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p. 578

17. Misrepresentation

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Abstract

A misrepresentation induces a party to enter into a contract but typically is not part of the contract itself. The chapter examines the different types of misrepresentation (fraudulent, negligent, or innocent) and the remedies that the law provides in respect of a misrepresentation. The chapter focuses on the liability for misrepresentation. It begins by examining the definition of a misrepresentation. The chapter considers the extent to which English law recognizes the existence of a duty of disclosure and goes on to discuss the concept of rescission. It then explores how misrepresentation gives rise to a claim for damages, with a particular focus on section 2 of the Misrepresentation Act 1967. The final section examines the possibility of excluding liability for misrepresentation.

Keywords: English contract law, misrepresentation, duty of disclosure, rescission, Misrepresentation Act 1967, excluding liability for misrepresentation

Central Issues

1. The law of misrepresentation is, in many ways, the law of induced mistake: that is to say one party is induced to enter into a contract as a result of a false statement of fact made to him by the defendant or by a third party. The ground on which the relief is sought in these cases does not rest on the mistake made by the claimant but rather rests on the fact that the mistake was induced by the false statement of fact that was made to the claimant and which induced him to enter in the contract.

2. A claimant who wishes to seek relief on the ground of misrepresentation must, first of all, establish that a misrepresentation was made to him. A misrepresentation is an unambiguous false statement of fact, made to the claimant, which induced him to enter into a contract. This definition has given rise to a number of difficulties in the case-law. Can a statement of opinion or a statement of intention constitute a misrepresentation? Can a misrepresentation be made by conduct? Must a misrepresentation be 'material'? When will a misrepresentation be held to have induced a claimant to enter into a contract? All of these questions will be explored in this chapter.
3. English law does not generally recognize the existence of a duty of disclosure. However, in certain circumstances, a failure to disclose information may give rise to a claim for misrepresentation. These circumstances will be examined in this chapter.
4. A claimant who has been induced to enter into a contract by a misrepresentation made to him by the other party to the contract is, in principle, entitled to set aside (or 'rescind') that contract. Rescission is an extremely powerful remedy because it sets aside a contract for all purposes. There are, however, a number of 'bars' to rescission and the scope of these bars will be examined in this chapter. Rescission for misrepresentation must be distinguished from the termination of a contract for breach. Rescission for misrepresentation aims to unwind the contract so that it is set aside both retrospectively and prospectively. Termination for breach, by contrast, discharges the contract prospectively but not retrospectively.

p. 579

5. Damages are also available as a remedy for misrepresentation. Prior to 1963 only a fraudulent misrepresentation gave rise to a claim for damages (in the tort of deceit). The right to claim damages for misrepresentation was extended by the House of Lords in 1963 when it was recognized that, in certain circumstances, a negligent misrepresentation could give rise to a claim for damages in tort. The final step was taken in 1967 when section 2 of the Misrepresentation Act 1967 created a statutory right to recover damages in respect of negligent misrepresentations and in respect of some innocent misrepresentations. Section 2 is now the most important source of the right to recover damages for misrepresentation. Section 2 has proved to be a controversial provision and the controversies associated with it will be examined in this chapter.
6. Attempts to exclude or restrict liability for misrepresentation are regulated by section 3 of the Misrepresentation Act 1967 which subjects such clauses to a test of reasonableness. The question whether an entire agreement clause falls within the scope of section 3 has proved to be a contentious issue and will be examined at the end of the chapter.

17.1 Introduction

The law of misrepresentation inhabits a borderland between contract, tort, and restitution (or unjust enrichment). A misrepresentation induces a party to enter into a contract but is often not part of the contract itself; a fraudulent or negligent misrepresentation can give rise to a claim for damages in tort; and a personal

and (possibly) a proprietary restitutionary claim can be brought to recover the value of benefits conferred under a contract which has been set aside (or 'rescinded') for misrepresentation. The role of the law of tort and the law of restitution will be examined when discussing the remedial consequences of a misrepresentation. A further possible source of redress open to a consumer is to be found under the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) as amended by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870). The giving of false information to a consumer may amount to an unfair commercial practice entitling the consumer to unwind the contract, to obtain a discount, or to recover damages. These rights are additional to those given to consumers by the common law (including equity) but cannot be exercised in combination with such rights. These statutory rights will not be discussed in any detail in this book.

The proposition that a misrepresentation induces a party to enter into a contract but is often not part of the contract itself requires further elaboration. Not every statement made prior to entry into a contract is incorporated into the contract as a term. It can in fact be a difficult task to determine in any given case whether a pre-contractual statement is simply a representation which has induced entry into the contract but is not part of the contract or whether it is in fact a term of the contract. The tests applied by the courts to distinguish between a term and a representation have been examined already (see 8.3) and it is not necessary to go over the same ground again. Here, it suffices to state that the distinction between a term and a
p. 580 representation does have remedial consequences. Where ↵ the statement is a term of the contract, a failure to comply with it, without lawful excuse, will constitute a breach of contract, and the remedies available will be those available in a breach of contract claim (on which see Chapters 22–24). On the other hand, where the representation is not a term of the contract then the claimant's claim will be one for misrepresentation and not for breach of contract. The remedies for misrepresentation will be discussed in this chapter.

It is, of course, possible for a pre-contractual statement to be incorporated into the contract as a term. In such a case the claimant must lead evidence to establish that the representation has been so incorporated and, where he does so, will have an action for breach of contract in the event of a breach of the term and the usual remedies for breach will be available to him. But it may also be possible for a claimant in such a case to bring a claim for misrepresentation and seek rescission of the contract or damages. Section 1(a) of the Misrepresentation Act 1967 provides that a party who has entered into a contract after a misrepresentation has been made to him may rescind the contract for misrepresentation, even in the case where the misrepresentation is subsequently incorporated into the contract as a term, provided that he is entitled to rescind the contract without alleging fraud. The scope of this subsection is, in some respects, unclear but its general effect is to make provision for the survival of the right to rescind for misrepresentation in the case where a statement of fact has been incorporated into a contract as a term, but at the same time the subsection does not purport to take away any remedies available to the claimant for breach of contract (*Salt* v. *Stratstone Specialist Ltd* [2015] EWCA Civ 745, [2015] 2 CLC 269). This being the case, the claimant would appear to have available to him the usual array of remedies for breach of contract but also has the possibility of rescinding the contract for misrepresentation where he can establish an entitlement to do so.

The remainder of this chapter is devoted solely to liability for misrepresentation and does not deal with the complications that can arise where the statement has also been incorporated into the contract as a term. The remainder of the chapter is divided into five sections. The next section (17.2) examines the definition of a misrepresentation; 17.3 deals with the extent to which English law recognizes the existence of a duty of

disclosure; the subject matter of 17.4 is rescission; 17.5 explores the extent to which a misrepresentation can give rise to a claim for damages; and 17.6 examines the extent to which it is possible to exclude liability for misrepresentation.

17.2 What Is a Misrepresentation?

A misrepresentation can be defined as an unambiguous false statement of fact which is addressed to the party misled and which induces that party to enter into a contract. There may be further elements to the definition. One issue of controversy has been whether or not the misrepresentation must also be 'material'. The definition of a misrepresentation has proved to be surprisingly troublesome and it has given rise to a considerable amount of litigation. It is therefore necessary to examine the constituent elements of a misrepresentation in greater detail before using some cases to illustrate the difficulties that have arisen.

First, the misrepresentation must have been 'unambiguous'. An ambiguous statement will not generally give rise to a right of action for misrepresentation except in the case where a party makes an ambiguous statement intending it to convey a meaning which he knows is not true and the party to whom the statement is made reasonably understands it in the sense which is not true.

p. 581 ↵ Second, the representation must have been 'false'. A statement which is true obviously cannot give rise to a claim for misrepresentation.

Third, there must have been a 'statement'. The requirement that the misrepresentation take the form of a 'statement' draws attention to the fact that there must be some positive conduct on the part of the representor. A mere failure to disclose information will not, as a general rule, give rise to an action for misrepresentation (see 17.3). The statement commonly takes the form of a written or an oral communication. But it need not do so. A representation can be made by conduct. Cases involving representations by conduct can give rise to acute difficulties in terms of identifying the meaning that was conveyed by the conduct.

Fourth, the statement must generally be one 'of fact'. There are a number of issues here. In the first place, this requirement serves to distinguish a representation from a promise. A promise is more than a statement of fact. It is an undertaking to do something or not to do something. A representation, by contrast, simply asserts the existence of a given state of affairs which is either true or false. The statement invites reliance upon it but it does not constitute an undertaking to bring about that state of affairs. It has also proved to be difficult to distinguish a statement of fact from other types of statement that can be made, such as a statement of law, of opinion, or of intention. The distinction between these different types of statement is not as rigid as it once was because it is now clear that statements of law, opinion, and intention can, in certain circumstances, give rise to a claim for misrepresentation. Thus it is now established that a mistake of law can, in an appropriate case, entitle the mistaken party to set aside a contract entered into as a result of the mistake (*Brennan* v. *Bolt Burden (a firm)* [2004] EWCA Civ 1017, [2005] QB 303) and that a misrepresentation of law can found a cause of action (*Pankhania* v. *London Borough of Hackney* [2002] EWHC 2441 (Ch)). Statements of opinion are more difficult. While authority can be found to support the proposition that a statement of opinion does not suffice to give a claim for misrepresentation (*Bisset* v. *Wilkinson* [1927] AC 177, see 17.2.1), more recent authority has held statements of opinion to be actionable where the person who makes the statement

of opinion has some special skill but fails to exercise it (see *Esso Petroleum Ltd* v. *Mardon* [1976] QB 801, 8.3.1). A statement of intention, on the other hand, cannot generally constitute a misrepresentation unless the person making the statement mis-states his present intention (see *Edgington* v. *Fitzmaurice* (1885) 29 Ch D 459, 17.2.2).

Fifth, the statement must have been 'addressed to the party misled'. This can be done in one of two ways. It can be made directly as in the case where one party speaks to another or writes to him or it can be done indirectly. A statement can be addressed to a person 'indirectly' when the statement is made by the maker of the statement to a third party with the intention that the third party pass on the information to the claimant. An example is information conveyed by one bank to another with the intention that the recipient bank convey the information to one of its customers (see, for example, *Commercial Banking of Sydney* v. *R.H. Brown and Co* [1972] 2 Lloyd's Rep 360).

Sixth, there is a debate as to whether or not the misrepresentation must have been 'material'. The judgments in *Bisset* v. *Wilkinson* [1927] AC 177 (17.2.1), *Redgrave* v. *Hurd* (1881) 20 Ch D 1 (17.4.1), and *Edgington* v. *Fitzmaurice* (1885) 29 Ch D 459 (17.2.2) make frequent references to the existence or otherwise of a 'material' statement. There are two difficulties here. The first relates to the meaning of 'material'. It would appear that a 'material' statement is one that would affect the mind of a reasonable person in deciding whether or not to enter into a contract. The second difficulty relates to the role played by materiality in the case-law. Many of the references appear to be in the context of deciding whether or not the misrepresentation was an inducement to entry into the contract. But it is possible to argue that the requirement of 'materiality' (if there is such a requirement) is
p. 582 analytically distinct from the ↵ question of inducement. The difficult case is the case in which a party is induced to enter into a contract by a misrepresentation which is objectively immaterial. Such cases are unlikely to arise in practice because a court in such a case will, in all probability, find on the facts that the representation did not induce the party concerned to enter into the contract. The authorities suggest that the courts adopt the following approach: where the misrepresentation is of such a nature that it would have induced a reasonable person to enter into the contract then the court will presume that it did induce the representee to enter into the contract and the onus of proof then switches to the party who made the statement to show that the representee did not in fact rely on the representation in entering into the contract (*Museprime Properties Ltd* v. *Adhill Properties Ltd* (1991) 61 P & CR 111, 124). By contrast, in the case where the statement would not have induced a reasonable person to enter into a contract in reliance upon the statement, the onus of proof rests upon the recipient of the statement to show that the misrepresentation did in fact induce him to enter into the contract (*Dadourian Group International Inc* v. *Simms* [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep 601, [99]–[101]). In any event, the materiality requirement does not apply where the representation was made fraudulently (*Ross River Ltd* v. *Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), [2008] 1 All ER 1004).

Seventh, the misrepresentation must have induced the claimant to enter into the contract. This apparently straightforward statement has, however, given rise to some real difficulties. That said, some points can be established with a high degree of certainty. First, a misrepresentation which is the 'but for' cause of the representee entering into the contract on the represented terms satisfies the text for the existence of an inducement. Second, and at the other end of the spectrum, a misrepresentation which had no impact whatsoever on the decision of the representee to enter into the contract is not an inducement to entry into the contract. So, if the representee would have acted in exactly the same way in the absence of the misrepresentation, a claim brought by the representee in respect of the misrepresentation will fail (*Versloot*

Dredging BV v. *HDI Gerling Industrie Versicherung AG* [2016] UKSC 45, [2017] AC 1, [29]). A misrepresentation may have no impact on the representee for a number of reasons. For example, the representee may have been unaware of the existence of the statement at the time of entry into the contract (*Horsfall* v. *Thomas* (1862) 1 H & C 90) or the statement was not actively present to his mind at the time of entry into the contract (*Leeds City Council* v. *Barclays Bank plc* [2021] EWHC 363 (Comm), [2021] QB 1027, [102]), the representee may have placed his reliance upon a third party when entering into the contract (*Atwood* v. *Small* (1838) 6 C & F 232), or the representor may have corrected his misrepresentation and actually drawn the representee's attention to the correction prior to any reliance upon it (*Peekay Intermark Ltd* v. *Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511). Third, the fact that the representee could have discovered the true position by acting in a more diligent fashion does not, of itself, prevent him from asserting that he was induced to enter into the contract in reliance upon the misrepresentation made (see *Redgrave* v. *Hurd* (1881) 20 Ch D 1, 17.4.1). Fourth, the onus of proof is upon the representee to prove that the misrepresentation induced him to enter into the contract (*BV Nederlandse Industrie van Eiprodukten* v. *Rembrandt Enterprises Inc* [2019] EWCA Civ 596, [2020] QB 551, [15]).

Matters get more difficult in the case where the representee cannot satisfy the 'but for' test for causation. In such a case, on one view, the representee must fail because the requisite threshold has not been overcome (see N Venkatesan (2021) 137 *LQR* 503). But there is also authority for the proposition that it suffices for the representee to prove that the misrepresentation was actively present to his mind at the time at which he entered into the contract (*BV Nederlandse Industrie van Eiprodukten* v. *Rembrandt Enterprises Inc* [2019] EWCA
p. 583 Civ 596, [2020] QB 551, [32]). The context for this lowered threshold is frequently a claim for ↵ damages in respect of a fraudulent misrepresentation and one can understand the sentiment that leads the court to be reluctant to allow a fraudulent party to escape liability by asserting that his false representation, while an inducement to entry into the contract, was not important enough to satisfy the 'but for' test. Tempting though it is to relax the relevant threshold, the 'but for' test is an important rule given that it is 'fundamental that the representee must have acted on the misrepresentation' (*Versloot Dredging BV* v. *HDI Gerling Industrie Vershicherung AG* [2016] UKSC 45, [2017] AC 1, [29]) and it should not be lightly departed from. While the misrepresentation need not have been the only inducement to entry into the contract (*Edgington* v. *Fitzmaurice* (1885) 29 Ch D 459, 17.2.2) it should nevertheless satisfy the 'but for' test of causation if it is to give rise to a claim in respect of that misrepresentation, at least in the case where the remedy sought by the representee is rescission.

These principles can be seen at work in the following three cases:

17.2.1 Statements of Opinion

Bisset v. Wilkinson
[1927] AC 177, Privy Council

In May 1919 Wilkinson agreed to purchase from Bisset two adjoining blocks of land in New Zealand called 'Homestead' and 'Hogan's'. Wilkinson purchased the land for the purpose of sheep farming. In accordance with the agreement Wilkinson paid part of the purchase price on the signing of the agreement. The balance was payable in May 1924 and interest was to be paid half-yearly in the meantime. Wilkinson took possession of the land but soon after experienced difficulties and did not make the interest payments when they fell due. When Bisset brought an action to recover the overdue interest payments Wilkinson sought to have the agreement rescinded, alleging that Bisset had misrepresented that the land 'had a carrying capacity of 2000 sheep if only one team were employed in the agricultural work of the land'. Bisset argued that the representation was a statement of opinion, which he honestly held, and so was not actionable. The New Zealand Court of Appeal held that the representation was an untrue statement of fact and set aside the agreement. The Privy Council allowed Bisset's appeal and held that the representation was a statement of opinion, which Bisset honestly held and was not actionable.

