liable. [270] And if one agent makes a fraudulent statement to another agent, intending the latter to pass the statement on to a third party, and this is done, the principal will again be liable; for in these circumstances, the first agent is guilty of the complete tort of fraudulent misrepresentation, the second agent being his innocent agent. [271] Again, if one agent makes a statement honestly believing it to be true, but another agent or the principal himself knows that it is not true, knows that the statement will be or has been made, and deliberately abstains from intervening, the principal will be liable. [272] In these circumstances the party with the guilty knowledge can himself be treated as being guilty of fraud.

Causation in damages for fraud

7-054

As stated earlier, [273] when the claimant seeks damages for fraud as opposed to rescission, the normal "but for" rule of causation seems to apply. Thus if the claimant would have entered the contract on the same terms even if the misrepresentation had not been made, his claim for damages will fail. [274] The court is not required to speculate as to what the misrepresentee would have done had he known the truth, and the defendant will not be permitted to argue that he might have entered the contract on the same terms anyway. [275] But if the misrepresentor can be definitively show that this is what the misrepresentee would have done, it will be very difficult for the misrepresentee to argue that it was induced by the fraudulent misrepresentation. [276]

Measure of damages for fraudulent misrepresentation

7-055

The proper measure of damages for fraudulent misrepresentation was discussed by the Court of Appeal in *Doyle v Olby (Ironmongers) Ltd*. [277] It was here held that damages for fraud were not the same as damages for breach of contract in that they were not designed to place the innocent party in the position he would have been in if the representation had been true, but to put him in the position he would have been in if the representation had not been made. The presumption seems to be that if the misrepresentation had not been made, the claimant would not have entered into the contract. [278] So the plaintiff ought to be awarded such damages as will put him back in the financial position he was in before the contract was made. This means that where a person is induced by fraud to buy some property, the proper measure of damages is prima facie the difference between the price paid and the fair value of the property. [279]

Unforeseeable losses

7-056

In *Doyle v Olby (Ironmongers) Ltd*, it was held that in cases of fraud the plaintiff was entitled to damages for any such loss which flowed from the defendants' fraud, even if the loss could not have been foreseen by the latter. Thus the claimant may recover not only the difference between the price

paid and the value of what he received [280] but also expenditure wasted in reliance on the contract and compensation for other opportunities passed over in reliance on it.

7-057

In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [281] Lord Browne-Wilkinson described *Doyle v Olby (Ironmongers) Ltd* as restating the law correctly. He stated the principles applicable in assessing damages where a party has been induced by a fraudulent misrepresentation to buy property as follows:

> "(1)
>
> The defendant is bound to make reparation for all the damage directly flowing from the transaction;
>
> (2)
>
> although such damage need not have been foreseeable, it must have been directly caused by the transaction;
>
> (3)
>
> in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction;
>
> (4)
>
> as a general rule, the benefits received by him include the market value of the property acquired at the date of the transaction; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered;
>
> (5)
>
> although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property [282];
>
> (6)
>
> in addition, the plaintiff is entitled to recover consequential losses caused by the transaction;
>
> (7)
>
> the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud." [283]

Lost opportunity

7-058

The points that damages for fraud will not compensate the claimant for loss of bargain but may cover loss caused by passing up other profitable opportunities are well illustrated by *East v Maurer*. [284] The plaintiffs bought a hairdressing business in reliance on a false representation that the defendant had no intention of working regularly at a second hairdressing business he owned in the same town. In fact he continued to work at the second business and the plaintiffs were forced to resell the business they had bought at a substantial loss. They were awarded damages for the difference between the price they had paid and the price they received on resale, plus expenditure wasted in attempting to improve the business and in other ways. They were also awarded the sum they could have expected to make as profit had they bought another similar business in the same area. [285] However, they were not entitled to the higher amount they might have earned from the actual business bought had the defendant kept to his stated intention; he had not warranted that they would keep all his old customers or that he would not compete. [286] Damages for lost opportunity may be recovered even though they may have to be discounted on the ground that it was not certain that the claimant would have been able to take up the opportunity, e.g. if the owner of the alternative business might not have agreed to sell. [287] It is not necessary to show that the alternative deal would necessarily have been profitable; if necessary the amount can be discounted to reflect the element of risk. [288]

Not loss of bargain

7-059

It follows that in many cases the measure of damages for breach of contract will be higher than that for fraud, as it will include the profit that would have been made on the contract in question had the representation been true. If as a result of a fraudulent misrepresentation the claimant has bought a property, but the property appears to be worth the price paid for it and there is no wasted expenditure or loss of a more valuable opportunity, the claimant damages according to the tort measure would appear to be nil. [289]

Property worth less than paid for it

7-060

While the claimant in an action for fraud cannot claim to be put into the position he would have been in if the fact represented were true, a claimant who has made a bad bargain, in the sense that even if what he had been told were true, at the time the contract is made the property he is induced to buy would have been worth less than he has agreed to pay for it, will be better off under the tortious measure than the contractual one. [290]

Difference in value at time of acquisition

7-060A

As Lord Browne-Wilkinson states in his propositions (3) and (4), [291] the general rule is that the claimant is entitled to the difference between what he paid and the value of the property he received at the date he acquired it. The court will not reduce the damages to reflect that fact that, as it turned out, various risks that, at that date, reduced the value of the property, did not in fact materialise. [292] The claimant will normally recover the difference between the price paid and the value of the property bought, and also any consequential loss. [293]

Subsequent falls in value of property

7-061

As Lord Browne-Wilkinson's fourth proposition indicates, the damages are normally to be calculated according to the difference between the contract price and the value of the property at the time of the contract. [294] This seems to follow from the rule that the loss must flow directly from the transaction. [295] But this is only a prima facie rule; as Lord Steyn put it, [296] the date of transaction rule is simply a second-order rule applicable only if the valuation method is followed, and the court is entitled to assess the loss flowing directly from the fraud without any reference to the date of the transaction or indeed any particular date. In some situations, the claimant may recover the difference between the contract price and the value of the property at a later date. This is so when the fall in value is due to the discovery of the defendant's fraud, which has also deceived others in the market. [297] However, it may also apply even if the reduction of value is not the result of the fraud.

"Already flawed assets"

7-062

One such case is where, as the result of the fraud, the claimant has bought an "already flawed asset", the value of which falls when the flaw is discovered, but the fraud did not relate to the flaw. In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*, [298] SNC had bought shares in Ferranti as the result of fraudulent misrepresentations by the defendants. SNC intended to keep the shares for a period of time. Their value fell drastically when it was discovered that Ferranti had been the victim of another fraud by a third party. The House of Lords, reversing the Court of Appeal, [299] held that SNC were not limited to recovering the difference between the contract price and the market value of the shares at the date of the transaction; they could recover the difference between the contract price and the prices obtained for the shares when they were sold after the discovery of the fraud. As stated in the fourth and fifth propositions of Lord Browne-Wilkinson quoted above (see para.7-057), the date of transaction rule will not be applied if it would prevent the claimant obtaining full compensation, for example if the claimant is locked into the transaction. In this case, as SNC had intended to keep the shares and it was not commercially feasible to resell them immediately, it was locked into the property.

7-063

It is not wholly clear whether the purchaser who has bought a "flawed asset", which falls in value after the date of the transaction because the flaw is discovered, can recover for this further loss if it was not clearly the purchaser's purpose to retain the property. In *Twycross v Grant*, [300] Cockburn C.J. gave the example of a person who is induced by fraud to buy a racehorse. If the horse has already contracted some disease from which it dies when he gets it home, the buyer may recover the entire price paid. In the *Smith New Court Securities* case Lord Steyn refers to this example with apparent approval. [301] It may suffice that it was to be expected that the claimant would keep the property for at least the time that it took for the flaw to emerge.

Loss caused by fall in market

7-064

Secondly, as the result of the fraud, the claimant may have acquired a property which, had it known the truth, it would not have acquired, and that property may have fallen because of a subsequent fall in the general value of property of the kind in question. It is possible that in an appropriate case, damages for fraud may include such losses. In *South Australia Asset Management Corp v York Montague Ltd* [302] the House of Lords held that in a case of negligent valuation, recovery of such losses are limited to the difference between the valuation given and a correct one, but it left open the question in cases of fraud. [303] In *Downs v Chappell* [304] the plaintiffs had bought a business as the result of the defendant's fraudulent statements; they recovered the difference between the price paid

and the value of the business when the fraud was discovered, even though the difference may have been increased by a general fall in property prices. In that case, Hobhouse L.J. said that only losses flowing from the tort would be recoverable, and as a means of testing whether the loss was caused by the tort and of preventing over-compensation, proposed comparing:

> "The loss consequent upon entering the transaction with that which what would have been the position had the represented, or supposed, state of affairs actually existed."

This last aspect of the case was disapproved by the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*. [305] Thus it appears that in a fraud case the claimant can recover the full fall in value of the property, at least up to the date of discovery of the fraud, where the claimant was "locked into the transaction". Lord Steyn justified a special rule for cases of deceit by considerations of morality and deterrence. [306]

Other cases

7-065

Where the asset bought is not "already flawed" and the claimant is not locked into the transaction, nor is the fraud continuing to operate to induce him to retain the property (so that Lord Browne-Wilkinson's fifth proposition does not apply [307]), it appears that the damages will still be assessed by the value of the property at the date of the transaction. In *Twycross v Grant*, [308] Cockburn C.J. also gave the example of a person who is induced by fraud to buy a racehorse which subsequently catches a disease and dies; the buyer may only recover the difference between the price paid and the real value at the time of the transaction. In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* Lord Steyn gave this as an example of a case in which there would not be a sufficient causal link between the fraud and the loss. [309] But it seems that the claimant will be treated as locked into the transaction where the other party knew that the claimant was purchasing the property for a purpose that would require him to retain it.

Claimant would have entered another losing transaction

7-066

As mentioned earlier, in fraud cases it is presumed that had it not been for the fraud, the claimant would not have entered the contract. [310] In *Downs v Chappell* [311] it was said that a party who has been induced to enter a contract by fraud and who seeks damages need not show that, had he known the truth, he would not have entered the transaction. He need only show that he was induced to enter the contract by a material misrepresentation and the loss that flowed from entering it. Where the misrepresentee claims to rescind the contract, it is irrelevant that he might have entered a contract with the misrepresentor even if the fraudulent misrepresentation had not been made: it need only have been one of the factors which influenced him. [312] But what the misrepresentee would have done will normally be relevant to a claim for damages, since he must show a causal connection between the misrepresentation and the loss claimed; and if it is shown that he would have entered another losing transaction, this should be taken into account. This is certainly the case when the claim is one for negligence. In *South Australia Asset Management Corp v York Montague Ltd* Lord Hoffmann pointed out that it might be shown that, had the valuer not been negligent, the lender would have lent a lesser amount to the same borrower on the same security, or "would have used his money in some altogether different, but equally disastrous venture". [313] The same rule should apply in cases of fraud, even though, according to Lord Steyn's speech in the *Smith New Court Securities* case, the rules of causation are applied differently [314] and:

> "… it is not necessary for the judge to embark on a hypothetical reconstruction of what the parties would have agreed had the deceit not occurred." [315]

In *Yam Seng Pte Ltd v International Trade Corp Ltd* [316] Leggatt J. held that although there is some authority [317] for ignoring the fact that, but for the fraudulent misrepresentation, the claimant might have entered another losing transaction, such a rule would be logically indefensible when profits that the claimant might have made are to be taken into account in assessing damages for fraud. [318] Lord Steyn's statement quoted above was referring to a different issue, whether the court should consider what the claimant might have done had the statement been true. It is therefore open to a defendant to show that, had the representation not been made, the claimant would have entered another losing transaction. The evidential burden will be on the defendant, and in seeking to discharge this burden, the defendant (unlike the claimant) does not have the benefit of the principle that if the financial outcome of the alternative transaction is uncertain the court will make reasonable assumptions in its favour (for example by allowing damages to be calculated on a loss of a chance basis) to assist in the proof of loss. [319]

Mitigation

7-067

Finally it should be noted that Lord Browne-Wilkinson's final proposition is that once the fraud is discovered, the plaintiff must take all reasonable steps to mitigate his loss. [320]

Damages for non-pecuniary losses

7-068

Damages for worry and inconvenience [321] and for mental and physical suffering [322] have been awarded in actions based on fraud.

No account of profits

7-069

The victim of fraud may not obtain an account of profits made by the fraudulent party, at least where the victim has affirmed the contract and has suffered no loss. [323] The House of Lords in *A.G. v Blake* [324] held that, in certain circumstances, the victim of a breach of contract may obtain an account of the profit made by the other party through his breach. This is undoubtedly a relaxation of the rule in cases of breach of contract and it may be asked whether the rule that an account of profits is not available in case of fraud will continue to be applied. However, the conditions which the House of Lords laid down for an account of profits in breach of contract cases—broadly, that the claimant has a legitimate interest in the promised performance which an award of damages will not satisfy because the breach will not necessarily cause a loss—are less likely to occur in cases of fraud, since damages for fraud by definition do not include the gain the claimant would have made (the "expectation") had the statement made been true. Thus the claimant is entitled only to be put into the position he would have been in had the misrepresentation not been made, [325] and it is suggested that damages will normally be adequate for this purpose. To award the victim of a fraud an account of profit would be to allow him a fully restitutionary claim, and in *Halifax Building Society v Thomas* that was held by the Court of Appeal not to be available. [326]

Exemplary damages

7-070

It is not yet wholly clear if exemplary damages can be awarded for fraud. [327] Until recently it seemed very unlikely. Even if fraud could be brought within the first or second of Lord Devlin's three categories in *Rookes v Barnard*, [328] namely, first, oppressive, arbitrary or unconstitutional action by the servants of government or, secondly, cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff, [329] the

interpretation of those categories by the House of Lords in *Cassell & Co Ltd v Broome* [330] and by the Court of Appeal in *AB v South West Water Services Ltd* [331] required that for exemplary damages to be awarded the tort must be one in respect of which such an award had been made prior to 1964, and deceit is not such a tort. [332] However in *Kuddus v Chief Constable of Leicestershire Constabulary* [333] the House of Lords held that the power to award exemplary damages is not limited to those cases in which such awards had been made before 1964. *AB v South West Water Services Ltd* was overruled. This seems to open the way for awards of exemplary damages in cases of deceit which fall into Lord Devlin's first two categories. However both Lord Nicholls [334] and Lord Scott [335] remarked that the growth of remedies for unjust enrichment may make Lord Devlin's second category of less importance as the defendant's profit may be removed without an award of exemplary damages. [336] Even if it is still open to a court to hold that exemplary damages may be awarded in an action for deceit (even if the defendant has not succeeded in making any profit from his deceit) it is wrong to do so where the defendant has already been convicted and imprisoned for the same fraud. [337] This would infringe the basic principle that a man should not be punished twice for the same offence.

Contributory negligence

7-071

Contributory negligence is not a defence to an action of deceit and the Law Reform (Contributory Negligence) Act 1945 [338] does not apply. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 applies "[w]hen any person suffers damage as the result partly of his own fault and partly of the fault of any other person". Section 4 defines "fault" as:

> "… negligence, breach of statutory duty or other act or omission which gives rise to liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."

Thus for the Act to apply, the claimant's conduct must either be an act giving rise to liability to the defendant in tort or be one which at common law would have given rise to the defence of contributory negligence. [339] It has been held that at common law contributory negligence is not a defence to fraud and that therefore the Law Reform (Contributory Negligence) Act does not apply to fraud. [340]

Compound interest

7-072

In *Black v Davies* [341] the Court of Appeal held that compound interest cannot be awarded on damages for fraud. Waller L.J., giving the judgment of the court, said that compound interest will be awarded in equity in the two cases:

> "[1] … where money had been obtained and retained by fraud, or [2] where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position." [342]

However, the House of Lords has recently said that the rule that lost interest may not be recovered by way of damages should be confined to those cases in which the loss is not pleaded or proved. [343] Loss of interest at compound rates can be recovered if that is the loss pleaded and proven. [344] This applies to damages for fraud as much as to damages for any other common law claim. It has been held in a case of fraud that damages may be recovered for loss of use of money on an alternative investment. [345]

Illegality

7-073

It has been held that payments made under a contract which was illegal (though not to the knowledge of the plaintiff) could be recovered in an action of fraud, [346] though the contract itself could not be sued upon because of the illegality. Further, damages for fraud may be recovered even where the contract was known by the plaintiffs to be illegal, if the fraud and the illegality were quite unconnected. [347] In *Hughes v Clewley, The Siben (No.2)* [348] the misrepresentee was permitted to claim damages for fraud although part of the business transferred to him was used for immoral purposes, as it was said that he did not have to rely on the illegal contract. Moreover, in calculating the value of what he had received for the purposes of damages, the value of this part of the business was disregarded.

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

249. *Archer v Brown [1985] Q.B. 401*; cf. Companies Act 2006 s.655, replacing Companies Act 1985 s.111A.

250. Below, paras 7-111—7-142.

251. See below, para.7-076.

252. Below, paras 7-075 et seq.

253. ❗Strictly, the burden is the same as that in other civil proceedings, namely, proof on the balance of probabilities (*Hornal v Neuberger Properties Ltd [1957] 1 Q.B. 247*), but it is well known that the burden of proof of fraud is not easily discharged in practice. See the explanation in *Dadourian Group International Inc v Simms [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep. 601* at [31]–[32], referring to the speech of Lord Nicholls in *Re H (Minors) [1996] A.C. 563, 586* and that of Baroness Hale in *Re B (Children) (Care proceedings: standard of proof) [2008] UKHL 35, [2009] 1 A.C. 11* at [62]. In *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701* at [229] Hamblen J. summarised the point thus: "Where a serious allegation (such as deceit) is in issue, this does not mean the standard of proof is higher. However, the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established".

254. Below, para.7-095.

255. Below, para.7-104.

256. *(1889) 14 App. Cas. 337*.

257. Or knowledge that a fact stated previously is no longer true, and of its significance: *Fitzroy Robinson Ltd v Mentmore Towers Ltd [2009] EWHC 1552 (TCC)*; *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)* at [213]–[214]: see above, para.7-021.

258. *(1889) 14 App. Cas. 337, 374*.

259. ❗"I can conceive of many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one.": Lord Herschell (1889) 14 App. Cas. 337, 375, cited in *Mortgage Express v Countrywide Surveyors Ltd [2016] EWHC 224 (Ch)*

at [164].

260. *(1889) 14 App. Cas. 337, 379*.

261. *Reese River Silver Mining Co Ltd v Smith (1869) L.R. 4 H.L. 64*. See also *Taylor v Ashton (1843) 11 M. & W. 401, 415*; *Evans v Edmonds (1853) 13 C.B. 777, 786*.

262. *(1869) L.R. 4 H.L. 64, 79–80*.

263. See *Polhill v Walter (1832) 3 B. & Ad. 114*; *Denton v G.N. Ry (1856) 5 E. & B. 860*; *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd [1957] 2 Q.B. 621*; *Standard Chartered Bank v Pakistan National Shipping Corp [1995] 2 Lloyd's Rep. 365*; *Standard Chartered Bank v Pakistan National Shipping Corp (No.2) [2000] 1 Lloyd's Rep. 218, 224* (reversed in part on other grounds, *[2002] UKHL 43, [2003] 1 A.C. 959*); *Gabriel v Little [2013] EWCA Civ 1513* at [32]. See also *Morrell v Stewart [2015] EWHC 962 (Ch)* (fraud if vendors said no work done on property knowing work had been done but believing it had cured any problem). The definition of criminal fraud under the Fraud Act 2006 is different. Section 2 requires both dishonesty and an intention, by making the representation, either to make a gain for oneself or to cause loss to another or to expose another to the risk of loss.

264. *Gabriel v Little [2013] EWCA Civ 1513* at [33].

265. *Smith v Chadwick (1884) 9 App. Cas. 187*; *Bonham-Carter v SITU Ventures Ltd [2012] EWHC 3589 (Ch)* at [119].

266. *Akerhielm v De Mare [1959] A.C. 789*; *John McGrath Motors (Canberra) Pty Ltd v Applebee (1964) 110 C.L.R. 656*.

267. *Akerhielm v De Mare [1959] A.C. 789*.

268. *Gross v Lewis Hillman Ltd [1970] Ch. 445*.

269. *Cornfoot v Fowke (1840) 6 M. & W. 358*; *Armstrong v Strain [1952] 1 K.B. 232*. This sentence was quoted with approval in *Greenridge Luton One Ltd v Kempton Investments Ltd [2016] EWHC 91 (Ch)* at [77].

270. *Lloyd v Grace, Smith & Co [1912] A.C. 716*; *Briess v Woolley [1954] A.C. 333*. The position of a junior employee, for instance one who passes on information given to him by a more senior officer and, though he has doubts about its accuracy, puts his name to it because he does not like to question it, is discussed by Tugendhat J. in *GE Commercial Finance Ltd v Gee [2006] 1 Lloyd's Rep. 337* at [96]–[112].

271. *London County Freehold & Leasehold Properties Ltd v Berkeley Property & Investment Co Ltd [1936] 2 All E.R. 1039*, as explained in *Armstrong v Strain [1952] 1 K.B. 232*.

272. *Ludgater v Love (1881) 44 L.T. 694*; *Occidental Worldwide Investment Corp v Skibs A/S Avanti [1976] 1 Lloyd's Rep. 293, 320–321* (where this sentence in the text was cited with approval). See also *GG 132 Ltd v Hampson Industries Plc [2011] EWHC 1137 (Comm)* at [42].

273. Above, para.7-038.

274. See above, para.7-038; see *Templeton Insurance Ltd v Motorcare Warranties Ltd [2010] EWHC 3113 (Comm)* at [168] (need not be sole cause; sufficient that substantially contributed to deceiving the claimant). Though the defendant will not normally be permitted to argue that the claimant might have done the same thing had he known the truth.

275. *Downs v Chappell [1997] 1 W.L.R. 426* at 433; see also *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] A.C. 254, 283*. This principle cannot prevent the claimant from giving evidence that it would not have acted as it did if it had known the true position, as demonstrating inducement by the fraudulent misrepresentation: *Parabola*

Investments Ltd v Browallia Cal Ltd [2009] EWHC 901 (Comm), [2009] 2 All E.R. (Comm) 589 at [105], per Flaux J. (affirmed without reference to this point, *[2010] EWCA Civ 486, [2011] Q.B. 477*).

276. *Dadourian Group International Inc v Simms [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep. 601* at [107]. This dictum is criticised by Handley (2015) 131 L.Q.R. 275, 283. However, it is consistent with what appears to be the case if it can be shown that, if the misrepresentation had not occurred and the misrepresentee would not have entered the contract, nonetheless he would have entered another losing contract. See below, para.7-066.

277. *[1969] 2 Q.B. 158, noted (1969) in 32 M.L.R. 556*; see also *New Zealand Refrigerating Co v Scott [1969] N.Z.L.R. 30*; *Parma v G. & S. Properties (1969) 5 D.L.R. (3d) 315 Doyle v Olby* is of general application, so it applies whether the claimant is the buyer or the seller: *Inter Export LLC v Townley [2017] EWHC 530 (Ch)* at [8]..

278. See *Esso Petroleum Ltd v Mardon [1976] Q.B. 801, 820, 828, 833*. *Wemyss v Karim [2016] EWCA Civ 27* at [23].

279. *Newark Engineering (N.Z.) Ltd v Jenkin [1980] N.Z.L.R. 504*; *Smith Kline & French Laboratories Ltd v Long [1989] 1 W.L.R. 1*.

280. When there is no evidence as to values, the cost of making good the representation may be taken to represent the difference in value: *Jacovides v Constantinou, The Times, October 27, 1986*.

281. *[1997] A.C. 254, 263*.

282. In *Parabola Investments Ltd v Browallia Cal Ltd [2010] EWCA Civ 486*, Toulson L.J. said that he took these instances "to be illustrative rather than exclusive" (at [34]).

283. *[1997] A.C. 254, 267*. Lord Mustill said that the judgment of Lord Denning in *Doyle v Olby (Ironmongers) Ltd [1969] 2 Q.B. 158* was in some respects too broad-brush; the case had not been fully argued (apparently a reference to the fact mentioned by Lord Browne-Wilkinson that certain nineteenth-century cases on the date of valuation had not been cited). He considered that, in future, courts would do well to be guided by Lord Browne-Wilkinson's seven propositions: 269. On the duty to mitigate, see *Standard Chartered Bank v Pakistan National Shipping Corp [1999] 1 All E.R. (Comm) 417, affirmed [2001] EWCA Civ 55, [2001] 1 All E.R. (Comm) 822*.

284. *[1991] 1 W.L.R. 461*. See also *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd [2001] Q.B. 488* (claimants had agreed to buy goods from defendants at prices which defendants had fraudulently stated to be those charged to the defendants' UK customers. Although claimants had been able to resell the goods profitably, they were still entitled to the difference between the prices they had paid and those they would probably have been able to negotiate had the misrepresentation not been made). Similar damages for wasted expenditure and loss of other opportunities were awarded in *Esso Petroleum Ltd v Mardon [1976] Q.B. 801*. But cf. *Davis v Churchward Unreported May 6, 1993 noted in (1994) 110 L.Q.R. 35*. See also *Smith Kline & French Laboratories Ltd v Long [1989] 1 W.L.R. 1*, in which sellers, who had been tricked into supplying goods to a buyer who was unable to pay, recovered the normal wholesale price of the goods, not just the cost of producing them.

285. The award in *East v Maurer [1991] 1 W.L.R. 461* based on a hypothetical profitable business in which the plaintiff would have engaged but for the deceit has been described by Lord Steyn as "classic consequential loss": *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] A.C. 254, 282*.

286. Even if the claimant would have paid the market price for the alternative business, he may have lost the opportunity to make profits, both by way of income and capital appreciation, and this loss is compensable: *[2008] EWHC 915 (Ch)* at [51]. (On the last point, see further below, para.26-029.)

287. *4 Eng Ltd v Harper [2008] EWHC 915 (Ch), [2009] Ch. 91*.

288. *Parabola Investments Ltd v Browallia Cal Ltd [2009] EWHC 901 (Comm)* at [147]. (The Court of Appeal held that the issue of loss of chance did not arise on the facts: *[2010] EWCA Civ 486, [2011] Q.B. 477* at [23].) See also *Welven Ltd v Soar Group Ltd [2011] EWHC 3240 (Comm)*; *County Leasing Asset Management Ltd v Michael Green Plant Ltd [2012] EWCA Civ 53*. On damages for loss of chance see further below, para.26-016.

289. In the United States, some jurisdictions allow recovery of damages for loss of bargain in actions for fraud, e.g. *Beardmore v T.D. Burgess Co (1967) 226 A. 2d 329*; cf. *Uncle Ben's Tartan Holdings Ltd v North West Sport Enterprises Ltd (1974) 46 D.L.R. (3d) 280*. Loss of bargain damages did appear to be recoverable in English law where there had been fraud by a vendor of land who knew that he had no good title and would be unable to make one, with the result that the rule in *Bain v Fothergill (1874) L.R. 7 H.L. 158*, below, para.26-003, did not apply; but this was not a true exception: the fraud simply lifted a restriction on recovery of damages for breach of contract that would otherwise apply. Mere negligence was not enough: see the disapproval of *Watts v Spence [1976] Ch. 165* in *Sharneyford Supplies Ltd v Edge* at first instance *[1986] Ch. 128, 149* and by Balcombe L.J. in the Court of Appeal *[1987] Ch. 305, 323*. In any event the rule has been abolished as regards all contracts made after September 27, 1989: Law of Property (Miscellaneous Provisions) Act 1989 s.3.

290. *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] A.C. 254, 281–282*, per Lord Steyn, approving the statement by Treitel (1969) 32 M.L.R. 558–559. See also *Sycamore Bidco Ltd v Breslin [2012] EWHC 3443 (Ch)* at [201]. *Wemyss v Karim [2016] EWCA Civ 27* at [24]–[25].

291. See Vol.I, para.7-057.

292. *OMV Petrom SA v Glencore International AG [2016] EWCA Civ 778* ("The purpose of the flexibility of approach about the valuation date to which Lord Browne-Wilkinson referred was to ensure that the person duped should not suffer an injustice by failing to recover full compensation in the type of circumstances to which he referred. There is no need to adopt such an approach in order to relieve the fraudster from the general rule as to damages, especially if to do so means that the person defrauded ends up paying more than the cargo was worth at the time that he bought it." (at [39]).

293. *[2016] EWCA Civ 778* at [66].

294. See the speech of Lord Steyn in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] A.C. 254, 284*; *Great Future International Ltd v Sealand Housing Corp [2002] All E.R. (D) 28*; McGregor on Damages, 19th edn (2014), para.47–011.

