COMMERCIAL FRAUD IN CIVIL PRACTICE

SECOND EDITION

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OVERVIEW

A. Commercial Fraud

1.01 This book concerns the law and practice relating to commercial fraud litigation. It is a broad and complex topic involving all areas of commercial life and most if not all, areas of the law. What qualifies as fraud differs, as we shall see, depending on the context and the nature of the claim. No single definition is available. What will become clear very quickly to those unfamiliar with this subject matter is that it embraces far more than a mere claim in deceit at common law.

1.02 This topic's complexity is heightened because it straddles many difficult and developing areas of the law, such as unjust enrichment, proprietary claims, and conflict of laws, and is, in fact, usually the context in which the boundaries of such areas are pushed, whether it is a jurisdictional or choice of law question relating to constructive trusts or unjust enrichment, tracing through modern forms of value-exchanges in the banking system, or, as recently, whether the corporate veil could be lifted so as to render a fraudster puppeteer liable on the underlying choice of court clause. The resourcefulness of the modern-day fraudster, and the technological advances which present ever more varied opportunities to perpetrate fraud, mean that commercial fraud typically provides the context of many of the more difficult questions that come before the courts. If that were not enough, the practitioner faces an added challenge arising from the fact that, in the main, commercial fraud is ignored as a topic of study in our universities. Individual topics are considered, separately and within their own category of law (i.e. deceit within the law of tort), but there is little or no study of the topic of fraud as a whole which means the learning curve is usually steep for anyone wishing to practise in this fascinating area of the law.

1.03 The difficulty in getting to grips with commercial fraud lies not only in trying to understand the myriad of claims potentially available in any commercial fraud setting but also in learning to make the right choices as to which of those claims should be pursued and which should be abandoned. Different claims will require different elements to be proved and in turn will each give rise to their own issues of choice of law and jurisdiction. The right combination of claims will assist in bringing the claim in this jurisdiction. The wrong combination could result in the client facing a serious challenge to jurisdiction and the prospect of litigation abroad. When deciding on what claims to bring, consideration must

be given to how best to secure the interests of the client. If one is representing a bank that has been defrauded of several million pounds in a fraudulently induced loan to buy a vessel, it may be tempting immediately to exercise whatever security comes with that loan but by doing so the contract will be affirmed and one's client may well be prevented thereafter from rescinding the contract with the consequence that no tracing exercise can be undertaken with the loan proceeds and no proprietary claim sought to any property purchased with those proceeds. But it takes a brave and well-informed litigator to advise the client not to exercise whatever security has been given so as to keep such tracing options open. All these decisions and more need to be taken relatively swiftly and can only properly be taken with the appropriate level of knowledge.

1.04 The practitioner is not alone in facing such difficulties, and has the comfort of knowing that the judges fare little better. The point is put well by Lord Millett in the Foreword he kindly provided to the first edition of this book:

> The sophistication of the modern fraudster and the ease and speed with which he can transmit the proceeds to other jurisdictions and conceal or launder them make the facts complex and their discovery difficult. Once the facts have been unravelled, the application of the law should be straightforward. But that is not the case. English law provides a bounteous array of interlocking causes of action, and their relationship and different requirements are not universally agreed. The claimant may bring an action at common law or he may invoke the jurisdiction of equity; he may seek a personal remedy or a proprietary one. It may be questioned whether so many different and overlapping remedies should continue to be available for the same misapplication of property. But while they are available, the practitioner must familiarize himself with their different requirements, and that is no easy matter when scholars, and even Law Lords, disagree; when terminology has changed over the years and is at best confusing and at worst misleading; when the same expression (such as constructive trust) has different meanings in different contexts; and when judges, constrained by precedent, are compelled to express a view of the law which they later repudiate when promoted to a position which enables them to do so.

1.05 The observations from Lord Millett, whose contribution in this area, both as judge and commentator, has been, and as a commentator, continues to be, groundbreaking, reveal the breadth and depth of understanding and knowledge expected of practitioners holding themselves out as litigators in this area. Such practitioners require knowledge, not only of general areas such as contract, tort, equity, and restitution, but more specialist topics such as conflict of laws, insolvency, and company law. The aim behind this book is to provide the busy practitioner, and those whose areas of study and practice trespass into this topic, with an understanding of these principal areas which might arise in any fraud claim without having to resort to a library of different texts for assistance.