Lord Merrivale

[delivering the judgment of the Board]

In an action for rescission, as in an action for specific performance of an executory contract, when misrepresentation is the alleged ground of relief of the party who repudiates the contract, it is, of course, essential to ascertain whether that which is relied upon is a representation of a specific fact, or a statement of opinion, since an erroneous opinion stated by the party affirming the contract, though it may have been relied upon and have induced the contract on the part of the party who seeks rescission, gives no title to relief unless fraud is established. The application of this rule, however, is not always easy, as is illustrated in a good many reported cases, as well as in this. A representation of fact may be inherent in a statement of opinion and, at any rate, the existence of the opinion in the person stating it is a question of fact … In *Smith* v. *Land and House Property Corporation* (1884) 28 Ch D 7, 15 there came in question a vendor's description of the tenant of the property sold as
p. 584 'a most ↵ desirable tenant'—a statement of his opinion, as was argued on his behalf in an action to enforce the contract of sale. This description was held by the Court of Appeal to be a misrepresentation of fact, which, without proof of fraud, disentitled the vendor to specific performance of the contract of purchase. 'It is often fallaciously assumed', said Bowen LJ, 'that a statement of opinion cannot involve the statement of fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally well known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows

facts which justify his opinion.' The kind of distinction which is in question is illustrated again in a well-known case of *Smith* v. *Chadwick* (1884) 9 App Cas 187; (1882) 20 Ch D 27. There the words under consideration involved the inquiry in relation to the sale of an industrial concern whether a statement of 'the present value of the turnover or output' was of necessity a statement of fact that the produce of the works was of the amount mentioned, or might be and was a statement that the productive power of the works was estimated at so much. The words were held to be capable of the second of these meanings. The decisive inquiries came to be: what meaning was actually conveyed to the party complaining; was he deceived, and, as the action was based on a charge of fraud, was the statement in question made fraudulently?

In the present case, as in those cited, the material facts of the transaction, the knowledge of the parties respectively, and their relative positions, the words of representation used, and the actual condition of the subject matter spoken of, are relevant to the two inquiries necessary to be made: What was the meaning of the representation? Was it true?

In ascertaining what meaning was conveyed to the minds of the now respondents by the appellant's statement as to the two thousand sheep, the most material fact to be remembered is that, as both parties were aware, the appellant had not and, so far as appears, no other person had at any time carried on sheep-farming upon the unit of land in question. That land as a distinct holding had never constituted a sheep-farm. The two blocks comprised in it differed substantially in character. Hogan's block was described by one of the respondents' witnesses as 'better land'. 'It might carry', he said, 'one sheep or perhaps two or even three sheep to the acre'. He estimated the carrying capacity of the land generally as little more than half a sheep to the acre. And Hogan's land had been allowed to deteriorate during several years before the respondents purchased. As was said by Sim J: 'In ordinary circumstances, any statement made by an owner who has been occupying his own farm as to its carrying capacity would be regarded as a statement of fact. ... This, however, is not such a case. The defendants knew all about Hogan's block and knew also what sheep the farm was carrying when they inspected it. In these circumstances ... the defendants were not justified in regarding anything said by the plaintiff as to the carrying capacity as being anything more than an expression of his opinion on the subject.' In this view of the matter their Lordships concur.

Whether the appellant honestly and in fact held the opinion which he stated remained to be considered. This involved examination of the history and condition of the property. If a reasonable man with the appellant's knowledge could not have come to the conclusion he stated, the description of that conclusion as an opinion would not necessarily protect him against rescission for misrepresentation. But what was actually the capacity in competent hands of the land the respondents purchased had never been, and never was, practically ascertained. The respondents, after two years' trial of sheep-farming, under difficulties caused in part by their inexperience, found themselves confronted by a fall in the values of sheep and wool which would have left them losers if
p. 585 they could have carried ↵ three thousand sheep. As is said in the judgment of Ostler J: 'Owing to sheep becoming practically valueless, they reduced their flock and went in for cropping and dairy-farming in order to make a living'. ...

> After attending to the close and very careful examination of the evidence which was made by learned counsel for each of the parties their Lordships entirely concur in the view which was expressed by the learned judge who heard the case. The defendants failed to prove that the farm if properly managed was not capable of carrying two thousand sheep.

Commentary

Bisset was narrowly interpreted by the Court of Appeal in *Esso Petroleum Ltd* v. *Mardon* [1976] QB 801 (see 8.3.1). Lord Denning there distinguished *Bisset* on the ground that 'the land had never been used as a sheep farm and both parties were equally able to form an opinion as to its carrying capacity'. The key fact would therefore appear to be that the vendor was not possessed of any special skill or expertise in relation to sheep farming. The position is otherwise where, as in *Esso*, the maker of the statement does profess to have some special skill or expertise in relation to the subject matter of his statement of opinion. In such a case the courts will readily imply that the maker of the statement is subject to a duty to make the statement with reasonable care and skill. The effect of this implication is to leave the maker of the statement potentially exposed to a claim for misrepresentation when he makes the statement without exercising reasonable care and skill. It should be noted that the Privy Council in *Bisset* did not deny the possibility that a claim for misrepresentation could arise out of a statement which could be classified as one of opinion. Lord Merrivale cites with approval a passage from the judgment of Bowen LJ in *Smith* v. *Land and House Property Corporation* (1884) 28 Ch D 7, 15 where he states that:

> if the facts are not equally well known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.

On the facts of *Smith* a vendor of property described a tenant as 'a most desirable tenant' when the vendor knew that part of the tenant's rent remained unpaid and other instalments had only been paid under the threat of legal proceedings. The vendor argued that his statement was a statement of opinion which was not actionable. His argument was rejected on the basis that his statement was held to contain an implied assertion that he knew of no facts which would lead to the conclusion that the tenant was not in fact a 'most desirable tenant'. It is, however, important to note that Bowen LJ is here dealing with the case where the 'facts are not equally well known to both sides'. In the case where there is no such imbalance in knowledge, a court may refuse to make the implication (see, for example, *Economides* v. *Commercial Union Assurance Co plc* [1998] QB 587). Equally, a representor who declines to assume responsibility for the accuracy of the information which he has passed on to the claimant; in such a case, the express refusal to assume responsibility is likely to negate any implication that the representor knows facts which justify his opinion (*IFE Fund SA* v. *Goldman Sachs International* [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep 449).

p. 586

17.2.2 Statements of Intention and Inducement

Edgington v. Fitzmaurice
(1885) 29 Ch D 459, Court of Appeal

> The plaintiff, Mr Edgington, was a shareholder in a company of which the defendants were officers. The directors issued a prospectus which invited shareholders to subscribe to debenture bonds. It stated that the bonds were being issued for the purpose of (i) making improvements to a property recently purchased by the company, (ii) the development of a transport service for the company through the purchase of horses and vans, and (iii) the further development of their business of supplying cheap fish from the coast. The plaintiff also wrote to the company secretary and asked whether or not the debentures would be a first charge on the property. The company secretary confirmed that they would be.
>
> The company was later wound up and the assets were insufficient to pay the debenture holders more than a small dividend. The plaintiff brought an action against the defendants to recover the sum of money advanced by him on the ground that he had been induced to pay the money by fraudulent misrepresentations for which the defendants were responsible. The defendants denied liability. The Court of Appeal held, affirming the decision of Denman J, that the plaintiff was entitled to recover the money in an action in deceit on the basis that he had been induced to pay the money to the company by the fraudulent misrepresentation of the defendants as to the purpose for which the debentures were issued.
>
> ### Bowen LJ
>
> This is an action for deceit, in which the Plaintiff complains that he was induced to take certain debentures by the misrepresentations of the Defendants, and that he sustained damage thereby. ...
>
> The alleged misrepresentations were three [he considered the first two misrepresentations and concluded that there was insufficient proof that the misrepresentations had been made fraudulently and continued]
>
> But when we come to the third alleged misstatement I feel that the Plaintiff's case is made out. I mean the statement of the objects for which the money was to be raised. These were stated to be to complete the alterations and additions to the buildings, to purchase horses and vans, and to develop the supply of fish. A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact. Having applied as careful consideration to the evidence as I could, I have reluctantly come to the conclusion that the true objects of the Defendants in raising the money were not those stated in the circular. ...

> Then the question remains—Did this misstatement contribute to induce the Plaintiff to advance his money? … What is the first question which a man asks when he advances money? It is, what is it wanted for? Therefore I think that the statement is material, and that the Plaintiff would be unlike the rest of his race if he was not influenced by the statement of the objects for which the loan was required. The learned Judge in the Court below came to the conclusion that the misstatement did influence him, and I think he came to a right conclusion.

p. 587

Fry LJ

> It is clear that their [the defendants'] object in raising the money was to meet their pressing liabilities. … But the statement in the prospectus was that a large sum of money had been already expended in improving the building … and that the directors intended to apply the money raised by the debentures in further improving the buildings. This statement was therefore false. …
>
> The next inquiry is whether this statement materially affected the conduct of the Plaintiff in advancing his money. He has sworn that it did, and the learned Judge who tried the action has believed him. On such a point I should not like to differ from the Judge who tried the action, even though I were not myself convinced, but in this case the natural inference from the facts is in accordance with the Judge's conclusion. The prospectus was intended to influence the mind of the reader. Then this question has been raised: the Plaintiff admits that he was induced to make the advance not merely by this false statement, but by the belief that the debentures would give him a charge on the company's property, and it is admitted that this was a mistake of the Plaintiff. Therefore it is said that the Plaintiff was the author of his own injury. It is quite true that the Plaintiff was influenced by his own mistake, but that does not benefit the Defendants' case. The Plaintiff says: I had two inducements, one my own mistake, the other the false statement of the Defendants. The two together induced me to advance the money. But in my opinion if the false statement of fact actually influenced the Plaintiff, the Defendants are liable, even though the Plaintiff may have been also influenced by other motives. I think, therefore, the Defendants must be held liable. The appeal must therefore be dismissed.
>
> ***Cotton LJ*** delivered a concurring judgment.

Commentary

On the facts of this case, the plaintiff had no effective claim against the company (because it was insolvent) and so he brought the claim against the directors instead. Two points of significance emerge from the case. The first is that it demonstrates that a statement of intention can be actionable in a case where the maker of the statement mis-states his present intention. In Bowen LJ's memorable phrase, 'the state of a man's mind is as much a fact as the state of his digestion'. As Bowen LJ acknowledges, it can be extremely difficult to prove that a person has in fact mis-stated his present intention. A party who truly states his present intention but then changes his mind does not commit a misrepresentation. In the absence of a binding promise not to

change his mind, the maker of the statement is free to change his mind without incurring any liability for doing so (*Kleinwort Benson Ltd* v. *Malaysia Mining Corporation Berhad* [1989] 1 WLR 379; *Wales* v. *Wadham* [1977] 1 WLR 199).

The second point to note is that the plaintiff advanced the money under the erroneous belief that he was entitled to a first charge on the property of the company. This was therefore not a case in which the plaintiff was relying solely upon the statements contained in the prospectus. This was held to be no barrier to the plaintiff's action. As Fry LJ stated, provided that the false statement of fact actually influenced the plaintiff, he was entitled to succeed in his claim notwithstanding the fact that he was also influenced to enter into the transaction by other factors.

p. 588

17.2.3 Statements Made by Conduct

Spice Girls Ltd v. Aprilia World Service BV
[2002] EWCA Civ 15, [2002] EMLR 27, Court of Appeal

> The claimants, Spice Girls Ltd ('SGL'), entered into a contract with the defendants, Aprilia World Service ('AWS'), a manufacturer of motorcycles and scooters, according to which the latter agreed to sponsor the Spice Girls' concert tour in return for promotional work carried out by the group. The contract between the parties was signed on 6 May 1998. One of the members of the Spice Girls, Ms Geri Halliwell, left the band on 27 May 1998. The defendants subsequently discovered that Ms Halliwell had informed the other members of the group of her decision to leave prior to the conclusion of the contract with the defendants. In these circumstances the defendants claimed that they had been induced to enter into the contract by a misrepresentation made by the claimants. The claimants denied that any misrepresentation had been made and, for this purpose, relied upon a clause in the contract which stated that the defendants were entitled to the 'endorsement rights of the group of individuals performing under the professional name "Spice Girls" (currently comprising …)'. In their submission, this statement was true because Ms Halliwell was a member of the band at the time the contract was concluded and the risk that one of the members of the group would subsequently decide to leave had been allocated to AWS.
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> The misrepresentation relied upon by AWS was that SGL did not know and had no reasonable grounds to believe at or before the time of entry into the agreement that any of the Spice Girls had an existing declared intention to leave the group during the minimum term of the agreement. The trial judge, Arden J, concluded that there had been a misrepresentation by conduct in that all five members of the group participated in a commercial photo shoot on 4 May 1998 at considerable cost to the defendants at a time when they knew, but the defendants did not, that Geri Halliwell intended to leave the group. The Court of Appeal affirmed the decision of Arden J but did so on a wider basis. It relied upon a number of factors in reaching the conclusion that the claimants had, by their conduct, conveyed to the defendants the impression that all members of the group were committed to the contract with the defendants and that none of them had an existing, declared intention to leave the group.
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> ### Morritt V-C
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> [delivering the judgment of the court]
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> #### The representation
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> 51. At the outset it is necessary to reiterate certain well-established principles. First, though the representation must be one of fact representations as to the future or of opinion frequently contain implied representations with regard to the present or to the knowledge of the representor. … Second, a representation once made is likely to have continuing effect. So if made for the purpose of an intended transaction it will continue until the transaction is

completed or abandoned or the representation ceases to be operative on the mind of the representee; *With* v. *O'Flanagan* [1936] 1 Ch 575, at 585. Third, if at a time when it is continuing the representor discovers that the representation was false when made or has become false since he should correct it. The principle is most clearly expounded in the judgment of Romer LJ in *With* v. *O'Flanagan* [1936] 1 Ch 575 [see 17.3] … Fourth, the meaning and effect of a statement or of conduct must be ascertained in the light of the circumstances pertaining at the time. Those circumstances will include the course of the negotiations and any earlier representations.

p. 589

52. The representation for which AWS has contended ever since it amended its defence and counterclaim in December 1999 is that 'SGL did not know and had no reasonable grounds to believe at or before the time of entry into the agreement that any of the Spice Girls had an existing declared intention to leave the group during the minimum term of the Agreement', i.e. before March 1999. This was accepted by the judge … but only in respect of the commercial shoot on May 4, 1998 and 'other promotional material depicting the five Spice Girls which was intended to be used at any time during the period of the agreement'.

53. In our view the judge took too limited a view of the effect of the course of the negotiations as a whole and the specific documents and conduct relied on. We have already described the course of negotiations in some detail. Accordingly at this stage it is sufficient to highlight the most salient facts and events.

54. First, shortly after the conclusion of the heads of agreement on March 4, 1998 SGL supplied the logos, images and designs depicting each of the Spice Girls which were to be used by Aprilia in the promotion of the scooters. It must have been quite obvious from all such material and the judge's finding … that the same five girls were required for all of them. AWS was entitled to use them throughout the period of 12 months. … As we understand it such material was consistently used thereafter so as to generate a connection in the public eye between the Spice Girls and the scooters. In our view the representation contended for is necessarily implicit in that conduct from early March 1998 onwards. …

55. Second, the events of March 9, 1998 [when Geri Halliwell told the members of the group, shortly before they went on stage in Milan, that she had had enough and definitely intended to leave the group in September] were such as to bring to the attention of four of the other five directors of SGL the fact that Ms Halliwell had declared her intention to leave in September 1998. It follows that the representation implicit in the approval and use of the promotional material was false when made, or to the extent it was made before March 9, became false on March 9, 1998. The fact that the other Spice Girls mistakenly as it turned out did not take Ms Halliwell seriously is immaterial.

56. Third, the subsequent events merely served to affirm, not correct, the initial representation and its falsity. …

57. Fourth, the fax of March 30, 1998 … was an express assurance that each Spice Girl was fully committed to all the matters contained in the heads of agreement and in the draft agreement then circulating for the full term of 12 months. There is implicit in such assurance the representation for which AWS contends. That representation was false when made because

of the declaration of intention made by Ms Halliwell on March 9, 1998 and never qualified or withdrawn. The fact that Mr Pettett did not consider that he was making such a representation is irrelevant. … Knowledge of the fax is to be attributed to SGL because KLP was its agent. …

58. Fifth, the events of the meeting held at Wembley on April 25, 1998 [when Geri Halliwell confirmed at a meeting of the group and their legal advisers that she was going to leave the group at the end of their American tour] demonstrated quite conclusively the falsity of all the representations previously made. Whichever formulation of the principle enunciated in *With* v. *O'Flanagan* is adopted and whatever view is taken of the declaration made by Ms Halliwell on March 9, 1998 it is quite clear that SGL could no longer deal with AWS on the previous basis without disclosing Ms Halliwell's expressed intention. …

59. Sixth, it is clear that far from correcting the previous misrepresentations SGL continued and affirmed them. There was the draft agreement originally issued on March 24 and reissued on April 30. No doubt the phrase 'currently comprising' points primarily to the present (whether at the time of the draft or as of the imminent time when the Agreement was executed) and in that limited sense was true. But to our minds, in the context of the surrounding circumstances, it was concerned with an agreement which would continue into the future, in much the same sense as the conduct of SGL in approving the promotional material or of the Spice Girls in participating in the commercial shoot, in each case, for future use. In these two latter senses there was implicit in the representation derived from the conduct of SGL in circulating the draft agreement with the phrase 'currently comprising' the representation for which AWS contends. It follows that, in that context, to say that the Spice Girls currently comprised the five named individuals without going on to say that one of them was going to leave within the period of the Agreement was false when made. What was omitted rendered that which was actually stated false or misleading in the context in which it was made: see *Chitty on Contracts* (1999, 28th ed), Volume 1, paragraph 6–016.

p. 590

60. Seventh, as the judge held, participation in the commercial shoot necessarily carried the same implication and was likewise false. It did nothing to correct the previous misrepresentations, indeed it gave them additional force. …

63. Whilst it is necessary to give each episode separate consideration it is also necessary to have regard to their cumulative effect. This is not a case of an isolated representation made at an early stage of ongoing negotiations. It is the case of a series of continuing representations made throughout the two months' negotiations leading to the Agreement. Later representations gave added force to the earlier ones; earlier representations gave focus to the later ones. It is in this context, not the much more limited one the judge adopted, that the submissions for SGL as to inducement and reliance must be considered. …

73. For all these reasons, while we consider that the judge took too narrow a view as to what representations were made and when, we do not accept the submissions for SGL that section 2(1) of the Misrepresentation Act 1967 is inapplicable. Subject to proof of damage, we conclude that SGL is liable to AWS under that provision.