295. See the speech of Lord Steyn at 281–284.

296. *[1997] A.C. 254, 284*.

297. *[1997] A.C. 254, 262 and 265*; McGregor on Damages, 19th edn (2014), para.47-013. A rather similar explanation may underlie *Naughton v O'Callaghan [1990] 3 All E.R. 191*, a case under Misrepresentation Act s.2(1), in which the purchaser did not realise that the pedigree of the horse had been misrepresented until it had been very unsuccessful, by which time its value had fallen. Alternatively, the case may be one of a "flawed asset": see para.7-062 and McGregor, 19th edn (2014), para.47-056.

298. *[1997] A.C. 254*.

299. [1994] 1 W.L.R. 1271.

300. *(1877) 2 C.P.D. 469, 544–545*.

301. *[1997] A.C. 254, 279.*

302. *[1997] A.C. 191, [1997] A.C. 191*. See below, para.26-168.

303. *[1997] A.C. 191, 215*.

304. *[1997] 1 W.L.R. 426*.

305. *[1997] A.C. 254*.

306. *[1997] A.C. 254, 280*.

307. In *Parabola Investments Ltd v Browallia Cal Ltd [2010] EWCA Civ 486*, Toulson L.J. said that he took these instances "to be illustrative rather than exclusive" (at [34]).

308. *(1877) 2 C.P.D. 469*.

309. *[1997] A.C. 254, 285*. McGregor on Damages, 19th edn (2014), para.47-016 appears to take the view that the plaintiff may only be compensated for a subsequent fall in value when the asset was already flawed.

310. See above, para.7-055.

311. *[1997] 1 W.L.R. 426*.

312. See para.7-039, above.

313. *[1997] A.C. 191, 218*.

314. *[1997] A.C. 254, 284–285*.

315. *[1997] A.C. 254, 283*. The decision in *Downs v Chappell [1997] 1 W.L.R. 426*, as far as the vendor's accountants were concerned, may have been interpreted in *Bristol and West Building Society v Mothew [1998] Ch. 1* as applying the same measure in cases of negligence, but Hobhouse L.J., who delivered the only full judgment in *Downs*, has said that this is not an accurate account of the decision: *Swindle v Harrison [1997] 4 All E.R. 705, 728*. But a different view is taken by McGregor on Damages, 19th edn (2014), para.47-048.

316. *[2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526* at [209]–[217].

317. *Slough Estates Plc v Welwyn Hatfield DC [1996] N.P.C. 118, 124*; *Naughton v O'Callaghan [1990] 3 All E.R. 191*.

318. See e.g. *East v Maurer [1991] 1 W.L.R. 461*, discussed in para.7-058.

319. *[2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526* at [217].

320. For an application of the mitigation rule in a fraud case see *Downs v Chappell [1997] 1 W.L.R. 426*.

321. *McNally v Welltrade International Ltd [1978] I.R.L.R. 497*; *Jones v Emerton-Court [1983] C.L.Y. 982*.

322. *Shelley v Paddock [1980] Q.B. 348*; *Archer v Brown [1985] Q.B. 401*.

323. *Halifax B.S. v Thomas [1996] Ch. 217*; see also *Murad v Al-Saraj [2005] EWCA Civ 959, [2005] W.T.L.R. 1573*; *Renault UK Ltd v Fleetpro Techincal Services Ltd [2007] EWHC 2541 (QB), [2007] All E.R. (D) 208 (Nov)* at [153]–[158]; and below, para.29-152.

324. *[2001] A.C. 268*; see below, paras 26-055 et seq.

325. See above, para.7-055.

326. *[1996] Ch. 217*. The Law Commission had recommended that restitutionary damages should be available if the defendant has committed a tort and his conduct shows a deliberate and outrageous disregard for the claimant's rights, but that was thought to require legislation: Report on Aggravated, Exemplary and Restitutionary Damages (No.247, 1997), para.3.51.

327. See *Mafo v Adams [1970] 1 Q.B. 548*; *Cassell & Co Ltd v Broome [1972] A.C. 1027* and *Archer v Brown [1985] 1 Q.B. 401, 418–421*.

328. *[1964] A.C. 1129*.

329. *Rookes v Barnard [1964] A.C. 1129, 1225–1226*.

330. *Cassell Co Ltd v Broome [1972] A.C. 1072*, *Mafo v Adams [1970] 1 Q.B. 548* was criticised.

331. *[1993] Q.B. 507*.

332. *Cassell & Co Ltd v Broome [1972] A.C. 1027, 1076*, per Lord Hailsham L.C. See also Law Commission, Aggravated, Exemplary and Restitutionary Damages (Report No.247, 1997), para.4.25. In *Parabola Investments Ltd v Browallia Cal Ltd [2009] EWHC 901 (Comm)* Flaux J. said that his own research had shown that "exemplary damages have been awarded in cases of deceit, primarily in the case of fraudulent insurance claims by insureds dealt with in the county courts. This is no doubt because such cases do fall into that category, as the insurer's remedy is rejection of the claim coupled with avoidance and retention of the premium and it would not expect any compensation as such" (at [205]). However, he declined to make an award when the defendant's responsibility was only vicarious (see at [206]–[208]). The Court of Appeal (*[2010] EWCA Civ 486, [2011] Q.B. 477*) did not refer to this question.

333. *[2001] UKHL 29, [2002] 2 A.C. 122*.

334. *[2001] UKHL 29* at [67]. Lord Nicholls considered that Lord Devlin's second category should be expanded to include cases in which the defendant had acted with a malicious motive.

335. *[2001] UKHL 29* at [109]. Lord Scott thought that if exemplary damages were to be retained (which he personally regretted), deceit practised by a government or local authority official, or by a police officer, would be a suitable case for their award (at [122]).

336. See above, para.7-069 and below, para.26-055. The Law Commission, in its Report on Aggravated, Exemplary and Restitutionary Damages (No.247, 1997) had recommended that punitive damages be available when, in committing a wrong or in subsequent conduct, the defendant deliberately disregarded the claimant's rights: above, n.319.

337. *Archer v Brown [1985] Q.B. 401*.

338. See below, para.26-077.

339. *Forsikringaktieselskapet Vesta v Butcher (No.1) [1989] A.C. 852, 862*, et seq.

340. *Alliance and Leicester Building Society v Edgestop Ltd [1993] 1 W.L.R. 1462*; *Standard Chartered Bank v Pakistan National Shipping Corp (No.2) [2002] UKHL 43, [2003] 1 A.C. 959*; see also *Corp Nacional del Cobre de Chile v Sogemin Metals Ltd [1997] 2 All E.R. 917, 921–923*.

341. *[2005] EWCA Civ 531, [2005] All E.R. (D) 78 (May)*. The question had been left open in *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd [2001] Q.B. 488*.

342. The categories given by Lord Brandon in *President of India v LaPintada Compania Navigacion SA [1985] A.C. 104* at 116A. This was the view of the majority in *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669*.

343. *Sempra Metals Ltd v Commissioners of Inland Revenue [2007] UKHL 34, [2008] 1 A.C. 561* at [96]. See below, para.26-175.

344. *[2007] UKHL 34* at [16]–[17], [94]. [100], [132], and [154].

345. *Parabola Investments Ltd v Browallia Cal Ltd [2010] EWCA Civ 486, [2011] Q.B. 477*.

346. *Saunders v Edwards [1987] 1 W.L.R. 1116*.

347. *[1987] 1 W.L.R. 1116*.

348. *[1996] 1 Lloyd's Rep. 35*.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 7 - Misrepresentation [1]

Section 3. - Damages for Misrepresentation

(b) - Negligent Misrepresentation

Preliminary

7-074

A negligent misrepresentation is one which is made carelessly, or without reasonable grounds for believing it to be true. Apart from statute, a misrepresentation could not be regarded as negligent unless the representor owed a duty to be careful to the representee, and the law relating to the existence of such a duty of care has undergone some quite remarkable fluctuations since the case of *Derry v Peek*. [349] That case was at one time thought to lay down that there could never be a duty to take care in the making of statements unless the duty arose out of a contract itself, but the House of Lords has rejected this view in two leading cases in this country. In *Nocton v Ashburton* [350] it was decided that such a duty to take care could arise out of a fiduciary relationship, and in *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [351] the law was greatly widened by the decision that a duty to take care in making statements could arise out of many other "special relationships". But the enactment of the Misrepresentation Act 1967 has somewhat reduced the importance of these cases so far as the law of contract is concerned.

Misrepresentation Act s.2(1) [352]

7-075

This subsection reads as follows:

> "Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true."

Thus, where a person is induced to enter into a contract as a result of a misrepresentation, this subsection does away with the need to establish any duty of care as between the representor and the representee. In any circumstances in which this section applies, [353] the representee will have an action for damages under the Act. In *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd* [354] the plaintiffs misrepresented to the defendants the carrying capacity of two barges which the defendants wished to hire for carrying large quantities of clay out to sea and dumping them. The defendants entered into the contract in reliance on this misrepresentation and used the barges for some time, after which they discovered the true facts and returned the barges. It was said by a majority of the Court of Appeal that the plaintiffs were probably not under a duty of care

at common law, but a differently-constituted majority held that the defendants were entitled to damages for a breach of s.2(1) of the 1967 Act.

Not strictly speaking liability for negligence

7-076

In *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd* [355] it was also stressed that under s.2(1) the question was, strictly speaking, not one of negligence, but that the Act imposed an absolute obligation not to state facts which the representor cannot prove he had reasonable grounds to believe. No doubt it is correct to say that it is not a question of negligence, as at common law, where a duty of care is in issue [356]; and it is possible that circumstances may exist in which a person may make a statement without having reasonable ground to believe it, yet in which it would be held that he was not (having regard to all the circumstances) negligent. Nevertheless, for explanatory purposes it is sufficient to equate liability under s.2(1) of the Act with liability for negligence, and the statutory liability is referred to in this chapter, for the sake of convenience, as a liability for negligence.

Effect of s.2(1)

7-077

It will be noted that the gist of the subsection is to confer a right to damages for negligent misrepresentation in circumstances in which such a right would exist if the misrepresentation has been fraudulent. [357] A number of consequences seem to follow from this. First, the rules relating to what constitutes a misrepresentation, [358] and the principle that the representation must have been one of the inducements influencing the mind of the representee, [359] will apply to an action under the subsection as they apply to an action in fraud. Secondly, it is now settled that the basic measure of damages under the subsection is the same as the measure of damages for fraud. [360] This follows from the wording of the subsection. [361] In any event it would be highly anomalous if the basic measure of damages for negligent misrepresentation under the Act were different from the normal measure of damages for common law negligent misrepresentation. This means that generally damages will be awarded to put the representee in the position in which he would have been if he had never entered into the contract, and not to put him in the position in which he would have been if the misrepresentation had been true. [362]

Application of rules on damages for fraud

7-078

It has been shown that damages for fraud are governed by somewhat different rules to damages for negligent misrepresentation at common law: losses may be recoverable even though they were not of a foreseeable kind [363] and, in some circumstances, consequential losses may include compensation for falls in the value of the property acquired which were unrelated to the fraudulent statement. [364] It is not clear whether these rules, which appear to be justified by considerations of morality and deterrence, [365] are applicable to damages claimed under s.2(1). In the 26th edn of this work it was suggested [366] that the first rule did not apply, but this was rejected by the Court of Appeal in *Royscot Trust Ltd v Rogerson* [367] on the ground that this interpretation "is to ignore the plain words of the subsection". [368] In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [369] both Lords Browne-Wilkinson and Steyn declined to comment on the correctness of the *Royscot* case. If the interpretation of s.2(1) taken in *Royscot* is correct, however, it would presumably follow that damages under s.2(1) can also include compensation for loss of value caused by a fall in the market, at least where the claimant has acquired an "already flawed asset", [370] and that contributory negligence will not necessarily be a defence or lead to a reduction in the claimant's damages. [371] Whether it is necessary to interpret s.2(1) in this way may, with respect, be doubted. [372] It does not seem appropriate to apply the special rules governing damages for fraud, which are justified by considerations of morality and deterrence, [373] to cases in which there was, by definition, no

Fraud rules on knowledge

7-079

Further, a possible consequence of the decision in *Royscot Trust Ltd v Rogerson* [375] is that the difficulties which arise in cases of fraud where the misrepresentation is made by one person, but the guilty knowledge is that of another, seem to apply equally to an action for negligence under the subsection. [376] If, for example, the representee contracts with a company as a result of a misrepresentation made to him by one of the company's employees or agents, and that employee or agent did have reasonable grounds for believing the statement to be true, the representee will have no action under the subsection merely because another employee or agent of the company knew that the representation was untrue, or knew that there were no reasonable grounds for believing it to be true. [377] However, in practice this type of case may not prove so troublesome in cases of negligence as it has been in cases of fraud. Although a court will not impute fraud to an employee or agent merely because his principal (or another employee or agent) knows that the statement he has made is untrue, a court might be much more ready to hold that the person making the statement in these circumstances did not have reasonable grounds for believing that the facts stated were true [378]; and it would also be possible to find negligence at common law as a result of a failure of one employee to inform another of the true facts. [379] Damages have been awarded under this subsection against a vendor of land because of the misrepresentations of his estate agent. [380]

Rescission and damages

7-080

There is nothing in the subsection to prevent the representee from both rescinding the contract and claiming damages, [381] though (as will be seen below) [382] the court now has a discretion to refuse to allow rescission, except in cases of fraud, under s.2(2) of the Act. If the representee does rescind he was, even before the passing of the Act, entitled to an "indemnity" [383] against liabilities incurred as a result of the contract, and it seems clear that he cannot claim both an indemnity and damages under s.2(1) in respect of the same loss.

7-081

The section does not give rise to liability in damages for failure to disclose, even when there is a duty to disclose material facts. [384] Silence as to material facts which should be disclosed is not an implicit representation that there is nothing to be disclosed, nor does it constitute a "misrepresentation made" within s.2(1). [385]

Contributory negligence

7-082

It was held in *Gran Gelato Ltd v Richcliff (Group) Ltd* [386] that damages for negligent misrepresentation under s.2(1) of the Misrepresentation Act 1967 may be reduced under s.1 of the Law Reform (Contributory Negligence) Act 1945 [387] if the loss was partly the fault of the representee. Liability under s.2(1) applies unless the representor "had reasonable grounds to believe and did believe … that the facts represented were true" and thus is "essentially founded on negligence". However, it would not be just and equitable to reduce the damages when the representor had intended, or should be taken as having intended, that the representee should act in reliance on the answers which had been given to his questions. [388] The decision was based on the fact that there was concurrent liability under s.2(1) and in tort for negligent misrepresentation under the principle of

Hedley Byrne & Co Ltd v Heller & Partners Ltd. [389] It may happen that a defendant is liable under s.2(1) without being concurrently liable in tort for negligent misrepresentation, for instance because the court considers that there was on the facts no undertaking of responsibility towards the claimant. [390] In such a case it seems that the claimant's damages could not be reduced on account of any contributory negligence. This is because s.2(1) makes the misrepresentor who cannot prove reasonable grounds liable as if the statement had been fraudulent. It has been held that at common law contributory negligence is not a defence to fraud and that therefore the Law Reform (Contributory Negligence) Act does not apply to fraud. [391] Because the misrepresentor is to be liable under the Misrepresentation Act 1967 s.2(1), "as if the representation had been fraudulent", [392] the Law Reform (Contributory Negligence) Act seems not to apply to claims under s.2(1) where there is no concurrent liability in tort for negligent misrepresentation.

Burden of proof

7-083

Once the representee proves that the statement was in fact false, the burden under the subsection shifts to the representor to prove that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true. Where the negotiations for a contract have continued over a substantial time, and the misrepresentation was made some while before the contract was finally entered into, this burden may indeed prove a heavy one. It will not be sufficient for the representor to prove that he had reasonable grounds to believe the statement was true when made; he will have to go on to prove that he had reasonable grounds to believe and did believe the statement was true when the contract was made. [393]

Parties liable under the subsection

7-084

The subsection only applies where the representee has entered into a contract after a misrepresentation was made to him by another party to the contract. [394] Presumably, ordinary principles of agency will still apply, so that an action will lie under the subsection where the misrepresentation has been made by an agent of the other contracting party, acting within the scope of his authority. [395] But an agent who makes a misrepresentation which is within his actual or ostensible authority is not personally liable under the subsection, despite the fact that the subsection, having referred to a misrepresentation having been made by a *party* to the contract (i.e. the principal via the agent) then goes on to refer to the liability of the *person* making the representation. [396] The agent may, of course, be liable for negligence at common law but only if he has assumed personal responsibility towards the claimant. [397] If the agent seeks to enforce the contract in his own name, the misrepresentation may be set up as a defence against him whether or not it is attributable to him rather than his principal. [398]

Misrepresentation by third person

7-085

The subsection has no application where the representor is neither himself the other contracting party nor the agent of the other contracting party. Thus where B is induced to enter into a contract with C as a result of a misrepresentation made by A, and A is not C's agent, [399] B will have no right of action against A under the subsection. [400] He may, however, have a remedy in damages against A on some other ground. There is, of course, no doubt that A would be liable to B in tort for fraud if fraud were proved, and in these circumstances, he might also be liable on the ground of a collateral contract or warranty (which requires neither fraud nor negligence to support it). [401] Further, an action may lie for negligent misrepresentation quite apart from s.2(1) of the Misrepresentation Act.

Liability for negligence at common law

7-086

It would be beyond the scope of this work to examine this kind of liability in detail [402] since it is not strictly contractual in its nature, and in any event, its importance has been greatly diminished by s.2(1) of the Misrepresentation Act which has been discussed in the preceding paragraphs. [403] But some account of this kind of liability is not out of place even in a work on the law of contract, since cases may arise in which a person is induced to enter into a contract as a result of a misrepresentation by a third party, and in these circumstances it is obviously desirable to consider the remedies available to the representee as a whole. This kind of liability may sometimes also arise where parties are negotiating for a contract but no contract is ever concluded, and loss is caused to one party as a result of a negligent statement by the other. [404] Since the decisions in *Nocton v Ashburton* [405] and *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [406] it is clear that an action will lie in tort for negligent misrepresentation causing loss to the representee where the relationship of the parties is such as to give rise to a duty of care. The former case establishes that such a duty may arise (even apart from contract) out of a fiduciary relationship, such as that of solicitor and client, principal and agent, or trustee and beneficiary; the latter case establishes that such a duty may also arise in other circumstances. [407]

Nocton v Ashburton

7-087

In this case a mortgagee sued his solicitor, alleging that by improper advice the latter had induced him to release part of his security, whereby the security had become insufficient; it was further alleged that the solicitor knew that the security would be rendered insufficient, and that his advice was given in order that he himself might benefit. The House of Lords held that fraud in the sense of *Derry v Peek* [408] had not been proved, but that the mortgagee was entitled to relief for the breach of a duty imposed on the solicitor by the relationship in which he stood to his client.

What is a fiduciary relationship

7-088

The fiduciary or confidential relationship necessary to bring this doctrine into operation extends to certain obvious ties, such as those between trustee and cestui que trust, solicitor and client, and parent and child. But the courts have not fettered their jurisdiction by defining its limits, and are ready to interfere in order to protect the person who is under the influence of another. The principle was stated in *Tate v Williamson* [409]:

> "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed." [410]

Cases relating to fiduciary relationships are generally dealt with as part of the doctrine of "undue influence", [411] but it is not wholly clear whether every relationship which would justify rescission of a contract for undue influence would also give rise to a duty of care which would support an action for damages for negligence. [412]

Hedley Byrne & Co Ltd v Heller & Partners Ltd

7-089

Until the decision of the House of Lords in the *Hedley Byrne* [413] case in 1964, it was thought that a duty to take care in the making of statements could only arise in the case of fiduciary (or, of course, contractual) relationships, but that decision has shown that the law is very much wider than this. Although the House made it clear that misrepresentations made in the course of a mere social relationship would not ground liability in tort, they also made it clear that many "special relationships" would suffice. In particular, it is clear that professional relationships, even where there is no contract between the parties, will often give rise to a duty of care if it can be said that the representor knew or ought reasonably to have known that the representee was likely to act on the representation. [414] So, for example, if a company's auditor gives negligent advice to a person who invests money in the company on the strength of the advice, and it can be shown that the auditor ought to have realised that the representee would act on the advice, an action for negligent misrepresentation will lie against the auditor. [415] Again advice given "in a business connection" about the creditworthiness of a third party may give rise to a duty of care even where the adviser is not acting in a professional capacity, [416] provided he has some financial interest in the transaction. [417] On the other hand, the question whether a banker owes a duty to take care in giving references about his customers was left open by the House of Lords in the *Hedley Byrne* case, since it was thought that such a liability might be too onerous. It was, however, said that a "duty to be honest" is at least owed in such circumstances, though it is far from clear whether this is the same thing as the duty merely to abstain from fraud. [418] If the "duty to be honest" goes beyond liability in fraud, it would seem necessary to recognise a new form of liability midway between fraud and negligence, but it is submitted that this is a confusing and unnecessary conception. Since the duty of care means a duty to take such care as is reasonable in all circumstances of the case, the law of negligence is already sufficiently flexible to cater for different degrees of care. There is, for instance, no reason why a court should not hold that a banker giving references about a customer does owe a duty of care to the representee, while at the same time recognising that this duty does not require the banker to compile an exhaustive dossier on the customer's activities over a period of many years. [419]

Statement in connection with particular transaction

7-090

In *Caparo Industries Plc v Dickman* [420] it was held that there will be no liability in tort for negligent misrepresentation unless the maker of the statement knew that the statement would be communicated to the person relying on it specifically in connection with a particular transaction or a transaction of a particular kind. In relation to misrepresentation as between contracting parties, [421] this appears to mean that the misrepresentation must have been made in connection with the contract in respect of which relief is sought, or at least that reliance on the representation in connection with the contract was likely.

Voluntary assumption of responsibility

7-091

In *Hedley Byrne*, considerable emphasis was placed on whether the defendants had voluntarily assumed responsibility towards the plaintiffs [422]; and the defendants' disclaimer of responsibility prevented them from being liable in that case. The meaning of assumption of responsibility is not wholly clear. In *Smith v Eric S. Bush*, [423] in which the plaintiff had purchased a house on the strength of a valuation made by surveyors employed by the building society from whom the plaintiff borrowed to finance the purchase, the application form signed by the plaintiff stated that the defendant valuer's report would be "supplied without acceptance of responsibility on their part to me". Similarly, in the joined case of *Harris v Wyre Forest DC*, in which the survey was carried out by an employee of the lender, the application form stated that the lender took "no responsibility … for the value or condition of the property". It was held by the House of Lords that the defendants were responsible nonetheless;

the clauses were subject to Unfair Contract Terms Act 1977 s.2(2) and had not been shown to be reasonable. Lord Griffiths stated that he did not find that "voluntary assumption of responsibility is a helpful or realistic test for liability". [424] However, subsequent authority in the House of Lords again stressed that liability for economic loss, including in cases of negligent misstatement, is based on an "assumption of responsibility". [425] Lord Goff has explained that:

> "… especially in a context concerned with a liability which may arise under a contract or in a situation 'equivalent to contract', it must be expected that an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff." [426]

Thus the existence of a disclaimer will not necessarily negate an assumption of liability if the defendant knows that there is a strong probability that the plaintiff will nonetheless rely on the information given. [427] The defendant will be protected only if he shows that the disclaimer satisfies the requirement of reasonableness under the Unfair Contract Terms Act 1977. [428] or the requirement of fairness under the Consumer Rights Act 2015, [429]

Statements not made in course of business

7-092

The principle of the *Hedley Byrne* case was somewhat limited by the majority decision of the Privy Council in *Mutual Life and Citizen's Assurance Co Ltd v Evatt* [430] where it was held that in general there is no duty to take care in the making of statements unless the maker has held himself out as having some special skill or competence in the matter in question. In general, it was held, the duty will only arise where the statement is made in the course of a business though in some cases other factors may be sufficient to impose a duty, for example that the person making the statement has a financial interest in the transaction on which he has given advice. [431] It seems unlikely that this decision will now be followed. It was decided by a bare majority and several judges have felt free to indicate their preference for the minority judgments of Lord Reid and Lord Morris. [432] However, it has been pointed out that although the inflexible view of *Mutual Life* has been rejected, it remains the case that a claimant is much more likely to be able to show that he is entitled to depend on a service or statement where the work is undertaken by a person who is exercising a special skill in a business context. [433]

Special relationship between parties negotiating contract

7-093

It has now become clear that a special relationship, giving rise to a duty of care, may subsist between parties negotiating a contract if information is given in connection with the contract. [434] In *Esso Petroleum Co Ltd v Mardon* [435] it was held that a petroleum company, negotiating a lease of a filling station, was liable to the tenant for negligently giving him over-optimistic estimates of the sales potential of the filling station. It should be noted that this was not a casual observation made between parties each of whom was in the same position to judge the accuracy of the estimate. The information was based on a detailed evaluation of the position by the petroleum company and the tenant was clearly not in as good a position as they were to make such an estimate. [436] Similarly, it has been held that a special relationship existed between a landlord and a tenant as a result of pre-contractual discussion during which the landlord assured the tenant that he would keep the premises insured [437]; but it was also held in this case that the duty was only a duty not to give misleading information, and did not extend to requiring the landlord to exercise care not to allow the insurance to expire unrenewed without informing the tenant. [438] On the other hand, it has been held that a special relationship existed between an astute and experienced business woman and an insurance company with whom she was contemplating investing over £90,000 in a property bond; and in this case it was held that the consequential duty of care required the defendants' agent to give the plaintiff an adequate explanation of the nature of property bonds, and was not merely a duty to avoid

misrepresentation. [439] An estate agent may be liable to a customer who purchases a house in reliance on a negligent misrepresentation. [440] A Canadian case has held that a builder who provided an estimate as to the cost of building a house was under a duty to take care to see that the client realised that his estimate did not include his 15 per cent mark up. [441] Sometimes even a failure to disclose may give rise to liability, but this will only be so if there has been a voluntary assumption of responsibility to disclose and the claimant has relied on it. There is no liability under the *Hedley Byrne* principle simply because the contract was uberrimae fidei and thus could be avoided for non-disclosure of a material fact. [442]

Relationship between manufacturer and purchaser of goods

7-094

In *Lambert v Lewis* [443] it was held by the Court of Appeal that a person who purchases goods in reliance on statements in a manufacturer's promotional literature is not, for that reason alone, entitled to claim that a special relationship exists as a result of which the manufacturer may be held liable for negligent statements in the literature. The mere making of a serious statement with the intent that it should be relied upon was not enough, said the court, to create a special relationship. It may seem regrettable that a manufacturer is under no duty of care with respect to statements made in his brochures and advertising leaflets which are plainly designed to influence buyers. However, the decision itself seems consistent with the later decision in *Caparo Industries Plc v Dickman* [444] that there will be no liability in tort for negligent misrepresentation unless the maker of the statement knew that the statement would be communicated to the person relying on it either as an individual or as a member of a specified class, specifically in connection with a particular transaction or a transaction of a particular kind. In most cases a manufacturer will not know the purchaser's identity other than as a member of a very broad class and will know the purchaser's purposes only in general terms. If the manufacturer knows both the purchaser's identity and his purposes it is submitted that there may be a special relationship. [445] There is authority for saying that in such circumstances information given by the manufacturer may constitute a contractual warranty. [446] There is some ground for suggesting that even in the absence of direct contact between manufacturer and purchaser, statements in the manufacturer's literature should be treated as warranties, rendering the manufacturer strictly liable, and not merely liable for negligence: this is certainly the position in American law, [447] but in English law such statements are said not to be warranties unless there is an intent to warrant. [448] However, where goods are sold to a person dealing as a consumer, public statements made by the producer are relevant to whether the goods are of satisfactory quality [449]; and where goods are sold or supplied to a consumer with a "consumer guarantee", under the Sale and Supply of Goods to Consumers Regulations 2002 [450] and (for contracts made on or after October 1, 2015) the Consumer Rights Act 2015, [451] the consumer guarantee "takes effect … as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and associated advertising". [452]

Where negotiations do not lead to contract

7-095

In principle there seems no reason why a special relationship should not be held to exist between parties negotiating a contract even where the negotiations break down so that no contract is ultimately made. Indeed, this seems to have been the basis of the decision in *Box v Midland Bank Ltd* [453] where the plaintiff sought a large loan from his bankers. His bank manager told him that the loan would need approval from head office but gave the plaintiff to think that this was a formality; in the meantime, the plaintiff was permitted overdraft facilities. The loan application was refused by head office and the plaintiff claimed that he had suffered loss through being led to believe that the loan would be forthcoming. This claim was, in part, upheld by Lloyd J. on the basis that the bank manager owed a duty not to mislead the plaintiff by careless advice as to the probable outcome of his loan application.