1.06 The focus is on civil fraud or fraud-related claims arising in a commercial setting or transaction. As such, the book does not deal with liability under criminal law including the Fraud Act 2006 which, for the first time, provides an overall structure to criminal liability for fraud (false representation; non-disclosure information in breach of legal duty to disclose and abuse of position). Nor does it touch upon asset recovery under the Proceeds of Crime Act 2002.[1] Within the civil law, and in order to maintain some semblance of control over the size

[1] See M Sutherland Williams, M Hopmeier and R Jones (eds), *Millington and Sutherland Williams on the Proceeds of Crime* (4th edn OUP, Oxford 2013).

of the text, the book refrains from any detailed discussion of negligent conduct. For these and other excluded topics, the reader is left in the capable hands of the many learned treatises available on each.

B. Understanding the Concepts of Fraud

Fraud is notoriously difficult to define. That is because it is not in itself an activity. X does not *do* fraud. It cannot be equated with buying or selling as an activity and yet it may form part of any such activity. It is effectively not an activity as such but the manner in which an activity is performed. It tells us *how* someone went about an activity. The most obvious consequence to flow from this observation is that fraud potentially pervades most commercial activity and as such is a diverse subject of study.[2] For these reasons, a commercial fraud litigator will find himself dipping into many different areas of law and considering numerous forms of potential claims in any given fraud action. **1.07**

There is, in fact, more than one concept of what amounts to fraud. Each concept differs depending on the context in which it is used. In the common law, fraud carries with it the connotation of deception or deceit leading to causation of loss. The focus of any inquiry at common law is usually on a representation or statement having been made which has deceived and was intended to deceive the claimant and has thereby caused him loss. Such an attitude is seen in the treatment of claims in deceit. It is also evident in the close scrutiny afforded claims such as conspiracy to defraud. Equity has never been so constrained in its idea of fraud. Whereas the common law demands the representation and the dishonest or deceitful conduct, Equity is free from such limitations and constraints.[3] Indeed, when exercising its exclusive jurisdiction, Equity can characterize as fraud conduct which, whilst amounting to a breach of fiduciary duty, may otherwise be considered honest or bona fides conduct. One need only ask the solicitor in *Boardman v Phipps*.[4] We can see such an attitude in the Constructive Trust chapter and in particular the remedies for breach of fiduciary duty. In some of the earlier writings and authorities, the differing use of the word fraud would be highlighted by adoption of phrases such as 'actual fraud' to describe the common law position and 'constructive fraud' for the position in Equity—although it might well be questioned whether such tags in fact aid our understanding of this topic at all. But it would be wrong to view Equity as failing to recognize or being incapable of confronting actual fraud: so we see examples where dishonesty is required for liability based on assisting in a breach of trust and unconscionable conduct (whatever that actually means) for liability based on receipt of assets. **1.08**

It is not the purpose of this book to provide detailed guidance on every area which may be touched by commercial fraud. Indeed, to attempt to do so would be impractical. Rather, the focus is on those issues which touch most aspects of a fraud claim, for example early disclosure and pre-emptive relief; jurisdictional and choice of law issues; tracing and following the proceeds of the fraud; and finally the claims which may be asserted in common law, equity, and statute. That, in itself, is a large enough remit. **1.09**

[2] *Reddaway v Banham* [1896] AC 199, 221.
[3] See *Nocton v Lord Ashburton* [1914] AC 932, 954.
[4] [1967] 2 AC 46.

C. Fraud—Alive and Well

1.10 When the first edition was completed in 2008 the economy was just entering into recession. I wrote at the time that commercial fraud is big business and is only getting bigger, cleverer and more complex. That has proved to be the case in the intervening five years. Litigators have been inundated with an endless stream of heavy commercial fraud litigation whilst pre-emptive remedies such as freezing and search and seizure orders appear to have taken on a new level of popularity with clients keen to take an aggressive stance at the merest hint of fraud. All this reflects the increased level of commercial fraud activity in the market.

1.11 In 2009, the National Fraud Authority estimated UK fraud losses at about £30 billion rising to £38.4 billion in 2010. By March 2012, that figure had risen to a staggering estimate of £73 billion.[5] On any view, such estimates are likely to be matched by a continued upward swing in litigation in this area. On that basis, it is hoped that this second edition proves both timely and useful.