Commentary

Spice Girls neatly illustrates the problems that can arise from the fact that English law neither recognizes a duty of disclosure (17.3) nor a duty of good faith in the negotiation of a contract (Chapter 15). The source of AWS's complaint was that SGL had failed to inform them that Geri Halliwell had already decided to leave the group before the contract was concluded. But they could not plead the claim on this basis nor could they rely on a failure to act in good faith. Instead, they had to spell out from the conduct of SGL a representation which would give them a cause of action. While AWS were prepared to take the risk that one of the members of the group would decide to leave the group during the currency of the agreement (this risk seems inherent in the phrase 'currently comprising'), they were not prepared to take the risk that one of the members had already decided to leave the group prior to the conclusion of the contract and told other members of the group of her decision, but did not tell the defendants. The basis on which counsel for AWS formulated the representation can be found in paragraph [52] of the judgment of the Court of Appeal. If this was the representation, when did it become a misrepresentation? Arden J took a narrow view and concluded that it became a misrepresentation
p. 591 at the point at which the Spice Girls, including Geri Halliwell, ↵ participated in the commercial shoot on 4 May 1998. She stated ([2000] EMLR 479 at [112] of her judgment):

> Given that the benefits of the commercial shoot could not be enjoyed by Aprilia if one of the Spice Girls left the group before March 1999, participation in the shoot in my judgment carried with it a representation by conduct that SGL did not know, and had no reasonable ground to believe, that any of the Spice Girls had an existing declared intention to leave the group before that date. Nothing was done to correct that representation which was a continuing representation. It was on the facts found material to Aprilia's decision to enter into the agreement that none of the Spice Girls was intending to leave in the contract period. Accordingly, SGL had a duty to correct its misrepresentation. What I have said about the commercial shoot must equally apply to other promotional material depicting the five Spice Girls which was intended to be used at any time during the period of the agreement.

The Court of Appeal took a broader view of the facts and relied upon a range of factors (set out in [54]–[60] of their judgment). While these factors, standing alone, might not have been decisive, taken together (see [63]) they painted a picture which was false and therefore amounted to a misrepresentation.

Spice Girls would have been a much easier case for AWS if English law had recognized a duty of disclosure or a duty of good faith. The arguments for and against the introduction of a doctrine of good faith in English law have been canvassed in Chapter 15 but here it is necessary to consider the law relating to the existence, or otherwise, of a duty of disclosure.

17.3 Duty of Disclosure

English law does recognize a limited group of cases in which a duty of disclosure is imposed upon the parties to the contract. These are known as contracts of the utmost good faith or contracts '*uberrimae fidei*'. Very few contracts fall into this category. The leading example is a contract of insurance where the insured is subject to a duty to disclose all facts which a reasonable or prudent insurer would regard as material to his decision to

enter into the particular contract of insurance (although, in the case of a consumer insurance contract, the duty owed by the consumer is now one to take reasonable care not to make a misrepresentation to the insurer, and this duty replaces any duty of disclosure previously owed by the consumer to the insurer in such circumstances: Consumer Insurance (Disclosure and Representations) Act 2012, section 2). English law also imposes a duty of disclosure in certain categories of fiduciary relationship where one party reposes trust and confidence in the other party. The party in whom trust and confidence is reposed may be subject to a duty of disclosure.

As a general rule, however, English law does not recognize the existence of a duty to disclose material facts known to one party but not to the other (*Keates* v. *Cadogan* (1851) 10 CB 591). As Viscount Maugham stated in *Bradford Third Equitable Benefit Building Society* v. *Borders* [1941] 2 All ER 205, 211 'mere silence, however morally wrong, will not support an action of deceit'. The word 'mere' is important. Something more than silence is therefore required in order to constitute a representation of fact. But that 'something more' can take many different forms. English law does not require that the representation take the form of words. As *Spice Girls* demonstrates, the representation can be made by conduct or can be inferred from the facts and circumstances of the case. In particular, the courts have been willing to find the existence of a
p. 592 misrepresentation in cases where one party has ↵ actively sought to conceal a defect in the subject matter of the contract from the other party. A number of examples can be provided of this phenomenon.

First, a misrepresentation can be made by conduct. Information can be conveyed as much by conduct as by words, and the courts have generally been willing to imply representations by conduct in ordinary dealings. Thus a buyer who orders goods impliedly represents that he intends to pay for them (*Re Shackleton, ex parte Whittaker* (1875) LR 10 Ch App 446, 449 per Sir G Mellish LJ), and a person who sits down in a restaurant and orders a meal impliedly represents that he has the means to pay for the meal (*DPP* v. *Ray* [1974] AC 370). The proposition that representations can be made by conduct is also demonstrated by the *Spice Girls* case. Further support for the proposition that a representation can be made by conduct can be derived from the case of *Walters* v. *Morgan* (1861) 3 D F & G 718, 723–724, where Lord Campbell LC stated that, while simple reticence does not amount to a legal fraud:

> a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold

would be a sufficient ground for refusing to enforce a contract.

Second, a court may be prepared to infer a misrepresentation where there has been an active attempt to conceal a defect. This proposition is illustrated by the case of *Schneider* v. *Heath* (1813) 3 Camp 506 which concerned the sale of a ship 'to be taken with all faults'. The plaintiff purchased the vessel and, after taking possession of it, he took it to a shipwright to be examined, where it was discovered that the bottom of the ship was worm-eaten and the keel broken. The plaintiff brought an action to recover the deposit paid for the purchase of the vessel on the ground that he had been induced to enter into the contract by the misrepresentation and fraud on the part of the vendor. It was held that he was entitled to recover his deposit. Mansfield CJ stated (at p. 509) that 'it appears here that means were taken fraudulently to conceal the defect in the ship's bottom' in that the captain removed the vessel from a dry dock and kept her afloat until the sale

was over. He did so for the purpose of preventing potential buyers from discovering the true state of the vessel and this was held to amount to a fraudulent misrepresentation (see to similar effect *Gordon* v. *Selico* (1985) 275 EG 899 (Goulding J) and (1986) 11 HLR 219 (CA), where it was held that the vendors had made a misrepresentation when they covered up dry rot in a flat before putting the flat up for sale).

Third, a partial non-disclosure may amount to a misrepresentation (see *Spice Girls Ltd* v. *Aprilia World Service BV*, [59]). In *Peek* v. *Gurney* (1873) 8 LR 6 HL 377 Lord Chancellor Chelmsford stated (at pp. 391–392) that:

> [i]t is said that the prospectus is true as far as it goes, but half a truth will sometimes amount to a real falsehood; and I go farther and say, that to my mind it contains a positive misrepresentation.

And in *Arkwright* v. *Newbold* (1881) 17 Ch D 301, 318 James LJ stated:

> Supposing you state a thing partially, you may make as false a statement as much as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it you may make a false statement. For instance, if pretending to set out the report of a surveyor, you set out two passages in his report, and leave out a third passage which qualifies them, that is an actual misstatement.

p. 593 ↵ Suppression of material facts can also render a statement false. In *Dimmock* v. *Hallett* (1866) LR 2 Ch App 21 a vendor of land told a purchaser that all the farms on the land were fully let but did not inform him that the tenants had given notice to quit. This was held to be a misrepresentation (see also *Central Railway Co of Venezuela* v. *Kisch* (1867) LR 2 HL 99, 114). A statement may also amount to a misrepresentation if it is literally true but it implies certain additional facts which are themselves false. In *Goldsmith* v. *Rodger* [1962] 2 Lloyd's Rep 249 a purchaser of a yacht negotiated a reduction in the price of the yacht after he told the seller that he had found defects in the yacht's keel. The statement that he had found defects in the keel was held to amount to a representation that he had taken the boat out and discovered the defect in the keel. The purchaser not having done this, it was held that his statement amounted to a misrepresentation.

Fourth, a statement which is literally true but is nevertheless misleading because the maker of the statement has failed to disclose all the relevant information may amount to a misrepresentation. This could be regarded as another example of a partial non-disclosure. In *Notts Patent Brick and Tile Co* v. *Butler* (1866) 16 QBD 778 a purchaser of land asked the vendor's solicitors whether the land was subject to restrictive covenants. The solicitor replied that he was not aware of any, but did not say that the reason for his ignorance was that he had not bothered to check. It was held that, although the solicitor's statement was literally true, it nevertheless amounted to a misrepresentation. Lord Esher MR stated (at pp. 787–788) that:

> the evidence has been read to us, and I am sorry to say that I have come to the conclusion that the defendant's solicitor allowed himself to be carried away by his zeal for his client, and that he did not act with that candour to the other side with which a solicitor is bound to act under such circumstances. He allowed himself, in his zeal for his client, to make statements which were calculated to lead the other side to believe that he was stating facts within his own knowledge, and his statements in fact misled them, so that what he said amounts to a mis-statement of facts.

Finally, a person may be held to have made a misrepresentation where he fails to correct a representation which, when made was true, but which subsequently, to his knowledge, has become false or which, at the time of making it, he believed to be true, but which he has subsequently discovered to be false. The leading example of a case in this category is the following decision of the Court of Appeal.

With v. O'Flanagan
[1936] Ch 575, Court of Appeal

In January 1934, the plaintiffs entered into negotiations for the purchase of the defendant's medical practice. Dr O'Flanagan represented that the takings of the practice were £2,000 per annum. This statement was true at the time that it was made but, when Dr O'Flanagan subsequently fell seriously ill and a number of locums ran the practice, the takings fell to an average of £5 per week. This change in circumstances was not revealed to the plaintiffs before the contract was signed in May 1934. The plaintiffs brought an action for rescission of the agreement. The trial judge refused to set aside the agreement on the basis that the representation was true when it was made and that there was no
p. 594 duty on the defendant to disclose the change in circumstances. The Court ↵ of Appeal allowed the plaintiffs' appeal and held that the defendant had made a misrepresentation in failing to reveal the change of circumstances and that, accordingly, the agreement between the parties should be set aside.

Lord Wright MR

[set out the facts and continued]

As to the law, which has been challenged, I want to say this. I take the law to be as it was stated by Fry J in *Davies* v. *London and Provincial Marine Insurance Co*. 8 Ch D 469. ...

The learned judge points out (at p. 474): 'Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other; and it rests upon those who say that there was a duty to disclose, to shew that the duty existed'. Then the learned judge points out that in many cases there is such a duty as between persons in a confidential or a fiduciary relationship where the pre-existing relationship involves the duty of entire disclosure. Then his Lordship says: 'In the next place, there are certain contracts which have been called contracts uberrimae fidei where, from their nature, the Court requires disclosure from one of the contracting parties'. The learned judge refers to contracts of partnership and marine insurance. Then he goes on (at p. 475): 'Again, in ordinary contracts the duty may arise from circumstances which occur during the negotiation. Thus, for instance, if one of the negotiating parties has made a statement which is false in fact, but which he believes to be true and which is material to the contract, and during the course of the negotiation he discovers the falsity of that statement, he is under an obligation to correct his erroneous statement; although if he had said nothing he very likely might have been entitled to hold his tongue throughout'. Then he adds what was material in that case and what is material in this case: 'So, again, if a statement has been made which is true at the time, but which during the course of the negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances'.

The matter, however, may be put in another way though with the same effect, and that is on the ground that a representation made as a matter of inducement to enter into a contract is to be treated as a continuing representation. That view of the position was put in *Smith* v. *Kay* 7 HLC 750, 769 by

> Lord Cranworth. He says of a representation made in negotiation some time before the date of a contract: 'It is a continuing representation. The representation does not end for ever when the representation is once made; it continues on. The pleader who drew the bill, or the young man himself, in stating his case, would say, Before I executed the bond I had been led to believe, and I therefore continued to believe, that it was executed pursuant to the arrangement.' ...
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> On these grounds, with great respect to the learned judge, I think he ought to have come to the conclusion that the plaintiffs have established their case and there ought to be a declaration rescinding the contract with the consequences which follow upon such a declaration.

Romer LJ

> I agree. The only principle invoked by the appellants in this case is as follows. If A with a view to inducing B to enter into a contract makes a representation as to a material fact, then if at a later date and before the contract is actually entered into, owing to a change of circumstances, the representation then made would to the knowledge of A be untrue and B subsequently enters into the contract in ignorance of that change of circumstances and relying upon that representation, A
> p. 595 cannot hold B to the bargain. There is ample authority for ↵ that statement and, indeed, I doubt myself whether any authority is necessary, it being, it seems to me, so obviously consistent with the plainest principles of equity.
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> The only questions therefore that we have to decide in the present case are, first, what was the representation made on January 21, secondly, had that representation, owing to the change of circumstances to which the Master of the Rolls has referred, become untrue by May 1 when the contract was entered into? The representation was this. It was made originally by Dr O'Flanagan's agent and subsequently confirmed by Dr O'Flanagan himself that the practice was doing at the rate of 2000l. a year and he, that is Dr O'Flanagan, was asking 4000l. for it, that is to say, two years' purchase. The reference to two years' purchase makes it plain to me that the statement that the practice was doing at the rate of 2000l. a year was intended to be a statement as to an essential feature of the practice, that is to say, a representation to the proposing purchasers that if they bought the practice they would be buying what might properly be called a 2000l. a year practice. Had that statement become untrue by May 1? It appears to me plainly it had. It is stated by Dr Stern, who was the locum tenens during the last of the three periods that Dr O'Flanagan was unwell, that he only took on an average 5l. a week during three weeks and, as the Master of the Rolls pointed out, of that 15l., 10l. was received from one patient. ...
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> ***Clauson J*** concurred.

Commentary

There are two possible bases for this decision. The first is that there was a continuing representation by the defendant and the second is that the defendant was subject to a duty to communicate to the plaintiffs the change of circumstances. In any event the principle only comes into play when the maker of the initial

representation has knowledge of the fact that his representation has been falsified by later events. The principle laid down in *With* was one of the elements relied upon by the Court of Appeal in *Spice Girls* in concluding that a misrepresentation had been made on the facts of that case.

The cases examined in this section 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. It can be argued that they do not go far enough, particularly in cases where it is alleged that the defendant has been fraudulent. In *HIH Casualty and General Insurance Ltd* v. *Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483 Rix LJ stated (at [48]):

> The general rule is that mere non-disclosure does not constitute misrepresentation, and that in the absence of a duty to speak there can be no liability in fraud, however dishonest the silence. However, in certain circumstances a combination of silence together with a positive representation may itself create a misrepresentation. Such a situation may be called partial non-disclosure, and such cases may be explained as either instances of actual misrepresentation or as cases where a duty to speak arises. ...

In terms of policy the problematic sentence is the first one. While some judges have inclined to the view that a remedy in damages may be available in a case of 'dishonest' non-disclosure (see, for example, *Conlon* v. *Simms* [2006] EWCA Civ 1749, [2008] 1 WLR 428), the orthodox view is that no such remedy is available in a case of pure non-disclosure. Should English law continue to hold that silence cannot amount to a misrepresentation, even when the silence is 'dishonest'? Article 4:107 of the Principles of European Contract Law states:

p. 596 ↵

> **Article 4:107—Fraud**
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> 1. A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed.
> 2. A party's representation or non-disclosure is fraudulent if it was intended to deceive.
> 3. In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including:
>   (a) whether the party had special expertise;
>   (b) the cost to it of acquiring the relevant information;
>   (c) whether the other party could reasonably acquire the information for itself; and
>   (d) the apparent importance of the information to the other party.

Should English law adopt such a provision?