Special relationship between parties already in contractual relationship

7-096

It is now clear that one party to a contractual relationship may owe duties in tort to the other; these duties may overlap with contractual duties, and where this is the case the claimant may have alternative causes of action in contract and in tort. [454] It has also been held that damages may be obtainable for misrepresentations made in the course of renegotiating a contract already in existence, under the Misrepresentation Act, [455] and there seems no reason to doubt that in an appropriate case liability could also arise under the *Hedley Byrne* principle in such a situation.

Damages at common law

7-097

Damages for negligent misrepresentation at common law will naturally be on the tortious measure [456]; but the usual rules on remoteness [457] and contributory negligence [458] will apply. So will the restrictions on a negligent valuer's liability for subsequent falls in the value of the property set down in *South Australia Asset Management Corp v York Montague Ltd*. [459]

Other legislative provisions creating liability for negligent misrepresentations: financial services

7-098

There are a number of legislative provisions that in effect create liability for negligent misrepresentation in particular circumstances. [460] For example, Financial Services and Markets Act 2000 Pt VI imposes stringent duties on persons responsible for listing particulars of securities for admission to the Official List, and prospectuses. [461] The legislation makes the person responsible liable to pay compensation to a person who has acquired securities to which the legislation applies, [462] and who has suffered loss as the result of any untrue or misleading statement in the prospectus or, in the case of listing particulars, the particulars. [463] It then provides a number of exceptions, one of which is that liability for the loss will not be incurred if the person responsible satisfies the court that, at the time when the particulars were submitted to the relevant authority or delivered for registration, he reasonably believed that the statement was true and not misleading. [464] There is also liability for failure to publish a supplementary prospectus when necessary. [465]

Former Property Misdescriptions Act

7-099

Under s.1 of the Property Misdescriptions Act 1991, the making of a false or misleading statement about a prescribed matter [466] in the course of an estate agency business or a property development business might constitute a criminal offence, unless all reasonable steps and due diligence had been used to avoid committing the offence. [467] However no contract was void or unenforceable and no right of action in civil proceedings would arise by reason only of the commission of an offence under the section. [468] The Property Misdescriptions Act 1991 has been repealed with effect from October 1, 2013. [469] Consumers will be protected by the Consumer Protection from Unfair Trading Regulations 2008. [470]

Package travel, etc

7-100

Under the Package Travel, Package Holidays and Package Tours Regulations 1992, [471] organisers or retailers of such packages must not supply any descriptive matter concerning a package, the price

of a package or any other conditions applying to the contract which contains misleading information. If a consumer suffers loss as a result of a breach of this requirement the organiser or retailer is liable to pay compensation. [472] As liability appears to be strict it might be regarded as contractual than for misrepresentation; but it has been pointed out that the relevant regulation differs from others which imply terms into the contract. [473] The measure of damages is not stated, but it seems likely that a tort measure would be applied. [474]

Home Information Packs

7-101

It had been intended that vendors (or their estate agents) of larger types of residential property would be required to provide on request a "Home Information Pack" including a "home condition report" prepared by a home inspector. [475] However, the relevant Regulations were revoked before coming into force [476] and a home condition report was made optional. [477] The use of Home Information Packs was then suspended altogether with effect from May 21, 2010 [478] and the relevant primary legislation was repealed. [479]

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

349. *(1889) 14 App. Cas. 337*; above, paras 7-048—7-049.

350. *[1914] A.C. 932*; see below, para.7-087.

351. *[1964] A.C. 465*; see below, para.7-089.

352. Note that under s.2(4) of the Misrepresentation Act 1967 (added by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) reg.5), a consumer who has a right to redress under Pt 4A of the Consumer Protection from Unfair Trading Regulations 2008 (on which see Vol.I, para.7-002 and Vol.II, paras 38-145 et seq.) in respect of the conduct constituting misrepresentation no longer has a right to damages under s.2 of the Act: see Vol.II, para. 38-188.

353. There seems no reason why s.2(1) should not apply in cases of insurance when the policyholder has made a misrepresentation, and on occasion it has been assumed that it does: see *HIH Casualty & General Insurance v Chase Manhattan Bank [2001] 1 Lloyd's Rep. 30* at [90] (for further proceedings not related to this point, see *[2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep. 483 and [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61*). However, it has been questioned whether it is correct to permit an insurer who has lost the right to avoid the policy nonetheless to recover damages equivalent to the benefit it would have received from avoidance under s.2(1): *Argo Systems FZE v Liberty Insurance Pte Ltd [2011] EWHC 301 (Comm)* at [45]; reversed on other grounds *[2011] EWCA Civ 1572, [2012] Lloyd's Rep. I.R. 67*, compare below, para.7-109.

354. *[1978] Q.B. 574, noted (1978) 94 L.Q.R. 334*.

355. *[1978] Q.B. 574, noted (1978) 94 L.Q.R. 334*.

356. An action under s.2(1) is not an action for negligence within the meaning of the Limitation Act 1980 s.14A, since it is not necessary for the claimant to aver any negligent act or omission: *Laws v Society of Lloyd's [2003] EWCA Civ 1887, The Times, January 23, 2004* at [91]. Whether it is an action in tort within s.2 of that Act was left open (see at [92]).

357. s.2(1) only gives rise to a right to damages and cannot be relied on as a defence to a claim for

injunctive relief by a misrepresentee who does not wish to avoid the contract as a whole but to repudiate just one of its terms: *Inntrepreneur Pub Company (CPC) v Sweeney, The Times, June 26, 2002*.

358. Above, paras 7-006 et seq.

359. Above, paras 7-035 et seq. See the *Howard Marine case [1978] Q.B. 574*.

360. *Royscot Trust Ltd v Rogerson [1991] 2 Q.B. 297*. See also *F. & H. Entertainments Ltd v Leisure Enterprises Ltd (1976) 120 S.J. 331*; *André & Cie SA v Ets Michel Blanc & Fils [1977] 2 Lloyd's Rep. 166*; *McNally v Welltrade International Ltd [1978] I.R.L.R. 497*; *Chesnau v Interhomes (1983) 134 New. L.J. 341*; *Heineman v Cooper (1987) 19 H.L.R. 262* (apparently an action under s.2(1)); *Cooper v Tamms [1988] 1 E.G.L.R. 257*.

361. *Royscot Trust Ltd v Rogerson [1991] 2 Q.B. 297*. Note that actual fraud still has to be proved if it becomes relevant for other purposes: *Garden Neptune Shipping Ltd v Occidental World Wide Investment Ltd [1990] 1 Lloyd's Rep. 330*.

362. Though see the contrary suggestion in *Jarvis v Swan Tours Ltd [1973] Q.B. 233, 237*. See also *Davis & Co (Wines) Ltd v Afa-Minerva (EMI) Ltd [1974] 2 Lloyd's Rep. 27*; *Esso Petroleum Co Ltd v Mardon [1976] Q.B. 801*. *Watts v Spence [1976] Ch. 165*, which suggested that damages under s.2(1) might be on a loss of bargain basis, has been disapproved: see above, para.7-058 n.285.

363. Above, para.7-056.

364. Above, paras 7-061—7-066. In *Young v Hamilton [2012] NICh 4* damages for distress were awarded (cf. above, para.7-068) under s.2(1) without referring to the fiction of fraud.

365. See the words of Lord Steyn in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] A.C. 254, 280*, referred to earlier, para.7-064.

366. Chitty, 26th edn, Ch.6, para.439, referring to Peel, *Treitel on The Law of Contract*, 7th edn, p.278.

367. *[1991] 2 Q.B. 297*. See the criticisms of that case in (1991) 107 L.Q.R. 547.

368. *[1991] 2 Q.B. 297* at 307 and 309.

369. *[1997] A.C. 254* at 267 and 283. In *Avon Insurance v Swire [2000] 1 All E.R. (Comm) 573* the defendants reserved the right to argue the correctness of the *Royscot* case in a higher court. See also *Cheltenham BC v Laird [2009] I.R.L.R.* at [524]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 C.L.R. 701* at [223]. But see *Forest International Gaskets Ltd v Fosters Marketing Ltd [2005] EWCA Civ 700* at [15]–[16].

370. Above, paras 7-061—7-066. See *Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526* at [207].

371. See above, para.7-071 and below, para.7-082. Lord Tenterden's Act may also apply: see above, para.7-046 n.244.

372. In *Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526* Leggatt J. said (at [206]) that "It is possible to construe the words 'and as a result thereof has suffered loss' as requiring the claimant to show that he has suffered loss as a reasonably foreseeable result of a misrepresentation having been made to him, and to treat the following words as imposing an additional requirement (that the defendant would be liable to damages had the misrepresentation been made fraudulently) which must also be satisfied", but held that unless and until *Royscot Trust* is over-ruled he was bound to apply it.

373. See above, para.7-064.

374. cf. McGregor on Damages, 19th edn (2014), para.47-053; Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.9-072.

375. *[1991] 2 Q.B. 297*.

376. Above, para.7-053.

377. cf. *Armstrong v Strain [1952] 1 K.B. 232*.

378. See *Taberna Europe CDO II Plc v Selskabet [2015] EWHC 871 (Comm)* at [128] (sufficient that the meaning that misrepresentee attributed to those expressions was one that he was reasonably entitled to adopt as an addressee of the representation) (reversed on other grounds *[2016] EWCA Civ 1262*).

379. See, e.g. *W.B. Anderson & Sons Ltd v Rhodes (Liverpool) Ltd [1967] 2 All E.R. 850*.

380. *Gosling v Anderson [1972] C.L.Y. 492*.

381. See *F. & H. Entertainments Ltd v Leisure Enterprises Ltd (1976) 120 S.J. 331*.

382. Below, paras 7-104 and 7-115.

383. Below, paras 7-129—7-130.

384. See below, paras 7-155 et seq.

385. *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665, 787–789*, approved by the House of Lords *[1991] 2 A.C. 249, 268, 280, 281*.

386. *[1992] Ch. 560*.

387. See below, para.26-077.

388. *[1992] Ch. 560, 574*. See also *Taberna Europe CDO II Plc v Selskabet [2015] EWHC 871 (Comm)* at [181], citing this paragraph in the 31st edn with apparent approval; no deduction was made in that case. The *Taberna* case was reversed on appeal on other grounds but Moore-Bick L.J. appears (*[2016] EWCA Civ 1262, [2017] Q.B. 633* at [51]) to agree with the first instance judge's analysis.

389. *[1964] A.C. 465*.

390. See the views of the majority in the *Howard Marine case [1978] Q.B. 574*, below, para.7-093 n.425.

391. *Alliance and Leicester Building Society v Edgestop Ltd [1993] 1 W.L.R. 1462*; *Standard Chartered Bank v Pakistan National Shipping Corp (No.2) [2002] UKHL 43, [2002] 3 W.L.R. 1547*, above, para.7-071.

392. *Royscot Trust Ltd v Rogerson [1991] 2 Q.B. 297*, above, para.7-078.

393. *Cooper v Tamms [1988] 1 E.G.L.R. 257*. Perhaps the burden would also have been discharged in *Oscar Chess Ltd v Williams [1957] 1 W.L.R. 370*.

394. *Foxtons Ltd v O'Reardon [2011] EWHC 2946 (QB)* at [44].

395. See *Gosling v Anderson [1972] C.L.Y. 492*.

396. *Resolute Maritime Inc v Nippon Kaiji Kyokai (The Skopas) [1983] 1 W.L.R. 857*, disapproving a suggestion in earlier editions of this work.

397. *Williams v Natural Life Health Foods Ltd [1998] 1 W.L.R. 830*; see further below, para.7-091.

398. *Garnac Grain Co v H.M. Faure & Fairclough Ltd [1966] 1 Q.B. 650, reversed on facts, 658 and [1968] A.C. 1130n*.

399. As happened, e.g. in *Hedley Byrne & Co Ltd v Heller and Partners Ltd [1964] A.C. 465*. For rescission in such circumstances see above, paras 7-024 et seq.

400. ⚠It has been held that s.2(1) does not apply if B is induced by a representation by C to enter a contract with A that also results in B coming into a contractual relationship with C: *Taberna Europe CDO II Plc v Selskabet [2016] EWCA Civ 1262, [2017] Q.B. 633* at [48] (B induced by C's misrepresentation to purchase from A subordinated loan notes issued by C; effect that B came into contractual relationship with C).

401. See *Wells (Merstham) Ltd v Buckland Sand & Silica Co Ltd [1965] 2 Q.B. 170*; below, para.13-007.

402. ⚠For a full account see Clerk & Lindsell on Torts, 21st edn (2014), paras 8-93—8-124 and especially 8-113—8-119; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), Ch.6.

403. But the existence of concurrent liability under s.2(1) and at common law may be important if a question of contributory negligence arises; see above, para.7-082.

404. As in *Box v Midland Bank Ltd [1979] 2 Lloyd's Rep. 391*, on appeal (as to costs only) *[1981] 1 Lloyd's Rep. 434*; see above, para.2-126, and below, para.7-095.

405. *[1914] A.C. 932*.

406. *[1964] A.C. 465*.

407. The plaintiff may be required to specify the nature of the duty in his pleadings: *Selangor United Rubber Estates Co Ltd v Cradock [1965] Ch. 896*.

408. *(1889) 14 App. Cas. 337*; above, para.7-048.

409. *(1866) L.R. 2 Ch. App. 55*.

410. *(1866) L.R. 2 Ch. App. 55, 61*.

411. Below, paras 8-057 et seq.

412. It is perhaps not strictly accurate to refer to an action for "damages" for negligence in breach of a fiduciary relationship, for this was an equitable remedy and equity did not award damages. In *Nocton v Ashburton [1914] A.C. 932* the House of Lords spoke of an action for "compensation" and it may be that the measure of damages which they had in mind as appropriate in that case would have been lower than the usual tort measure. But today it is at least clear that a fiduciary relationship arising out of a professional relationship will ordinarily support a duty of care in tort for which ordinary tort damages will be recoverable, see, e.g. *Arenson v Arenson [1977] A.C. 405*; *Midland Bank v Hett, Stubbs and Kemp [1979] Ch. 384*.

413. ⚠*[1964] A.C. 465*. On the facts the defendants could not be liable because they had coupled their statement with a disclaimer of responsibility. Such a disclaimer is subject to the Unfair Contract Terms Act 1977 s.2(2) or Consumer Rights Act 2015 s.62(2): *Smith v Eric S. Bush* and *Harris v Wyre Forest DC [1990] 1 A.C. 831*.

414. It seems that an explicit voluntary assumption of responsibility by the defendant may not always be needed, at least when the defendant should know that the plaintiff will reasonably rely on the defendant's statement: see further below, para.7-091.

415. See, e.g. *Candler v Crane, Christmas & Co [1951] 2 K.B. 164*, the majority decision in which was overruled in the *Hedley Byrne case [1964] A.C. 465*; *J.E.B. Fasteners Ltd v Marks, Bloom & Co [1981] 3 All E.R. 289, [1983] 1 All E.R. 583*. But note the restriction described in para.7-090, below.

416. *W.B. Anderson & Sons Ltd v Rhodes (Liverpool) Ltd [1967] 2 All E.R. 850*.

417. See below, para.7-092.

418. Honoré, "Hedley Byrne & Co Ltd v Heller and Partners Ltd" (1965) 8 Journal of the Society of Public Teachers of Law (N.S.) 284.

419. For UK and Commonwealth cases on the *Hedley Byrne* principle, see Clerk & Lindsell on Torts, 21st edn (2014), paras 8-93—8-128.

420. *[1990] 2 A.C. 605*. cf. *Morgan Crucible Co Plc v Hill Samuel Bank Ltd [1991] Ch. 295*. In *Galoo Ltd (In Liquidation) v Bright Grahame Murray [1994] 1 W.L.R. 1360*, it was held that an auditor of a company's accounts may owe a duty of care to a takeover bidder if he has expressly been informed that the bidder will rely on the accounts for the purpose of deciding whether to make an increased bid and intends that the bidder should so rely. See also *Possfund Custodian Trustee Ltd v Diamond [1996] 1 W.L.R. 1351*.

421. See below, para.7-093.

422. e.g. by Lord Reid and Lord Devlin in *Hedley Byrne [1964] A.C. 465* at 487 and 529, respectively. There was no assumption of responsibility or duty of care in *IFE Fund SA v Goldman Sachs International [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*.

423. *[1990] 1 A.C. 831*.

424. *[1990] 1 A.C. 831, 862*.

425. See *Henderson v Merrett Syndicates Ltd [1995] 2 A.C. 145*; *White v Jones [1995] 2 A.C. 207*; *Williams v Natural Life Health Foods Ltd [1998] 1 W.L.R. 830*. All three cases are discussed in more detail above, paras 1-211—1-214.

426. *Henderson v Merrett Syndicates Ltd [1995] 2 A.C. 145, 181*. See also the speech of Lord Steyn in *Williams v Natural Life Health Foods Ltd [1998] 1 W.L.R. 830*.

427. See, e.g. the judgments of Lords Templeman and Griffiths in *Smith v Eric S. Bush [1990] 1 A.C. 831*, at 852 and 865, respectively.

428. ss.2(2), 11(5) and 13.

429. s.62. See, Vol.II, paras 38-374—38-375.

430. *[1971] A.C. 793, noted (1971) 87 L.Q.R. 147*.

431. See *W.B. Anderson & Sons Ltd v Rhodes (Liverpool) Ltd [1967] 2 All E.R. 850*.

432. In *Esso Petroleum Co Ltd v Mardon [1975] Q.B. 819 and [1976] Q.B. 801*, below, para.7-093, and also in the *Howard Marine case [1978] Q.B. 574*, above, para.7-070. The Australian High Court has also refused to follow the majority judgments in the *Evatt* case: see *L. Shaddock & Associates Pty Ltd v Parramatta City Council (1981) 55 A.L.J.R. 713*.

433. Clerk & Lindsell on Torts, 21st edn (2000), para.8-123.

434. See above, para.7-090.

435. *[1976] Q.B. 801*; also *McInerny v Lloyds Bank Ltd [1974] 2 Lloyd's Rep. 246, 253–254*; *Cornish v Midland Bank Plc [1985] 3 All E.R. 513*; *Gran Gelato Ltd v Richcliff (Group) Ltd [1992] Ch. 560*.

436. Contrast the *Howard Marine case [1978] Q.B. 574*, where the majority seems to have considered that the casual nature of the answer precluded a duty of care.

437. *Argy Trading Development Co Ltd v Lapid Developments Ltd [1977] 1 W.L.R. 444*.

438. *[1977] 1 W.L.R. 444*.

439. *Rust v Abbey Life Insurance Co Ltd [1978] 2 Lloyd's Rep. 386*.

440. *Computastaff Ltd v Ingledew Brown Bennison & Garrett (1983) 268 E.G. 598*.

441. *A.L. Gullison & Sons Ltd v Corey (1980) 29 N.B.R. (2d) 86*.

442. *La Banque Financiére de la Cité SA v Westgate Insurance Co Ltd Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665, 791, 794–795, 799, 802–803, affirmed on other grounds [1991] 2 A.C. 249*. On contracts uberrimae fidei see below, paras 7-155 et seq. It is possible that there might be an implicit assumption of responsibility if the defendant should have known that the plaintiff was reasonably relying on the defendant to disclose certain facts: cf. *Smith v Eric S. Bush [1990] 1 A.C. 831*, above, para.7-091.

443. *[1982] A.C. 225*; this issue was not discussed on appeal to the House of Lords.

444. *[1990] 2 A.C. 605*, above, para.7-090.

445. By analogy to the special relationship between employer and nominated sub-contractor in *Junior Books Ltd v Veitchi Co Ltd [1983] 1 A.C. 520*. cf. *Independent Broadcasting Authority v EMI Electronics and BICC Construction Ltd (1980) 14 Build. L.R. 1*, a case of a post-contractual representation.

446. *Shanklin Pier v Detel Products Ltd [1951] 2 K.B. 854*; *Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd [1965] 2 Q.B. 170*.

447. See, e.g. *Greenman v Yuba Power Products (1963) 377 P. 2d 897*, and many other cases cited in White & Summers, *Uniform Commercial Code*, 5th edn (2000), para.11-2.

448. See *Lambert v Lewis [1982] A.C. 225* itself, and see also below, paras 13-003—13-007.

449. Sale of Goods Act 1979 s.14(2D)–(2F); see below, Vol.II, para.38-406. Under the Consumer Rights Act 2015, these sections are repealed and replaced by cl.9(5)–(7) of the Act: see below, para.44-095.

450. SI 2002/3045. See further below, Vol.II, para.38-491.

451. Consumer Rights Act 2015, s.30: see below, Vol.II, para.38-403.

452. 2002 Regulations reg.15(1).

453. *[1979] 2 Lloyd's Rep. 391*, on appeal (as to costs only) *[1981] 1 Lloyd's Rep. 434*.

454. *Henderson v Merrett Syndicates Ltd [1995] 2 A.C. 145*; above, paras 1-154 et seq.

455. *André & Cie SA v Ets Michel Blanc & Fils [1977] 2 Lloyd's Rep. 166*.

456. See above, para.7-055.

457. Compare above, para.7-056.

458. Above, para.7-082.

459. *[1997] A.C. 191*; above, para.7-064 and below, para.26-168.

460. Financial Services Act 2012 ss.89–92 impose criminal liability for knowingly or recklessly making false or misleading statements in relation to financial services, impressions as to the market in or the price or value of any relevant investments or false or misleading statements in relation to benchmarks; but it does not appear that there will be civil liability. These sections replace Financial Services and Markets Act 2000 s.397, that section replacing Financial Services Act 1986 s.47, which was held not to confer any right to damages or other civil remedy: *Norwich Union Life Insurance Society v Qureshi [1999] 2 All E.R. (Comm) 707, CA*. See further Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), paras 7-82–7-83. For the possibility of a restitution order on the basis that the conduct may constitute market abuse within the Market Abuse Regulation (Regulation (EU) 596/2014) see Gower & Davies, *Principles of Modern Company Law*, 10th edn (2016), paras 30-51 and 30-55 and cf. *Securities and Investments Board Ltd v Pantell SA (No.2) [1993] Ch. 256*, decided under Financial Services Act 1986.

461. See generally, Gower & Davies, *Principles of Modern Company Law*, 10th edn (2016), paras 25–10 et seq.; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), paras 7-49 et seq.. For the duties of disclosure imposed by these provisions see below, para.7-169.

462. Thus investors who have bought on the market after dealing has commenced are now protected.

463. Financial Services and Markets Act 2000 ss.85, 90(1). Note that s.90 is without prejudice to any liability which may be incurred apart from the section or regulation: s.90(6). These provisions stem ultimately from the Directors Liability Act 1890, which was passed to reverse the effect of *Derry v Peek (1889) 14 App. Cas. 337*, so far as it applied to prospectuses.

464. Financial Services and Markets Act 2000 Sch.10 para.1(2). For the possible application of the *Hedley Byrne* principle (above, para.7-089) and of Misrepresentation Act 1967 to misstatements in prospectuses and particulars, see Gower & Davies, *Principles of Modern Company Law*, 10th edn (2016), paras 25-36—25-39.

465. See further below, para.7-169.

466. See Property Misdescriptions (Specified Matters) Order (SI 1992/2834).

467. Property Misdescriptions Act 1991 s.2. See *Enfield LBC v Castles Estate Agents Ltd (1997) 73 P. & C.R. 343*.

468. s.1(4).

469. Property Misdescriptions Act 1991 (Repeal) Order 2013 (SI 2013/1575).

470. See above, para.7-002 and below, Vol.II, paras 38-145 et seq.

471. SI 1992/3288 implementing Directive 90/314. See below, para.14-044.

472. 1992 Regulations reg.4.

473. Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.7-68.

474. Cartwright at 4th edn (2016), para.7-69.

475. See the Housing Act 2004 Pt 5 and the Home Information Pack Regulations 2006 (SI 2006/1503) reg.8.

476. By SI 2007/1525.

477. See Home Information Pack (No.2) Regulations 2007 (SI 2007/1667) reg.9. If a report was provided, the home inspector would be obliged to use reasonable care and skill and the terms of the contract under which the report was prepared must provide that, if he does not, the seller, the purchaser or a mortgagee of the property will have a direct right of action against him, Sch.9 arts 2 and 3.

478. Home Information Pack (Suspension) Order 2010 (SI 2010/1455).

479. Localism Act 2011, Sch.25(29) para.1 repealed Housing Act 2004 Pt 5.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 7 - Misrepresentation [1]

Section 3. - Damages for Misrepresentation

(c) - Innocent Misrepresentation

No damages for innocent misrepresentation

7-102

The term “innocent misrepresentation” is here used to mean a representation which is neither fraudulent nor negligent, and the general rule remains what it has always been, namely, that no action for damages lies for a mere innocent misrepresentation in this sense. [480] Damages in respect of the misrepresentation will be recoverable, however, if the court exercises its discretion under the Misrepresentation Act 1967 s.2(2), to declare the contract subsisting, and awards damages in lieu of rescission. [481] Also it must be stressed that a misrepresentation will found a claim for damages if it can be construed as a contractual promise, and is either part of a wider contract, or is itself supported by consideration. This may happen in two principal types of case. First, where the representor and representee themselves enter into a contract after the misrepresentation was made. Here, if the misrepresentation becomes a term of the contract, an action for damages will lie, whether the misrepresentation was fraudulent, negligent or innocent. [482] Secondly, the representee may enter into a contract with a third party as a result of the misrepresentation. Even in this situation, it is often possible to construe the misrepresentation as a collateral contract, the consideration for which is supplied by the fact that the representee enters into the contract with the third party. [483] A familiar illustration of the principle of the collateral contract can be seen in an agent’s liability for breach of warranty of authority. [484]

Estoppel

7-103

Circumstances may arise in which damages are recoverable for a completely innocent misrepresentation, through the assistance of the doctrine of estoppel. For example, if a person agrees to buy shares in a company on the strength of a share certificate issued to the seller stating that he is the registered owner of the shares, the company may be estopped from denying that the seller was in truth the owner of the shares. The purchaser is, in these circumstances, entitled to demand that the company register him as the owner of the shares, or to claim damages in lieu. [485] The purchaser does not claim damages directly for the misrepresentation, but the net effect is much the same. For the doctrine of estoppel to apply the usual requirements of an estoppel must be satisfied; in particular the statement relied on must be precise, unambiguous and unqualified. [486] An estoppel may in exceptional circumstances arise out of non-disclosure, but a duty to disclose must then be shown. [487] It is also necessary that some independent cause of action be shown, apart from the misrepresentation itself. [488] This cause of action will normally be a claim to some form of property to which the representee would be entitled if the representation were true, and the truth of which the representor is not entitled to deny, e.g., money which would be due to the representee as assignee, [489] or goods which the representor has acknowledged that he holds on behalf of the representee. [490]

Misrepresentation Act section 2(2) [491]

7-104

This subsection reads as follows:

> "Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party."

It will be seen that this subsection does not give a representee any *right* to claim damages, but it enables the court, in its discretion, to grant damages to the representee in lieu of rescinding the contract. [492] It seems probable that the subsection was intended principally for the benefit of the representor, so that a contract need not be rescinded where the court feels that the representee can be adequately compensated in damages. [493] But cases may well occur in which damages would be the preferable remedy for the representee. In this event there seems nothing to prevent the representee from claiming the right to rescind but then inviting the court to award damages in lieu. Nor does there seem to be anything which would prevent the court from taking this course over the protests of the representor, who may prefer rescission to an award of damages.

Damages only in lieu of rescission

7-105

But it is important to note two limitations on the power to award damages under this subsection. First, damages can only be awarded *in lieu* of rescission. In the case of a fraudulent misrepresentation, to which the subsection does not apply, the representee can both rescind and claim damages as of right. [494] Rescission for fraud is rescission ab initio, and damages for breach of contract cannot be recovered after such rescission, but damages for fraud are recovered in tort and there is no reason why this remedy should not survive rescission of the contract. In the case of a negligent misrepresentation, the representee can claim both rescission and damages, but whereas his claim to damages under s.2(1) is as of right, his claim to rescission is now subject to the discretion of the court under s.2(2). [495] But in the case of an innocent misrepresentation, the representee cannot get both rescission and damages, [496] nor can he claim either remedy as of right.