D. Structure of the Book

1.12 Following this overview, the book is divided into Part II, which is the largest part of the book dealing with substantive claims; Part III, which is an expanded treatment of pre-emptive relief; and Part IV, which deals with the conflict of laws.

1.13 Part II divides into:

(1) Part (a) dealing with a more detailed treatment of *Deceit*;
(2) Part (b) dealing with personal claims based upon receipt of assets arising out of *Unjust Enrichment* (including examination of the decision of the Supreme Court in *Benedetti v Sawiris*[6] dealing with enrichment issues), *Conversion* and *Knowing or Unconscionable Receipt*;
(3) Part (c) dealing with *Constructive Trust* claims (including a detailed examination of the controversial Court of Appeal decision in *Sinclair v Versailles*[7]);
(4) Part (d) dealing with multi-party liability arising out of *Conspiracy* (including analysis of *Total Network*), *Inducing A Breach of Contract*, *Dishonest Assistance* and *Bribery*;
(5) Part (e) dealing with statutory liability for wrongful transfers covering *Transfers at an Undervalue*, *Transactions Defrauding Creditors*, *Preferences* and *Miscellaneous*.
(6) Part (f) dealing with claims relating to the identification of assets including *Disclosure*, *Tracing*, a new chapter on *Sham Trusts* and a new chapter on *Lifting the Corporate Veil* (examining both *VTB v Nutritek*[8] and *Prest v Petrodel Resources Ltd*[9]).

1.14 Part III is headed Pre-Emptive Relief, including revamped and expanded chapters on *Search Orders*, *Freezing Orders*, *Proprietary Injunctions* and new chapters on *Receivers*, *Practice and Procedure*, and *Contempt and other Sanctions*.

[5] M Levi, 'Trends and Costs of Fraud' in A Doig (ed), *Fraud: The Counter Fraud Practitioner's Handbook* (Gower, Farnham 2012) 8.
[6] [2013] UKSC 50; [2013] 3 WLR 351.
[7] [2011] EWCA Civ 347; [2012] Ch 453.
[8] [2013] UKSC 5; [2013] 2 WLR 398.
[9] [2013] UKSC 34; [2013] 3 WLR 1.

Part IV is concerned with the Conflict of Laws, including revised chapters on *Jurisdiction* and *Choice of Law* (including incorporation of Rome I and Rome II Regulations). **1.15**

Overall, the text is considerably expanded and provides a more detailed treatment of some of the more important issues that arise in commercial fraud litigation. **1.16**

Finally, as in the first edition, the reader will see that, where appropriate, extracts and quotations are taken from the case law or articles to which reference has been made. This has been done so that readers can make up their own mind as to whether the interpretation of the extract portrayed in the text is correct. The danger of paraphrasing, which is necessary sometimes, is that something important may well be left out which alters its meaning. It is hoped also that the ready availability of the quotation may be more user-friendly for the busy practitioner reader. **1.17**

2

DECEIT[1]

A. Summary of Requirements[2]

A claim in the tort of deceit arises in the following circumstances: **2.01**

(1) X makes a representation [of fact] to Y;[3]
(2) X knows the representation is false, or has no belief in its truth or is reckless as to whether or not it is true;[4]
(3) X intends Y to rely upon the representation;[5]
(4) Y does rely upon the representation;[6]
(5) Y is caused loss and damage as a result of such reliance.[7]

[1] See A Dugdale and M Jones (eds), *Clerk & Lindsell on Torts* (20th edn Thomson/Sweet & Maxwell, London 2010) ch 18; H Carty, *An Analysis of the Economic Torts* (2nd edn, OUP, Oxford, 2010, hereinafter *Economic Torts*) ch 9; WVH Rogers (ed), *Winfield & Jolowicz on Tort* (18th edn Sweet & Maxwell, London 2010) paras 11.3–11.14; J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (3rd edn Sweet & Maxwell, London 2012, hereinafter *Misrepresentation*) ch 5; P MacDonald Eggers, *Deceit: The Lie of the Law* (Informa, London 2009); NJ McBride and R Bagshaw, *Tort Law* (4th edn Pearson, Harlow 2012) ch 24.8.