17.4 Rescission

17.4.1 What Is Rescission and When Is it Available?

Rescission is a remedy that is available in principle for all types of misrepresentation; that is to say it is available whether the misrepresentation made was fraudulent, negligent, or innocent. A contract which is rescinded for misrepresentation is set aside for all purposes. It is set aside both retrospectively and prospectively with the aim of restoring the parties, as far as possible, to the position which they were in before they entered into the contract. Rescission is a potent remedy and its availability in cases of innocent misrepresentation can seem harsh. Its potential harshness is demonstrated by the following case:

Redgrave v. Hurd
(1881) 20 Ch D 1, Court of Appeal

Redgrave was an elderly solicitor due to retire. He placed an advertisement in the *Law Times* seeking a successor to his practice who would buy his house for £1,600. Hurd answered the advertisement. At a meeting Redgrave stated that the business brought in about £300 a year. Hurd asked for information about the amount of business done for the last three years. At a second meeting Redgrave provided papers showing business of not quite £200 a year. When Hurd asked how the difference was made up, Redgrave showed him further papers which he said related to other business. Hurd did not examine the further papers which actually showed only a small amount of business. In fact the gross returns of the business were only about £200 a year. Hurd agreed to buy Redgrave's house for £1,600 and paid a deposit. Redgrave refused to include any reference to the business in the agreement. Hurd took possession of the property but on finding the business to be 'utterly worthless' refused to complete. Redgrave sought specific performance. Hurd disputed his
p. 597 right to ↵ specific performance and sought rescission of the contract and damages on the ground of Redgrave's misrepresentations. Fry J held that Redgrave was entitled to specific performance because Hurd, having had the opportunity to discover the truth of Redgrave's representations and not having done so, had not relied on them. On Hurd's appeal to the Court of Appeal it was held that Hurd was entitled to rescind the contract and to the return of the deposit.

Jessel MR

As regards the rescission of a contract, there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law—a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, 'A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it'. The other way of putting it was this: 'Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements'. The rule in equity was settled, and it does not matter on which of the two grounds it was rested. As regards the rule of Common Law there is no doubt it was not quite so wide. There were, indeed, cases in which, even at Common Law, a contract could be rescinded for misrepresentation, although it could not be shewn that the person making it knew the representation to be false. They are variously stated, but I think, according to the later decisions, the statement must have been made recklessly and without care, whether it was true or false, and not with the belief that it was true. ...

> There is another proposition of law of very great importance which I think it is necessary for me to state, because, with great deference to the very learned Judge from whom this appeal comes, I think it is not quite accurately stated in his judgment. If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them'. ... Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence. One of the most familiar instances in modern times is where men issue a prospectus in which they make false statements of the contracts made before the formation of a company, and then say that the contracts themselves may be inspected at the offices of the solicitors. It has always been held that those who accepted those false statements as true were not deprived of their remedy merely because they neglected to go and look at the contracts. Another instance with which we are familiar is where a vendor makes a false statement as to the contents of a lease, as, for instance, that it contains no covenant preventing the carrying on of the trade which the purchaser is known by the vendor to be desirous of carrying on upon the property. Although the lease itself might be produced at the sale, or might have been open to the inspection of the purchaser long previously to the sale, it has been repeatedly held that the vendor cannot be allowed to say, 'You were not entitled to give credit to my statement'. It is not
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> p. 598 sufficient, therefore, to say that the purchaser had ↵ the opportunity of investigating the real state of the case, but did not avail himself of that opportunity. It has been apparently supposed by the learned Judge in the Court below that the case of *Attwood* v. *Small* 6 Cl & F 232 conflicts with that proposition. ...
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> [He considered *Attwood* in some detail and continued]
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> In no way, as it appears to me, does the decision, or any of the grounds of decision, in *Attwood* v. *Small*, support the proposition that it is a good defence to an action for rescission of a contract on the ground of fraud that the man who comes to set aside the contract inquired to a certain extent, but did it carelessly and inefficiently, and would, if he had used reasonable diligence, have discovered the fraud.
>
> [He then turned to the facts of the case and considered whether the defendant relied upon the statement made by the defendant and concluded]
>
> [T]he learned Judge came to the conclusion either that the Defendant did not rely on the statement, or that if he did rely upon it he had shewn such negligence as to deprive him of his title to relief from this Court. As I have already said, the latter proposition is in my opinion not founded in law, and the former part is not founded in fact; I think also it is not founded in law, for when a person makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the party to whom the representation is made does not prove that he entered into the contract, relying upon the representation. If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shewn either that he had

> knowledge of the facts contrary to the representation, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation. If you tell a man, 'You may enter into partnership with me, my business is bringing in between £300 and £400 a year', the man who makes that representation must know that it is a material inducement to the other to enter into the partnership, and you cannot investigate as to whether it was more or less probable that the inducement would operate on the mind of the party to whom the representation was made. Where you have neither evidence that he knew facts to shew that the statement was untrue, or that he said or did anything to shew that he did not actually rely upon the statement, the inference remains that he did so rely, and the statement being a material statement, its being untrue is a sufficient ground for rescinding the contract. For these reasons I am of opinion that the judgment of the learned Judge must be reversed and the appeal allowed.
>
> ***Baggallay*** and ***Lush LJJ*** delivered concurring judgments.

Commentary

Two points of significance emerge from *Redgrave*. The first is that it demonstrates that the availability of rescission is not confined to cases of fraudulent misrepresentation. It extends to non-fraudulent misrepresentations (that is, misrepresentations made negligently or innocently). In some ways this is surprising. The justification offered by Lord Esher MR is that 'a man is not allowed to get a benefit from a statement which he *now* admits to be false' (emphasis added). The word 'now' is important because it demonstrates that there need not have been knowledge of the falsity of the statement at the time at which it was made. Should the fact that the maker of the statement subsequently discovers that his statement was false inevitably give to the other party the right to set aside the contract? Contrast *Redgrave* with *Hart* v. *O'Connor* [1985] AC 1000, where the defendant was held to be entitled ↵ to hold the plaintiff to the terms of his contract despite the fact that the plaintiff had an inadequate understanding of the transaction into which he was entering. The Privy Council focused on the defendant's knowledge of the plaintiff's capacity *at the time of entry into* the contract, and not upon the knowledge which he gained subsequent to the making of the contract. In other words, the fact that the defendant subsequently realized that the plaintiff did not understand the nature of the transaction into which he had entered did not give to the plaintiff a right to set aside the contract. Should a similar principle not apply here so that rescission is in principle available in all cases of fraudulent and negligent misrepresentation but not in all cases of innocent misrepresentation? It can in fact be argued that English law has now reached a very similar position by virtue of the enactment of section 2(2) of the Misrepresentation Act 1967 (on which see 17.4.2).

p. 599

The second point to note is that the Court of Appeal held that the defendant had relied upon the plaintiff's misrepresentation notwithstanding the fact that he failed to take the opportunity that was given to him to discover the truth. The defendant was held to be entitled to set aside the contract notwithstanding his own carelessness. At the time the defendant could not have brought a claim for damages against the plaintiff (see 17.5). Today the remedy of damages is more widely available, and it is suggested that the carelessness of the representee can be taken into account when assessing damages (unless the misrepresentation was made fraudulently). Thus it has been argued (Atiyah's *An Introduction to the Law of Contract* (6th edn, Oxford University Press, 2006), p. 257) that:

> [i]t is no defence to a plea of misrepresentation to allege that the other party might have discovered the true facts by reasonable diligence. Provided that the innocent party relied at least in part on the false statements, she is entitled to have the contract rescinded, although she might easily have discovered the falsity of the statements. All the same, an extreme want of due care by the representee would show that his reliance was unreasonable. And although the courts have not recognized this as a principle, it seems to be an implicit feature in many cases where relief is denied. Moreover, where the misrepresentation is being used to found a claim in tort for damages, it seems it would today be possible to take account of contributory negligence for the purposes of apportioning damages. Naturally the primary responsibility for a false statement must always lie with the maker of the statement but there are some circumstances in which apportionment would be justified. Of course, in situations where the claimant's claim is for rescission of the contract, this alternative is not possible.

Redgrave therefore demonstrates that rescission is in principle available in all cases of misrepresentation. Rescission does not, however, occur automatically. A party who wishes to rescind a contract for misrepresentation must take positive steps to do so. This requires him to bring his decision to the attention of the other party and, according to Dyson LJ in *Islington London Borough Council* v. *UCKAC* [2006] EWCA Civ 340, requires him also to obtain a court order. He stated that a voidable contract continues to exist 'until and unless it is set aside by an order of rescission made by the court at the instance of a party seeking to terminate it or bring it to an end'. The requirement that he obtain a court order is unwarranted (although the authorities on this point are not as clear as one might have hoped and it has recently been described as 'a highly controversial question' whether a court order is always required: *SK Shipping Europe Ltd* v. *Capital VLCC 3 Corp ('The C Challenger')* [2022] EWCA Civ 231, [2022] 1 Lloyd's Rep 521, [89]). The decision whether or not to rescind the contract is one that resides with the parties to the contract and not with the court. The court can validly
p. 600 decide whether or not a party was entitled to rescind a contract and, in this sense, can ↵ review the decision which has been made. But the court itself does not actually rescind the contract by virtue of the order which it makes. What matters is that the party seeking to set aside the contract notifies the representor but the notice need not take the form of initiating legal action to set aside the contract. In *Redgrave* the point was taken by way of defence to the plaintiff's action for specific performance. The general rule is that a party who wishes to rescind a contract must bring his decision to rescind to the attention of the other party to the contract. There is one exception to this notification requirement and that arises where the representor absconds so that it is no longer possible for the party to whom the representation was made to communicate with him. As the next case demonstrates, in such a case it suffices for the party wishing to set aside the contract to take such steps as are reasonable to demonstrate that he is setting the contract aside (usually by notice to the police or some other official or quasi-official body).

Car and Universal Finance Co v. Caldwell
[1965] 1 QB 525, Court of Appeal

The defendant, Caldwell, was the owner of a Jaguar car. He sold the car to Norris for £975 in return for a cheque for £965 and a £10 deposit. The cheque was dishonoured the following day (13 January). The defendant immediately informed the police and the Automobile Association what had happened. Norris subsequently sold the car to Motobella Co Ltd, and the car then changed hands on a number of occasions until the plaintiff bought it in all good faith. The car was later seized by police authorities, and in interpleader proceedings, one of the issues that arose was whether the defendant had validly rescinded the contract for the sale of the car on 13 January. The Court of Appeal held that he had done so.

Sellers LJ

This appeal raises a primary point in the law of contract. The question has arisen whether a contract which is voidable by one party can in any circumstances be terminated by that party without his rescission being communicated to the other party. Lord Denning MR has held in the circumstances of this case that there can be rescission without communication where the seller of a motor car, who admittedly had the right to rescind the contract of sale on the ground of fraudulent misrepresentation, terminated the contract by an unequivocal act of election which demonstrated clearly that he had elected to rescind it and to be no longer bound by it. The general rule, no doubt, is that where a party is entitled to rescind a contract and wishes to do so the contract subsists until the opposing party is informed that the contract has been terminated. The difficulty of the seller in this case was that, when he learnt of the fraud and, therefore, ascertained his right to terminate the bargain, he could not without considerable delay find either the fraudulent buyer or the car which had been sold. Such circumstances would not appear to be so rare in transactions in motor cars (or horses in earlier days) that they would not, it might be thought, have given rise to litigation and an authoritative decision, but it seems that over the years the point in issue has not been decided in any reported cases in similar or comparable circumstances. …

An affirmation of a voidable contract may be established by any conduct which unequivocally manifests an intention to affirm it by the party who has the right to affirm or disaffirm. Communication of an acceptance of a contract after knowledge of a fundamental breach of it by the other party or of fraud affecting it is, of course, evidence establishing affirmation but ↵ it is not essential evidence. A party cannot reject goods sold and delivered if he uses them after knowledge of a right to reject, and the judgment cites a case where an instruction to a broker to re-sell was sufficient affirmation of the contract in question even though that conduct was not communicated. It may be said that a contract may be more readily approved and accepted than it can be terminated where a unilateral right to affirm or disaffirm arises. The disaffirmation or election to avoid a contract changes the relationship of the parties and brings their respective obligations to an end, whereas an affirmation leaves the contract effective though subject to a claim for damages for its breach. Where a contracting party could be communicated with, and modern facilities make communication practically world-wide and almost immediate, it would be unlikely that a party could

p. 601

be held to have disaffirmed a contract unless he went so far as to communicate his decision so to do. It would be what the other contracting party would normally require and unless communication were made the party's intention to rescind would not have been unequivocally or clearly demonstrated or made manifest. But in circumstances such as the present case, the other contracting party, a fraudulent rogue who would know that the vendor would want his car back as soon as he knew of the fraud, would not expect to be communicated with as a matter of right or requirement, and would deliberately, as here, do all he could to evade any such communication being made to him. In such exceptional contractual circumstances, it does not seem to me appropriate to hold that a party so acting can claim any right to have a decision to rescind communicated to him before the contract is terminated. To hold that he could would involve that the defrauding party, if skilful enough to keep out of the way, could deprive the other party to the contract of his right to rescind, a right to which he was entitled and which he would wish to exercise, as the defrauding party would well know or at least confidently suspect. The position has to be viewed, as I see it, between the two contracting parties involved in the particular contract in question. That another innocent party or parties may suffer does not in my view of the matter justify imposing on a defrauded seller an impossible task. He has to establish, clearly and unequivocally, that he terminates the contract and is no longer to be bound by it. If he cannot communicate his decision he may still satisfy a judge or jury that he had made a final and irrevocable decision and ended the contract. I am in agreement with Lord Denning MR who asked 'How is a man in the position of Caldwell ever to be able to rescind the contract when a fraudulent person absconds as Norris did here?' and answered that he can do so ' ... if he at once, on discovering the fraud, takes all possible steps to regain the goods even though he cannot find the rogue nor communicate with him'.

Upjohn LJ

Where one party to a contract has an option unilaterally to rescind or disaffirm it by reason of the fraud or misrepresentation of the other party, he must elect to do so within a reasonable time, and cannot do so after he has done anything to affirm the contract with knowledge of the facts giving rise to the option to rescind. In principle and on authority, however, he must, in my judgment, in the ordinary course communicate his intention to rescind to the other party. This must be so because the other party is entitled to treat the contractual nexus as continuing until he is made aware of the intention of the other to exercise his option to rescind. So the intention must be communicated and an uncommunicated intention, for example, by speaking to a third party or making a private note, will be ineffective. ...

Such in my view must be the general principle. Does it admit of any exception? ...

If one party, by absconding, deliberately puts it out of the power of the other to communicate his intention to rescind which he knows the other will almost certainly want to do, I do not think he can
p. 602 any longer insist on his right to be made aware of the election to determine ↵ the contract. In these circumstances communication is a useless formality. I think that the law must allow the innocent party to exercise his right of rescission otherwise than by communication or repossession. To hold otherwise would be to allow a fraudulent contracting party by his very fraud to prevent the

> innocent party from exercising his undoubted right. I would hold that in circumstances such as these the innocent party may evince his intention to disaffirm the contract by overt means falling short of communication or repossession.
>
> ***Davies LJ*** delivered a concurring judgment.

Commentary

The court in *Caldwell* was required to carry out the familiar exercise of deciding which of two innocent parties should bear the loss caused by the fraud of a third party. The Court of Appeal decided that the loss should be borne by the plaintiff purchaser on the basis that the seller had taken all reasonable steps to notify the fraudster of his decision to rescind the contract and on the ground that the fraudster did not wish to receive any communication from the defendant seller. A different result was reached in Scotland in *Macleod* v. *Kerr*, 1965 SC 253 where the Court of Session came down on the side of the innocent purchaser on the basis that notification given to the police by the seller did not suffice to rescind a contract with a third party (the fraudster).

Caldwell appears to be an example of rescission operating as a proprietary restitutionary remedy in the sense that the effect of rescission was to revest ownership of the car in Mr Caldwell.

17.4.2 Loss of the Right to Rescind

While the right to rescind is, in principle, available in all cases of misrepresentation, the right can be lost in a range of circumstances. These circumstances are generally referred to as 'bars' to rescission. There are a number of such 'bars'. The first is that a claimant cannot rescind the contract if he affirms the contract after discovering that a misrepresentation was made to him. Secondly, the right to rescind is lost if a bona fide third party purchaser for value acquires the goods which are the subject matter of the contract before the contract has been set aside. This was the principle that was invoked by the plaintiff purchaser in *Caldwell*, discussed earlier, but his attempt to invoke the principle failed on the ground that the defendant had validly set aside the contract before Norris sold the car on to any bona fide third party purchaser for value. Thirdly, the right to rescind can be lost by the lapse of a reasonable time such that it would be inequitable in all the circumstances to grant rescission. In *Salt* v. *Stratstone Specialist Ltd* [2015] EWCA Civ 745, [2015] 2 CLC 269 the claimant agreed to buy a car from the defendant, which was described to the claimant by an employee of the defendant as a Cadillac CTS 3.6 litre Sport Luxury car that was 'brand new'. The car was delivered to the claimant on 29 September 2007 and he paid £21,895 for it. It transpired that the car was not in fact brand new because, although it had never had a registered owner, it had been manufactured and delivered to the defendant in 2005, had been involved in a collision, and had required various repairs. On 16 September 2008 the claimant tried to reject the car and did not use it subsequently. The Court of Appeal held that the claimant had not lost the right to rescind the contract. In so concluding, Roth J stated that it was 'something of a misnomer to say
p. 603 that rescission may be barred by lapse of time' and Longmore LJ concluded ↵ that it did not seem to him that 'lapse of time on its own can be a bar to rescission in this case'. The words 'on its own' are important. This bar to rescission would now appear to have been absorbed within the principle of laches according to which it is 'only the lapse of a reasonable time such that it would be inequitable in all the circumstances to grant

rescission which constitutes a bar to the remedy'. In this respect the decision of the Court of Appeal in *Leaf* v. *International Galleries* [1950] 2 KB 86 may now require re-consideration. There the plaintiff purchased a painting in 1944 after a representation had been made to him that it was the work of John Constable. When the plaintiff attempted to sell the painting in 1949 he was informed that the painting was not in fact a Constable. The plaintiff then returned the painting to the defendant and sought to recover from him the £85 he had paid for it. The Court of Appeal held that he was not entitled to rescind the contract, albeit different reasons were given for this conclusion. Jenkins LJ relied on the lapse of time between the purchase of the painting and the attempt to rescind the contract. This reasoning would now appear to be incorrect. On the other hand, the lapse of time in *Leaf* was much greater than that which had elapsed in *Salt* and so it is not inevitable that *Leaf* would be decided differently today, although it would now be incumbent on the defendant to show that it was inequitable to permit the plaintiff to rescind the contract and recover the purchase price if it were to succeed in its attempt to resist rescission of the contract between the parties.