Rescission barred

7-106

A second limitation on the subsection is that the power to grant damages is, on the balance of authority, available only where the remedy of rescission would still be available at the time of the court's order. The court may award damages in lieu of rescission wherever the representee "would be entitled … to rescind the contract". The question is whether this means: "would be entitled at the time of the court's order", or "would have been entitled after the representation was made". Purely linguistic considerations suggest that the former meaning is the correct one and in *Atlantic Lines & Navigation Co Inc v Hallam Ltd (The Lucy)* [497] Mustill J. accepted it. Nonetheless earlier editions of this Work suggested that the wording was ambiguous. In *Thomas Witter Ltd v TBP Industries Ltd* [498] Jacob J. also considered the section to be ambiguous [499] and referred to a statement of the Solicitor-General during a debate on the Misrepresentation Bill. [500] Jacob J. expressed the view that damages could have been awarded under s.2(2) even though the misrepresentee had lost the right to

rescind. But the suggestion that the words were unclear was disapproved in *Zanzibar v British Aerospace (Lancaster House) Ltd*, [501] in which Judge Jack Q.C. held that the power to award damages is an alternative to damages and no longer existed when the right to rescission had been lost. The same conclusion had been reached earlier by Judge Humphrey Lloyd Q.C. in *Floods of Queensferry Ltd v Shand Construction Ltd*, [502] who refused to follow the decision in the *Thomas Witter* case. The Court of Appeal has now confirmed that there is no power to award damages under s.2(2) if the claimant has lost the right to rescind. [503]

Measure of damages under s.2(2)

7-107

Section 2(2) does not state the measure of damages to be awarded. It is possible that the measure of damages which may be awarded under subs.(2) is intended to be lower than the measure of damages for fraudulent misrepresentation which, as seen above, is now also applicable to negligent misrepresentation under s.2(1). This possibility is suggested by subs.(3) of the same section which provides that damages may be awarded under subs.(2) whether or not the representor is liable to damages under subs.(1) (i.e. whether or not he has been negligent), but goes on to provide that any damages awarded under subs.(2) shall be taken into account in assessing liability under subs.(1). This seems to indicate that the damages awarded under subs.(2) may be lower than the damages awarded under subs.(1), and there might be something to be said for this since the representor may be wholly innocent in a case under subs.(2). But the Act gives little clue as to how damages are to be assessed under this subsection if they are not to be assessed in the same way as under subs.(1). It has already been seen that damages under subs.(1) are tortious rather than contractual. [504] It would seem a fortiori that damages under subs.(2) would not be at the contractual level. The alternatives then would seem to be to award either the tort measure or a special measure designed to compensate the representee for the loss resulting from his inability to obtain rescission. There seem to be two reasons to interpret s.2(2) as applying a special measure. The first relates to consequential loss, the second to bad bargains.

Section 2(2) and consequential loss

7-108

Suppose the vendor of a house has made an innocent misrepresentation about the state of the drains and as a result the purchaser has suffered personal injury and property damage. Rescission, even with an indemnity, would not compensate the purchaser for these losses [505] and it is arguable that they should not be compensated under s.2(2), which refers to damages “in lieu of rescission”. [506] It has been held that consequential damages may be recovered under this subsection, [507] but without averting to these questions.

Section 2(2) and bad bargains

7-109

The second relates to cases where the misrepresentee has made a bad bargain in the sense that, quite apart from the misrepresentation, the property is worth less than he has paid for it. In such a case the court might well exercise its discretion to declare the contract subsisting if it thinks the misrepresentee is less concerned about the effect of the misrepresentation than to escape from the contract. Were the damages in lieu of rescission to be on the tortious measure as applied in actions for fraud, [508] or were the damages to be calculated so as to indemnify the misrepresentee fully against the consequences of rescission being refused, the damages might include loss suffered by the misrepresentor through the general fall in value of the property. The Court of Appeal in *William Sindall Plc v Cambridgeshire CC* [509] said that this would not be appropriate in a case like the one outlined since the result would be to defeat the object of declaring the contract subsisting; the loss caused by the general fall in value would once again be put onto the misrepresentor. Evans L.J. [510] said that in such a case the contract measure—the difference in value between the property with and without the

"defect" to which the misrepresentation related, or the cost of correcting the defect—would be appropriate. With respect, it seems to be contrary to principle to award the contractual measure when the claim was to rescind because of a misrepresentation. Moreover, the solution will not always be attractive. Even without the defect, the property might be worth as much as the misrepresentee had paid for it. In such circumstances and provided that there is no consequential loss, damages for misrepresentation will normally be nil. [511] It would not be logical for an award under s.2(2) to include the additional value the property would have had if the representation had been true, which would be included were the contractual measure to apply. [512] Nor should the amount recoverable under the contractual measure be used to "cap" recovery for misrepresentation. [513] However, since the *Sindall* case was decided it has become clear that in a claim at common law against a negligent valuer, the valuer will not necessarily be liable for the losses caused by the fall in property prices generally, even though the lender would not have taken the property as security had a correct valuation been given. The damages are limited to the difference between the valuation negligently provided and the correct property value at the time. [514] By analogy, it is submitted that in a case where property has been bought as the result of a misrepresentation, damages under Misrepresentation Act 1967 s.2(2) should be limited to any difference between the contract price and the actual value of the property taking account of the misrepresentation but not taking into account the general fall in the value of the property. This was canvassed as an alternative approach by Evans L.J. in *Sindall*'s case [515] and it does not seem inconsistent with the words of the statute. It would, in effect, reverse any unjust enrichment of the defendant. [516] Where as the result of the misrepresentation the misrepresentee has given up some other right, the damages should be the value of that other right. [517]

Exercise of court's discretion

7-110

The court's discretion under s.2(2) is a wide one. In particular, it is to be noted that the court is not confined to a consideration of whether damages would be an adequate remedy to the representee. The court is also required to consider the loss that would be caused to the representor by rescission. Thus even where damages would not be an adequate remedy for the representee, the court may feel that it would be more equitable to award damages where it is shown that great loss would be caused to the representor by rescinding the whole contract, for instance because the market value of the performance to be rendered has fallen dramatically. [518] The court may also exercise its discretion where to permit rescission would expose the misrepresentor to a large liability, even if that might in practice not be enforceable, whereas to maintain it would result in little additional loss to the misrepresentee. [519] A court is unlikely to exercise its power to declare the contract subsisting under s.2(2) when an award of damages against the misrepresentor will be an empty remedy. [520] The Court of Appeal has indicated that rescission is "the normal remedy" and "should be awarded if possible, particularly perhaps in a case in which a defendant makes no attempt to prove that he had reasonable grounds to believe its representation was true." [521] It has also been said that it would not be appropriate to refuse rescission of a reinsurance contract for misrepresentation by the reinsured, as avoidance of the contract performs an important policing function. [522] The burden of persuading the court to exercise its discretion is on the party seeking its exercise. [523]

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

480. *Heilbut, Symonds & Co v Buckleton [1913] A.C. 30*; *Gilchester Properties Ltd v Gomm [1948] 1 All E.R. 493*.

481. See below, para.7-104.

482. See, e.g. *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965] 1 W.L.R. 623*, below, para.13-003. If the statement amounts to a contractual term, the promisee need not show reliance: *Wemyss v Karim [2016] EWCA Civ 27* at [26], citing Slade L.J. in *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd [1991] 1 Q.B. 564, 584*. The

measure of damages will also differ: see above, para. 7-055.

483. Below, para.13-007.

484. See Vol.II, paras 31-100—31-107.

485. *Re Bahia and San Francisco Ry (1868) L.R. 3 Q.B. 584*; *Balkis Consolidated Co v Tomkinson [1893] A.C. 396*.

486. *Low v Bouverie [1891] 3 Ch. 82*; *Woodhouse A.C. Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd [1972] A.C. 741*; *China-Pacific SA v Food Corp of India [1981] Q.B. 403, reversed on different grounds [1982] A.C. 939*.

487. *Greenwood v Martin's Bank [1933] A.C. 51*; *Moorgate Mercantile Co Ltd v Twitchings [1977] A.C. 890*; *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665, affirmed on other grounds [1991] 2 A.C. 249*.

488. *[1990] 1 Q.B. 665*. But cf. *Brikom Investments Ltd v Seaford [1981] 1 W.L.R. 863*; *Re Wyvern Developments Ltd [1974] 1 W.L.R. 1097*. In cases based on "proprietary estoppel" it seems that no independent cause of action need be shown, but the authorities in this area of the law are still developing. See above, paras 4-099—4-106 and 4-139—4-185.

489. *Burrows v Lock (1805) 10 Ves. 470*.

490. *Seton, Laing & Co v Lafone (1887) 19 Q.B.D. 68*.

491. Note that under s.2(4) of the Misrepresentation Act 1967 (added by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) reg.5), a consumer who has a right to redress under Pt 4A of the Consumer Protection from Unfair Trading Regulations 2008 (on which see Vol.I, para.7-002 and Vol.II, paras 38-145 et seq.) in respect of the conduct constituting misrepresentation no longer has a right to damages under s.2 of the Act: see Vol.II, para. 38-188.

492. It is apparent from subs.(3) that this subsection also applies where the misrepresentation was negligent, but clearly the victim of such a misrepresentation who wants damages rather than rescission will claim under subs.(1).

493. See paras 11 and 12 of the Tenth Report of the Law Reform Committee, Cmnd.1782 (1962) on which s.2 was based.

494. *Attwood v Small (1838) 6 Cl. & F. 232, 444*; *Newbigging v Adam (1886) 34 Ch. D. 582, 592*. There is nothing inconsistent with this in *Johnson v Agnew [1980] A.C. 367*. See below, paras 7-114 and 24-049.

495. For a case in which damages and rescission were permitted under the Act, see *F. & H. Entertainments Ltd v Leisure Enterprises Ltd (1976) 120 S.J. 331*.

496. Except in those exceptional cases in which damages are recoverable for innocent misrepresentation, above, para.7-102. Note also that, on rescission, the representee is entitled to an indemnity for burdens assumed under the contract, but this is much narrower than the right to damages, below, paras 7-129—7-130.

497. *[1983] 1 Lloyd's Rep. 188*.

498. *[1996] 2 All E.R. 573*. See (1995) 111 L.Q.R. 385.

499. *[1996] 2 All E.R. 573, 590*.

500. The statement itself lends some support to this view but further investigation of the legislative history throws some doubt on it: see (1995) 111 L.Q.R. 385.

501. *[2000] 1 W.L.R. 2333*.

502. *[2000] Build. L.R. 81*.

503. *Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745* at [17].

504. Above, para.7-077.

505. *Whittington v Seale-Hayne (1900) 82 L.T. 49*, below, para.7-130.

506. In favour of this alternative is the literal interpretation given to s.2(1) by the Court of Appeal in *Royscott Trust Ltd v Rogerson [1991] 2 Q.B. 297*. Against it is the analogy of damages under Lord Cairns' Act 1858 in lieu of an award of specific performance where (it seems) the damages are to be assessed as at common law, and not in accordance with some special measure: *Johnson v Agnew [1980] A.C. 367, 400*.

507. *Davis & Co (Wines) Ltd v Afa-Minerva (EMI) Ltd [1974] 2 Lloyd's Rep. 27*. In *William Sindall Plc v Cambridgeshire CC [1994] 1 W.L.R. 1016, 1044* Evans L.J. said that in his view a plaintiff under s.2(2) should recover the same additional compensation as was permitted in *Cemp Properties (UK) Ltd v Dentsply Research and Development Corp [1991] 2 E.G.L.R. 197*, a case under s.2(1) in which the plaintiffs recovered for wasted expenditure. See generally, McGregor on Damages, 19th edn (2014), para.47–067.

508. See above, paras 7-055 et seq. It would have to be shown that the misrepresentee would not have entered the contract but for the fraud.

509. *[1994] 1 W.L.R. 1016*: held that there were no grounds for rescission.

510. *[1994] 1 W.L.R. 1016, 1045*. At 1037 Hoffmann L.J. remarked that while s.2(1) is concerned with damage flowing from the plaintiff having entered the contract, s.2(2) is concerned with damage caused by the property not being what it was supposed to be.

511. See McGregor on Damages, 19th edn (2014), para.47–070.

512. cf. above, para.7-055.

513. *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] A.C. 254*, disapproving on this point *Downs v Chappell [1997] 1 W.L.R. 426*; see above, para.7-066. (Both cases were ones of fraud but it is not clear that disapproval of this form of "cap" is limited to cases of fraud.)

514. *South Australia Asset Management Corp v York Montague Ltd [1997] A.C. 191*; see below, para.26-168.

515. *[1994] 1 W.L.R. 1016, 1046*. It is, with respect, preferred to the explanation given by McGregor on Damages, 19th edn (2014), paras 47–076—47–077, for reasons given below, para.7-125 n.559.

516. See Birks [1997] R.L.R. 72, who argues that this is what Parliament intended despite use of the word "damages".

517. In *UCB Corporate Services Ltd v Thomason [2005] EWCA Civ 225, [2005] 1 All E.R. (Comm) 601* the respondents were liable for large sums under two guarantees. As the result of misrepresentation, the appellants entered an agreement to waive their rights under the guarantees in exchange for payment of a much smaller sum. The damages that might be awarded to the appellants under s.2(2) were not the full sums due under the guarantees but only compensation for any loss of the chance to recover more than the appellants gave up when they entered the waiver agreement (at [38] and [51]).

518. *Atlantic Lines & Navigation Co Inc v Hallam Ltd [1983] 1 Lloyd's Rep. 188*; and see *William*

Sindall Plc v Cambridgeshire CC [1994] 1 W.L.R. 1016, discussed in para.7-109.

519. *UCB Corporate Services Ltd v Thomason [2005] EWCA Civ 225, [2005] 1 All E.R. (Comm) 601*. It was said that "loss" in s.2(2) includes financial loss and "what may loosely be described as detriment" (Latham L.J. at [37]).

520. *TSB Bank Plc v Camfield [1995] 1 W.L.R. 430, 439*.

521. *Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745* at [24].

522. *Highland Insurance Co v Continental Insurance Co [1987] 1 Lloyd's Rep. 109*.

523. *British & Commonwealth Holdings Plc v Quadrex Holdings Inc (unreported April 10, 1985) CA*.

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Volume I - General Principles

Part 2 - Formation of Contract

Chapter 7 - Misrepresentation [1]

Section 4. - Rescission for Misrepresentation

(a) - General

Preliminary

7-111

Before the passing of the Misrepresentation Act 1967, the position with regard to rescission was, broadly speaking, as follows: where a person was induced to enter into a contract as a result of a misrepresentation by the other party to the contract, and the misrepresentation never became incorporated as a contractual term, the representee was entitled to rescind the contract, whether the misrepresentation was fraudulent, negligent or wholly innocent. At common law, the right to rescind was confined to cases in which the misrepresentation was fraudulent or in which there was a total failure of consideration, [524] but in equity there was a right to rescind even for innocent misrepresentation. [525] Since the Act of 1967 this right of rescission is qualified (except in cases of fraud) by the court's power to refuse rescission and award damages in lieu, [526] and there remain certain bars to rescission in all cases, which are discussed below. [527] But it still remains a general proposition that the remedy for misrepresentation is rescission of the contract. [528]

Misrepresentation incorporated as contractual term

7-112

Where the misrepresentation was later incorporated into the contract as a contractual term, the position was in some respects uncertain before the Act of 1967. In cases of fraud, the subsequent incorporation of the misrepresentation into the contract made no difference to the representee's right to rescind, but in cases of innocent misrepresentation (including, for this purpose, negligent misrepresentation) the position was different. For in this case there was some authority for saying that the equitable right to rescind did not arise, and the representee's right to rescind (if any) depended entirely on the effect of the misrepresentation as a contractual term. [529] That is to say, if the term was a condition or an innominate term, breach might justify rescission (or, as it would now be more appropriately put, [530] termination of the representee's outstanding obligations) whereas if the term was a warranty, breach would not justify rescission at all. [531] Thus the somewhat strange result followed that a misrepresentation which would have justified rescission as of right by the representee if it had remained a representation pure and simple, might cease to have this effect if it later became incorporated into the contract as a warranty. [532]

Misrepresentation Act section 1(a)

7-113

Section 1(a) of the Act of 1967 provides that a person is not to be deprived of the right to rescind for misrepresentation merely because the representation has become a term of the contract. Thus a misrepresentation which is subsequently incorporated into the contract as a warranty will now remain

a ground for rescission, whereas breach of a warranty which has never been a misrepresentation will never ground rescission. But it is not easy to see how, in fact, a misrepresentation could ever be a term of the contract except where the term had previously been a representation, [533] though a warranty might, of course, be a promise as to future conduct which would not be a misrepresentation in any event (unless fraudulent).

Rescission and termination

7-114

Since the decision of the House of Lords in *Johnson v Agnew* [534] a much clearer and sharper distinction has been drawn between rescission of a contract ab initio and termination of the contract for subsequent breach. The former generally has retrospective effect, while the latter does not; indeed, termination usually affects only some of the obligations under the contract and it is strictly incorrect to speak of the contract ceasing to exist through termination. It is clear from *Johnson v Agnew* itself that rescission for fraud is rescission ab initio, and will therefore prima facie have retrospective effect, though it has already been submitted [535] that such rescission will not deprive the representee of a right to damages for fraud, because that right arises in tort, and not out of the contract. Where s.1(a) of the Act of 1967 applies, it seems that the representee retains his right to rescind ab initio, but may in addition have a right to terminate for breach of the one-time representation, now become a term of the contract. Problems may well arise in deciding whether a refusal to continue with the contract in such circumstances amounts to a rescission or only a termination. It has been held that where a variation of a contract has been induced by fraud, the innocent party may rescind the variation ab initio, with the effect that the original contract is retrospectively revived. [536]

Present position

7-115

The right to rescind for fraudulent misrepresentation is unimpaired by the Misrepresentation Act, but there is no longer any absolute right to rescind for negligent or innocent misrepresentation. Section 2(2) of the Act (which has been set out above) [537] provides that the court now has a discretion to award damages in lieu of rescission wherever it is of the opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause the other party. It has already been observed that this is a wide discretion, and the court is not confined to a consideration of whether damages would be an adequate remedy to the representee. [538]

Effect on right to terminate for breach

7-116

There is one point of possible difficulty on the construction of s.2(2) of the Act. As mentioned above, it is clear from s.1(a) of the Act that (subject to the court's discretion under s.2(2)) there is now a right to rescind for any misrepresentation made before the contract was entered into, notwithstanding that the misrepresentation has become a term of the contract. But what is not wholly clear is whether, when this happens, any right to terminate for breach of contract also becomes subject to the discretion of the court under subs.(2). There are many circumstances in which a person has a right to terminate a contract for breach of condition, in which no loss has in fact been incurred by him, and a case could be made for saying that, where the term is a representation of fact, the court now has a discretion to refuse to permit repudiation, but to award damages in lieu—indeed, the damages might well be nominal. [539] On the other hand, it is unlikely that the subsection was intended to have this effect, and it is submitted that the words: "[w]here a person … would be entitled by reason of the misrepresentation, to rescind the contract" would exclude the case under discussion since the right to rescind (or terminate [540]) then arises from breach of the contractual term. But whatever the answer to this point may be, it is at least clear that subs.(2) would not affect a right to treat the contract as

terminated for breach of a contractual term which was a promise of future conduct; nor for a breach of a contractual term which was an undertaking as to fact but which was never made before the contract was entered into.

Misrepresentation as defence to proceedings

7-117

There is no doubt that a misrepresentation which would justify rescission of a contract may also be used as a defence to an action brought by the representor against the representee. The use of misrepresentation as a defence has sometimes been distinguished from its use as a ground for rescission, [541] and it is possible that the principles governing the two situations are not in all respects identical [542] but generally speaking they appear to be the same. Indeed, the courts have sometimes treated the setting up of a misrepresentation as a defence as though this were in itself one way of rescinding the contract. [543] Accordingly, it is thought that although s.2(2) of the 1967 Act speaks of rescission, its provisions would apply equally to a case in which the misrepresentation is set up by way of defence. However, fraud may be used as a defence to a claim for specific performance (which is a discretionary remedy [544]) even where the right to rescind has been lost (save by affirmation, when the inconsistency of affirming and then resisting specific performance would be unconscionable). [545] It was said that impossibility of restoring the parties to their original position will not necessarily prevent the use of fraud as a defence; it will depend on the impact that enforcement would have on the representee, and especially on whether it would cause hardship, whether on the facts any estoppel had arisen and the importance of the term to be enforced and the breach of it. The fact that there would be a claim for damages for deceit should be taken into account. [546]

Rescission normally requires notice

7-118

The general rule is that, in order to rescind the contract, the representee must communicate his intention to do so to the representor. [547] But in *Car & Universal Finance Co Ltd v Caldwell* [548] it was held by the Court of Appeal that this was not an inflexible rule. In this case a person was induced to sell his car by fraud to a purchaser who paid with a bad cheque, and promptly disappeared. When the seller discovered the fraud he informed the police and the Automobile Association, but was, of course, unable to notify the fraudulent purchaser. It was held that the seller had done sufficient to rescind the contract, and that accordingly a subsequent purchaser from the fraudulent party had acquired no title to the car, as the title had revested in the seller on rescission. The actual ratio of the decision seems confined to circumstances in which communication of the representee's desire to rescind is not possible because the representor is deliberately keeping out of the way, and the court left open the question whether the decision would apply to a case where the impossibility of communication did not arise from the representor's deliberate fraud.

Court order not required

7-119

Although it is common to speak of a court "setting aside" or rescinding a contract for misrepresentation, it seems clear from this and other cases [549] that the remedy is not necessarily a judicial one. [550] A representee is entitled to rescind for misrepresentation without invoking the assistance of the court at all, although the court now has (as seen above) a discretion to refuse to allow rescission in some cases. [551] It may well be, as a purely practical matter, that the representee will require the assistance of the court in some cases, e.g. where rescission of an executed conveyance is sought [552]; but "the process of rescission is essentially the act of the party rescinding, and not of the court". [553]

Rescission not available except against contracting party

7-120

It seems clear that rescission is prima facie a remedy which is only available against the other party to the contract. In *Northern Bank Finance Corp Ltd v Charlton* [554] this principle was affirmed by a bare majority of the Supreme Court of Eire in a case in which the plaintiff had been induced by the fraud of a bank to pay various sums to the bank in order that these sums should be used by the bank to purchase various properties on behalf of the plaintiff. The properties were in fact so purchased from third parties. The plaintiff claimed rescission of the contracts of purchase but the majority of the court held that rescission was not available as against the bank since the properties were not bought from the bank itself. Rescission would in fact have amounted to a sort of compulsory subrogation under which the bank would have taken over the properties and refunded the purchase price to the plaintiff.

Misrepresentation inducing consent order

7-121

Where proceedings are compromised by agreement, and the compromise is made the subject of a consent order, the court may set aside the consent order if it is shown to have been based on an agreement induced by misrepresentation. [555]

Effect of rescission

7-122

When a contract is rescinded it has the effect of revesting any property transferred in the transferor, so far as no formal steps are required for the retransfer. [556] Thus property in goods will revest in the victim of fraud without more. [557] If land has been conveyed, rescission will have the effect that the representor holds the title on constructive trust for the representee. [558] Although the contract is avoided retrospectively, some clauses that are regarded as "separable" may continue to have effect. Thus unless otherwise agreed an arbitration agreement is unaffected by the invalidity of the substantive contract of which it forms part [559]; and an exclusive jurisdiction clause will survive rescission. [560]

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

524. *Kennedy v Panama, etc., Royal Mail Co Ltd (1867) L.R. 2 Q.B. 580*.

525. *Lamare v Dixon (1873) L.R. 6 H.L. 414*. The generalisation of this remedy was largely a post-Judicature Act development, stemming principally from *Redgrave v Hurd (1881) 20 Ch. D. 1* and *Adam v Newbigging (1888) 13 App. Cas. 308*.

526. Above, paras 7-104 et seq.

527. Below, paras 7-123—7-142.

528. This sentence was cited with approval by Longmore L.J. in *Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745* at [24]: see above, para.7-110, text at n.476a.

529. *Pennsylvania Shipping Co v Compagnie Nationale de Navigation [1936] 2 All E.R. 1167, 1171*; *Leaf v International Galleries [1950] 2 K.B. 86*; cf. *Compagnie Française de Chemins de Fer*

Paris-Orleans v Leeston Shipping Co Ltd (1919) 1 Ll.L. Rep. 235, 237–238.

530. See *Johnson v Agnew [1980] A.C. 367*.

531. See below, paras 13-031—13-032.

532. However, this "somewhat strange result" was held not to be law in *Academy of Health and Fitness Pty Ltd v Power [1973] V.R. 254*, a case arising in a jurisdiction not governed by the Misrepresentation Act 1967.

533. If the representee did not know of the representation before the contract was made (as, e.g. where he simply signed a written agreement) it would not in any event be an effective misrepresentation, above, para.7-035. There has been some disagreement over whether there is a representation when one party simply gives a warranty that certain facts are rue. In *Invertec Ltd v De Mol Holding BV [2009] EWHC 2471 (Ch)* Arnold J. held that the warranties in that case also amounted to representations (at [362]–[363]). In *Sycamore Bidco Ltd v Sean Breslin [2012] EWHC 3443 (Ch)*, at [209]–[210] Mann J. held that the warranties in the case before him were simply warranties and "there was nothing more to make them into representations". Thus there was no claim for damages under Misrepresentation Act 1967 s.2(1), and s.3 was not relevant to the limitation of liability in the contract. It seems that in the *Sycamore* case the claimants did not rely on any pre-contract representations, but only on the warranties "as both warranties and representations": at [202]. See also *Idemitsu Kosan Co Ltd v Sumitomo Corp [2016] EWHC 1909 (Comm)* (above, para.7-009). Thus the question depends on the facts and interpretation of the agreement: *Ticket2final OU v Wigan Athletic AFC Ltd Unreported January 22, 2015 Ch D* at [26]. Usually a party giving a warranty will have stated what it believed to be the facts before the contract was made and therefore there will have been a representation as well as a warranty. However, it is possible that even then the other party will be relying on the warranty and not on the representation. It is also possible, though in practice unlikely, for a person to warrant the truth of a fact without making any representation at all where he expressly agrees to take the risk, however the facts may turn out.

534. *[1980] A.C. 367*.

535. See above, para.7-080.

536. *Occidental Worldwide Investment Corp v Skibs A/S Avanti [1976] 1 Lloyd's Rep. 293*.

537. Above, para.7-104.

538. Above, para.7-110.

539. See, e.g. *Re Moore & Co Ltd and Landauer Co [1921] 2 K.B. 519* (although the term here may well have been a promise rather than a statement of fact). This argument is also applicable to insurance contracts in which the insured may warrant some fact which is untrue, but the fact in question may have no bearing on the risk which occurs. Hitherto, it has always been clear that the insurer may repudiate liability in these circumstances, below, para.7-166.

540. See above, para.7-114.

541. Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.9-088.

542. Treitel points to the rule that an insurer who uses fraud as a defence may repudiate liability and keep the premiums: see below, Vol.II, para.42-076. Further, he suggests that in cases of criminal fraud a representee who sets the fraud up by way of defence need not return money received under the contract (*Berg v Sadler & Moore [1937] 2 K.B. 158*), whereas if he sues for rescission he must do so (*Spence v Crawford [1939] 3 All E.R. 271*). *Berg v Sadler Moore* is contrary to dicta of the Exchequer Chamber in *Clough v L. & N.W. Ry (1871) L.R. 7 Ex. 26, 37* which do not seem to have been cited, and the refusal of the claim for return of the money may be better explained on the basis of illegality: see below, para.16-194.

543. *Clough v L. & N.W. Ry (1871) L.R. 7 Ex. 26*; *Academy of Health and Fitness Pty Ltd v Power [1973] V.R. 254*.

544. See below, para.27-034.

545. *Geest Plc v Fyffes Plc [1999] 1 All E.R. (Comm) 627, 694* et seq.

546. *Geest Plc v Fyffes Plc [1999] 1 All E.R. (Comm) 627*. On the facts of the case, restitutio was impossible. To refuse specific performance altogether of the undertaking to provide security for an indemnity that the defendant had given the plaintiff would expose the plaintiff to very different risks. Specific performance would be granted but limited to the excess of the claim over any counterclaim for damages.

547. *Car & Universal Finance Co Ltd v Caldwell [1961] 1 Q.B. 525*. It was accepted that the misrepresentee could also rescind by retaking the goods, even without the misrepresentor's knowledge: 555, 558. There is no principle that rescission (in the case concerned, for repayment on the ground of mistake) is unavailable unless sought by a notice given before an action is brought: *West Sussex Properties Ltd v Chichester DC [2000] N.P.C. 74 CA*, at [12].

548. *[1961] 1 Q.B. 525*; see also *Newtons of Wembley Ltd v Williams [1965] 1 Q.B. 560*.

549. *Abram S.S. Co Ltd v Westville Shipping Co Ltd [1923] A.C. 773*. In Australia, the High Court has taken a different approach, holding that even in a case of fraud equity does more than recognise rescission effected by the action of the innocent party. It may impose terms to achieve observance of the requirements of good conscience and practical justice and this enables it to grant partial rescission. Thus it could set aside the part of a contract of guarantee to which the fraud related (previous supplies) but leave the rest (as to future supplies) intact: *Vadasz v Pioneer Concrete (SA) Pty Ltd (1995) 184 C.L.R. 102, noted (1997) 113 L.Q.R. 16*; Proksch [1996] R.L.R. 71. On the *Vadasz* case see further below, para.7-126.

550. See, however, O'Sullivan [2000] C.L.J. 509. See also Turner (2016) 132 L.Q.R. 388.

551. Thus the court may, in effect, annul a rescission previously effected by self-help: see *Atlantic Lines & Navigation Co Inc v Hallam Ltd [1983] 1 Lloyd's Rep. 188, 202*. The conferral of a discretion on the court by s.2(2) has been said to imply that, apart from that section, there is no power to declare the contract subsisting; the right to rescind is that of the representee, not that of the court, which merely has to decide whether the rescission was lawful: *TSB Bank Plc v Camfield [1995] 1 W.L.R. 430, 439*.

552. In *Hughes v Clewley, The Siben (No.2) [1996] 1 Lloyd's Rep. 35* it was held that rescission will not be ordered [sic] if the effect would be to transfer a business being used for unlawful purposes from one party to the other. The case was one of fraud, so there was no power to declare the contract subsisting under s.2(2).

553. *Horsler v Zorro [1975] Ch. 302, 310*. In *Islington London BC v UCKAC [2006] EWCA Civ 340, [2006] 1 W.L.R. 1303*, it was held that a tenancy to which the Act applies can be brought to an end only on the grounds stated in the Act on which the landlord may obtain possession, which include a false statement made knowingly or recklessly by the tenant (s.84 and Sch.2, ground 5). In reaching this conclusion, Dyson L.J. adopted the opposing theory that a contract is only rescinded for misrepresentation by a court order (at [26]). But the court's conclusion that, as Mummery L.J. put it: "[T]he relevant provisions of the 1985 Act provide a complete code for the termination of a secure tenancy, the private law remedy of rescission of the tenancy for fraudulent representation is not available to the council" (at [46]), can be supported as a matter of statutory construction without resorting to the notion that a court order is needed for rescission.

554. *[1979] I.R. 149*.

555. *Dietz v Lennig Chemicals Ltd [1969] 1 A.C. 170*. The consent order had not been drawn up in this case, but that seems immaterial. Except in matrimonial cases, a consent order derives its

force and effect from the contract underlying it, and if the contract can be set aside, so can the order: *Purcell v F.C. Trigell Ltd [1971] 1 Q.B. 358*. See further above, para.6-060 n.276.

556. Until the contract is rescinded, the accepted view is that the misrepresentee has no proprietary right in the property transferred but only a "mere equity": below, para.7-139.

557. *Car & Universal Finance Co Ltd v Caldwell [1961] 1 Q.B. 525*. But note that the fact that the contract has been rescinded does not prevent Sale of Goods Act s.25 (sale by buyer in possession) from applying. See below, Vol.II, para.44-219.

558. Megarry & Wade, *The Law of Real Property*, 8th edn (2012), para.11–022. Note that completion of the contract is no longer a bar to rescission: Misrepresentation Act 1967 s.1(b), below, para.7-142.

559. Arbitration Act 1996 s.7; Vol.II, para.32-028.

560. *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association [1998] L.R.L.R. 24, 28*; Vol.II, para.32-028.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 7 - Misrepresentation [1]

Section 4. - Rescission for Misrepresentation

(b) - Restitutio in Integrum

Restitutio in integrum

7-123

The purpose of rescission is to restore the status quo ante, and it was said by Bowen L.J. in *Newbigging v Adam* [561] that "there ought … to be a giving back and a taking back on both sides". Thus the traditional view is that the remedy will not lie if the parties are not in a position to make restitutio in integrum. In *Clarke v Dickson* [562] Crompton J. said that when a party:

> "… exercises his option to rescind the contract, he must be in a state to rescind; that is he must be in such a situation as to be able to put the parties into their original state before the contract."

Common law and equity

7-124

Common law put a strict interpretation on the requirement of restitution, and consequently restricted the field within which rescission could operate. Further, there was no machinery for taking accounts, or for balancing set-offs against each other, or for making allowances. As a result the injured party was often relegated to his remedy in damages, if any. In contrast equity offered two advantages to the litigant. [563] As at common law the parties to an action for rescission were required to make restitution, but equity did not insist that this should be precise. It was content to do practical justice between the parties. Secondly, the greater flexibility of the machinery at its disposal enabled equity to direct accounts to be taken and balances to be struck and adjustments to be made which were impossible at common law. Both of these points were emphasised by Lord Blackburn in *Erlanger v New Sombrero Phosphate Co* [564]:

> "It [a court of equity] can take account of profits and make allowance for deterioration. And I think the practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract."

The present position seems to be that in contracts where the benefits received are in their nature returnable, such as contracts of sale, while an ability to make restitution is an essential to an action for rescission, the courts require that this should be substantial rather than precise. [565] In other

words, the equitable approach to this requirement has prevailed over that of the common law. Further, it has been suggested that a contract for services, which in their nature cannot be restored, may be rescinded despite part performance of the services by the misrepresentor. [566]

Alteration of subject matter

7-125

Clearly, it is impossible to make substantial restitution of property transferred under the contract if it has altered its character. Thus in *Clarke v Dickson* [567] rescission was refused where a partnership, in which the representee had been induced to take shares, had been converted into a limited liability company, for the existing shares were wholly different from those which he originally received. Other examples of alteration in the subjectmatter of the contract sufficient to disentitle the representee to rescission are the working out of mines [568]; the conversion of an unincorporated banking company into an incorporated joint stock company [569]; a material change in the position of both parties in relation to the patents and business in question [570]; the commencement of winding-up proceedings [571] and, when completion was a bar to rescission of a contract for the sale of land, [572] part performance of a single contract. [573] On the other hand, if property has retained its substantial identity, restitution may be ordered even though it has deteriorated or depreciated or cannot be restored in its original state. [574] Thus in *Adam v Newbigging* [575] the respondent was induced by an innocent misrepresentation to become a partner in a business which was insolvent and which subsequently failed. He was held to be entitled to rescind and to have his capital repaid although the business to be restored was worthless. Two further comments may be useful. First, in appropriate cases the court may order the plaintiff to pay compensation on account of any deterioration that has occurred, in accordance with the principle that this is preferable to allowing the defendant to retain all the advantages of property transferred under the contract. [576] The point was put by Roche J. as follows:

> "The principle of restitutio in integrum did not require that a person should be put back into the same position as before; it meant that he should be put into as good a position as before." [577]

Secondly, it seems that the courts are more willing to exercise their discretionary powers and to order restitution in a case of fraud than in a case of innocent misrepresentation. [578] Thus in *Hulton v Hulton* [579] the court rescinded a separation deed obtained by the husband by fraudulent misrepresentation, and refused to order the wife to repay the sums that she had received under the deed because the husband had received corresponding benefits, such as freedom from molestation and from proceedings by the wife for restitution of conjugal rights.

Partial rescission not allowed

7-126

The more flexible approach advocated in the previous paragraph would not necessarily be inconsistent with what appears to be the current rule that the misrepresentee may only rescind the whole contract and not part of it. In *Vadasz v Pioneer Concrete (SA) Pty* [580] the High Court of Australia had held that in a case of fraud the court has power to set aside the contract on terms and thus could set aside the part of the contract of guarantee to which the fraud related (previous supplies) but leave the rest (as to future supplies) intact. This should be contrasted with the decision of the English Court of Appeal in *TSB Bank Plc v Camfield*, [581] in which a wife was held to have the right to set aside a charge in its entirety when she had entered it as the result of the husband's misrepresentation that it was limited to £15,000. In *Scales Trading Ltd v Far Eastern Shipping Plc* [582] the Privy Council had left open the question of whether the approach in *Vadasz* should be preferred to that in *TSB Bank Plc v Camfield*. However, in *De Molestina v Ponton* [583] Colman J. held that it was not even arguable that partial rescission may be awarded. [584] That there cannot be partial rescission is part of a wider principle that there cannot be rescission unless there can be restitutio in integrum. [585] Thus:

> "… if a representee is induced to enter separate contracts A and B by the same misrepresentation, it may be that performance of contract B depends on the prior performance of contract A. In that case one cannot rescind contract A without also rescinding contract B … But there may be cases where, although both contracts were induced by the same misrepresentation, either can be performed without performance of the other. In that case the misrepresentee may rescind unless the contract not sought to be rescinded would never have been entered without also entering the other." [586]

Services

7-127

The suggestion [587] that a partly performed contract for services may be rescinded is attractive but raises difficulties. One view might be that the contract is rescinded for the future, leaving the services already rendered unaffected, but this would be inconsistent with the normal view that rescission for misrepresentation is rescission ab initio. [588] It might also result in the party who had rendered the services going without payment for them if the contract were entire and the payment due on completion. [589] Rather the suggestion seems to be that the contract is rescinded ab initio but the misrepresentee must make an allowance for the services received. [590] That seems a workable proposition but it would leave an anomaly when the services had been performed by the misrepresentee: it would be rather hard if he were permitted to rescind only at the price of forgoing payment for what he had done, but unless the contract was severable it is not clear what remedy he would have to claim payment. The adjustments and allowances which a court may make in a claim for rescission may not include the allowance of a quantum meruit. This is suggested by *Boyd and Forrest v Glasgow Ry*. [591] During the negotiations for a contract for constructing a railway, an innocent misrepresentation was made about the nature of the subsoil; the contractors claimed to rescind the contract, and sued on a quantum meruit for the difference between the contract price, which they had received, and the increased cost of the work which was due to the misrepresentation. The House of Lords, reversing the Scottish courts, rejected the claim on the ground that, if allowed, it would be equivalent to an award of damages to the contractors.

A more flexible approach?

7-128

In the *Boyd and Forrest* case [592] the work had actually been completed, so it was clearly too late for the contractor to "rescind", and it is to be hoped that a modern court might see its way to granting a quantum meruit to the misrepresentee in a case in which he only discovers that an innocent misrepresentation has been made after he has performed some of the services required of him. [593] It has been argued that the courts should adopt a still more flexible approach to the requirement of restitutio in integrum where third party rights are not in question, [594] allowing restitution to be made in the form of money. [595] This, despite recent endorsement by the Court of Appeal of the difficulties alluded to earlier, [596] seems a sensible development and one which is in line with the decision in a case of undue influence to award "equitable compensation" when the property transferred could no longer be returned. [597] A recent decision of the Court of Appeal in a duress case suggests that the courts are now adopting this approach. [598]

Indemnity distinguished from damages

7-129

Assuming that a claimant who wishes to rescind is in a position to make restitutio in integrum, the

present position seems to be that he may expect the restoration of benefits and resumption of burdens which have passed under the contract. Thus, if property has been delivered, it must be restored, and the claimant likewise must make restitution of any property delivered to him; and if obligations have passed to the claimant, these must be resumed by the defendant so that the restoration of the status quo ante may be achieved. In practical terms this means that the defendant must indemnify the claimant against obligations which he has discharged or will become liable to discharge. One problem arises: how is the rule requiring the defendant to indemnify the claimant for obligations assumed by him reconciled with the rule that damages cannot be recovered for an innocent misrepresentation which has not become a term of the contract? The traditional answer has been that the defendant must indemnify the claimant against obligations necessarily created by the contract, i.e. against liabilities to third parties which the contract required the claimant to incur or payments to third parties which it required him to make, but against these only. Thus the court is enabled to stop short of making an award which could be classified as damages. [599]

7-130

The practical operation of the distinction between indemnity and damages is illustrated by *Whittington v Seale-Hayne*. [600] The plaintiffs took a lease of certain premises on the strength of the defendant's innocent misrepresentation that they were in a sanitary condition and they erected certain poultry sheds thereon. As a result of the unsanitary state of the premises the manager of the plaintiffs' poultry farm became ill, and the poultry died; the local council ordered the plaintiffs to renew the drains, and the plaintiffs were obliged to remove their sheds. In an action for rescission and for an indemnity against the consequences of having entered into the contract, it was held that the plaintiffs were entitled to an indemnity against the obligations to pay rates and to effect repairs, for these were necessarily assumed under the contract. But they were not entitled to recover anything in respect of medical expenses or loss of poultry, or the removal of the sheds, for these were in effect claims for damages, and therefore not admissible in an action based on innocent misrepresentation.

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

561. *(1886) 34 Ch. D. 582, 595*.

562. *(1858) E.B. & E. 148, 154*.

563. But note that fraud may be used as a defence to specific performance even when restitutio in integrum is impossible: *Geest Plc v Fyffes Plc [1999] 1 All E.R. (Comm) 672*. See above, para.7-117.

564. *(1878) 3 App. Cas. 1218, 1278–1279*. See also *O'Sullivan v Management Agency Ltd [1985] Q.B. 428*, below, para.8-104.

565. ❗*Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745* (buyer of car could rescind despite depreciation and intermittent enjoyment). In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* in the Court of Appeal it had been accepted that rescission was no longer possible because the plaintiffs had disposed of the shares they had brought. Nourse L.J. referred to this rule as harsh in relation to fungible assets: *[1994] 1 W.L.R. 1271, 1280*. In the House of Lords, Lord Browne-Wilkinson remarked that, if a sale of shares cannot be rescinded once the specific shares purchased have been sold, "the law will need to be looked at closely hereafter": *[1997] A.C. 254, 262*. See Halson [1997] R.L.R. 89. A claimant is not entitled to recover the price paid to the defendant for shares if the claimant is able to return the shares to the defendant but is merely unwilling to do so: *Gamatronic (UK) Ltd v Hamilton [2016] EWHC 2225 (QB)* at [218]; to pay the value of the shares to the defendant instead of returning them would not put the parties back into their original position or anywhere near it (at [219]).

566. *Atlantic Lines & Navigation Co Inc v Hallam Ltd [1983] 1 Lloyd's Rep. 188, 202*. See further below, para.7-127.

567. *(1858) E.B. & E. 148*. Some dicta in this case were disapproved in *Armstrong v Jackson [1917] 2 K.B. 822, 829*. A Name at Lloyd's cannot rescind membership because the benefits received are not in their nature returnable: *Lloyd's of London v Leigh [1997] CA Transcript 1416*; *Society of Lloyd's v Khan [1998] 3 F.C.R. 93*.

568. *Vigers v Pike (1842) 8 Cl. & F. 562*.

569. *Western Bank of Scotland v Addie (1867) L.R. 1 Sc. & Div. 145, 159–160*.

570. *Sheffield Nickel Co v Unwin (1877) 2 Q.B.D. 214*; see also *Lagunas Nitrate Co v Lagunas Syndicate [1899] 2 Ch. 392*.

571. *Oakes v Turquand (1867) L.R. 2 H.L. 325*.

572. See now below, para.7-142.

573. *Thorpe v Fasey [1949] Ch. 649*; cf. *Kupchak v Dayson Holdings Co Ltd (1965) 53 D.L.R. (2d) 482*.

574. *Armstrong v Jackson [1917] 2 K.B. 822*. The contrary suggestion in McGregor on Damages, 19th edn (2014), para.47–076 is, with respect, doubtful.

575. *(1888) 13 App. Cas. 308*.

576. *Lagunas Nitrate Co v Lagunas Syndicate [1899] 2 Ch. 392, 456, 457*. See also *O'Sullivan v Management Agency Ltd [1985] Q.B. 428*, below, para.8-104.

577. *Compagnie Chemin de Fer Paris-Orleans v Leeston Shipping Co (1919) 36 T.L.R. 68, 69*; cf. *Wiebe v Butchart's Motors [1949] 4 D.L.R. 838* (contract for sale of car rescinded subject to allowance for depreciation during use); *Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745* (buyer of car could rescind despite depreciation and intermittent enjoyment; court could order an account and/or an inquiry to determine the terms on which restitution should be made: at [22], referring to these paragraphs in the 31st edition of Chitty on Contracts. The burden of showing that justice requires compensation for depreciation should be on the misrepresentor: at [30]).

578. *Spence v Crawford [1939] 3 All E.R. 271, 288*. The effect of negligent misrepresentation in this respect is an open question.

579. *[1917] 1 K.B. 813*.

580. *(1995) 184 C.L.R. 102, noted in (1997) 113 L.Q.R. 16*.

581. *[1995] 1 W.L.R. 430*. The case, and *De Molestina v Ponton [2002] EWHC 2413*, are criticised by Poole and Keyser (2005) 121 L.Q.R. 273, who argue that in cases of non-fraudulent misrepresentation, where rescission is allowed under equity's auxiliary jurisdiction, if the misrepresentation is as to the terms, partial rescission can be ordered to bring the contract into line with the misrepresentee's expectation. This seems doubtful on the authorities, which seem to recognise that even rescission for non-fraudulent misrepresentation is the act of the party not of the court. See above, para.7-119.

582. *[2001] 1 All E.R. (Comm) 319*.

583. *[2002] 1 Lloyd's Rep. 271*.

584. ❗See also *Potter v Dyer [2011] EWCA Civ 1417*. Note that in cases in which a voluntary

settlement is being set aside for mistake (see Main Work, Vol.I, and also above, para.6–025 n.25) or misrepresentation, partial rescission may be allowed: *Kennedy v Kennedy [2014] EWHC 4129* at [46]; *Bainbridge v Bainbridge [2016] EWHC 898 (Ch)* at [22].

585. *[2002] 1 Lloyd's Rep. 271* at [6.2].

586. *[2002] 1 Lloyd's Rep. 271* at [6.9].

587. Above, para.7-124 n.552.

588. Above, para.7-123. These two sentences were endorsed by the Court of Appeal in *Society of Lloyds v Lyon unreported August 11, 1997*.

589. See below, para.24-056.

590. *[1983] 1 Lloyd's Rep. 188, 202*.

591. *(1915) S.C.(H.L.) 20*.

592. *Boyd and Forest v Glasgow Ry (1915) S.C.(H.L.) 20*; above, para.7-127.

593. If the misrepresentation had been fraudulent or negligent the problem could be avoided since the victim could claim the cost of performing as part of the damages. In the loosely analogous situation where a contract is terminated for breach after the victim has performed part of the services required, the victim may opt to abandon his remedies on the contract and claim a quantum meruit: *Planché v Colburn (1831) 8 Bing. 14*; see below, para.29-072.

594. cf. below, paras 8-103 et seq.

595. Burrows, *Law of Restitution*, 3rd edn (2011), pp.249–252, arguing that the requirement of restitution is best rationalised as a form of the "change of position" defence; Birks [1997] R.L.R. 72.

596. See above, para.7-127 n.573.

597. *Mahoney v Purnell [1996] 3 All E.R. 61*, discussed below, para.8-105. Neither this case nor *Cheese v Thomas [1994] 1 W.L.R. 129* (see below, para.8-106) is authority for allowing a claimant to recover the price paid to the defendant for shares if he is unwilling to return the shares to the defendant: *Gamatronic (UK) Ltd v Hamilton [2016] EWHC 2225 (QB)* at [218].

598. See *Halpern v Halpern (No.2) [2007] EWCA Civ 291, [2008] Q.B. 195* at [70]–[73]; below, para.8-055.

599. *Newbigging v Adam (1886) 34 Ch. D. 582, 594*, per Bowen L.J. Cotton and Fry L.JJ. interpreted "indemnity" more widely, but their view was not followed in *Whittington v Seale-Hayne (1900) 82 L.T. 49*, below, para.7-130. cf. *Horsler v Zorro [1975] Ch. 302* where it was held that, on termination for *breach of contract* the innocent party was entitled to recover expenses thrown away.

600. *(1900) 82 L.T. 49*.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 7 - Misrepresentation [1]

Section 4. - Rescission for Misrepresentation

(c) - Other Bars to Remedy of Rescission

Restrictions on the right to rescind

7-131

The ability to make restitution is an essential to the rescission of a contract, but it does not follow that because restitution is possible, rescission must result. For (apart altogether from the court's discretionary power to refuse rescission in cases of innocent or negligent misrepresentation) [601] the plaintiff may find his claim barred by one of three restrictions on the right to rescind, namely, affirmation of the contract, lapse of time or the acquisition by a third party of rights in the subject-matter of the contract. Until the passing of the Misrepresentation Act there was also a fourth bar to rescission in cases of innocent misrepresentation, namely, the execution of the contract; this has now been abrogated.

Affirmation of the contract

7-132

If the representee, having discovered the misrepresentation, either expressly declares his intention to proceed with the contract, or does some act inconsistent with an intention to rescind the contract, he is bound by his affirmation. [602] Thus a shareholder's right to claim rescission of a contract to take shares, made on the strength of a misrepresentation in the prospectus, may be lost if, after discovering the facts, he carries on the business of which the shares give him control, [603] or if he attends a shareholders' meeting [604] or tries to sell the shares [605]; for by such acts he is taken to have affirmed the contract. But, where rescission cannot in fact be made without the co-operation of the representor, affirmation is not to be inferred merely because the representee continues to enjoy the fruits of the contract. So where purchasers of shares in a motel company continued to occupy the motel and manage the company after discovering that they had been induced to buy by fraud, this was held insufficient evidence of affirmation [606]; the purchasers in fact took prompt proceedings for rescission, and they could not have rescinded out of court without the co-operation of the vendors. [607] And a representee who became suspicious of the truth of representations which induced her to buy a share in a partnership was held not to have affirmed merely because she continued to act as a partner while she took steps to verify her suspicions. [608] Each case is decided on its own facts, and the courts pay particular attention to the nature of the contract, to any lapse of time which may have occurred, and to the question whether the representor has changed his position in reliance on the absence of a protest by the representee, or whether third parties have been affected by this. [609]

Affirmation requires knowledge

7-133

In general, a party entitled to rescind or avoid a contract will not be held to have affirmed it unless he

knows the facts, and also is aware that he has a right to rescind or avoid. This was the conclusion of the Court of Appeal in *Peyman v Lanjani*, [610] after a full review of the authorities. [611] Such an affirmation, where there is such knowledge, is conclusive evidence of the party's election, whether or not it is acted upon, and whether or not there is any change of position by the other party.

Sale of goods cases

7-134

In contracts for the sale of goods, it has been said that the right to rescind for innocent misrepresentation will be lost when, had the statement been a condition, the right to reject for breach of condition would have been lost. [612] In most circumstances an act which constitutes an acceptance of the goods within s.35 of the Sale of Goods Act, and so bars the right to reject the goods for breach of condition, would doubtless also constitute an affirmation of the contract and would also bar the right to rescind. But there may be some cases in which this is not so, because a person can "accept" goods within s.35 [613] without knowing of his right to reject them, [614] whereas there can be no affirmation without knowledge of the facts. To this extent, sale of goods cases may be an exception to the general rule; but in the Court of Appeal it has recently been doubted whether after the enactment of s.1 of the Misrepresentation Act 1967 it is still the law that the right to rescind is lost just because the goods have been accepted. [615]

Estoppel

7-135

A party may, however, be held estopped from rescinding or avoiding the contract even where he does not know the facts or his rights, [616] but in this event, he must have led the other to believe, by unequivocal statements or actions, that he does intend to affirm the contract; and it is unlikely that a party will give a sufficiently clear indication of his intention not to rely on a misrepresentation unless his statements or conduct indicate apparent awareness that he has some rights. [617] In addition, the other party must show that he has acted on the statement or conduct to his prejudice. [618]

Lapse of time

7-136

Lapse of time after discovery that there has been a misrepresentation may be evidence of affirmation. [619] In *Clough v L. & N.W. Ry* [620] it was said that "when the lapse of time is great it probably would be treated in practice as conclusive evidence" of a decision to proceed with the contract. This is especially true of contracts for the sale or allotment of shares in companies, where the utmost promptness is required. [621] In such a case a delay of even a few weeks after discovery of the misrepresentation is usually fatal, and there cannot, in any event, be rescission of an allotment after the company has gone into liquidation. [622] But there can normally be no affirmation where the representee is ignorant of the truth and therefore of his right to rescind, [623] and the inference of affirmation from lapse of time should therefore be rebuttable by proof of lack of knowledge of the untruth. In *Leaf v International Galleries* [624] the right to rescind a contract for the sale of goods was held barred by five years' delay despite the fact that the representee only discovered the truth shortly before the proceedings but that was a case in which the delay would have amounted to acceptance of the goods and appears to be an exception to the general rule [625]; and in the Court of Appeal it has recently been doubted whether *Leaf v International Galleries* is good law after the enactment of s.1 of the Misrepresentation Act 1967. [626] It seems doubtful whether mere lapse of time will bar rescission in other cases of completely innocent misrepresentation, and this will not be so in cases of fraud, nor where there has been breach of a fiduciary duty. [627]

Effect on representee

7-137

Older cases indicate that in considering whether the representee has lost his right to rescind by lapse of time, it may be important to inquire if the representee has been adversely affected by the delay. [628] Thus in *Morrison v Universal Marine Insurance Co* [629] it was said that rescission of a contract of marine insurance, the policy of which was voidable for non-disclosure of a material fact, would have been refused if there had been any evidence that the failure of the underwriters to avoid the contract after they had become aware of the defect had led the insured party to refrain from insuring elsewhere. It is submitted that if the misrepresentee has delayed in exercising his right for so long that he reasonably appears to be indicating that he will not do so, and the other party acts on that assumption, the misrepresentee will be barred by estoppel [630] or acquiescence. [631] But the fact that the representor has changed his position is not by itself a bar to rescission, so, e.g. a contract of guarantee can be rescinded by the guarantor notwithstanding that money has been lent by the representor in reliance on the guarantee. [632] Prompt action would doubtless be required once the representee knows the truth in a case of this nature.

Third-party rights

7-138

The intervention of third-party rights may prevent the misrepresentee from rescinding the contract and reclaiming property transferred under it. [633] This is one of the risks run by the injured party if he delays in taking action, for if a third party acquires an interest in the subject matter of the contract before the contract has been avoided a claim for rescission will not lie, [634] provided that the third party acted in good faith and gave consideration. [635] Thus, although there may be no duty to act within a prescribed time, it is in the representee's interest to act promptly, for the longer the delay, the greater the possibility of a third party acquiring rights in the subject-matter of the contract. This rule does not apply to void contracts, for in such cases the transferee has no title to pass to the third party [636]; it does apply to voidable contracts, for here the transferee has a good title until the contract is avoided. [637] Thus the rule may operate in all cases of misrepresentation (whether innocent, negligent or fraudulent) unless the effect of the misrepresentation is to make the contract void for mistake. [638] The effect on third parties, in this case insured persons, may also prevent a name at Lloyd's from rescinding her agreement to become a name. [639]

Tracing proceeds of disposition.

7-138A

Even though the fact that, before rescission, an innocent third party has acquired rights over the property transferred under the contract that was induced by misrepresentation will prevent the misrepresentee from recovering the property as such, the misrepresentee obtains an equity on which it may rely to trace into other property that represents the proceeds of disposition of the original property, [640] thus giving it a proprietary claim rather than merely a personal claim against the misrepresentor. [641]

A "mere equity"

7-139

Until the contract is rescinded, the accepted view is that the misrepresentee has no proprietary right in the property transferred but only a "mere equity". [642]

Assignments "subject to equities"

7-140

The principle that the intervention of third party rights will prevent rescission only applies to a transfer of goods and not to an assignment of contractual rights. If A is induced to sell goods to B by the fraud of B, and B resells the goods to C who takes in good faith and for value, C acquires a good title to the goods. But if A is induced to buy goods from B by the fraud of B, and B assigns the right to receive the purchase price to C, the rule that assignments are "subject to equities" [643] means that C gets no better right than B.

Rescission by sub-buyer

7-141

If a contract is induced by an innocent misrepresentation and that same innocent misrepresentation is passed on to a sub-buyer and in turn induces a subcontract, the sub-buyer may rescind the subcontract; if he does so, there is nothing to prevent the first representee from rescinding the original contract. [644]

Executed contracts

7-142

Until the passing of the Misrepresentation Act 1967 there was a further bar to rescission in certain cases of innocent misrepresentation, namely, the execution of the contract. This rule, often known as the rule in *Seddon v North Eastern Salt Co Ltd*, [645] did not apply to cases of fraud, nor to cases of breach of fiduciary relationships, [646] and its application to particular types of contract was much disputed. The rule was, however, completely abrogated by s.1(b) of the Misrepresentation Act which provides that the performance of the contract shall be no bar to rescission for any misrepresentation where it would not have barred rescission for fraud. Although the Law Reform Committee (on whose Report the Act was based) had recommended that this rule should be retained for contracts for the sale of an interest in land, except for leases not exceeding three years, [647] the Act contains no special provision for such contracts. And despite the fact that the word "performed" is perhaps not wholly appropriate to contracts for the sale of an interest in land, it is thought that there can be no doubt that rescission of such contracts is now possible after execution of a conveyance or other grant in all cases of misrepresentation. Of course, the execution of the contract may still be a bar to rescission on other grounds, for example, because it is evidence of affirmation, [648] or because restitutio in integrum is no longer possible. [649] Moreover, it is to be anticipated that a court might be more ready to exercise its discretion under s.2(2) of the Act of 1967 to award damages in lieu of rescission in cases where the contract has been executed. [650] But execution of the contract will no longer in itself be an absolute bar to rescission.