The right to rescind is often said to be lost where it is impossible to restore the parties to their pre-contractual position. There is some confusion as to the exact basis of this requirement. Is it the case that it must be possible to restore both parties to their pre-contractual position or is the case that a claimant can obtain rescission provided that he makes restitution to the defendant for any benefit which he has obtained under the contract? The use of the phrase '*restitutio in integrum*' suggests that the aim is to restore the parties to their pre-contractual position but it is suggested that the case-law is in fact consistent with the latter rationale: that is to say the concern of the courts is to ensure that the claimant is not unjustly enriched as a result of rescission. For example, a claimant cannot get back the purchase price he has paid for the goods and keep the goods themselves. He must return the goods and may also have to make an allowance to the vendor for the use that he has made of the goods. But a defendant cannot resist rescission on the basis that he has suffered a loss which cannot be made good so that he cannot be restored to his pre-contractual position (*McKenzie* v. *Royal Bank of Canada* [1934] AC 468). The aim is therefore to prevent the unjust enrichment of the claimant and not to restore both parties to the position they were in before the contract was concluded (*Halpern* v. *Halpern (No 2)* [2007] EWCA Civ 291, [2008] QB 195).

The common law took an extremely restrictive view of the right of the claimant to rescind the contract. In order to be able to rescind the contract the claimant had to be able to restore to the defendant the very benefit which he had obtained from the defendant. In *Clarke* v. *Dickson* (1858) EB & E 148 Crompton J stated:

> The plaintiff must rescind the contract in toto or not at all; he cannot both keep the shares and recover the whole price. That is founded on the plainest principles of justice. If he cannot return the article he must keep it, and sue for his real damage in an action on the deceit. Take the case I put in argument, of a butcher buying live cattle, killing them, and even selling the meat to his customers. If the rule of law were as the plaintiff contends, that butcher might, upon discovering a fraud on the part of the grazier who sold him the cattle, rescind the contract and get back the whole price: but how could that be consistently with justice? The true doctrine is, that a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition.

p. 604 ↵ A more flexible approach was taken in equity and that approach has prevailed. In *Erlanger* v. *New Sombrero Phosphate Co* (1878) 3 App Cas 1218 the defendants, who were promoters of the plaintiff company, sold a phosphate mine to the plaintiff for £110,000. After it had worked the mine for a period of time, the plaintiff sought to rescind the contract of sale on the ground that the defendants had breached the fiduciary duty which they owed to the plaintiff by failing to disclose that they had bought the mine for £55,000 a few days before the sale to the plaintiff. The defendants submitted that the plaintiff was not entitled to rescission because the parties could not be restored to their pre-contractual position. It was held that the plaintiff was entitled to rescind the contract and recover the purchase price on terms of giving up possession of the mine and accounting to the defendants for any profits made from working the mine. Lord Blackburn stated (at pp. 1278–1279):

> It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration. But as a Court of Law has no machinery at its command for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property and sue in an action for deceit, in which the jury, if properly directed, can do complete justice by giving as damages a full indemnity for all that the party has lost: see *Clarke* v. *Dixon* EB & E 148 and the cases there cited.
>
> But a Court of Equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts 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. And a Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by. And any change which occurs in the position of the parties or the state of the property after such notice or knowledge should tell much more against the party *in morâ*, than a similar change before he was *in morâ* should do.

The key phrase here is 'practical justice' (see also *Spence* v. *Crawford* [1939] 3 All ER 271) and the principal issue is the extent to which the courts are willing to allow a party who wishes to rescind a contract to offer a money allowance for the benefit that he cannot physically give back. The greater the willingness of the court to allow the claimant to make a money payment in this way, the less significant this barrier to rescission will become. In *Salt* v. *Stratstone Specialist Ltd* [2015] EWCA Civ 745, [2015] 2 CLC 269 the Court of Appeal affirmed that the courts do enjoy a considerable degree of flexibility when deciding whether or not it is possible to restore the parties to their pre-contract position. The emphasis was placed on the need to achieve a 'practically just' outcome and, to this end, where it is impossible physically to restore the parties (or the subject matter of their contract) to the pre-contract position, the court should consider whether a monetary award can restore the parties in substance to that position. On this basis this barrier to rescission is likely to reduce significantly. As Longmore LJ observed, rescission will in future be prima facie available if 'practical justice' can be done as between the parties. Further, if 'practical justice' requires a representor to be compensated for depreciation, it

is for the representor to so assert and prove its entitlement to compensation and the same principle applies where the representor asserts that account should be taken of use made by the representee of the subject matter of the contract.

p. 605 ↵ The final circumstance in which the right to rescind may be lost is where the court exercises its discretion under section 2(2) of the Misrepresentation Act 1967 to award the claimant damages in lieu of rescission. At this point it is important to remember that rescission is an attractive remedy for a claimant who has entered into a bad bargain because it provides him with an exit route from his contract. This may be very harsh on a defendant, particularly a defendant who has made an innocent misrepresentation. Section 2(2) can come to the aid of such a defendant by confining the claimant to a remedy in damages. We shall return to the basis upon which the courts assess damages under section 2(2) at a later stage (see 17.5.4). Here our concern is with the basis upon which the court will exercise its discretion not to grant rescission and to confine the claimant to a remedy in damages. Section 2(2) provides:

> [W]here 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 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 to the other party.

An example of the willingness of the court to use section 2(2) in order to stop a claimant escaping from a bad bargain is provided by the following case:

William Sindall plc v. Cambridgeshire County Council
[1994] 1 WLR 1016, Court of Appeal

In December 1988 William Sindall plc agreed to buy development land from Cambridgeshire County Council for £5,082,500. Before the sale was completed, Sindall made various inquiries of the council regarding rights of easement and other public rights affecting the land. The council replied on a standard form stating that, so far as it was aware, there were no rights of easement or public rights affecting the property other than those disclosed in the contract. The sale was completed in March 1989. In October 1989 Sindall discovered a private foul sewer which had been built on the land in 1970. They alleged that the existence of this foul sewer meant that the council had made a misrepresentation when they stated that there were no such matters affecting the site. By this time the value of the land had halved so Sindall brought an action for a declaration that the contract had been rescinded and for repayment of the purchase price. The judge granted the declaration. On appeal the court held that there had been no misrepresentation by the council, negligent or otherwise, but if there had been any misrepresentation, damages would be awarded under section 2(2) of the Misrepresentation Act 1967 in lieu of rescission.

Hoffmann LJ

[Having concluded that no misrepresentation had been made nevertheless turned to consider section 2(2) of the Act]

p. 606

6. Discretion

My conclusion that there are no grounds for rescission, either for misrepresentation or mistake, mean that it is unnecessary to consider whether the judge correctly exercised his discretion under section 2(2) of the Misrepresentation Act 1967 not to award damages in lieu of rescission. But in case this case goes further, I should say that in my judgment the judge approached this question on a false basis, arising from his mistake about the seriousness of the defect. This vitiated the exercise of the discretion and would have made it necessary, if we thought that Sindall would otherwise have been entitled to rescind for misrepresentation, to exercise our own discretion under section 2(2). ...

[He set out section 2(2) and continued]

This provision was adopted as a result of the Tenth Report of the Law Reform Committee (1962) (Cmnd. 1782) which also recommended abolishing the bar on rescission after completion. The relevant paragraphs of the report were 11 and 12:

> '11. A more fundamental objection which may be advanced against our recommendation [to abolish the bar on rescission after completion] concerns the drastic character of the remedy to which the plaintiff would be entitled. Unless the court's power to grant rescission is made more elastic than it is at present, the court will not be able to take account of the relative importance or unimportance of the facts which have been misrepresented. A car might be returned to the vendor because of a misrepresentation about the mileage done since the engine was last overhauled, or a transfer of shares rescinded on account of an incorrect statement about the right to receive the current dividend. In some cases the result could be as harsh on the representor as the absence of a right to rescind under the current law can be on the representee. Moreover, the conflict between remedies for misrepresentation and those for breach of contract would be aggravated. There is already the anomaly that a statement embodied in the contract and constituting a minor term of it is treated as a warranty, the breach of which gives only a right to damages, whereas the same statement as a representation inducing the contract enables the latter to be rescinded. Before the contract is executed and at a time when the parties can be relatively easily restored to their original positions, this anomaly may not matter very much, but the position would be different if the court had no option but to order rescission after the contract had been executed.
>
> 12. To meet these objections we recommend that wherever the court has power to order rescission it should, as an alternative, have a discretionary power to award damages if it is satisfied that these would afford adequate compensation to the plaintiff, having regard to the nature of the misrepresentation and the fact that the injury suffered by the plaintiff is small compared with what rescission would involve. The courts were given power to award damages in addition to or in substitution for an injunction or a decree of specific performance by section 2 of Lord Cairns's Act (the Chancery Procedure Amendment Act 1858), and since the decision of the House of Lords in *Leeds Industrial Co-operative Society Ltd* v. *Slack* [1924] AC 851, the power has been exercised on principles similar to those we have just mentioned.'

The discretion conferred by section 2(2) is a broad one, to do what is equitable. But there are three matters to which the court must in particular have regard.

The first is the nature of the misrepresentation. It is clear from the Law Reform Committee's report that the court was meant to consider the importance of the representation in relation to the subject matter of the transaction. I have already said that in my view, in the context of a £5m. sale of land, a misrepresentation which would have cost £18,000 to put right and was unlikely seriously to have interfered with the development or resale of the property was a matter of relatively minor importance.

p. 607 ↵ The second matter to which the court must have regard is 'the loss that would be caused by [the misrepresentation] if the contract were upheld'. The section speaks in terms of loss suffered rather than damages recoverable but clearly contemplates that if the contract is upheld, such loss will

> be compensated by an award of damages. …
>
> [He then considered the basis on which the court is to award damages under section 2(2), on which see 17.5.4]
>
> The third matter to be taken into account under section 2(2) is the loss which would be caused to Cambridgeshire by rescission. …
>
> Having regard to these matters, and in particular the gross disparity between the loss which would be caused to Sindall by the misrepresentation and the loss which would be caused to Cambridgeshire by rescission, I would have exercised my discretion to award damages in lieu of rescission.
>
> ***Evans LJ*** delivered a concurring judgment. ***Russell LJ*** concurred.

Commentary

This case is an excellent example of a court being willing to use its discretion under section 2(2) to relegate a claimant to an award of damages. Hoffmann LJ identifies and applies the three factors identified as relevant by section 2(2), while at the same time emphasizing that the discretion given to the court under section 2(2) is a broad one. It is, however, important to keep a sense of perspective here. *William Sindall* is not the typical case. It is the exception rather than the rule. Thus, it has been said that the 'strong starting point' should be that rescission is available to a representee given that it is the 'normal remedy' available in cases of misrepresentation (*SK Shipping Europe Ltd* v. *Capital VLCC 3 Corp ('The C Challenger')* [2022] EWCA Civ 231, [2022] 1 Lloyd's Rep 521, [86]). It is a bold step for a court to take to order the restoration of a contract after one party has purported to rescind it, particularly in the case where there is a lapse of time between the purported rescission and the decision of the court. The significance of *William Sindall* lies in its recognition of the fact that the statutory discretion conferred upon the court can operate to confine a representee to a claim in damages where the court is satisfied, having weighed the factors it is directed to take into account, that it would be equitable to do so. However, as we shall see (17.5.4), there are difficulties in discerning the basis on which damages are to be awarded under section 2(2). Nevertheless, section 2(2) is a useful provision in so far as it enables a court to do what the Court of Appeal did on the facts of *William Sindall*, namely block an attempt to use an innocent misrepresentation as a pretext to get out of what has become a bad bargain.

17.5 Damages

Until relatively recently only a fraudulent misrepresentation gave rise to an action for damages. This point has to be borne in mind when reading cases pre-1963. Prior to the decision of the House of Lords in *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* [1964] AC 465 the courts could not award damages for a negligent or an innocent misrepresentation. In these circumstances courts were sometimes tempted to find that what seemed to be a mere representation was in fact a term of a collateral contract so that a deserving plaintiff had a claim for
p. 608 damages for breach of contract (*De Lassalle* v. *Guildford* [1901] 2 KB 215, 8.3). ↵ The need for such subterfuge has gone. Parliament has now created a right to damages under section 2(1) of the

Misrepresentation Act 1967 and the right so created is an extraordinarily generous one. We shall therefore start with the right to damages created by the Act before turning to other alternatives open to a claimant who wishes to recover damages in respect of a misrepresentation made by the defendant.

17.5.1 Section 2(1) of the Misrepresentation Act 1967

Section 2(1) of the Misrepresentation Act 1967 provides:

> 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 grounds to believe and did believe up to the time that the contract was made that the facts represented were true.

This subsection has been stated to create 'a statutory tort' (*First Tower Trustees Ltd* v. *CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [98]). It creates a right of action for damages where the misrepresentation has been made by the other party to the contract. Where the misrepresentation has been made by a third party, the claimant cannot rely upon section 2(1) but must bring his claim in tort. But in the case where the misrepresentation has been made by the other party to the contract, then section 2(1) is the obvious remedy for a claimant who wishes to recover damages. The advantages that can be obtained through an action for damages under section 2(1) are illustrated by the following two cases:

Royscot Trust Ltd v. Rogerson
[1991] 2 QB 297, Court of Appeal

In May 1987 Maidenhead Honda Centre Ltd, a car dealer, agreed to sell to Rogerson a car on hire-purchase terms for £7,600, £1,200 of which was payable as a deposit. Royscot Trust Ltd, a finance company, agreed to purchase the car from Maidenhead and to enter into a hire-purchase agreement with Rogerson. In its proposal to Royscot, Maidenhead innocently misrepresented the purchase price as £8,000 and the deposit as £1,600. Royscot had a policy of not entering into hire-purchase agreements unless the deposit was at least 20 per cent of the purchase price, and on the basis of Maidenhead's misrepresentations, agreed to pay Maidenhead £6,400 for the car. Rogerson paid some of the outstanding instalments to Royscot but in August 1987 dishonestly sold the car. Rogerson informed Royscot of the sale in August 1988 and stopped making instalment payments in September 1988. Royscot brought an action against Maidenhead for damages for misrepresentation under
p. 609 section 2(1) of the Misrepresentation Act 1967. The trial judge awarded damages of £1,600 for the
↵ difference between the amount paid by Royscot to Maidenhead (£6,400) and the amount Royscot would have paid to Maidenhead if the deposit of £1,200 had been 20 per cent of the purchase price (£4,800). The Court of Appeal awarded damages of £3,625.24 for the difference between the amount paid by Royscot to Maidenhead (£6,400) and the amount paid by Rogerson to Royscot (£2,774.76).

Balcombe LJ

[set out the facts and continued]

So I turn to the issue on this appeal which the dealer submits raises a pure point of law: where (a) a motor dealer innocently misrepresents to a finance company the amount of the sale price of, and the deposit paid by the intended purchaser of, the car, and (b) the finance company is thereby induced to enter into a hire-purchase agreement with the purchaser which it would not have done if it had known the true facts, and (c) the purchaser thereafter dishonestly disposes of the car and defaults on the hire-purchase agreement, can the finance company recover all or part of its losses on the hire-purchase agreement from the motor dealer?

The finance company's cause of action against the dealer is based on section 2(1) of the Misrepresentation Act 1967 which reads:

[He set out the terms of the subsection and continued]

As a result of some dicta by Lord Denning MR in two cases in the Court of Appeal—*Gosling* v. *Anderson* [1972] EGD 709 and *Jarvis* v. *Swan Tours Ltd* [1973] QB 233, 237—and the decision at first instance in *Watts* v. *Spence* [1976] Ch 165, there was some doubt whether the measure of damages for an innocent misrepresentation giving rise to a cause of action under the Act of 1967 was the tortious measure, so as to put the representee in the position in which he would have been if he had never entered into the contract, or the contractual measure, so as to put the representee in the position in which he would have been if the misrepresentation had been true, and thus in some cases give rise to

a claim for damages for loss of bargain. Lord Denning MR's remarks in *Gosling* v. *Anderson* were concerned with an amendment to a pleading, while his remarks in *Jarvis* v. *Swan Tours Ltd* were clearly obiter. *Watts* v. *Spence* was disapproved by this court in *Sharneyford Supplies Ltd* v. *Edge* [1987] Ch 305, 323. However, there is now a number of decisions which make it clear that the tortious measure of damages is the true one. ... One at least, *Chesneau* v. *Interhome Ltd* (1983) 134 NLJ 341; Court of Appeal (Civil Division) Transcript No 238 of 1983, is a decision of this court. The claim was one under section 2(1) of the Act of 1967 and the appeal concerned the assessment of damages. In the course of his judgment Eveleigh LJ said:

> '[Damages] should be assessed in a case like the present one on the same principles as damages are assessed in tort. The subsection itself says: "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 ..." By "so liable" I take it to mean liable as he would be if the misrepresentation had been made fraudulently.'