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

601. Above, paras 7-104 et seq.

602. *Ormes v Beadel (1860) 2 De G.F. & J. 333*; *Clough v L. & N.W. Ry (1871) L.R. 7 Ex. 26, 34*; *Sharpley v Louth and East Coast Ry (1876) 2 Ch. D. 663*. Passive conduct, such as not claiming to avoid an insurance policy or not offering to return the premium, may amount to affirmation: *Argo Systems FZE v Liberty Insurance Pte Ltd [2011] EWHC 301 (Comm), [2011] 2 Lloyd's Rep. 61* at [40]; but the Court of Appeal held that the representation must be unequivocal and on the facts it was not: *[2011] EWCA Civ 1572, [2012] Lloyd's Rep. I.R. 67* at

[41], [50].

603. *Seddon v North Eastern Salt Co [1905] 1 Ch. 326*. As to the wider grounds for this decision, see below, para.7-142.

604. *Sharpley v Louth and East Coast Ry (1876) 2 Ch. D. 663*.

605. *Re Hop and Malt Exchange and Warehouse Co Ex p. Briggs (1866) L.R. 1 Eq. 483*.

606. *Kupchak v Dayson Holdings Co Ltd (1965) 53 D.L.R. (2d) 482*.

607. See also *Edwards v Ashik [2014] EWHC 2454 (Ch)* at [60]–[61] (no affirmation when clear claimant was intending to claim remedies for fraud and was merely waiting to see what the defendant had to say about the allegations).

608. *Senenayake v Cheng [1966] A.C. 63*.

609. See *Clough v L. & N.W. Ry (1871) L.R. 7 Ex. 26, 34, 35*; *Bank of Credit and Commerce International SA (In Liquidation) v Ali [1999] 2 All E.R. 1005, 1023*.

610. *[1985] Ch. 457*.

611. See also *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1984] 1 Lloyd's Rep. 476, 498, 518, 529*; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga) [1990] 1 Lloyd's Rep. 391, 397–399*; *Habib Bank Ltd v Tufail [2006] EWCA Civ 374, [2006] All E.R. (D) 92 (Apr) (Comm)* at [20]. For a case where any right to rescind would have been lost, see *Donegal International Ltd v Zambia [2007] EWHC 197 (Apr), [2007] 1 Lloyd's Rep. 397* at [467].

612. *Leaf v International Galleries [1950] 2 K.B. 86* (lapse of time). See also *Long v Lloyd [1958] 1 W.L.R. 753*. Sale and delivery to a sub-purchaser also amounts to acceptance (though only after he has had a reasonable opportunity to examine the goods: Sale of Goods Act 1979 (as amended) s.35), but if the sub-purchaser rejects the goods the right to rescind for misrepresentation can probably still be exercised, cf. below, para.7-141. It should make no difference to the right to rescind for misrepresentation that the representation has become a term of the contract: Misrepresentation Act 1967 s.1(a). On loss of the right to reject, see Vol.II, paras 44-275 et seq.

613. See below, Vol.II, para.44-278.

614. The buyer in *Leaf v International Galleries [1950] 2 K.B. 86* therefore had lost the right to rescind although he was unaware of the misrepresentation.

615. *Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745* at [34]; see below, para.7-136.

616. See *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga) [1990] 1 Lloyd's Rep. 391, 399*. In *Habib Bank Ltd v Tufail [2006] EWCA Civ 374, [2006] All E.R. (D) 92 (Apr) (Comm)* the Court of Appeal distinguished between promissory estoppel and acquiescence. The right to avoid a contract for misrepresentation may be lost by acquiescence if the misrepresentee indicates that he will not avoid it and the other party acts on this to its detriment, but only if the representation was made after the misrepresentee knew of the facts giving him the right to avoid (at [22]–[23]). The difference (if any) between estoppel (in the sense used in this paragraph) and acquiescence seems to be that estoppel envisages a statement or action indicating the party's intention, whereas acquiescence implies passive acceptance of the status quo. Thus mere delay might amount to acquiescence: see below, para.8-101.

617. *HIH Casualty and General Insurance Ltd v Axa Corporate Solutions [2002] EWCA Civ 1253, [2003] Lloyd's Rep. I.R. 1* at [21]; *IHC (A Firm) v Amtrust Europe Ltd [2015] EWHC 257 (QB)* at [12].

618. *[2006] EWCA Civ 374* at [20].

619. *Lindsay Petroleum Co v Hurd (1874) L.R. 5 P.C. 221*; *Erlanger v New Sombrero Phosphate Co (1878) 3 App. Cas. 1218*; *Clough v L. & N.W. Ry (1871) L.R. 7 Ex. 26, 35*; *Oelkers v Ellis [1914] 2 K.B. 139*; *Armstrong v Jackson [1917] 2 K.B. 822*; *Leaf v International Galleries [1950] 2 K.B. 86*; *Argo Systems FZE v Liberty Insurance Pte Ltd [2011] EWHC 301 (Comm), [2011] 2 Lloyd's Rep. 61* at [40]. The Court of Appeal held that the representation must be unequivocal and on the facts it was not: *[2011] EWCA Civ 1572, [2012] Lloyd's Rep. I.R. 67* at [41], [50].

620. *(1871) L.R. 7 Ex. 26, 34, 35*.

621. *Taite's Case (1867) L.R. 3 Eq. 795*; *Sharpley v Louth and East Coast Ry (1876) 2 Ch. D. 663*; *Re Scottish Petroleum Co (1883) 23 Ch. D. 413*; *Aaron's Reefs Ltd v Twiss [1896] A.C. 273, 294*; *Taylor v Oil and Ozokerite Co (1913) 29 T.L.R. 515*; *First National Reinsurance Co Ltd v Greenfield [1921] 2 K.B. 260*.

622. *Oakes v Turquand (1867) L.R. 2 H.L. 325*.

623. *Aaron's Reefs Ltd v Twiss [1896] A.C. 273, 287*; *Armstrong v Jackson [1917] 2 K.B. 822*; and see above, para.7-133.

624. *[1950] 2 K.B. 86*. Denning L.J. and Lord Evershed M.R. said that the right to rescind for innocent misrepresentation must be barred if a right to reject for breach of condition would be barred by acceptance. It is not clear that a strictly analogous rule applies to rescission for innocent misrepresentation. It seemed doubtful when the courts held that the right to reject for breach of condition might be lost by acceptance after a matter of weeks: *Bernstein v Pamson Motors (Golders Green) Ltd [1987] 2 All E.R. 220*; but subsequent decisions such as that of the Court of Appeal in *Clegg v Andersson [2003] EWCA Civ 320, [2003] 2 Lloyd's Rep. 32*, seem much more generous (below, para.44-284) and an analogous approach might still be applied to loss of the right to rescind for misrepresentation.

625. See above, para.7-133 n.598.

626. *Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745* at [34] (Longmore L.J, with whom Patten L.J. agreed. (The third member of the court, Roth J., doubted whether in *Leaf* a majority had in fact adopted a strict rule that if the right to reject goods would have been lost, so would the right to rescind, and held that in the circumstances there had been no undue delay on the part of the buyer: at [47]–[48].) On s.1 of the Misrepresentation Act 1967 see above, para.7-113.

627. *Armstrong v Jackson [1917] 2 K.B. 822*.

628. See *Clough v L. & N.W. Ry (1871) L.R. 7 Ex. 26, 34, 35*; *Morrison v Universal Marine Insurance Co (1873) L.R. 8 Ex. 197, 205*; *Erlanger v New Sombrero Phosphate Co (1878) 3 App. Cas. 1218, 1278*. See also *Re Cape Breton Co (1885) 29 Ch. D. 795* and *Ladywell Mining Co v Brookes (1887) 35 Ch. D. 400*.

629. *(1873) L.R. 8 Ex. 197*.

630. See above, para.7-135.

631. See above, para.7-135 n.600.

632. *Mackenzie v Royal Bank of Canada [1934] A.C. 468*.

633. But see next paragraph. The effect of insolvency of the misrepresentor is unclear. Older cases such as *Tilley v Bowman Ltd [1910] 1 K.B. 745* assume that the misrepresentee may still rescind and recover any property from the misrepresentor's trustee in bankruptcy but more recent cases involving companies have suggested that the rights of unsecured creditors have intervened to prevent recovery of the property: *Re Crown Holdings (London) Ltd [2015] EWHC 1876 (Ch)* at [37]–[45]: *Shalson v Russo [2003] EWHC 1637 (Ch), [2005] Ch. 281* at [126]. See

Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), para.40–027.

634. *White v Garden (1851) 10 C.B. 919*; *Babcock v Lawson (1880) 5 Q.B.D. 284*; *Re L.G. Clarke [1967] Ch. 1121*.

635. *Scholefield v Templer (1859) 4 De G. & J. 429, 433–434*.

636. *Hardman v Booth (1863) 1 H. & C. 803*; *Cundy v Lindsay (1878) 3 App. Cas. 459*; *Ingram v Little [1961] 1 Q.B. 31*; *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919*.

637. Sale of Goods Act 1979 s.23.

638. As, e.g. in *Cundy v Lindsay (1877) L.R. 3 App. Cas. 459* and *Ingram v Little (1892) L.R. 11 Q.B.D. 251*. The rule that intervention of third party rights prevents rescission is normally invoked where a third party has acquired rights over the property transferred; but it can also apply where liability to third parties has been incurred before rescission is claimed and rescission would cause detriment to them: *Society of Lloyd's v Lyon Unreported August 11, 1997*.

639. *Society of Lloyd's v Khan [1998] 3 F.C.R. 93*.

640. See *Shalson v Russo [2003] EWHC 1637 (Ch), [2005] Ch. 281* at [122]–[127]; *National Crime Agency v Robb [2015] Ch. 520* at [40]–[46] (cases of fraud); *Pearce v Beverley [2013] EWHC 2627 (Ch)* (undue influence); and *Bainbridge v Bainbridge [2016] EWHC 898 (Ch)* at [24]–[32] (voluntary settlement sought to be set aside for mistake (see Main Work, Vol.I, and also above, para.6-025 n.25)).

641. *Shalson v Russo [2003] EWHC 1637 (Ch)* at [122].

642. *Clough v L. & N.W. Ry (1871) L.R. 7 Ex. 26, 32, 34*; *Bristol and West Building Society v Mothew [1998] Ch. 1, 22*; *Barclays Bank Plc v Boulter [1999] 1 W.L.R. 1919, HL*, at 1925; *Twinsectra Ltd v Yardley [1999] Lloyd's Rep. Bank. 438 CA* at [461]–[462]; *Shalson v Russo [2003] EWHC 1637, The Times, September 3, 2003 Ch D* (defendant did not hold property on constructive trust before rescission). For a full discussion see Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.4-10, and Worthington [2002] R.L.R. 28.

643. Below, para.19-071.

644. *Abram S.S. Co v Westville Shipping Co [1923] A.C. 773*.

645. *[1905] 1 Ch. 326*. See also *Senenayake v Cheng [1966] A.C. 63*, decided shortly before the 1967 Act was passed.

646. *Armstrong v Jackson [1917] 2 K.B. 822*.

647. Tenth Report, Cmnd.1782 (1962), paras 6 and 7.

648. Above, para.7-132.

649. Above, paras 7-123—7-130.

650. Above, para.7-110.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 7 - Misrepresentation [1]

Section 5. - Exclusion of Liability for Misrepresentation

Position at common law

7-143

At common law a person could not contract out of liability for fraud inducing the making of a contract with him, at least where the fraud was his own. [651] It is, however, possible that he could do so where the fraud was that of his employees [652] or agents [653] and there seems no doubt that it was possible, by a provision of the contract itself, to exclude or modify the normal consequences of innocent or negligent misrepresentation. [654] Such clauses were, however, subject to the normal principles of construction common to all exemption clauses. [655] Thus a clause containing a statement by one party that "we are acting for our own account and have made our own independent decisions … "would not exclude liability for misrepresentations in investment advice or recommendations [656]; and a clause stating that "this Agreement shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this Agreement" was held not to exclude or supersede misrepresentations as to matters that were not the subject of the terms of the Agreement. [657]

"No reliance" clauses

7-144

A clause that acknowledges that a party has not relied on a non-contractual representation may prevent that party showing that he was induced to enter the contract by a representation, as it may raise an estoppel. An "evidential estoppel" will have that effect only if the party who made the representation entered the contract in the belief that the other had not relied on the representation:

> "… it may be impossible for a party who has made representations which he intended should be relied upon to satisfy the court that he entered into the contract in the belief that a statement by the other party that he had not relied upon those representations was true." [658]

However it was subsequently pointed out that the clause may also be effective, even if it is known that the party did rely on a representation, if the parties have in fact agreed to conduct their affairs on the basis that there has been no reliance, so that an estoppel arises by convention [659] or "by contract". This analysis has now been accepted by the Court of Appeal in *Springwell Navigation Corp v JP Morgan Chase Bank*. [660] The estoppel should be regarded as one that arises "by contract" rather than by convention, the difference being that with an estoppel by contract, the party which wishes to rely on that estoppel has no need to demonstrate that it would be unconscionable for the other party to resile from the conventional state of affairs that the parties have assumed. [661]

Acknowledgement that statement of opinion only

7-145

The parties' agreement may create a contractual estoppel to the effect that statements will be treated as no more than expressions of opinion. [662]

Misrepresentation Act s.3

7-146

Section 3 of the Act of 1967 limits the freedom of the parties [663] to contract out [664] of the effect of the Act in certain respects. The original s.3 was replaced by s.8 of the Unfair Contract Terms Act 1977, and s.3 is now as follows:

> "If a contract contains a term which would exclude or restrict—
>
> (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
>
> (b) any remedy available to another party to the contract by reason of such a misrepresentation,
>
> that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does."

The main change of substance between the current and the original s.3 is that under the original section it was *reliance* on the exempting provision which had to be shown to be reasonable; under the current s.3, it is the exempting term itself which has to be shown to be reasonable. The requirement of reasonableness is now stated in s.11(1) of the Unfair Contract Terms Act 1977 as a requirement that the term in question:

> "… shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."

Thus a very wide exempting term may be held unreasonable under the current s.3 while reliance on it might have been reasonable under the old s.3 [665]; equally, a term may now be held reasonable where reliance on it in particular circumstances might formerly have been held unreasonable. A further change is that the current s.3 makes it clear that the onus is on a person claiming to rely upon an exempting term to show that it is reasonable under the relevant section of the Unfair Contract Terms Act. Reasonableness under the Act is discussed below. [666]

Consumer cases

7-147

With the coming into force of the Consumer Rights Act 2015 (for contracts made on or after October 1, 2015), s.3 of the Misrepresentation Act 1967 is amended so as to no longer apply to "a term in a consumer contract within the meaning of Pt 2 of the Consumer Rights Act 2015". [667] These terms are controlled under the 2015 Act by the general test of unfairness provided by s.62. [668] This has the effect of making the application of the legislation (the Misrepresentation Act 1967 s.3 on the one hand, the Consumer Rights Act on the other) turn on the distinction between a person who contracts as a "consumer" with a "trader" within the meanings of the Act and otherwise. As will be seen, the definition of "consumer" provided by the Act is fact-sensitive and, therefore, in some cases the relevant legislation applicable will be difficult to determine. [669] It is not thought that the distinction will make much, if any, difference to the outcome of cases in which it has to be determined whether a term that purports to exclude or restrict liability for misrepresentation is "fair" or "reasonable". This is because in relation to any particular type of term, application of the test of fairness employed in s.62 of the 2015 Act is unlikely to differ from the test of "reasonableness" under the Unfair Contract Terms Act 1977. [670] However, it may be easier to show that a term in a consumer contract falls within the scope of the control, as it will not be necessary to show that the term is one that "would exclude or restrict liability" (as opposed to preventing any liability for misrepresentation arising in the first place, e.g. by negating reliance), as is necessary to bring the term within s.3 of the 1967 Act. [671]

International supply contracts and s.3

7-148

Section 3 does not apply if the contract is an "international supply contract" within the meaning of the Unfair Contract Terms Act 1977 s.26. [672] This is because s.3 subjects the relevant clauses to the requirement of reasonableness under s.11 of the 1977 Act, and s.26 of the 1977 Act provides that the requirement of reasonableness does not apply to exclusions or restrictions of liability arising under contracts within s.26. [673]

Scope of s.3

7-149

The terms "any liability" and "any remedy" are presumably wide enough to cover provisions which would exclude or restrict a claim to damages, or the right to rescind, or the right to set up the misrepresentation by way of defence to an action. [674] The section applies not merely to provisions totally excluding the normal consequences of misrepresentation, but also to provisions which restrict any liability or remedy arising from a misrepresentation. [675] This means, for instance, that a provision barring rescission but allowing claims for damages would fall within the section, as also would a provision limiting the amount of damages or the time within which a claim may be made. What is more problematic is whether the section applies to a clause that is worded so as to exclude any liability for misrepresentation [676] from arising at all, by stating that one of the essential elements is missing. [677] Thus it has been held that the section does not prevent a principal from limiting the authority of his agent even though the effect is to exclude or restrict a liability to which the principal would otherwise be subject, [678] and it may not apply to a "no reliance" clause. [679]

Section 3 and no reliance clauses

7-150

Whether s.3 applies to clauses under which one party acknowledges that it has not relied on any statement made to it [680] have been the subject of apparently conflicting views. [681] In *Springwell Navigation Corp v JP Morgan Chase Bank* [682] the Court of Appeal held that statements by one party that it had made its decision to contract independently, without relying on the other party, and that it was fully familiar with the risks, created a contractual estoppel to the effect that any statement by other would amount to merely one of opinion [683] and were not within s.3. [684] In contrast, a sentence in

the same paragraph of the document which stated that the other party would not be liable for any loss suffered by the first party unless the loss was caused by gross negligence or wilful misconduct was within s.3, though in the circumstances it was reasonable and therefore effective. [685] Aikens L.J., delivering the only full judgment, said that a statement that " … no representation or warranty, express or implied, is or will be made" by the relevant party "is more difficult to classify"; but he was inclined to treat it as falling within s.3 following because, as Christopher Clarke J. in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [686] put it, it "may be nothing more than an attempt retrospectively to alter the character and effect of what has gone before". [687] Christopher Clarke J. held that the same was true of a non-reliance clause in the agreement. [688] ❗ It is submitted that the question is whether a misrepresentation was made; the evidence as a whole, including the clause, might show that the representee did not rely on the misrepresentation. [689] ❗ Or, even if it had relied on a statement made by the other party, it was not "entitled to do so" as the statement was not put forward as one of fact. [690] ❗ But if the contract was induced by misrepresentation, s.3 applies, and its effect cannot be excluded. [691] As it was put by Toulson J.:

> "If a seller of a car said to a buyer 'I have serviced the car since it was new, it has had only one owner and the clock reading is accurate', those statements would be representations, and they would still have that character even if the seller added the words 'but those statements are not representations on which you can rely' … If, however, the seller of the car said 'The clock reading is 20,000 miles, but I have no knowledge whether the reading is true or false', the position would be different, because the qualifying words could not fairly be regarded as an attempt to exclude liability for a false representation arising from the first half of the sentence." [692]

As Christopher Clarke J. said in the *Raiffeisen* case:

> "… the essential question is whether the clause in question goes to whether the alleged representation was made (or, I would add, was intended to be understood and acted on as a representation), or whether it excludes or restricts liability in respect of representations made, intended to be acted on and in fact acted on; and that question is one of substance not form." [693]

Unfair Contract Terms Act 1977 s.3(2)(b)(i)

7-151

❗ It has been said that a clause stating that the document constitutes the "entire agreement [which] shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us" may also fall within s.3(2)(b)(ii) of the Unfair Contract Terms Act 1977. This section prevents a party relying on one of its written standard terms of business to entitle it to render a contractual performance which is substantially different from that which was reasonably expected of him, unless the clause satisfies the requirement of reasonableness. [694] In *AXA Sun Life Services Plc v Campbell Martin Ltd* Stanley Burnton L.J. said that a pre-contractual representation might affect what was reasonably expected; and therefore the clause "may be subject to the reasonableness test in UCTA in relation to both collateral warranties and representations". [695]

Reasonableness

7-152

Reasonableness under the Act is discussed below (paras 15-101—15-111) and only selected points will be considered here. [696] It seems that the court must consider the reasonableness of the provision as a whole. [697] A clause may be invalid because, taken as a whole, it is too wide, even though it would not necessarily be unreasonable to exclude or restrict liability on the facts which have occurred. Thus a clause which purports to exclude liability for misrepresentation of any kind will be unreasonable, since it is not reasonable to exclude liability for fraud, and the clause as a whole will be invalid. [698] The court should not, however, hold a clause unreasonable because it might extend to some situation which is unlikely to occur. [699] But if the clause is too wide, the court cannot rewrite the clause in a reasonable fashion and, as the test under s.11(1) of the Unfair Contract Terms Act 1977 is whether the term was "a fair and reasonable one to be included", the court cannot allow the misrepresentor to rely on it so far as seems reasonable. [700] Thus it cannot uphold a provision in so far as it would bar rescission, but reject it in so far as it would bar a claim for damages. However, it is possible that a clause which is in distinct parts might be severed and the reasonable parts upheld. It has been said in the Court of Appeal that there are at least two good reasons why the courts should not refuse to give effect to an exclusion of remedies for misrepresentation in a commercial contract between experienced parties of equal bargaining power—a fortiori, where those parties have the benefit of professional advice. First, it is reasonable to assume that the parties desire commercial certainty; and secondly, it is reasonable to assume that the price to be paid reflects the commercial risk which each party—or, more usually, the purchaser—is willing to accept. [701]

Clauses covering breach

7-153

The section does not seem to apply to a provision which excludes or restricts liability arising solely from breach of a contractual term, whether the term is a promise or a representation of fact. Read literally, the section might appear to apply to a provision which excludes or restricts liabilities or remedies arising both from misrepresentations as such and from misrepresentations as contractual terms, [702] but it seems more likely that it will be interpreted as affecting only any remedies arising from the misrepresentation. [703] What is less clear is the position if a single term of the contract purports to exclude or limit liability for both misrepresentation and breach, and the clause is held to not to be reasonable. Again read literally, s.3 appears to invalidate the term as a whole. [704] Again it is suggested that the section should be interpreted as invalidating the term only so far as remedies for misrepresentation are concerned.

Other statutory provisions affecting disclaimers

7-154

A clause aimed at preventing liability arising in tort under *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [705] on the part of a business will be valid under the Unfair Contract Terms Act 1977 s.2(2) only if it satisfies the requirement of reasonableness under that Act. [706] The Unfair Terms in Consumer Contracts Regulations 1999 [707] also affect clauses in consumer contracts which unfairly exclude or restrict the consumer's remedies for misrepresentation. When the Consumer Rights Act 2015 applies, such clauses will fall within the fairness test imposed by s.62 of the Act. For the most part it seems likely that the test of unfairness under the Regulations or the 2015 Act will produce substantially similar results to the reasonableness test of s.11 of the Unfair Contract Terms Act 1977. Any clause excluding or limiting liability for misrepresentation, however it is worded, will be within the Regulations provided that it is "in a contract concluded between a seller or supplier and a consumer" and "has not been individually negotiated". [708] Thus clauses limiting the authority of agents and "no reliance" clauses which are not caught by s.3 of the Misrepresentation Act 1967, [709] will be covered.

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright,

Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

651. *S. Pearson & Son Ltd v Dublin Corp [1907] A.C. 351*; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61* at [16], [76], [121]. This will include, in a case where there is a duty of disclosure (see below, paras 7-155 et seq.), fraudulent non-disclosure: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6* at [21], [72].

652. See *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd [1965] 2 Q.B. 495*.

653. This question was left open by the House of Lords in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61*, see at [16], [76]–[82]. In that case the clause was not in sufficiently clear and unmistakable terms to exclude remedies for alleged fraud on the part of the agent.

654. *Boyd and Forrest v Glasgow Ry (1915) S.C.(H.L.) 20, 36*. A properly worded clause which excludes a right of avoidance will be effective (assuming it is not affected by Misrepresentation Act 1967 s.3; see para.7-146) notwithstanding a purported rescission of the contract as a whole by the misrepresentee: *Toomey v Eagle Star Insurance Co Ltd (No.2) [1995] 2 Lloyd's Rep. 88*.

655. Below, paras 15-007—15-022. Thus a clause stating that a contract of reinsurance was "neither cancellable nor voidable by either party" was held to apply only to cases of innocent misrepresentation or non-disclosure, and not to alleged negligence, nor to exclude the right to damages under Misrepresentation Act 1967 s.2(1): *Toomey v Eagle Star Insurance Co Ltd (No.2) [1995] 2 Lloyd's Rep. 88*. A disclaimer "without responsibility" does not prevent rescission on the ground of misrepresentation: *Crédit Lyonnais Bank Nederland v Export Credit Guarantee Department [1996] 1 Lloyd's Rep. 1*. However, a clause applying to "rights, obligations and liabilities arising … in connection with this contract" may apply to a claim for misrepresentation: *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd (No.2) (1997) 87 B.L.R. 52*.

656. *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701* at [513]. However, the next sentence of the same clause, stating that "We are not relying on any communication (written or oral) from you as investment advice or as a recommendation" was effective under the principle to be discussed in the next paragraph.

657. *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1*. The decision is criticised by A. Trukhtanov (2011) 127 L.Q.R. 345. In *Mears Ltd v Shoreline Housing Partnership Ltd [2013] EWCA Civ 639* the entire agreement clause did not exclude liability for misrepresentation: see at [16]. However, in *Bikam OOD v Adria Cable Sarl [2012] EWHC 621 (Comm)*, where in one clause of the contract the seller acknowledged the buyer's reliance on specified warranties by the seller, it was held that the effect of an "entire agreement" clause was that, subject to the exception of fraud, the parties' rights were confined to those arising under the agreement, and rights in respect of warranties and representations not expressly set out in the agreement were waived (at [45]).

658. Chadwick L.J. in *Watford Electronics Ltd v Sanderson CFL Ltd [2001] EWCA Civ 317, [2001] Build. L.R. 143* at [40], referring to the requirements for evidential estoppel identified by the Court of Appeal in *Lowe v Lombank Ltd [1960] 1 W.L.R. 196* and citing his own unreported decision in *E A Grimstead & Son Ltd v McGarrigan unreported October 27, 1999*. This dictum was applied in *Quest 4 Finance Ltd v Maxfield [2007] EWHC 2313 (QB), [2007] 2 C.L.C. 706*. Whether a non-reliance clause is caught by Misrepresentation Act s.3 is discussed below at para.7-150.

659. *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511* at [54]–[60], referring to *Colchester BC v Smith [1991] Ch. 448, affirmed on appeal [1992] Ch. 421*; Moore-Bick L.J's analysis was followed in several first instance decisions, e.g. *Donegal International Ltd v Zambia [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397*, see at [465]; *JP Morgan Bank v Springwell Navigation Corp [2008] EWHC*

1186 (Comm), see at [536]–[567] (holding that the principle stated in the *Peekay* case formed part of the ratio, see [556]–[559]); for the Court of Appeal decision in this case, see n.641 below; *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2008] EWHC 1686 (Comm), [2009] 1 All E.R. (Comm) 16*, at [33]–[36] (affirmed *[2009] EWCA Civ 290*, see para.7-148; the trial judge's decision on this point was not appealed, see at [8]); *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc [2010] EWHC 211 (Comm)*, see at [87]–[89]; *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)* at [168]–[171]; and *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123*. See generally A. Trukhtanov (2009) 125 L.Q.R. 648. On estoppel by convention and by contract see above, paras 4-108 et seq.

660. *[2010] EWCA Civ 1221, [2010] 2 C.L.C. 705* at [169]. See also *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701* at [514]. In the *Springwell* case the Court of Appeal held that dicta by Diplock J. in *Lowe v Lombank Ltd [1960] 1 W.L.R. 196* at 204, to the effect that a statement as to past facts known to be untrue cannot be converted into a contractual obligation and is not a contractual promise, "are not binding authority for the far-reaching proposition that there can never be an agreement in a contract that the parties are conducting their dealings on the basis that a past event had not occurred or that a particular fact was the case, even if it was not the case and both the parties knew it was not" (at [155]; the Court did not however agree with the trial judge that Diplock J. was considering whether the agreement was a sham, nor with the analysis of *Lowe v Lombank* in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm)* at [253]–[254]).

661. *[2010] EWCA Civ 1221* at [177].