In view of the wording of the subsection it is difficult to see how the measure of damages under it could be other than the tortious measure and, despite the initial aberrations referred to above, that is now generally accepted. Indeed counsel before us did not seek to argue the contrary.

The first main issue before us was: accepting that the tortious measure is the right measure, is it the measure where the tort is that of fraudulent misrepresentation, or is it the measure where the tort is negligence at common law? The difference is that in cases of fraud a plaintiff is entitled to any loss which flowed from the defendant's fraud, even if the loss could not have been foreseen: see *Doyle* v. *Olby (Ironmongers) Ltd* [1969] 2 QB 158. In my judgment the wording of the subsection is clear: the person making the innocent misrepresentation shall be 'so liable', i.e., liable to damages as if the
p. 610 representation had been made fraudulently. This was ↵ the conclusion to which Walton J came in *F & B Entertainments Ltd* v. *Leisure Enterprises Ltd* (1976) 240 EG 455, 461. See also the decision of Sir Douglas Frank QC, sitting as a High Court judge, in *McNally* v. *Welltrade International Ltd* [1978] IRLR 497. In each of these cases the judge held that the basis for the assessment of damages under section 2(1) of the Act of 1967 is that established in *Doyle* v. *Olby (Ironmongers) Ltd*. This is also the effect of the judgment of Eveleigh LJ in *Chesneau* v. *Interhome Ltd* already cited: 'By "so liable" I take it to mean liable as he would be if the misrepresentation had been made fraudulently'.

This was also the original view of the academic writers. In an article, 'The Misrepresentation Act 1967' (1967) 30 *MLR* 369 by P.S. Atiyah and G.H. Treitel, the authors say, at pp. 373–374:

> 'The measure of damages in the statutory action will apparently be that in an action of deceit. ... But more probably the damages recoverable in the new action are the same as those recoverable in an action of deceit. ...'

Professor Treitel has since changed his view. In Treitel, *The Law of Contract*, 7th ed. (1987), p. 278, he says:

> 'Where the action is brought under section 2(1) of the Misrepresentation Act 1967, one possible view is that the deceit rule will be applied by virtue of the fiction of fraud. But the preferable view is that the severity of the deceit rule can only be justified in cases of actual fraud and that remoteness under section 2(1) should depend, as in actions based on negligence, on the test of foreseeability.'

The only authority cited in support of the 'preferable' view is *Shepheard* v. *Broome* [1904] AC 342, a case under section 38 of the Companies Act 1867, which provided that in certain circumstances a company director, although not in fact fraudulent, should be 'deemed to be fraudulent'. As Lord Lindley said, at p. 346: 'To be compelled by Act of Parliament to treat an honest man as if he were fraudulent is at all times painful', but he went on to say:

> 'but the repugnance which is naturally felt against being compelled to do so will not justify your Lordships in refusing to hold the appellant responsible for acts for which an Act of Parliament clearly declares he is to be held liable.'

The House of Lords so held.

It seems to me that that case, far from supporting Professor Treitel's view, is authority for the proposition that we must follow the literal wording of section 2(1), even though that has the effect of treating, so far as the measure of damages is concerned, an innocent person as if he were fraudulent. *Chitty on Contracts*, 26th edn. (1989), vol. 1, p. 293, para 439, says:

> '[I]t is doubtful whether the rule that the plaintiff may recover even unforeseeable losses suffered as the result of fraud would be applied; it is an exceptional rule which is probably justified only in cases of actual fraud.'

No authority is cited in support of that proposition save a reference to the passage in Professor Treitel's book cited above.

Professor Furmston in *Cheshire, Fifoot and Furmston's Law of Contract*, 11th ed. (1986), p. 286, says:

> '"It has been suggested"—and the reference is to the passage in Atiyah and Treitel's article cited above—"that damages under section 2(1) should be calculated on the same principles as govern the tort of deceit". This suggestion is based on a theory that section 2(1) is based on a "fiction of fraud". We have already suggested that this theory is misconceived. On the other hand the action created by section 2(1) does look much more like an action in tort than one in contract and it is suggested that the rules for negligence are the natural ones to apply.'

p. 611 ↵ The suggestion that the 'fiction of fraud' theory is misconceived occurs at p. 271, in a passage which includes:

> 'Though it would be quixotic to defend the drafting of the section, it is suggested that there is no such "fiction of fraud" since the section does not say that a negligent misrepresentor shall be treated for all purposes as if he were fraudulent. No doubt the wording seeks to incorporate by reference some of the rules relating to fraud but, for instance, nothing in the wording of the subsection requires the measure of damages for deceit to be applied to the statutory action.'

With all respect to the various learned authors whose works I have cited above, it seems to me that to suggest that a different measure of damage applies to an action for innocent misrepresentation under the section than that which applies to an action for fraudulent misrepresentation (deceit) at common law is to ignore the plain words of the subsection and is inconsistent with the cases to which I have referred. In my judgment, therefore, the finance company is entitled to recover from the dealer all the losses which it suffered as a result of its entering into the agreements with the dealer and the customer, even if those losses were unforeseeable, provided that they were not otherwise too remote.

[Balcombe LJ went on to consider whether Rogerson's wrongful sale of the car was a *novus actus interveniens* breaking the chain of causation between Maidenhead's innocent misrepresentations and Royscot's loss. He held that the reasonable foreseeability of the sale was relevant to this issue and that, as the sale was reasonably foreseeable, it was not a *novus actus interveniens*.]

Ralph Gibson LJ delivered a concurring judgment.

Commentary

This is an extraordinary decision because its effect is to require a defendant who may not even have been negligent (in the sense that the claimant is not required to prove that the defendant had been negligent in order to recover damages under section 2(1)) to pay damages as if he had been fraudulent. The justification offered for this conclusion is the reference to 'fraud' in section 2(1). The reference had been known as the 'fiction of fraud' but the Court of Appeal held that it was no fiction as far as defendants are concerned because it requires them to pay damages on the basis that the claim brought against them is one for fraud. As Professor Hooley has pointed out ('Damages and the Misrepresentation Act 1967' (1991) 107 *LQR* 547, 549), the 'effect of the Court of Appeal's decision is to treat the foolish but honest man as if he were dishonest'. In *Smith New Court Securities Ltd* v. *Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 283 Lord Steyn stated:

> The question is whether the rather loose wording of the statute compels the court to treat a person who was morally innocent as if he was guilty of fraud when it comes to the measure of damages. There has been trenchant academic criticism of the *Royscot* case [he refers to the article by Richard Hooley]. Since this point does not directly arise in the present case, I express no concluded view on the correctness of the decision in the *Royscot* case.

The decision in *Royscot* can be attacked on the ground that judges in other cases have not given so much
p. 612 weight to the 'fiction of fraud'. This can be seen in *Gran Gelato Ltd* v. *Richcliff (Group) Ltd* ↵ [1992] Ch 560 where Sir Donald Nicholls V-C, in considering whether the defence of contributory negligence was available in a case brought under section 2(1), stated (at p. 573):

> [I]n short, liability under the 1967 Act is essentially founded on negligence, in the sense that the defendant, the representor, did not have reasonable grounds to believe that the facts represented were true. (Of course, if he did not so believe the facts represented were true he will be liable for fraud.) This being so, it would be very odd if the defence of contributory negligence were not available to a claim under that Act. It would be very odd if contributory negligence were available as a defence to a claim for damages based on a breach of a duty to take care in and about the making of a particular representation, but not available to a claim for damages under the 1967 Act in respect of the same representation.

The interesting point here is that the analogy is drawn with the tort of negligence (see to the same effect *Taberna Europe CDO II plc* v. *Selskabet AF1 (formerly Roskilde Bank A/S)* [2016] EWCA Civ 1262, [2017] QB 633, [52]) and not with the tort of deceit (where contributory negligence is not available as a defence: see *Standard Chartered Bank* v. *Pakistan National Shipping Corporation* [2002] UKHL 43, [2003] 1 AC 959). Why is it that the analogy is drawn with the tort of deceit when fixing the measure of recovery, but that the analogy is drawn with the tort of negligence when considering the defences that are available to the claim brought by the claimant? The law presently lacks coherence and, as Hamblen J observed, there is a 'real possibility' that *Royscot* will be reversed when the issue is at some future time considered by the Supreme Court (*Cheltenham Borough Council* v. *Laird* [2009] EWHC 1253 (QB), [2009] IRLR 621, [524]). But we have not yet reached that point and it should be noted that Lord Steyn in *Smith New Court Securities* refrained from expressing a 'concluded view' on the correctness of the decision. This being the case, *Royscot* currently remains good law and it is a decision that is binding on the Court of Appeal and lower courts (see the reluctant acceptance of this point by Leggatt J in *Yam Seng Pte Ltd* v. *International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 321, [206]) unless, which appears unlikely, a court can be persuaded that the judgment of Balcombe LJ on this issue was *obiter* rather than part of the *ratio* of the case (*Hodson* v. *Creation Consumer Finance Ltd* [2021] EWHC 2167 (Comm), [118]).

The primary significance of *Royscot* lies, not so much in the measure of recovery, but in the remoteness rule applicable. It is agreed that the basic measure of recovery in a claim brought under section 2(1) should aim to put the claimant in the position he would have been in had the representation not been made. This reflects the basic measure of recovery in both the tort of deceit and the tort of negligence. When assessing damages it is relevant to consider what, if any, other transaction the claimant would have entered into if the misrepresentation had not been made (*Yam Seng Pte Ltd* v. *International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 321, [217]). It is principally in the context of the remoteness rules that the differences become apparent. In negligence the remoteness test is based on the reasonable foreseeability of the kind of harm suffered by the claimant (see *The Wagon Mound (No 1)* [1961] AC 388), whereas in deceit the defendant is liable for all losses which flow directly from the representation whether or not they were reasonably foreseeable (*Smith New Court Securities Ltd* v. *Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254). *Royscot* almost renders the tort of deceit a dead letter in relation to a claimant who can bring his claim

within the fold of section 2(1). Why should a claimant take on the arduous task of proving that a defendant
p. 613 was fraudulent when he can recover exactly the same ↵ amount of money by way of damages under section 2(1) by simply proving that the misrepresentation was made by the other party to the contract? Once he has demonstrated that a misrepresentation has been made he can collect damages on the basis that the defendant has been fraudulent unless the defendant can show that he had reasonable grounds to believe, and did believe, that his statement was true. As the next case demonstrates, it is no easy task for a defendant to discharge this burden.

Howard Marine and Dredging Co Ltd v. A Ogden & Sons (Excavations) Ltd
[1978] QB 574, Court of Appeal

The plaintiffs, Howard Marine and Dredging Co Ltd, owned two sea-going barges. The defendants, A Ogden & Sons (Excavations) Ltd, were contractors who wanted to hire the barges to carry clay out to sea for dumping. In negotiations for the hire of the barges an employee of Howard, O'Loughlin, told Ogden that the capacity of each barge was 850 cubic metres which was equivalent to 'about 1,600 tonnes deadweight carrying capacity, subject to weather, fuel load and time of year'. O'Loughlin based that figure on an entry in the Lloyd's Register. However, there was a mistake in the Register and the correct figure for deadweight capacity was only 1,055 tonnes. The correct figure was stated in the ship's documents in Howard's possession. A charterparty containing an exclusion clause was agreed by Howard and Ogden but never signed. Ogden took delivery of the barges and used them for about six months. When Ogden discovered that the deadweight capacity of the barges was only 1,055 tonnes, they refused to pay the full amount for hire. Howard brought an action to recover the outstanding hire charges. Ogden counterclaimed for damages. Four issues arose at trial: (i) whether O'Loughlin's statement as to deadweight capacity was a collateral warranty which Howard had breached, (ii) whether O'Loughlin's statement breached a common law duty of care owed by Howard to Ogden, (iii) whether O'Loughlin's statement was a misrepresentation for which Howard was liable under section 2(1) of the Misrepresentation Act 1967, and (iv) the effect of the exclusion clause. The trial judge held that Ogden were liable to pay for the hire of the barges. Ogden appealed to the Court of Appeal who, by a majority, allowed their appeal.

In the Court of Appeal all three judges held on the first issue that there was nothing in the pre-contractual negotiations which could amount to a collateral warranty. On the second issue Shaw LJ held that Howard were liable in negligence at common law as the nature of the transaction imposed on them a duty of care in giving information on matters peculiarly within their knowledge. Lord Denning MR held that Howard were under no duty of care at common law. Bridge LJ doubted whether Howard were under a duty of care at common law and, if they were, whether they had breached the duty, but expressed no concluded view. On the third issue Bridge and Shaw LJJ held that Howard were liable to Ogden for O'Loughlin's misrepresentation and had not discharged the burden in section 2(1) of the Act of 1967 of proving that O'Loughlin had a reasonable ground for believing that his representation was true. Lord Denning MR held that Howard had discharged the burden contained in section 2(1). On the fourth issue Bridge and Shaw LJJ held that Howard could not escape liability by reliance on the exclusion clause. The clause was a provision which would 'exclude or restrict … any liability to which a party to a contract might be subject by reason of any misrepresentation made by him' within section 3 of the Act of 1967, and it was not 'fair and reasonable' to allow Howard to rely on it. Accordingly, the clause was of no effect. Lord Denning MR

p. 614

held ↵ that it was 'fair and reasonable' to allow Howard to rely on the exclusion clause as the parties were of equal bargaining power, and Ogden could easily have obtained advice that the barges were not fit for their purposes before concluding the contract. The extracts below concern only the second and third issues.

Lord Denning MR

[dissenting]

[Having concluded that Howard did not owe a duty of care at common law, he turned to consider Howard's liability under section 2(1) of the Misrepresentation Act 1967]

This enactment imposes a new and serious liability on anyone who makes a representation of fact in the course of negotiations for a contract. If that representation turns out to be mistaken—then however innocent he may be—he is just as liable as if he made it fraudulently. But how different from times past! For years he was not liable in damages at all for innocent misrepresentation: see *Heilbut, Symons & Co* v. *Buckleton* [1913] AC 30. Quite recently he was made liable if he was proved to have made it negligently: see *Esso Petroleum Co Ltd* v. *Mardon* [1976] QB 801. But now with this Act he is made liable—unless he proves—and the burden is on him to prove—that he had reasonable ground to believe and did in fact believe that it was true.

Section 2(1) certainly applies to the representation made by Mr O'Loughlin on July 11, 1974, when he told Ogdens that each barge could carry 1,600 tonnes. The judge found that it was a misrepresentation: that he said it with the object of getting the hire contract for Howards. They got it: and, as a result, Ogdens suffered loss. But the judge found that Mr O'Loughlin was not negligent: and so Howards were not liable for it.

The judge's finding was criticised before us: because he asked himself the question: was Mr O'Loughlin negligent? Whereas he should have asked himself: did Mr O'Loughlin have reasonable ground to believe that the representation was true? I think that criticism is not fair to the judge. By the word 'negligent' he was only using shorthand for the longer phrase contained in section 2(1) which he had before him. And the judge, I am sure, had the burden of proof in mind: for he had come to the conclusion that Mr O'Loughlin was not negligent. The judge said in effect: 'I am satisfied that Mr O'Loughlin was not negligent': and being so satisfied, the burden need not be further considered: see *Robins* v. *National Trust Co Ltd* [1927] AC 515, 520.

It seems to me that when one examines the details, the judge's view was entirely justified. He found that Mr O'Loughlin's state of mind was this: Mr O'Loughlin had examined Lloyd's Register and had seen there that the deadweight capacity of each barge was 1,800 tonnes. That figure stuck in his mind. The judge found that 'the 1,600 tonnes was arrived at by knocking off what he considered a reasonable margin for fuel, and so on, from the 1,800 tonnes summer deadweight figure in Lloyd's Register, which was in the back of his mind'. The judge said that Mr O'Loughlin had seen at some time the German shipping documents and had seen the deadweight figure of 1,055.135 tonnes: but it did not register. All that was in his mind was the 1,800 tonnes in Lloyd's Register which was regarded in shipping circles as the Bible. That afforded reasonable ground for him to believe that the barges could each carry 1,600 tonnes pay load: and that is what Mr O'Loughlin believed.

So on this point, too, I do not think we should fault the judge. It is not right to pick his judgment to pieces—by subjecting it—or the shorthand note—to literal analysis. Viewing it fairly, the judge (who had section 2 (1) in front of him) must have been of opinion that the burden of proof was discharged.

p. 615

Bridge LJ

... the remaining, and to my mind the more difficult, question raised in this appeal is whether Mr O'Loughlin's undoubted misrepresentation gives rise to any liability in tort either under the provisions of the Misrepresentation Act 1967 or at common law for breach of a duty of care owed to Ogdens with respect to the accuracy of the information given. I will consider first the position under the statute.