662. *Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705* at [118]–[173]. cf. above, para.7-010. See also *Brown v InnovatorOne Plc [2012] EWHC 1321 (Comm)* at [903].

663. ! With the coming into force of the Consumer Rights Act 2015 (for contracts made on or after October 1, 2015), s.3 of the Misrepresentation Act 1967 is amended so as to no longer apply to "a term in a consumer contract within the meaning of Pt 2 of the Consumer Rights Act 2015": see next paragraph.

664. Although s.3 applies only to terms and not to notices, a mere declaration of nonliability by the representor cannot have the effect of preventing a representor from incurring liability for misrepresentation: see *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264* in particular at [65]; but the notice may go to the question of whether the alleged misrepresentation was made at all (at [67]); in other words, whether he has made has made a misrepresentation on which the other was entitled to rely. See also *Taberna Europe CDO II Plc v Selskabet [2016] EWCA Civ 1262* at [20].

665. In the *Howard Marine case [1978] Q.B. 554* (above, para.7-076) Lord Denning M.R. was prepared to uphold reliance on an exempting clause under the old s.3 as reasonable; the majority of the court disagreed without giving reasons.

666. See below, para.7-152.

667. ! Consumer Rights Act 2015 s.75; Sch.4 para.1. On the effect of the Act on the law on unfair terms, see Vol.II, paras 38-196 and 38-334 et seq. It should be noted that (with exceptions that are not relevant here) s.62 applies to any term of a consumer contract, not just terms that were not individually negotiated, as was the case under the Unfair Terms in Consumer Contracts Regulations 1999 (on which see Vol.II, paras 38-201 et seq.).

668. ! On which see Vol.II, paras 38-359 et seq.

669. See below, paras 38-028 et seq.

670. See below, paras 38-271 and 38-359.

671. See below, paras 7-149 and 7-150.

672. *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2009] EWCA Civ 290, [2010] Q.B. 86*.

673. For a discussion of s.26, see above, para.15-122. In contrast, s.27 of the Unfair Contract Terms Act 1977, which prevents the principal provisions of the Act applying to contracts that are subject to the law of any part of the UK only by choice of the parties, does not affect s.3 of the Misrepresentation Act 1967.

674. A right of set-off is a remedy for this purpose: *Skipskredittforeningen v Emperor Navigation [1998] 1 Lloyd's Rep. 66*, not following *Society of Lloyd's v Wilkinson (No.2) [1997] 6 Re L.R. 214* on this point. See also *WRM Group Ltd v Wood [1998] C.L.C. 189*. But a term that purchasers of a lease would be permitted to enter into possession before completion "at their own risk" was held not to be within the section (though unreasonable if it was): *F. & H. Entertainments Ltd v Leisure Enterprises Ltd (1976) 120 S.J. 331*.

675. It may not apply to clauses excluding liability for non-disclosure: *National Westminster Bank Plc v Utrecht-America Finance Co [2001] EWCA Civ 658, [2001] 3 All E.R. 733* at [62] (point left open). In *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2008] EWHC 1686 (Comm), [2009] 1 All E.R. (Comm) 16* s.3 was applied to a clause under which party was said to "give up any rights … regarding any … misrepresentation" (affirmed *[2009] EWCA Civ 290*; the trial judge's decision on this point was not appealed, see at [8]). See A. Trukhtanov (2009) 125 L.Q.R. 648, 666–670.

676. Misrepresentation Act s.3 does not apply to clauses stating that the written document constitutes the entire contract and that particulars given do not constitute an offer or contract, but that is because such a clause does not purport to exclude liability for misrepresentation, but only to define what are the terms of the contract: *McGrath v Shah (1989) 57 P. & C.R. 452*.

677. It has been pointed out that the problem is caused by the fact that s.3 has no equivalent to Unfair Contract Terms Act 1977 s.13, which defines *"excluding or restricting liability"* to include "excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty": Peel (2001) 117 L.Q.R. 545, 548.

678. *Overbrooke Estates Ltd v Glencombe Properties Ltd [1974] 1 W.L.R. 1335*, approved by the Court of Appeal in *Museprime Properties Ltd v Adhill Properties Ltd [1990] 2 E.G.L.R. 196, 200*.

679. See next paragraph.

680. See above, para.7-144.

681. Compare *Cremdean v Nash (1977) 241 E.G. 837 CA* and *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)* on the one hand to, on the other, *William Sindall Plc v Cambridgeshire CC [1994] 1 W.L.R. 1016* at 1034 and *Watford Electronics Ltd v Sanderson CFL Ltd [2001] EWCA Civ 317, [2001] Build. L.R. 142* at [40].

682. *[2010] EWCA Civ 1221, [2010] 2 C.L.C. 705*. See McMeel [2011] L.M.C.L.Q. 185.

683. *[2010] EWCA Civ 1221* at [173]; see above, para.7-145.

684. *[2010] EWCA Civ 1221* at [181]. See also *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701* at [514]. *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd [2011] EWHC 479 (Comm), [2011] 1 C.L.C. 627* at [186]; *Standard Chartered Bank v Ceylon Petroleum Corp [2011] EWHC 1785 (Comm)* at [568].

685. *[2010] EWCA Civ 1221* at [181]. On reasonableness see below, para.7-152.

686. *[2010] EWHC 1392 (Comm)*.

687. *[2010] EWCA Civ 1221* at [181], referring to *[2010] EWHC 1392 (Comm)* at [315]; applied in *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd [2012] EWHC 2198 (Ch)* at [144]–[145]. But in *Thornbridge Ltd v Barclays Bank Plc [2015] EWHC 3430 (QB)* at [97]–[121] H.H. Judge Moulder, sitting as a judge of the High Court, said "the test is not whether the clause attempts to rewrite history or parts company with reality. The first step is to determine as a matter of construction whether the terms define the basis upon which the parties were transacting business or whether they were clauses inserted as a means of evading liability" (at [105]); and in *Sears v Minco Plc [2016] EWHC 433 (Ch)* at [74]–[84] H.H. Judge Hodge, sitting as a judge of the High Court, said "I respectfully agree with Judge Moulder's analysis and conclusions [in *Thornbridge*]" (at [80]).

688. ! *[2010] EWCA Civ 1221* at [182]. In *Thornbridge Ltd v Barclays Bank Plc [2015] EWHC 3430 (QB)* at [97]–[121] H.H. Judge Moulder, sitting as a judge of the High Court, said "the test is not whether the clause attempts to rewrite history or parts company with reality. The first step is to determine as a matter of construction whether the terms define the basis upon which the parties were transacting business or whether they were clauses inserted as a means of evading liability" (at [105]); and in *Sears v Minco Plc [2016] EWHC 433 (Ch)* at [74]–[84] H.H. Judge Hodge, sitting as a judge of the High Court, said "I respectfully agree with Judge Moulder's analysis and conclusions [in *Thornbridge*]" (at [80]). But in *First Tower Trustees Ltd v CDS (Superstores International) Ltd [2017] EWHC 891 (Ch), [2017] 4 W.L.R. 73* Michael Brindle QC, sitting as a High Court judge, differed, holding that the *Springwell* case "makes it entirely clear that where a representation has been made pre-contract and relied upon, a subsequent provision in the contract which states that there has been no representation or no reliance is, although contractually valid, an attempt to exclude or restrict liability and therefore subject to the reasonableness regime" (at [32]).

689. ! See e.g. the effect of the clauses in *Bikam OOD v Adria Cable Sarl [2012] EWHC 621 (Comm)*, above, para.7-143 n.637. Similarly, a clause has been held to prevent a duty of care arising in tort rather than excluding liability, so the clause did not fall within s.2(2) of the Unfair Contract Terms Act 1977: *Crestsign Ltd v National Westminster Bank Plc [2014] EWHC 3043 (Ch)*.

690. ! cf. Vol.I, para.7-006.

691. *Cremdean v Nash (1977) 241 E.G. 837 CA*. See also *Thomas Witter Ltd v TBP Industries Ltd [1992] All E.R. 573, 597–598*; *Zanzibar v British Aerospace (Lancaster House) Ltd [2000] 1 W.L.R. 2333, 2347*.

692. *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264* at [68]–[69]; affirmed without comment on this point *[2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*. The judge held that on the facts no representation had been made (see para.7-007, above). A "no reliance" clause was held to be ineffective under s.3 in *Leofelis SA v Lonsdale Sports Ltd [2007] EWHC 451 (Ch)*.

693. *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123* at [310], Christopher Clarke J. See also *Morgan v Pooley [2010] EWHC 2447 (QB)* at [114]; *Welven Ltd v Soar Group [2011] EWHC 3240 (Comm)* at [111].

694. See above, para.15-084.

695. *[2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1* at [50]. The clause was held to be reasonable: at [66]. Note that under the Consumer Rights Bill 2014 s.3 of the Unfair Contract Terms Act will no longer apply to consumer contracts; it will be replaced by cl.62 of the Bill. See below, Vol.II, paras 38-196 et seq.

696. ⚠It has been held that condition 17 of the National Conditions of Sale (19th edn) was invalid as unreasonable under s.3 of the Misrepresentation Act: *Walker v Boyle [1982] 1 W.L.R. 495*. Condition 17 stated that replies to questions by the vendor or his agents do not obviate the need for the buyer to make his own inquiries and inspections, and are not to be treated as representations. See also *Southwestern General Property Co Ltd v Marton (1982) 263 E.G. 1090*; *White Cross Equipment Ltd v Farrell (1982) 2 Tr.L.R. 21*; *Cooper v Tamms [1988] 1 E.G.L.R. 257*; *Goff v Gauthier [1991] 62 P. & C.R. 388*; *Cleaver v Schyde Investments Ltd [2011] EWCA Civ 929, [2011] 2 P. & C.R. 21*. In *Lloyd v Browning [2013] EWCA Civ 1637, [2014] 1 P. & C.R. 11* it was held that a special condition, commonly used within the area, stating that the buyer entered into the contract solely as a result of his inspection of the property and that no statement by the seller, other than written statements made in reply to enquiries, had induced him to enter into the contract, was a reasonable one to be included in the particular contract. Thus where a "no-reliance" clause is subject to the Act (see above, n.666a) it is likely to be reasonable if it expressly permits reliance on any reply given by the landlord's or vendor's solicitors to the tenant's or purchaser's solicitors, whereas one that seeks to prevent the landlord or vendor from incurring any liability for misrepresentation other than for fraud is unlikely to be reasonable: see *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)* at [177]; *Lloyd v Browning [2013] EWCA Civ 1637* at [34]; *First Tower Trustees Ltd v CDS (Superstores International) Ltd [2017] EWHC 891 (Ch), [2017] 4 W.L.R. 73* at [36]–[38] ("not a reasonable clause to put into the lease, even if the parties are of equal bargaining power and act on legal advice, because its effect would render the whole exercise of making inquiries and relying on answers thereto all but nugatory" (at [39]–[40])). See below, para.15-104.

697. See below, para.15-112.

698. *Thomas Witter Ltd v TBP Industries Ltd [1992] All E.R. 573*. cf. *Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] Q.B. 600*; below, para.15-112. In *Skipskredittforeningen v Emperor Navigation [1998] 1 Lloyd's Rep. 66* it was held not to be unreasonable to include in a loan agreement a no-set off clause which might apply even in cases of fraud.

699. *Skipskredittforeningen v Emperor Navigation [1998] 1 Lloyd's Rep. 66, 75–76*.

700. Compare the formulation used by the original version of s.3 before amendment by the 1977 Act: "[T]hat provision shall be of no effect except to the extent that … the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case". But see the doubts expressed by Mance J. in *Skipskredittforeningen v Emperor Navigation [1998] 1 Lloyd's Rep. 66, 75*; and also *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379* at [26].

701. See *National Westminster Bank Plc v Utrecht-America Finance Co [2001] EWCA Civ 658, [2001] 3 All E.R. 733* at [60]–[61], citing an unreported judgment of Chadwick L.J. in *E A Grimstead & Son Ltd v McGarrigan Unreported October 27, 1999*; *Watford Electronics Ltd v Sanderson CFL Ltd [2001] EWCA Civ 317, [2001] Build. L.R. 143* at [39]. See also *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)*, at [177]; *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123* at [319]–[327]. In *Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705*, at [183]–[184] the Court of Appeal agreed with the trial judge (see *[2008] EWHC 1186 (Comm)*) that clauses restricting liability towards a sophisticated investor who was aware of the risks were reasonable. See also *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd [2011] EWHC 479 (Comm)* at [187]; *AXA Sun Life Services Plc v Campbell Martin Ltd [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1* at [48]–[75]; *Standard Chartered Bank v Ceylon Petroleum Corp [2011] EWHC 1785 (Comm)* at [569]–[572]; *Welven Ltd v Soar Group [2011] EWHC 3240 (Comm)* at [115].

702. As already seen (above, para.7-113) s.1(a) of the 1967 Act provides that a misrepresentation continues to be effective as such even if it becomes a term of the contract. See also below, para.15-130.

703. ⚠Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.9-130.

704. Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.9-131.

705. *[1964] A.C. 465*; above, para.7-089.

706. *Smith v Eric S. Bush [1990] 1 A.C. 831*; see above, para.7-091 and below, para.15-104.

707. SI 1999/2083; see below, Vol.II, para.38-201. Note that under the Consumer Rights Act 2015, the Unfair Terms in Consumer Contracts Regulations 1999 are replaced by the provisions of Pt 2 of the Bill. See below, Vol.II, paras 38-201 et seq.

708. Regulations 1999 reg.5(1).

709. See above, para.7-150.

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Part 2 - Formation of Contract

Chapter 7 - Misrepresentation [1]

Section 6. - Contracts where a duty of disclosure

Non-disclosure

7-155

Mere non-disclosure of fact, material or not, does not ordinarily amount to misrepresentation, and the general rule is that in order to be actionable a representation must take an active form. [710] But in certain cases a stricter rule is enforced. The most important of these are the contracts uberrimae fidei [711] in which knowledge of the material facts generally lies with one party alone; that party is under a duty to make a full disclosure of these facts, and failure to do so makes the contract voidable. However, it is doubtful whether any contract other than one for insurance is correctly described uberrimae fidei, as the extent of the duty to disclose and the remedies available seem to vary from type of contract to type of contract; and when the Insurance Act 2015 comes into force [712] it seems that it will no longer be accurate to describe even contracts of insurance as uberrimae fidei, as any duty to disclose will be statutory [713] and any rule of law permitting a party to a contract to avoid it on the ground that utmost good faith has not been observed by the other party will be abolished. [714] Therefore it is more helpful to consider the extent of the duty and the remedies available in each type of case in which it has been held that there is a some duty of disclosure. [715] These include contracts to subscribe for shares in a company, [716] family settlements, [717] contracts for the sale of land, [718] contracts for suretyship [719] and partnerships. [720] To this list may be added general releases [721] and contracts where the parties are in a relationship of trust and confidence. [722] Contracts of service, [723] contracts of sale of goods [724] and interest rate swap agreements [725] have been held not to be uberrimae fidei, so that there is no duty of disclosure.

Rescission but not damages

7-156

A breach of the duty to disclose will give rise to the right to rescind the contract but, it is submitted, not to a right to damages even if the other party kept quiet "fraudulently" in the sense of intended deliberately to mislead the claimant. [726] In *Conlon v Simms* it was said that:

> "… where the breach of the duty of disclosure is fraudulent, a party to whom the duty is owed who suffers loss by reason of the breach may recover damages for that loss in the tort of deceit … Non-disclosure where there is a duty to disclose is tantamount to an implied representation that there is nothing relevant to disclose." [727]

This, with respect, is very doubtful, and cannot be supported on the ground given. It is well established that breach of the duty of disclosure in insurance does not of itself give rise to an action for damages. [728] A negligent failure to speak may give rise to liability in damages but only if there is a "voluntary assumption of responsibility". [729] If silence when there is a duty to disclose amounted to an implied representation that there was nothing to disclose, that would make even a non-fraudulent

non-disclosure into a positive misrepresentation for which damages could be recovered under Misrepresentation Act 1967 s.2(1), unless the non-disclosing party could show that he had reasonable grounds for believing that there was nothing to disclose, whereas it has been held that if the non-disclosure is negligent, it does not give rise to liability in damages under Misrepresentation Act 1967 s.2(1) or, without more, at common law. [730] It is almost certain that without a voluntary assumption of responsibility there is no liability in damages for merely keeping silent, and it is submitted that this is so even if there was an intention to deceive. [731]

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

710. See above, para.7-017.

711. For the others, see above, paras 7-017—7-021.

712. The relevant parts of the Act are due to come into force in August 2016.

713. Insurance Act 2015 s.3 imposes a duty of fair presentation: see below, para.7-159.

714. Insurance Act 2015 s.14(1). Any rule of law to the effect that a contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of the Act and the Consumer Insurance (Disclosure and Representations) Act 2012: 2015 Act s.14(2).

715. See also Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.17-03.

716. Below, para.7-169.

717. Below, para.7-171.

718. Below, para.7-172.

719. Below, para.7-174.

720. Below, para.7-178.

721. Below, para.7-180.

722. Below, para.7-181.

723. *Bell v Lever Bros Ltd [1932] A.C. 161, 227*; *Nottingham University v Fishel [2000] I.C.R. 1462*.

724. *Jewson & Sons Ltd v Arcos Ltd (1932) 39 Com. Cas. 59*.

725. *Nextia Properties Ltd v Royal Bank of Scotland [2013] EWHC 3167 (QB)*.

726. See also Cartwright, *Contract Formation and Parties* (2010), pp.137, 146–149.

727. *[2006] EWCA Civ 1749, [2008] 1 W.L.R. 484* at [130]; see also at first instance *[2006] EWHC 401 (Ch), [2006] 2 All E.R. 1024*; *JD Wetherspoon Plc v Ven de Berg & Co Ltd [2007] EWHC 1044 (Ch), [2007] P.N.L.R. 28* at [17] ("may be" liability); *Cavell USA Inc v Seaton Insurance Co [2008] EWHC 3043 (Comm), [2008] 2 C.L.C. 898* at [84].

728. *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665, 787–789,*

790–805, affirmed on other grounds [1991] 2 A.C. 249. See above, para.1-162.

729. *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665* at 794.

730. See above, n.705.

731. Liability in damages for fraudulent non-disclosure had been mooted as a possibility by Rix L.J. in *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep. 483* at [48], [164] and [168] but the point was neither argued nor decided. In the House of Lords, Lord Bingham did say that the deliberate withholding of information which the person knows or believes to be material, if done dishonestly or recklessly, may amount to a fraudulent misrepresentation: *[2003] UKHL 6, [2003] 2 Lloyd's Rep. 61* at [21]. However this appears to refer to cases where in the circumstances a failure to disclose amounts to a positive misrepresentation, and it is not clear that Lord Bingham thought this included every case of a duty to disclose. Lord Hoffmann said that "non-disclosure (whether dishonest or otherwise) does not as such give rise to a claim in damages" (at [75]); he referred to the judgments in *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665, 777–781 and 788* ("without a misrepresentation there can be no fraud in the sense of giving rise to a claim for damages in tort") and *[1991] 2 A.C. 249* at 280 (per Lord Templeman) and at 281 (per Lord Jauncey of Tullichettle). Moreover, in *Manifest Shipping Co v Uni-Polaris Insurance Co, The Star Sea [2001] UKHL 1, [2003] 1 A.C. 469* at [46], Lord Hobhouse regarded the *Banque Keyser Ullman* case as deciding authoritatively that a breach of duty to disclose does not give rise to damages. Damages may be recovered in tort for deceit but even deliberate non-disclosure does not give rise to an action for deceit. See Clerk & Lindsell on Torts, 21st edn (2014), para.18-09; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.17-37.

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(a) - Insurance

Contracts of insurance [732]

7-157

The traditional position is that, as a matter of law, all of these are uberrimae fidei, whatever their subject matter, that is whether they relate to marine, fire, life or burglary insurance, or to any other risk. Marine insurance is governed by the Marine Insurance Act 1906, which codified the existing law. Non-marine insurance is subject to the common law. It is thought to be contrary to good faith to withhold material facts from the insurer. [733] Such facts are generally known only to the assured, and he is therefore under a duty to disclose them. [734] However, the traditional rules no longer apply to consumer insurance as the result of the Consumer Insurance (Disclosure and Representations) Act 2012; and will no longer apply to contracts for other classes of insurance made after the Insurance Act 2015 comes into force in August 2016. [735] Note that the Insurance Act 2015 came into force and the Marine Insurance Act 1906 was repealed in August 2016.

Consumer insurance

7-158

In practice the duty of disclosure has for some time had a very limited application to “retail” or “consumer” insurance because of the requirements of the Financial Services Authority and, even more pertinently, the decisions of the Financial Ombudsman Service as to when insurers are complying with a general requirement to treat customers fairly and reasonably. [736] Under the Consumer Insurance (Disclosure and Representations) Act 2012, [737] the duty of disclosure on a consumer insured is removed altogether, as is the insurer’s right to avoid for innocent misrepresentation. The consumer has a duty to take reasonable care not to make a misrepresentation to the insurer. [738] Note that the Insurance Act 2015 came into force and the Marine Insurance Act 1906 was repealed in August 2016.

Insurance Act 2015 [739]

7-159

In contracts made after the relevant part of the Act comes into force, the non-consumer insured’s duty of disclosure will be replaced by a duty to make a fair presentation of the risk to the insurer. [740] The insured must disclose every material circumstance which the insured knows or ought to know, or, failing that, give the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances. [741] Note that the Insurance Act 2015 came into force and the Marine Insurance Act 1906 was repealed in August 2016.

Materiality

7-160

At common law, a circumstance is material if it "would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk". This is the definition given in the Marine Insurance Act 1906 s.18(2), and it was held in *Locker and Woolf Ltd v Western Australian Insurance Co Ltd* [742] that the definition applies to all forms of insurance. In *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [743] the House of Lords held that, for both marine insurance under Marine Insurance Act 1906 s.18(2) and non-marine insurance, the test of materiality is not whether the matter would have had a decisive effect on the prudent insurer's decision whether to accept the risk or at what premium, but whether it would have an effect on the mind of the prudent insurer in weighing up the risk. [744] In *St Paul Fire and Marine Insurance Co Ltd v McConnell Dowell Constructors Ltd* [745] it was held that a matter did not necessarily have to lead to an increase in the risk in order to be material; it was sufficient that the risk was different. [746] But in the *Pan Atlantic* case the House of Lords held that, in addition to being material, a misrepresentation or non-disclosure must have induced the making of the policy. [747] In this respect, the law on insurance contracts is parallel to the general law on positive misrepresentation. [748] Lord Mustill [749] refers to "a presumption in favour of causative effect", as there is in the case of a positive misrepresentation. [750] Note that the Insurance Act 2015 came into force and the Marine Insurance Act 1906 was repealed in August 2016.

Materiality under Insurance Act 2015

7-161

The 2015 Act adopts the same approach. A circumstance or representation is material if it would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms. [751] The insurer will have a remedy for breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer either (a) would not have entered into the contract of insurance at all, or (b) would have done so only on different terms. Note that the Insurance Act 2015 came into force and the Marine Insurance Act 1906 was repealed in August 2016.

Duty on insurer to be abolished

7-162

Traditionally, the obligation to disclose material facts is mutual and a duty also rests on the insurer to disclose all facts known to him which are material either to the nature of the risk sought to be covered or to the recoverability of a claim under the policy. [752] In this case the test of materiality is whether the fact not disclosed would be taken into account by a prudent insured in deciding whether to place the risk with that insurer. [753] However, the Insurance Act 2015 provides only for fair presentation by the insured [754] and any rule of law permitting a party to a contract to avoid it on the ground that utmost good faith has not been observed by the other party will be abolished, [755] so that when the Act comes into force the duty on the insured will disappear. The Law Commissions considered that the only instances in which the duty on the insurer has or might have been invoked—the selling of worthless policies—would be better dealt with by the Financial Services Authority or its successors) or the Financial Ombudsman Service. [756] Note that the Insurance Act 2015 came into force and the Marine Insurance Act 1906 was repealed in August 2016.

7-163

The following have been held to be material facts and their non-disclosure made the contract in question voidable: that goods were insured upon a voyage for an amount in excess of their value [757]; that the vessel itself was over-insured [758]; that (in the particular circumstances of the case) the insured under a policy of burglary insurance was an alien [759]; that the insured had been convicted of robbery 12 years previously [760]; that in relation to an insurance comparable to that sought previous claims had been made. [761] On the other hand, certain details may on construction be held to be irrelevant, [762]

such as the place where a lorry was to be garaged. [763] A circumstance that is material for one type of insurance is not necessarily material for another; for example, the fact that the risk has been refused by another company is material in life, fire, accident and burglary insurance, but not in marine insurance. [764] Whether a particular circumstance is material is a question of fact, and the opinion of the assured on its materiality is irrelevant. [765] Note that the Insurance Act 2015 came into force and the Marine Insurance Act 1906 was repealed in August 2016.

7-164

In marine insurance the duty to disclose is defined as follows:

> "Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him." [766]

In non-marine insurance the duty may extend only to facts actually known to the assured. [767] If so, he is under no duty to disclose facts of which he is ignorant. A statement which is expressed to depend on the assured's state of mind will not be untrue simply because he was unaware of the true facts, provided that his statement of belief was genuine. For instance, a statement by the assured that he is in good health in relation to a proposed life policy will generally be construed to mean in good health to his own knowledge, and the contract cannot be rescinded on proof that at the time of the contract the assured's state of health was not what he believed it to be. [768] If, however, he is aware of a fact which a reasonable or prudent insurer might treat as material, he must disclose it; the test is not whether a reasonable man would think it material. [769] Note that the Insurance Act 2015 came into force and the Marine Insurance Act 1906 was repealed in August 2016.

Remedies for non-disclosure

7-165

Traditionally, the insurer's remedy for breach of the duty of disclosure by the insured as been to rescind (or "avoid") the contract. [770] Under both the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015, if the breach of the relevant duty by the insured was deliberate or reckless, the insurer may avoid the policy and refuse all claims, and may not have to return the premium [771]; but in other cases the insurer may avoid the contract only if, in the absence of the breach the insurer would not have entered the contract on any terms. [772] If the insurer would have entered the contract but on different terms, then the contract is to be treated as if it contained those terms [773]; if at a different premium, then the insurer may reduce the amount paid on the claim proportionately. [774] Note that the Insurance Act 2015 came into force and the Marine Insurance Act 1906 was repealed in August 2016.

"Basis of the contract"

7-166

Traditionally, the insurer's remedies could be enlarged by the terms of the contract, and insurers commonly provided that the declarations of the assured shall form the basis of the contract. In effect this means that the assured "warrants" that the information which he supplies is correct, the penalty for inaccuracy being the avoidance of the contract by the insurer. Thus the insurer may be discharged from liability [775] if the assured fails to disclose even a non-material fact, [776] or a fact never within his knowledge, or if he gives what has proved to be an inaccurate statement on a matter of opinion. [777] Where an attempt is made to enlarge the duty by the terms of the contract, the courts put a strict burden of proof upon the insurer. [778] But this has not prevented the courts from holding that even disclosure to a representative of the insurer is insufficient, if (as has in the past commonly been the case with some forms of insurance) the proposal form declares that any person filling in the form is

deemed to be the agent of the insured, and not of the insurer. [779] More recently, however, it has been held that if the representative is authorised by the insurer to fill in the forms and then secure the proposer's signature thereto, he may be held to be the agent of the insurer. [780] Under both the Consumer Insurance (Disclosure and Representations) Act 2012 [781] and the Insurance Act 2015, [782] a representation by the insured may not be converted into a warranty by means of a "basis of the contract" clause or any other provision of the insurance contract or any other contract. Note that the Insurance Act 2015 came into force and the Marine Insurance Act 1906 was repealed in August 2016.

Burden of proof

7-167

With regard to the burden of proof generally, the insurer must produce evidence to show non-disclosure, unless there is prima facie evidence of concealment. In that case the burden is on the assured to prove disclosure. [783] Similarly, under the new legislation it appears to be for the insurer to show that the consumer insured has made a careless misrepresentation [784] or that the non-consumer insured is in breach of the duty to make a fair presentation of the risk. [785] In each case it is provided expressly that it for the insurer to show that a breach by the insured was deliberate or reckless. [786] Note that the Insurance Act 2015 came into force and the Marine Insurance Act 1906 was repealed in August 2016.

Continuing duty

7-168

The duty to disclose continues until the contract is concluded. Thus if before the acceptance of the proposal a new material fact arises, or a fact thought to be non-material becomes material, this must be disclosed. [787] Neither of the new Acts addresses this point; presumably what matters is whether any statement made by a consumer insured was inaccurate, or that the presentation made by a non-consumer insured was fair, at the time that the contract as concluded. Note that the Insurance Act 2015 came into force and the Marine Insurance Act 1906 was repealed in August 2016.

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

732. See Hasson (1969) 32 M.L.R. 615 and Vol.II, paras 42-033 et seq.

733. See *Carter v Boehm (1766) 3 Burr. 1905, 1909*; *London Assurance Co v Mansel (1879) 11 Ch. D. 363, 367*.

734. A contract of marine insurance appears to be based on an implied condition that there is no misrepresentation or concealment: *Blackburn v Vigors (1886) 17 Q.B.D. 552, 561, 562*; *Pickersgill v London and Provincial Marine and General Insurance Co [1912] 3 K.B. 614, 621*. The duty of disclosure in non-marine insurance, on the other hand, is said to rest on a common law, and not on a contractual duty: *Joel v Law Union and Crown Insurance Co [1908] 2 K.B. 863, 886*; *Merchants and Manufacturers Insurance Co v Hunt and Thorne [1941] 1 K.B. 295, 313*. But see *Moens v Hayworth (1842) 10 M. & W. 147, 157*. It is otherwise of course if the common law obligation is superseded by a term in the contract itself.

735. Insurance Act 2015 ss.22 and 23. Pt 2 (which includes the duty to make a fair presentation) will apply also to subsequent variations of contracts made at any time: s.22(1)(b).

736. An account of the FSA Regulations and the FOS practice will be found in Law Commission, Joint Consultation Paper, Insurance Contract Law: Misrepresentation, Non-disclosure and Breach of Warranty by the Insured (LCCP 182, SLCDP 134, 2007) paras 3.5–3.54. The FOS

applies the same approach in favour of some small business: para.5.165.

737. The Act came into force on April 6, 2013: SI 2013/450. Proposals for reform of the law were made by the Law Commission in 1980, see Law Com. No.104, Cmnd.8064 (1980). They were not implemented. The Law Commission for England and Wales and the Scottish Law Commission have taken the matter up again. The Consumer Insurance (Disclosure and Representations) Act 2012 implemented their joint report, Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation (Law Com. No.319, Scot. Law Com. No.219, 2009). For their consultation paper and report on non-consumer insurance, see below, para.7-159 n.716.

738. s.2. See further below, para.42-046.

739. For a detailed explanation, see below, Vol.II, paras 42-051 et seq. The Act implements in part further recommendations by the Law Commissions: see Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties (Law Com. Consultation Paper No.204, Scot. Law Com. Consultation Paper No.155, 2012) and Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (Law Com Report No.353, Scot Law Com Report No.238, 2014).

740. Insurance Act 2015 s.3(1).

741. s.3(4). Section 3(5) creates a number of exceptions for example for information that the insurer knows, ought to know or is presumed to know. Sections 4, 5 and 6 set out what the insured and the insurer know or ought to know.

742. *[1936] 1 K.B. 408, 415*. This was also the test applied in *Lambert v Co-operative Insurance Society Ltd [1975] 2 Lloyd's Rep. 485*.

743. *[1995] 1 A.C. 501*.

744. See further below, Vol.II, para.42-034.

745. *[1996] 1 All E.R. 96*.

746. *[1996] 1 All E.R. 96, 107*.

747. *[1995] 1 A.C. 501, 549–550*.

748. See above, paras 7-035 et seq.

749. *[1995] 1 A.C. 501, 542*.

750. See above, para.7-038 n.200; and also *St Paul Fire and Marine Insurance Co Ltd v McConnell Dowell Constructors Ltd [1996] 1 All E.R. 96, 112*.

751. Insurance Act 2015 s.7(3). See further below, para.42-053.

752. *Carter v Boehm (1766) 3 Burr. 1905*; *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665, 770–772*, affirmed on other grounds but without disapproval of this statement of principle, *[1991] 2 A.C. 249*.

753. *[1990] 1 Q.B. 665, 772*.

754. Insurance Act 2015 s.3, see above, para.7-159.

755. Insurance Act 2015 s.14(1), see above, para.7-155 n.691.

756. Report No.353, para.30–34.

757. *Ionides v Pender (1874) L.R. 9 Q.B. 531*; *Gooding v White (1913) 29 T.L.R. 312*.

758. *Thames and Mersey Marine Insurance Co v Gunford Ship Co Ltd [1911] A.C. 529*.

759. *Horne v Poland [1922] 2 K.B. 364*. But cf. *Associated Oil Carriers Ltd v Union Insurance Society [1917] 2 K.B. 184*.

760. *Woolcott v Sun Alliance & London Insurance Ltd [1978] 1 W.L.R. 493*; contrast *Reynolds and Anderson v Phoenix Assurance Co Ltd [1978] 2 Lloyd's Rep. 440* (mere allegation of fraud need not be disclosed). Note the effect of the Rehabilitation of Offenders Act 1974 on cases of this kind, see s.4(2) and (3).

761. *Farra v Hetherington (1931) 47 T.L.R. 465*.

762. *Perrins v Marine Insurance Society (1859) 2 E. & E. 317*.

763. *Dawsons Ltd v Bonnin [1922] 2 A.C. 413*.

764. *London Assurance Co v Mansel (1879) 11 Ch. D. 363*; *Yager v Guardian Assurance Co (1912) 29 T.L.R. 53*; *Glicksman v Lancashire and General Assurance Co [1927] A.C. 139*; *Holts' Motors v South East Lancashire Insurance Co (1930) 35 Com. Cas. 281*; *Locker and Woolf Ltd v Western Australian Insurance Co [1936] 1 K.B. 408*.

765. *Lindenau v Desborough (1828) 8 B. & C. 586, 592*; *London Assurance Co v Mansel (1879) 11 Ch. D. 363*; *Joel v Law Union and Crown Insurance Co [1908] 2 K.B. 863, 884*; *Godfrey v Britannic Assurance Co Ltd [1963] 2 Lloyd's Rep. 515*; *Lambert v Co-operative Insurance Society Ltd [1975] 2 Lloyd's Rep. 485*.

766. Marine Insurance Act 1906 s.18(1). On the interpretation of this section see *PCW Syndicates v PCW Reinsurers [1996] 1 W.L.R. 1136*.

767. *Blackburn, Low & Co v Vigors (1887) 12 App. Cas. 531* (a marine insurance case before the Marine Insurance Act 1906); *Joel v Law Union and Crown Insurance Co [1908] 2 K.B. 863, 884–885*. In the *Economides v Commercial Union Assurance Co Plc [1998] Q.B. 587* it was held that an insured who is not acting in the course of business has only to disclose material facts actually known to him; provided that he did not wilfully shut his eyes to the truth (so-called "Nelsonian blindness"), he is not under a duty to inquire further, for example by checking that his honest belief in the value of the property is in fact accurate. But see Vol.II, para.42-038.

768. *Wheelton v Hardisty (1857) 8 E. & B. 232*. But see *Macdonald v Law Union Insurance Co (1874) L.R. 9 Q.B. 328*.

769. *Lambert v Co-operative Insurance Society Ltd [1975] 2 Lloyd's Rep. 485*.

770. See below, Vol.II, para.42-042.

771. Consumer Insurance (Disclosure and Representations) Act 2012 Sch.1 para.2 (the premium must be returned to the extent that it would be unfair to the insured to retain it: para.2(b)); Insurance Act 2015 Sch.1 para.2 (no return of premium: para.2(b)).

772. Consumer Insurance (Disclosure and Representations) Act 2012 Sch.1 para.5; Insurance Act 2015 Sch.1 para.4. In each case the premium must be returned.

773. Consumer Insurance (Disclosure and Representations) Act 2012 Sch.1 para.5; Insurance Act 2015 Sch.1 para.6.

774. Consumer Insurance (Disclosure and Representations) Act 2012 Sch.1 paras 7–8; Insurance Act 2015 Sch.1 paras 5–6.

775. See *Bank of Nova Scotia v Hellenic Mutual War Risks (The Good Luck) [1992] 1 A.C. 233,*

263–4. The insurer may waive the breach and affirm the contract: Marine Insurance Act 1906 s.34(3).

776. *Anderson v Fitzgerald (1853) 4 H.L.C. 484*; *Condogianis v Guardian Assurance Co [1921] 2 A.C. 125*; *Dawsons Ltd v Bonnin [1922] 2 A.C. 413*. See Vol.II, para.42-044.

777. It was seen earlier (above, para.7-116) that it is not clear whether s.2(2) of the Misrepresentation Act enables a court to refuse to allow rescission for misrepresentation where the statement in question was later incorporated as a term of the contract. If it did have this effect, the totally unexpected result might follow, that an insurer might no longer be able to repudiate liability for an immaterial misrepresentation, or for a material misrepresentation which had no bearing on the risk which has occurred, even where the insured's statement formed part of the basis of the contract. But this is not generally thought to be the result of the 1967 Act (see Hudson (1969) 85 L.Q.R. 524); and in any event it is very unlikely that the court would exercise its jurisdiction to prevent an insurer rescinding on the ground of misrepresentation by the insured (see above, para.7-110).

778. *Anderson v Fitzgerald (1853) 4 H.L.C. 484*; *Joel v Law Union and Crown Insurance Co [1908] 2 K.B. 863*; *Anstey v British National Premium Life Association Ltd (1908) 99 L.T. 765*.

779. *Newsholme Brothers v Road Transport and General Insurance Co Ltd [1929] 2 K.B. 356*; *Facer v Vehicle & General Insurance Co Ltd [1965] 1 Lloyd's Rep. 113*. Contra, *Bawden v London, Edinburgh and Glasgow Assurance Co Ltd [1892] 2 Q.B. 534*; this case was treated as virtually overruled by the *Newsholme Bros* case in the *Facer* case but now seems to have been rehabilitated by *Stone v Reliance Mutual Insurance Society Ltd [1972] 1 Lloyd's Rep. 469*. Such a clause might well be caught by Unfair Terms in Consumer Contracts Regulations 1999.

780. *Stone v Reliance Mutual Insurance Society Ltd [1972] 1 Lloyd's Rep. 469*; see also *Maye v Colonial Mutual Life Assurance Society Ltd (1924) 35 C.L.R. 14*.

781. Consumer Insurance (Disclosure and Representations) Act 2012 s.6. Again, the practical effect of such warranties had been severely restricted in cases of consumer insurance by the FSA Regulations and the requirements of the Financial Ombudsman Service: see above, para.7-157 n.713.

782. Insurance Act 2015 s.9(2). Section 10 alters the remedies for breach of warranty for all types of insurance (see below, Vol.II, para.42-089).

783. *Glicksman v Lancashire and General Assurance Co [1925] 2 K.B. 593, [1927] A.C. 139*.

784. Consumer Insurance (Disclosure and Representations) Act 2012 s.2(2)

785. Insurance Act 2015 s.2.

786. Consumer Insurance (Disclosure and Representations) Act 2012 s.5(4); Insurance Act 2015 s.8(4). If the breach was careless or reckless, the insurer may have remedies that are not otherwise available: see above, para.7-165.

787. *Allis Chalmers Co v Maryland Fidelity and Deposit Co (1916) 114 L.T. 433*; *Looker v Law Union and Rock Insurance Co [1928] 1 K.B. 554*; cf. *Blackley v National Mutual Life Association of Australasia Ltd [1972] N.Z.L.R. 1038*. See Vol.II, para.42-037.

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(b) - Contracts to take Shares in Companies

Companies

7-169

Contracts to take shares in companies might be classified as uberrimae fidei because again the knowledge of the material facts lies with one party alone, namely, the promoters, directors and others responsible for the issue of the prospectus. It was long ago recognised that invitations to invest, made through a prospectus, could lead to much enrichment of individuals at the public expense, and at least from promoters the utmost good faith was required. [788] In time the legislature intervened to protect the public and to supplement the common law. The present position is governed by Financial Services and Markets Act 2000 ss.80 and 81. [789] The legislation requires the disclosure of specified matters, and render those responsible liable in damages to anyone who has acquired securities to which the legislation applies, [790] and who has suffered loss as the result of the omission from the prospectus or, in the case listing particulars, the particulars, of any matter that should have been included. [791] However, mere disclosure does not of itself give a right to rescission. [792] It is this fact which provokes the doubt as to whether contracts to take shares in companies are properly classified as contracts uberrimae fidei. However, if failure to disclose makes the prospectus misleading by falsifying that which is stated, there is a remedy as for positive misrepresentation. [793] With regard to misrepresentations as distinct from non-disclosures, an untrue statement in the prospectus which has induced a person to subscribe for shares does of course give that person the right to rescind the contract, provided that he acts promptly and before winding-up proceedings have begun. [794]

7-170

The position of the promoters is also regulated by the common law. They have a fiduciary relationship with the company, and the rule is that they must not make a secret profit at its expense. [795] They are under a duty to disclose either to an independent board of directors, or to the intended shareholders, for instance by making a disclosure in the prospectus, any profit made by them on a sale of property to the company. A breach of this duty entitles the company to sue the promoters for damages, or to recover the profit [796] or to rescind the contract. [797]

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

788. *Erlanger v New Sombrero Phosphate Co (1878) 3 App. Cas. 1218*.

789. ⚠See generally, Gower & Davies, *Principles of Modern Company Law*, 10th edn (2016), paras 25-8 to 25-43; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.17-53 et seq.

790. Thus investors who have bought on the market after dealing has commenced are now protected.

791. Financial Services and Markets Act 2000 s.90(1). Note that s.90(1) is without prejudice to any liability which may be incurred apart from the section or regulation: s.90(6). These provisions stem ultimately from the Directors Liability Act 1890, which was passed to reverse the effect of *Derry v Peek (1889) 14 App. Cas. 337*, so far as it applied to prospectuses.

792. ⚠Gower & Davies, *Principles of Modern Company Law*, 10th edn (2016), para.25-39.

793. See *Central Ry of Venezuela v Kisch (1867) L.R. 2 H.L. 99*.

794. Further, a shareholder may rescind if misrepresentations are made in a document issued by the promoters before the company is formed: *Karberg's Case [1892] 3 Ch. 1*.

795. *Erlanger v New Phosphate Co (1878) 3 App. Cas. 1218*; *Lagunas Nitrate Co v Lagunas Syndicate [1899] 2 Ch. 392*; *Re Leeds and Hanley Theatre of Varieties [1902] 2 Ch. 809*; see also below, para.10-054.

796. *Gluckstein v Barnes [1900] A.C. 240*.

797. *Erlanger v New Sombrero Phosphate Co (1878) 3 App. Cas. 1218* (provided of course that restitutio in integrum is still possible).

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(c) - Family Settlements

Family settlements

7-171

In these and in negotiations for these there must not only be an absence of misrepresentation but a full communication of all material facts known to the parties. Any failure to disclose may be a ground for setting aside the settlement, and it is immaterial that information was withheld because of a mistaken opinion as to its accuracy or importance. In *Gordon v Gordon* [798] a division of property, based on the assumption that the eldest son was illegitimate, was set aside after 19 years on proof that the younger son had withheld knowledge of a marriage ceremony that had taken place between his parents before the birth of his brother. Lord Eldon said that "whether the omission of disclosure originated in design, or in honest opinion of the invalidity of the ceremony", [799] the agreement could not stand. On the other hand, in *Wales v Wadham* [800] it was held that a wife was under no duty to disclose to her husband, when they were negotiating for a financial settlement to be embodied in a consent order after divorce, that she intended to remarry. In the particular circumstances of the case, the parties had been negotiating a compromise on the basis that neither party was required to make a full disclosure. However, *Wales v Wadham* was overruled so far as it related to disclosure in proceedings for financial relief by the House of Lords in *Livesey v Jenkins*. [801] This held that the relevant statutory provisions required a court exercising jurisdiction to make financial provision or property adjustment between spouses to be placed in full possession of the facts, so that each side must make full disclosure. [802] These decisions leave it uncertain whether the common law today recognises family settlements as contracts uberrimae fidei.

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

798. *(1816–19) 3 Swans. 400*; see also *Fane v Fane (1875) L.R. 20 Eq. 698*.

799. *(1816–19) 3 Swans. 400, 477*.

800. *[1977] 1 W.L.R. 199*.

801. *[1985] A.C. 424*. See above, para.7-022 n.116.

802. Matrimonial Causes Act 1973 s.25, now replaced by Matrimonial and Family Proceedings Act 1984 s.3.

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(d) - Contracts for the Sale of Land

Sales of land

7-172

Contracts for the sale of land are not uberrimae fidei in the sense that the vendor has to make to the purchaser a full disclosure of all material facts. [803] In the absence of actual misrepresentation [804] the general rule is caveat emptor. But certain qualifications must be made because the vendor is under a duty to disclose defects relating to title. Every material defect in the vendor's title must be disclosed, because if the title is in fact defective the vendor will be unable to perform his contract in the absence of a condition that the purchaser should accept a defective title. In consequence, if any such defect is not disclosed the purchaser may rescind the contract or resist a suit for specific performance. But it has been persuasively argued that there is in addition a duty on the vendor to disclose all latent defects in his title, since if an undisclosed latent defect appears the purchaser may apparently terminate the contract without waiting to see whether the vendor will be able to remove the defect before the date for completion. [805] However, as it appears that all defects must be revealed whether known to the vendor or not, and that if a latent defect is not revealed the purchaser may recover damages for breach of contract, it seems that the duty must be based on an implied term of the contract. [806]

7-173

It seems that any fact which will prevent the purchaser from obtaining such a title as he was led to expect may constitute a defect in title. [807] So where the subject of the sale was a leasehold interest, and the lease contained onerous and unusual covenants which were not disclosed by the vendor, the purchaser was held to be entitled to rescind the contract. [808] It has also been suggested that a tenant who is selling his leasehold interest is bound to disclose receipt of notice from his landlord of an intention to proceed under a rent review clause. [809] A purchaser may, of course, contract to accept a defective title, but even an express agreement to this effect will not (it seems) save the vendor where he fails to disclose defects known to him. [810] A purchaser is not obliged to disclose any information he may have which may affect the value of the property; but it has been held that a purchaser who applies for planning permission in the name of the vendor prior to the exchange of contracts is acting as a self-appointed agent, and may thereby come under fiduciary duties to the vendor. [811]

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

803. It had been intended that vendors (or their estate agents) of larger types of residential property would be required to provide on request a "Home Information Pack" including a "home condition report" prepared by a home inspector, but the relevant legislation has now been repealed; see

above, para.7-101.

804. See *Dyster v Randall [1926] Ch. 932*.

805. Harpum (1992) 108 L.Q.R. 208, relying on, inter alia, *Carlish v Salt [1906] 1 Ch. 355* and *Reeve v Berridge (1888) 20 Q.B.D. 423*. The existence of such a duty was accepted by at least the majority of the Court of Appeal in *Peyman v Lanjani [1985] Ch. 457, 482, 496–497*.

806. Harpum (1992) 108 L.Q.R. 208, 332–333.

807. But see *Re Flynn and Newman's Contract [1948] Ir.R. 104*.

808. *Molyneux v Hawtrey [1903] 2 K.B. 487*.

809. *F. & H. Entertainments Ltd v Leisure Enterprises Ltd (1976) 120 S.J. 331*.

810. *Becker v Partridge [1966] 2 Q.B. 155*.

811. *English v Dedham Vale Properties Ltd [1978] 1 W.L.R. 93*; *Rignall Developments Ltd v Halil [1988] Ch. 190*.

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(e) - Contracts of Suretyship

Suretyship or insurance [812]

7-174

It seems that contracts of suretyship are not contracts uberrimae fidei properly so-called, although they are sometimes said to bear certain characteristics of that class. One difficulty is that it may be a matter for doubt whether a given contract is one of suretyship or of insurance. In *Seaton v Heath* [813] Romer L.J. said that many contracts may with equal propriety be called contracts of insurance or contracts of suretyship, and that whether a contract requires uberrima fides or not depends not upon what it is called, but upon its substantial character and how it came to be effected. Commercial sureties, at least, are generally persons who know the risk they undertake without it being explained to them, and who if they do not know it, would make inquiry on the subject; in contracts of insurance, on the other hand, the person desiring to be insured has means of knowledge of the risk which the insurer does not possess, and he puts the risk before the insurer as a business proposition.

7-175

The position seems to be that while a contract of insurance has traditionally required a full disclosure of all material facts, a contract of suretyship does not. [814] Thus it has been held that a bank was under no duty to disclose to the guarantor of a customer's overdrawn account suspicions that the customer was defrauding him. [815] On the other hand, it seems that there is a limited duty of disclosure even in contracts of suretyship, though the nature and scope of this limited duty are hard to define. In *Levett v Barclays Bank Plc* [816] it was held that there is a duty to disclose to the surety any unusual feature of the contract between the principal debtor and the creditor which makes it materially different in a potentially disadvantageous respect from what the surety might naturally expect. In *Crédit Lyonnais Bank Nederland v Export Credit Guarantee Department* [817] it was held that any duty to disclose unusual features only applied to unusual features of the transaction itself, not to unusual features of the risk; and it did not extend to matters of which the bank had no knowledge, even if what it knew might have led it to make further enquiries. However, where a person guaranteed the honesty of a servant to an employer, who knew but did not disclose the fact that the servant had previously been dishonest while in his employment, the bond was held to be unenforceable when the servant subsequently committed a further act of dishonesty. [818] In *North Shore Ventures Ltd v Anstead Holdings Inc* [819] the Chancellor (Sir Andrew Morritt) said that the cases establish the following propositions:

> "(1)
>
> the creditor is obliged to disclose to the surety any contract or other dealing between creditor and debtor so as to change the position of the debtor from what the surety might naturally expect, but

(2)

the creditor is not obliged to disclose to the surety other matters relating to the debtor which might be material for the surety to know." [820]

But if the duty of disclosure has arisen because the feature of the transaction to be guaranteed is "unusual", the creditor is not absolved from his duty of disclosure because he reasonably believes that the surety knows of it already. [821]

Sureties given to banks on a non-commercial basis

7-176

It should be noted that the law which was developed to protect "surety wives" (principally wives who guarantee the debts of their husband's business), and which now apply to any guarantee to a bank given on a non-commercial basis [822] may have the practical effect of requiring the bank to disclose information to the surety. These rules are discussed in Ch.8. [823]

Binding authority to issue insurance

7-177

It has been suggested that an obligation to point out unusual facts, similar to that which appears to apply to suretyship, [824] may apply to a binding authority to issue insurance, so that unusual features of the coverholder to whom the authority is to be given should be pointed out. [825]

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

812. See Vol.II, Ch.45.

813. *[1899] 1 Q.B. 782, 792–793*.

814. *North British Insurance Co v Lloyd (1854) 10 Ex. 523*; *Lee v Jones (1864) 17 C.B.(N.S.) 482*; *Geest Plc v Fyffes Plc [1999] 1 All E.R. (Comm) 672*; below, paras 45-036 et seq.

815. *National Provincial Bank v Glanusk [1913] 3 K.B. 335*; see also *Royal Bank of Scotland v Greenshields (1914) S.C. 259*; *Cooper v National Provincial Bank [1946] K.B. 1*.

816. *[1995] 1 W.L.R. 1260*.

817. *[1996] 1 Lloyd's Rep. 200; affirmed on other grounds [2000] 1 A.C. 486*.

818. *London General Omnibus Co v Holloway [1912] 2 K.B. 72*; see also *Phillips v Foxall (1872) L.R. 7 Q.B. 666*. For further discussion of these points see Vol.II, para.45-036.

819. *North Shore Ventures Ltd v Anstead Holdings Inc [2011] EWCA Civ 230, [2012] Ch. 31*. At first instance it had been held that the duty extends to facts that the surety would expect not to exist, so the creditor should disclose the fact that the debtor has been fraudulent (*[2010] EWHC 1485 (Ch)* at [119]–[123], referring to statements by Vaughan Williams L.J. in *London General Omnibus Co v Holloway [1912] 2 K.B. 72, 79* which had been cited with approval by the Privy

Council in *Estate of Imorette Palmer (decd) v Cornerstone Investments & Finance Co Ltd [2007] UKPC 49* at [40]). The decision was reversed by the Court of Appeal, which held that Vaughan Williams L.J. had not widened the existing law (at [27] and [57]).

820. *[2011] EWCA Civ 230* at [14].

821. *[2011] EWCA Civ 230* at [37]. For further discussion of this case see below, para.45-036.

822. See below, para.8-116.

823. See below, paras 8-108—8-122.

824. See para.7-175.

825. *Pryke v Gibbs Hartley Cooper Ltd [1991] 1 Lloyd's Rep. 602, 616*.

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(f) - Partnership Agreements

Partnership

7-178

The fundamental duty of every partner is to show the utmost good faith in his dealings with the other partners. In *Conlon v Simms*, the Court of Appeal held that in negotiating a partnership agreement:

> "… a party owes a duty to the other negotiating parties to disclose all material facts of which he has knowledge and of which the other negotiating parties may not be aware." [826]

The duty of good faith applies during the continuance of the partnership, and during the winding up after dissolution. The duties of partners are regulated for the most part, in the absence of agreement to the contrary, by the Partnership Act 1890; and although the principle requiring the utmost good faith is not expressly enunciated by the Act, it is embodied in ss.28, 29 and 30. Thus a partner must account for any private profit made by him; so for instance, if a partner is buying from or selling to the firm, he cannot do either at a profit to himself. [827]

Analogous agreements

7-179

A duty of disclosure may arise as an implied term of an agreement which is not a partnership but which has "elements of joint enterprise or joint venture", but:

> "… wider duties will not lightly be implied, in particular in commercial contracts negotiated at arms' length between parties with comparable bargaining power, and all the more so where the contract in question sets out in detail the extent, for example, of a party's disclosure obligations." [828]

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

826. *[2006] EWCA Civ 1749, [2008] 1 W.L.R. 484* at [127], relying on a dictum of Lord Atkin in *Bell v*

Lever Bros [1932] A.C. 161 at 227 HL.

827. *Bentley v Craven (1853) 18 Beav. 75*; *Dunne v English (1874) L.R. 18 Eq. 524*.

828. *Ross River Ltd v Cambridge City Football Club Ltd [2007] EWHC 2115 (Ch), [2008] 1 All E.R. 1004* at [197] (Briggs J.). A duty of disclosure was found to exist in *Banwaitt v Dewji [2013] EWHC 879 (QB)*, see at [72].

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(g) - General Releases

General releases

7-180

In *Bank of Credit and Commerce International SA (In Liquidation) v Ali (No.1)* [829] Lord Nicholls said that where the party to whom a general release was given knew that the other party has or might have a claim and knew that the other party was ignorant of this, to take the release without disclosing the existence of the claim or possible claim could be unacceptable sharp practice. The law would be defective if it did not provide a remedy, and while the case did not raise the issue, he had no doubt that the law would provide a remedy. [830] Lord Hoffmann agreed:

> "There are different ways in which it can be put. One may say, for example, that inviting a person to enter into a release in general terms implies a representation that one is not aware of any specific claims which the other party may not know about. That would preserve the purity of the principle that there is no positive duty of disclosure. Or one could say, as the old Chancery judges did, that reliance upon such a release is against conscience when the beneficiary has been guilty of a suppressio veri or suggestio falsi.
>
> … a person cannot be allowed to rely upon a release in general terms if he knew that the other party had a claim and knew that the other party was not aware that he had a claim. I do not propose any wider principle: there is obviously room in the dealings of the market for legitimately taking advantage of the known ignorance of the other party. But, both on principle and authority, I think that a release of rights is a situation in which the court should not allow a party to do so. On the other hand, if the context shows that the parties intended a general release for good consideration of rights unknown to both of them, I can see nothing unfair in such a transaction." [831]

Whatever the basis on which this is to be explained, it would amount to creating a duty on a party negotiating for a general release to disclose a claim that he knows the other has or may have and which he knows the other is not aware of.

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

829. *[2001] UKHL 8, [2002] 1 A.C. 251*, in which the House of Lords held that a general release was not effective to release a claim for "stigma" damages that neither party could have known about (see above, para.4-049).

830. *[2001] UKHL 8* at [32]–[33]. Lord Bingham preferred not to address this question (at [20]), and so it seems did Lord Clyde (at [87]).

831. *[2001] UKHL 8* at [69]–[70].

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(h) - Fiduciary Relationships and Relationships of Trust and Confidence

7-181

The existence of a fiduciary relationship [832] or a relationship of trust and confidence [833] between the parties may also have the effect of requiring the trusted party to disclose information to the other. Disclosure when there is a relationship of trust and confidence is dealt with in Ch.8. [834]

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1. See Allen, *Misrepresentation* (1988); Cartwright, *Unequal Bargaining* (1991), Ch.3; Cartwright, Misrepresentation, Mistake and Non-disclosure, 4th edn (2016); Spencer Bower and Handley, *Actionable Misrepresentation*, 5th edn (2014).

832. See above, para.7-088.

833. See below, paras 8-075—8-089.

834. See below, para.8-069.