[He set out section 2(1) of the Act and continued]

The first question then is whether Howards would be liable in damages in respect of Mr O'Loughlin's misrepresentation if it had been made fraudulently, that is to say, if he had known that it was untrue. An affirmative answer to that question is inescapable. The judge found in terms that what Mr O'Loughlin said about the capacity of the barges was said with the object of getting the hire contract for Howards, in other words, with the intention that it should be acted on. This was clearly right. Equally clearly the misrepresentation was in fact acted on by Ogdens. It follows, therefore, on the plain language of the statute that, although there was no allegation of fraud, Howards must be liable unless they proved that Mr O'Loughlin had reasonable ground to believe what he said about the barges' capacity.

It is unfortunate that the judge never directed his mind to the question whether Mr O'Loughlin had any reasonable ground for his belief. The question he asked himself, in considering liability under the Misrepresentation Act 1967, was whether the innocent misrepresentation was negligent. He concluded that if Mr O'Loughlin had given the inaccurate information in the course of the April telephone conversations he would have been negligent to do so but that in the circumstances obtaining at the Otley interview in July there was no negligence. I take it that he meant by this that on the earlier occasions the circumstances were such that he would have been under a duty to check the accuracy of his information, but on the later occasions he was exempt from any such duty. I appreciate the basis of this distinction, but it seems to me, with respect, quite irrelevant to any question of liability under the statute. If the representee proves a misrepresentation which, if fraudulent, would have sounded in damages, the onus passes immediately to the representor to prove that he had reasonable ground to believe the facts represented. In other words the liability of the representor does not depend upon his being under a duty of care the extent of which may vary according to the circumstances in which the representation is made. In the course of negotiations leading to a contract the statute imposes an absolute obligation not to state facts which the representor cannot prove he had reasonable ground to believe.

[Bridge LJ considered the evidence of the grounds for O'Loughlin's belief. He noted the findings of the trial judge that: (i) O'Loughlin looked at the ship's documents and saw, but did not register, the figure of 1,055.135 tonnes; and (ii) O'Loughlin looked up the Lloyd's Register and saw the figure of 1,800 tonnes, which stayed in his mind. However Bridge LJ also noted O'Loughlin's oral evidence at trial. In particular: (i) O'Loughlin saw and understood the figure of 1,055.135 tonnes in the ship's documents and never said that the figure 'did not register' with him; and (ii) the only explanation

> O'Loughlin could provide for relying on the figure in the Lloyd's Register rather than the figure in the ship's documents was that the ship's documents stated the freshwater deadweight capacity rather than the saltwater cubic capacity.]
>
> I am fully alive to the dangers of trial by transcript and it is to be assumed that Mr O'Loughlin was perfectly honest throughout. But the question remains whether his evidence, however benevolently viewed, is sufficient to show that he had an objectively reasonable ground to disregard the figure in the ship's documents and to prefer the Lloyd's Register figure. I think it is not. The fact that he was more interested in cubic capacity could not justify reliance on one figure of deadweight capacity in
> p. 616 preference to another. The fact that the deadweight ↵ figure in the ship's documents was a freshwater figure was of no significance since, as he knew, the difference between freshwater and sea water deadweight capacity was minimal. Accordingly I conclude that Howards failed to prove that Mr O'Loughlin had reasonable ground to believe the truth of his misrepresentation to Mr Redpath.
>
> Having reached a conclusion favourable to Ogdens on the issue of liability under the Misrepresentation Act 1967, I do not find it necessary to express a concluded view on the issue of negligence at common law. As at present advised I doubt if the circumstances surrounding the misrepresentation at the Otley interview were such as to impose on Howards a common law duty of care for the accuracy of the statement. If there was such a duty, I doubt if the evidence established a breach of it.
>
> ### Shaw LJ
>
> There remains the issue raised by the claim under section 2(1) of the Misrepresentation Act 1967. I do not regard the telephone conversation of April and the interview of July 11, 1974, as being so casual as to give rise to no legal consequences. Certainly I find myself unable to dismiss what was said at the interview in July as inconsequential. I share the opinion expressed in this regard in the judgment of Bridge LJ which is based on the finding of the judge. I entirely agree, furthermore, with Bridge LJ's analysis of the evidence, together with the judge's findings in this regard, and I agree also with the views expressed by Bridge LJ as to the operation and effect of the relevant provisions of the Misrepresentation Act. I cannot do better than respectfully to adopt his reasoning without seeking to repeat it, and I agree with his conclusions.
>
> On this ground as well as in relation to the claim based on negligence at common law I would allow the appeal.

Commentary

The competition here was between a claim under section 2(1) and a claim in the tort of negligence (rather than, as in *Royscot*, a competition between section 2(1) and the tort of deceit). Once again section 2(1) emerged as the victor. The outcome of the tort claim was inconclusive in that Shaw LJ was of the opinion it would succeed, Lord Denning was of the view that it failed, while Bridge LJ doubted whether it would succeed. But the defendants did succeed in their appeal under section 2(1), albeit by a majority. The case demonstrates the significance of the shift in the onus of proof. The plaintiffs relied upon an extremely reliable source of

information (which was, unusually, incorrect) but they were nevertheless unable to discharge the onus of proof because they had the correct information in their possession at the relevant time. This suggests that it will be no easy task for a representor to show that he had reasonable grounds to believe that the facts represented were true. In many ways *Howard Marine* underlines the oddity of the fiction of fraud because, on the basis of the decision of the Court of Appeal in *Royscot*, the plaintiffs in *Howard Marine* were liable to pay damages as if they had been fraudulent. Yet the defendants never even succeeded in proving that they had been negligent!

When deciding whether or not the party had reasonable grounds to believe and did believe that the facts represented were true, it is the belief of the representor that is relevant and not an agent of the representor. Thus it will not suffice for a representor to show that an agent had reasonable grounds to believe and did believe that the facts represented were true. Section 2(1) is concerned with the liability of the 'other party' to
p. 617 the contract (and the 'other ↵ party' for this purpose does not include the agent of that party: *Resolute Maritime Inc* v. *Nippon Kaiji Kyokai, The Skopas* [1983] 1 WLR 857). Thus, where the 'other party' is a company, it is only the belief of a party who can be identified with the company itself that is relevant (*MCI WorldCom International Inc* v. *Primus Telecommunications Inc* [2003] EWHC 2182 (Comm), [2004] 1 All ER (Comm) 138).

Section 2(1) is therefore a very powerful weapon in the hands of a claimant. It is better than a claim in the tort of negligence because the remoteness rule is more generous, there is no need to show that the defendant owed a duty of care to the claimant, nor is it necessary for the claimant to show that the defendant has breached his duty of care. A claim under section 2(1) is also more advantageous than a claim in deceit because the claimant can recover the same measure of damages as in a deceit claim without having to prove that the defendant had been fraudulent. Are there any circumstances in which a claimant would find it preferable to invoke the tort of deceit or the tort of negligence? The obvious circumstance is where the claimant is not in a contractual relationship with the party who made the misrepresentation. In such a case the claimant must bring a claim in tort and cannot bring a claim under section 2(1). Second, a claimant who has himself been careless might find it advantageous to bring a claim in the tort of deceit in order to avoid the defence of contributory negligence (see earlier in this section). Third, a court may hesitate to find the existence of a misrepresentation in a claim brought under section 2(1) given the Draconian consequences which can flow from the finding that there has been a misrepresentation: *Avon Insurance plc* v. *Swire Fraser Ltd* [2000] 1 All ER (Comm) 573, 633 and *Raiffeisen Zentralbank Österreich AG* v. *Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123, [85]. In such a case a claimant may want to consider bringing an action in the tort of negligence. Fourth, it may be the case that section 2(1) cannot be applied to a case in which the misrepresentation is to be found in the contract itself but was not made before the contract was entered into (*Leofelis SA* v. *Lonsdale Sports Ltd* [2008] EWCA Civ 460, [2008] All ER (D) 87 (Jul), [141]). In such a case the claimant cannot state that it has entered into a contract 'after' a misrepresentation has been made to it. Fifth, the section is concerned only with representations made by a person who enters into a contract with the representee and with losses arising as a result of entering into that contract. There is nothing in the section to support the conclusion that, where A is induced to enter into a contract with B as a result of a misrepresentation made by C (C not acting as the agent of B), A can recover damages from C under the subsection. The subsection entitles the representee to recover only such damages as flow from its having entered into a contract with the representor (*Taberna Europe CDO II plc* v. *Selskabet AF1 (formerly Roskilde Bank A/S)* [2016] EWCA Civ 1262, [2017] QB 633). Finally,

section 2(4) of the 1967 Act provides that a claimant who has a right to redress under Part 4A of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) is not entitled to be paid damages under section 2(1) in respect of conduct constituting the misrepresentation.

17.5.2 Common Law Negligence

A claimant may be able to bring an action for damages in the tort of negligence. In order to do so a claimant must prove that the defendant owes to him a duty of care and that he has breached that duty of care (in other words, that he has been careless). The decision of the House of Lords in *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* [1964] AC 465 transformed this area of the law. A discussion of *Hedley Byrne* liability can be found
p. 618 in the judgments of the Court of Appeal in *Howard Marine* (17.5.1; for more modern analysis of the ↵ scope of *Hedley Byrne* liability, see S Deakin and Z Adams, *Markesinis and Deakin's Tort Law* (8th edn, Oxford University Press, 2019), pp. 127–137). The advantages of a claim under section 2(1) over a claim in the tort of negligence are discussed at 17.5.1.

17.5.3 Deceit

Thirdly, a claimant may be able to bring an action for damages in the tort of deceit. Prior to the decision of the House of Lords in *Hedley Byrne* a plaintiff who wished to recover damages for misrepresentation had to prove that the misrepresentation was made fraudulently and fraud is no easy matter to prove. The leading case is:

Derry v. Peek
(1889) 14 App Cas 337, House of Lords

The defendants were directors of a tramways company. They issued a prospectus stating that the company had the right to use steam power instead of horses when, in fact, under the terms of the relevant Act, the consent of the Board of Trade was required. The plaintiff subscribed for shares in the company on the strength of the prospectus. The Board of Trade subsequently refused to consent to the use of steam power and the company was wound up. The plaintiff brought an action in deceit against the directors. The trial judge found against the plaintiff, but the Court of Appeal reversed the trial judge's decision. The House of Lords reversed the decision of the Court of Appeal, on the basis that an action in deceit requires actual fraud, which is not satisfied merely by the absence of a reasonable basis for the erroneous belief. As the defendants honestly believed that their statement was true, the plaintiff's action failed.

Lord Herschell

'This action is one which is commonly called an action of deceit, a mere common law action.' This is the description of it given by Cotton LJ in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. …

I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn 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. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has
p. 619 obviously no such honest belief. Thirdly, ↵ if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made. …

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. …

> I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.
>
> ***Lord Halsbury LC***, ***Lord Watson***, ***Lord Bramwell***, and ***Lord Fitzgerald*** delivered concurring judgments.

Commentary

The opening paragraph from the judgment of Lord Herschell demonstrates the difference between a claim for rescission and a claim for damages. A claim to rescind a contract has never required proof of fraud, whereas an action for damages, until 1963, did require such proof. As the judgment of Lord Herschell makes clear, fraud is not an easy matter to prove and, indeed, it should not even be pleaded unless there is a substantial basis for the allegation of fraud. This being the case, section 2(1) of the 1967 Act offers a much more attractive route for a claimant who is in a contractual relationship with the defendant misrepresentor because it gives the claimant the advantages of a claim in deceit without having to assume the difficult task of alleging and proving fraud.

17.5.4 Section 2(2) of the Misrepresentation Act 1967

Section 2(2) of the Misrepresentation Act 1967 gives the court a discretion to award damages in lieu of rescission (see 17.4.2). What is the measure of damages recoverable under section 2(2)? This issue was considered by the Court of Appeal in *William Sindall plc* v. *Cambridgeshire County Council* [1994] 1 WLR 1016 (17.4.2) in the following terms:

Hoffmann LJ

The section speaks in terms of loss suffered rather than damages recoverable but clearly contemplates that if the contract is upheld, such loss will be compensated by an award of damages. Section 2(2) therefore gives a power to award damages in circumstances in which no damages would
p. 620 previously have been recoverable. Furthermore, such damages will be ↵ compensation for loss caused by the misrepresentation, whether it was negligent or not. This is made clear by section 2(3), which provides:

> 'Damages may be awarded under subsection (2) of this section whether or not he is liable to damages under subsection (1) thereof, but where he is so liable any award under subsection (2) shall be taken into account in assessing his liability under the said subsection (1).'

Damages under section 2(2) are therefore damages for the misrepresentation as such. What would be the measure of such damages? This court is not directly concerned with quantum, which would be determined at an inquiry. But since the court, in the exercise of its discretion, needs to know whether damages under section 2(2) would be an adequate remedy and to be able to compare such damages with the loss which rescission would cause to Cambridgeshire, it is necessary to decide in principle how the damages would be calculated.

The Law Reform Committee drew the analogy with Lord Cairns's Act (the Chancery Amendment Act 1858 (21 & 22 Vict. c. 27)) and in some respects this analogy is a good one. But it breaks down when one comes to decide the measure of damages. Under Lord Cairns's Act, the plaintiff who is refused specific performance or an injunction is left to his damages in contract or tort. The measure of such damages is exactly what it would be at common law: see *Johnson* v. *Agnew* [1980] AC 367, 400. The only change made by the Act was to give a remedy for purely equitable rights, such as breach of a restrictive covenant to which the plaintiff was not a party. But in such cases the common law analogy enabled a suitable measure of damages to be devised. Section 2(2), on the other hand, creates a power to award damages in a wholly new situation.

Under section 2(1), the measure of damages is the same as for fraudulent misrepresentation, i.e. all loss caused by the plaintiff having been induced to enter into the contract: *Cemp Properties (UK) Ltd* v. *Dentsply Research & Development Corporation* [1991] 2 EGLR 197. This means that the misrepresentor is invariably deprived of the benefit of the bargain (e.g. any difference between the price paid and the value of the thing sold) and may have to pay additional damages for consequential loss suffered by the representee on account of having entered into the contract. In my judgment, however, it is clear that this will not necessarily be the measure of damages under section 2(2).

First, section 2(1) provides for damages to be awarded to a person who 'has entered into a contract after a misrepresentation has been made to him by another party and as a result thereof'—[that is to say] of having entered into the contract—'he has suffered loss'. In contrast, section 2(2) speaks of 'the loss which would be caused by it'—[that is to say] the misrepresentation—'if the contract were

upheld'. In my view, section 2(1) is concerned with the damage flowing from having entered into the contract, while section 2(2) is concerned with damage caused by the property not being what it was represented to be.

Secondly, section 2(3) contemplates that damages under section 2(2) may be less than damages under section 2(1) and should be taken into account when assessing damages under the latter subsection. This only makes sense if the measure of damages may be different.

Thirdly, the Law Reform Committee report makes it clear that section 2(2) was enacted because it was thought that it might be a hardship to the representor to be deprived of the whole benefit of the bargain on account of a minor misrepresentation. It could not possibly have intended the damages in lieu to be assessed on a principle which would invariably have the same effect.

The Law Reform Committee drew attention to the anomaly which already existed by which a minor misrepresentation gave rise to a right of rescission whereas a warranty in the same terms would have grounded no more than a claim for modest damages. It said that this anomaly would be exaggerated if its recommendation for abolition of the bar on rescission after completion were to be
p. 621 implemented. I think that section 2(2) was intended to give the ↵ court a power to eliminate this anomaly by upholding the contract and compensating the plaintiff for the loss he has suffered on account of the property not having been what it was represented to be. In other words, damages under section 2(2) should never exceed the sum which would have been awarded if the representation had been a warranty. It is not necessary for present purposes to discuss the circumstances in which they may be less.

If one looks at the matter when Sindall purported to rescind, the loss which would be caused if the contract were upheld was relatively small: the £18,000 it would have cost to divert the sewer, the loss of a plot and interest charges on any consequent delay at the rate of £2,000 a day. If one looks at the matter at the date of trial, the loss would have been nil because the sewer had been diverted.

Evans LJ

Section 2(3) makes it clear that the statutory power to award damages under section 2(2) is distinct from the plaintiff's right to recover damages under section 2(1). ...

There is ... much room for debate as to the 'loss that would be caused if the contract were upheld'. The subsection assumes, as I read it, that this loss will be compensated by the damages awarded, if the contract is upheld. But if the measure is the same as those awarded in respect of a fraudulent misrepresentation (*Doyle* v. *Olby (Ironmongers) Ltd* [1969] 2 QB 158) or under section 2(1) (*Cemp Properties (UK) Ltd* v. *Dentsply Research and Development Corporation* [1991] 2 EGLR 197; cf. *Royscot Trust Ltd* v. *Rogerson* [1991] 2 QB 297) in cases where the contract continues in force, then two consequences seem to follow. First damages under section 2(2) are co-extensive with those under section 2(1), whereas section 2(3) suggests that they are or may be different. Secondly, an innocent and non-negligent defendant will be liable under section 2(2) for damages which he is specifically

> excused under section 2(1). Furthermore, if the plaintiff recovers full compensation under section 2(2), if the contract is upheld, then he will not suffer any net loss, assuming that the damages are paid.
>
> In my judgment, it is not correct that the measure of damages under section 2(2) for the loss that would be caused by the misrepresentation if the contract were upheld is the same measure as under section 2(1). The latter is established by the common law and it is the amount required to compensate the party to whom the misrepresentation was made for all the losses which he has sustained by reason of his acting upon it at the time when he did. But the damages contemplated by section 2(2) are damages in lieu of rescission. The starting point for the application of the sub-section is the situation where a plaintiff has established a right to rescind the contract on grounds of innocent misrepresentation: its object is to ameliorate for the innocent misrepresentor the harsh consequences of rescission for a wholly innocent (meaning, non-negligent as well as non-fraudulent) misrepresentor, in a case where it is fairer to uphold the contract and award damages against him. Such an award of damages was not permitted in law or equity before 1967. The court, therefore, exercises a statutory jurisdiction and it does so having regard to the circumstances at the date of the hearing, when otherwise rescission would be ordered. …
>
> When the court is required to form its own view of what is equitable between the parties at the date of the hearing, it is dangerous to lay down any hard-and-fast rule to the effect that no account can be taken of changed market values. Apart from the capital value of the subject matter of the contract, as here, which might rise or fall during the intervening period, there might be relevant market trading conditions which the court could properly take into account: cf. *The Lucy* [1983] 1 Lloyd's Rep. 188. Moreover, if it is right to take account of the current market value in assessing the loss which would be sustained by the council, if rescission were ordered, then it would be 'inequitable' not to have
> p. 622 regard to this factor in the case of the builders ↵ also. But the effect of doing so is merely to restate the issue which the court has to decide: in the circumstances of the case, should the loss of market remain where it presently lies?
>
> Viewed in this way, it would be substantially unjust, in my judgment, to deprive Cambridgeshire of the bargain which it made in 1988, albeit that the bargain was induced by a misrepresentation innocently made, but which was of little importance in relation to the contract as a whole. That misrepresentation apart, Sindall made what has proved to be so far an unfortunate bargain for them (although they remain owners of an important potential development site in what is a notoriously cyclical market). To permit them to transfer the financial consequences to Cambridgeshire, in the circumstances of this case, could properly be described as a windfall for them.
>
> For the above reasons, and taking into account the nature of the alleged representation and the history of the matter generally, including Sindall's deliberate failure to make any serious attempt to find a solution to the difficulty which arose when the sewer was discovered, the equitable balance, in my judgment, lies in favour of upholding the contract and awarding damages in lieu of rescission in this case. If there were a live issue under section 2(2), I would award damages in lieu of rescission and order the amount of such damages to be assessed.

> There remains the question of whether these damages should include the decline in the market value of the land since the contract was made. As indicated, above in my judgment they should not … The recovery of such damages in the present case, even if the tortious measure under section 2(2) applies, appears to be barred by the following three obstacles: (1) such damage was caused, not by the misrepresentation, but by the subsequent fall in market values, an extraneous cause; (2) the authorities suggest that the plaintiff's loss has to be assessed at the date when the property was transferred: *McGregor on Damages*, 15th ed., para 1727 citing *Waddell* v. *Blockey* (1879) 4 QBD 678; and (3) if a subsequent rise, or fall, in market values is relevant at the date of trial, then a chance element enters into the calculation, whether the contract is rescinded or not. I should add, however, that the reported authorities are sparse, as McGregor emphasises, and as I read them they do not purport to decide the question whether a decline in value until the time of discovery of the true facts is necessarily excluded.
>
> It is sufficient for present purposes to say that an award of damages in lieu of rescission under section 2(2) should in my view be calculated as I have described above.
>
> For these reasons, as well as those given by Hoffmann LJ, I would allow this appeal.
>
> ***Russell LJ*** concurred with both judgments.

Commentary

Since *William Sindall* was decided, the House of Lords has held in *South Australia Asset Management Corporation* v. *York Montague Ltd* [1997] AC 191 that the scope of the duty of care owed by a valuer to a lender did not extend to a fall in the value of the property market subsequent to the valuation. The damages recoverable were held to be confined to the difference between the correct valuation of the property at the time at which the valuation was done and the valuation negligently provided by the defendant. It has been suggested (H Beale (ed), *Chitty on Contracts* (35th edn, Sweet & Maxwell, 2023), para 10-119) that the same approach should be taken to a claim under section 2(2) so that damages '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'.

It should be noted that section 2(2) does not confer on a claimant a right to recover damages. It confers a
p. 623 *discretion* on the court to award damages in lieu of rescission. The court ↵ only has jurisdiction to award damages under section 2(2) if it also has jurisdiction to rescind the contract at the date of the hearing or the date on which the innocent party purported to rescind the contract (see *Salt* v. *Stratstone Specialist Ltd* [2015] EWCA Civ 745, [2015] 2 CLC 269). The unavailability of rescission thus deprives the court of the jurisdiction to award damages under section 2(2). The discretion is one to award damages 'in lieu of' rescission so that a claimant who wishes to rescind the contract cannot invoke section 2(2) in order to recover damages. Section 2(4) of the 1967 Act provides that a claimant who has a right to redress under Part 4A of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) is not entitled to be paid damages under section 2(2) in respect of conduct constituting the misrepresentation.

17.5.5 Rescission and an 'Indemnity'

A claimant who rescinds a contract may also be able to bring a claim for what is often referred to as an indemnity, although it is probably more accurate to describe it as a personal restitutionary claim. In *Whittington* v. *Seale-Hayne* (1900) 82 LT 49 the plaintiff entered into a lease of a farm which he intended to use for breeding prize poultry. He was induced to enter into the lease by misrepresentations made by the defendant that the premises were in a good state of repair and in a sanitary condition. The premises were not sanitary and the buildings were in a state of disrepair. As a result the plaintiff became ill and many of the birds died. The plaintiff claimed that he was entitled to set aside the lease and recover an indemnity in respect of the losses which he had suffered in the performance of the contract before it was set aside. It was held that he was not entitled to recover an indemnity in respect of the loss of his birds and the illness which he suffered. At the time at which the case was decided damages could only be recovered in respect of a fraudulent misrepresentation (see 17.5) and the plaintiff could not establish that the defendant had made the misrepresentations fraudulently. But the plaintiff was able to recover the rent paid and the cost of the repair work that had been done pursuant to an order issued by the local authority. These obligations were imposed on him by the terms of the lease. The reason for his entitlement to recover these payments was that they had resulted in an enrichment to the defendant (either through the direct payment of rent or by carrying out the work ordered by the local authority) and, when the lease was set aside, the defendant became subject to a restitutionary liability to repay to the plaintiff the value of the benefits which he had received as a result of the plaintiff's performance of his obligations under the lease. But he was not subject to any wider liability to pay compensation to the plaintiff for the losses which he had suffered.

17.6 Exclusion of Liability for Misrepresentation

A party cannot exclude liability for his own fraudulent misrepresentation (*S Pearson & Son Ltd* v. *Dublin Corporation* [1907] AC 351). The question whether English law allows a party to exclude liability for the fraud of his employee or agent is presently unclear. The Court of Appeal in *HIH Casualty and General Insurance Ltd* v. *Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483 at [103] held that liability for the fraud or dishonesty of employees and agents in the *performance* of a contract could be excluded but left open the
p. 624 question whether or not it was possible to exclude liability for the fraud of one's employee or ↵ agent in the negotiation of a contract. On appeal the House of Lords also left the latter point open (see [2003] UKHL 6, [2003] 2 Lloyd's Rep 61). Two views are possible. The first is that it is not possible as a matter of law to exclude liability for the dishonesty of one's employee or agent in the negotiation of a contract. The second is that it is possible to exclude liability for the dishonesty of one's employee or agent in the negotiation of a contract provided that sufficiently clear words are used. However, the difference between the two views may not matter a great deal in practice because of the insistence on the part of the courts that parties use clear language if they wish to exclude liability for the fraud of their agents (and the unlikelihood of a party using such clear language). Thus in *HIH Casualty and General Insurance Ltd* v. *Chase Manhattan Bank* Lord Bingham stated (at [16]):

> For it is in my opinion plain beyond argument that if a party to a written contract seeks to exclude the ordinary consequences of fraudulent or dishonest misrepresentation or deceit by his agent, acting as such, inducing the making of the contract, such intention must be expressed in clear and unmistakable terms on the face of the contract. The decision of the House in *Pearson* v. *Dublin Corporation* does at least make plain that general language will not be construed to relieve a principal of liability for the fraud of an agent: see in particular the speeches of Lord Loreburn LC at page 354, Lord Ashbourne at page 360 and Lord Atkinson at page 365. General words, however comprehensive the legal analyst might find them to be, will not serve: the language used must be such as will alert a commercial party to the extraordinary bargain he is invited to make. It is no doubt unattractive for a contracting party to propose a term clearly having such effect, because of its predictable effect on the mind of the other contracting party, and this may explain why the point of principle left open in *Pearson* v. *Dublin Corporation* has remained unresolved for so long.

The ability of a contracting party to exclude liability for misrepresentation is regulated by section 3 of the Misrepresentation Act 1967 which provides:

> (1) 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.
>
> (2) This section does not apply to a term in a consumer contract within the meaning of Part 2 of the Consumer Rights Act 2015 (but see the provision made about such contracts in section 62 of that Act).

The principles applied by the courts when deciding whether or not a clause is reasonable have been discussed earlier (13.3.7). It is probably wise not to attempt to exclude liability for 'any representation or warranty' because such a clause may, as a matter of interpretation, extend to a fraudulent misrepresentation and an attempt to exclude liability for fraudulent misrepresentation must be unreasonable (see *Thomas Witter Ltd* v. *TBP Industries Ltd* [1996] 2 All ER 573; for a contrary view see *Zanzibar* v. *British Aerospace (Lancaster House) Ltd*
p. 625 [2000] ↵ 1 WLR 2333, where it was held that the words 'any representation' were not apt, as a matter of construction, to encompass a fraudulent misrepresentation, given that liability for fraud generally cannot be excluded, see earlier in this section). It is, however, safer to state that the exclusion or limitation applies to any representation other than one made fraudulently.

An issue which has proved to be extremely controversial is the scope of section 3. A particular controversy has been whether it is possible to avoid the application of the section by drafting a clause which purports to set out the 'basis' on which the contract was entered into or which provides that 'no reliance' has been placed on any statement made by one party to the other prior to entry into the contract. In providing that 'no reliance'

can be placed on a statement made, the aim was to deny the existence of a misrepresentation to which the section could apply, given that the essence of a misrepresentation is that it is a statement *upon which reliance has been placed* by the person to whom the statement was made. An example of such a clause is to be found in clause 5.8 of the lease entered into between the parties in *First Tower Trustees Ltd* v. *CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, which was in the following terms:

p. 626

> 'The tenant acknowledges that this lease has not been entered into in ↵ reliance wholly or partly on any statement or representation made by or on behalf of the landlord.'

On the facts the landlord was found to have made misrepresentations to the tenant relating to the premises which were the subject matter of the lease. The issue before the Court of Appeal was whether clause 5.8 was effective to exclude that liability in misrepresentation, and the answer to that question turned, in part, on the issue whether or not clause 5.8 was caught by section 3. The Court of Appeal held that it was so caught and expressed their conclusions in the following terms:

Lewison LJ

51. Section 3 of the 1967 Act must be interpreted so as to give effect to its evident policy. That policy, in my judgment, is to prevent contracting parties from escaping from liability for misrepresentation unless it is reasonable for them to do so. How they seek to avoid that liability is subsidiary. In *Cremdean Properties* v. *Nash* [1977] 2 EGLR 80, it was argued that a term in a pre-contractual notice nullified the effect of any representation. Bridge LJ held that it did not have that effect but went on to say:

> 'But I would go further and say that if the ingenuity of a draftsman could devise language which would have that effect, I am extremely doubtful whether the court would allow it to operate so as to defeat section 3. Supposing the vendor included a clause which the purchaser was required to, and did, agree to in some such terms as "notwithstanding any statement of fact included in these particulars the vendor shall be conclusively deemed to have made no representation within the meaning of the Misrepresentation Act 1967," I should have thought that that was only a form of words the intended and actual effect of which was to exclude or restrict liability, and I should not have thought that the courts would have been ready to allow such ingenuity in forms of language to defeat the plain purpose at which section 3 is aimed. ...'

67. I would hold, therefore, that a clause which simply states (as clause 12.1 of the agreement for lease and clause 5.8 of the lease do) 'that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord' is a contract term which would have the effect of excluding liability for misrepresentation; and consequently is subject to the test of reasonableness. Accordingly, in my judgment the judge in our case was right to conclude as he did. I do not consider that a conclusion to this effect should cause consternation. It will always be open to a contracting party seeking to rely on such a clause to establish that it was reasonable; and in cases involving the sale of complex financial products to sophisticated investors it may well be. ...

Leggatt LJ

99. Even if, by giving the language of section 3 of the Act a strained interpretation, a distinction could be drawn between a contract term which would exclude liability and a term which would prevent liability from arising, there is no reason to draw such a formalistic distinction and good reason not to interpret section 3 in a way which omits the latter type of term from its scope. The result of doing so would be that a lawyer drafting boilerplate provisions could avoid the application of section 3 purely by the choice of words in which the clause is phrased. A clause stating that a party will have no liability for any representation made or on which the other party has relied on any view falls within section 3 and is subject to the requirement of reasonableness. But on this interpretation, if instead the clause were worded to say that A agrees not to assert that B has made or that A has

> relied on any representation, section 3 would not apply. No rational legislator could have intended that the need for a contract term to satisfy a test of reasonableness could be avoided simply by felicity in drafting the contract term. …
>
> 100. [Counsel for the landlord] submitted that, in determining whether clause 5.8 of the lease falls within section 3, it is relevant that the clause was contained in a contract made between sophisticated commercial parties who should be taken to have understood the effect of what they were agreeing and allowed to agree what they choose. …
>
> 103. Quite apart from authority, to read into section 3 an implied limitation which would make its application depend on who the parties to the contract are is not only unwarranted by the statutory language but inconsistent with the scheme of the Unfair Contract Terms Act. …
>
> 104. The decision to make section 3 applicable to all contracts induced by misrepresentation, irrespective of the nature and subject matter of the contract and the identity of the contracting parties, is readily understandable. The importance which English law attaches to the freedom of parties to contract on whatever terms they choose depends crucially on the assumption that their consent to the terms of the contract has been obtained fairly. That is not the case where one party's consent has been induced by a misrepresentation made by the other contracting party. Misrepresentation is a paradigm 'vitiating factor' which undermines the validity of a contract. This does not mean that a party cannot choose to give up the right to complain that its consent to the terms of the contract was obtained by misrepresentation. But in so far as a contract term is said to have removed that right, a control mechanism is needed to ensure that this term was a fair and reasonable one to include. That, at all events, is the policy which Parliament has thought it right to adopt. It is the duty of the courts to uphold and not to subvert that policy choice.
>
> 105. This is not to doubt that the level of sophistication of a contracting party is relevant in determining whether a term is effective to prevent the party from obtaining a remedy for misrepresentation. But its relevance is to the question whether, 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, it was fair and reasonable to exclude liability. It is not a ground for bypassing that question.

p. 627 ↵ The focus of the Court of Appeal is here on the substance or effect of the clause rather than its form. This being the case, it would appear that the ability to avoid the reach of section 3 by mere drafting devices is very limited (although it may not be entirely impossible, given the view of the Court of Appeal in the earlier case of *Taberna Europe CDO II plc* v. *Selskabet AF1 (formerly Roskilde Bank A/S)* [2016] EWCA Civ 1262, [2017] QB 633, [20] that section 3 'is concerned with attempts to exclude liability after the event' and that it 'is not concerned with the question whether there has actually been a representation'). The justification for this focus on substance rather than form is twofold. The first justification is the desire to uphold the policy behind the enactment of section 3 (see [51] and [99]). The second (at [104]) is the fact that English law attaches importance to the freedom of parties to a contract to agree on the terms of their contract but it does so on the basis that 'their consent to the terms of the contract has been obtained fairly' and that is not the case where the consent of one party has been induced by a misrepresentation made by the other contracting party. From

this it would appear to follow that whether the clause takes the form of a 'no-reliance' provision or a clause which purports to define the 'basis' on which the parties have entered into the contract, it will fall within the scope of section 3 and be subject to the reasonableness test. This being the case, rather than seek to exclude the operation of section 3, parties would be well advised to focus their attention instead on the reasonableness of any clause which seeks to exclude or restrict liability in respect of a statement which would otherwise amount to a misrepresentation.

Further Reading

ATIYAH, PS AND TREITEL, GH, 'Misrepresentation Act 1967' (1967) 30 *MLR* 369.

CARTWRIGHT, J, *Misrepresentation, Mistake and Non-Disclosure* (6th edn, Sweet & Maxwell, 2022).

HOOLEY, R, 'Damages and the Misrepresentation Act 1967' (1991) 107 *LQR* 547.

VENKATESAN, N, 'Causation in Misrepresentation: Historical or Counterfactual? And "but for" What?' (2021) 137 *LQR* 503.

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