[2] If the deceit relates to the creditworthiness of a third party then, in addition to requirements (1) to (5) in the text, it is also necessary to establish that the representation was made in writing: Statute of Frauds Amendment Act 1828, s 6

[3] E.g. *Bradford Trust Equitable Benefit Building Society v Borders* [1941] 2 All ER 205; *Gross v Lewis Hillman Ltd* [1970] Ch 445; *AIC Ltd v ITS Testing Services (UK Ltd)* [2006] EWCA Civ 1601; [2007] 1 Lloyd's Rep 555 at [251].

[4] *Derry v Peek* (1889) 14 App Cas 337.

[5] *Peek v Gurney* (1873) LR 6 HL 377.

[6] *Smith v Chadwick* (1884) 9 App Cas 187.

[7] *Derry v Peek* (1889) 14 App Cas 337. This undoubted requirement for loss to have been caused is curiously omitted from *Bradford Trust Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 and from *AIC Ltd v ITS Testing Services (UK Ltd)* [2006] EWCA Civ 1601; [2007] 1 Lloyd's Rep 555.

B. Introduction

2.02 Deceit is the closest the English law of tort comes to a claim in fraud. As its name suggests and as one might expect of a claim based on fraudulent conduct, a claim in deceit requires that the claimant be deceived by the words or conduct of the defendant resulting in loss or damage being sustained. Deception causing loss to the claimant is at the heart of any claim for deceit.

2.03 This chapter is concerned solely with the tort of deceit insofar as it arises from a fraudulent misrepresentation satisfying the elements identified above. Some texts include a discussion about bribery in the context of this tort,[8] whilst recognizing that bribery does not meet the typical requirements of a false misrepresentation. Whether or not bribery properly falls within a wide definition of deceit which also includes the fraudulent misrepresentation claim is an exercise in taxonomy which is of no relevance to a commercial fraud litigator. For ease of exposition and explanation, therefore, the elements of the tort of bribery will be dealt with in an entirely separate chapter.[9]

2.04 It will be readily apparent that the elements of the tort of deceit impose a high evidential burden on the claimant.[10] In *Foodco UK LLP v Henry Boot Developments Ltd*[11] Lewison J said:

> The burden of proof lies on the [claimants] to establish their case. They must persuade me that it is more probable than not that [the Defendant] made fraudulent misrepresentations. Although the standard of proof is the same in every civil case, where fraud is alleged cogent evidence is needed to prove it, because the evidence must overcome the inherent improbability that people act dishonestly rather than carelessly. On the other hand inherent improbabilities must be assessed in the light of the actual circumstances of the case . . .

2.05 Further, a pleader can only properly plead an allegation of fraud on the basis of reasonably credible material (not necessarily evidence)[12] which, without more, establishes a prima facie case of fraud: Bar Code of Conduct, para 708(c): Law Society's Code for Advocacy, para 6.6(c).[13] To plead such a claim without appropriate supporting material exposes the drafter to potential professional ethical difficulties, not to mention exposing the whole legal team to a possible wasted costs order should the court subsequently conclude the allegations should not have been made in the first place. The only way confidently to withstand the typical pressure applied by the client to plead out such a case is to know precisely what is required to do so and therefore be in a position to determine whether the facts as known satisfy those requirements.

2.06 It is therefore essential that proper inquiries and investigations are undertaken prior to commencing a claim alleging deceit. To persuade a client to await the outcome of the investigation, rather than rush headlong into commencing a claim, can be a difficult task but it is one

[8] Carty, *Economic Torts* (2nd edn) 186–8; *Clerk & Lindsell* (20th edn) recognizes that this head of claim shares some, but not all, of the elements of the tort of deceit: paras 18-55–18-56.

[9] See Chapter 10.

[10] Although it remains the civil burden of proof (see *Hornal v Neuberger Products Ltd* [1957] 1 QB 247), the court works on the principle that the more serious the allegation the less likely it is that it happened and hence the more it will need persuading that it did happen: see Lord Nicholls in *RH (Minors)* [1996] AC 563, 586–7; *Clerk & Lindsell* (20th edn) para 18-04.

[11] [2010] EWHC 358 (Ch) at [3]. See also *Ludsin Overseas Ltd v EC03 Capital Ltd* [2012] EWHC 1980 (Ch) at [51].

[12] *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 AC 120. Great care should be taken before pleading a claim in deceit: *Mason v Clarke* [1955] AC 778, 794; *Hornal v Neuberger Products Ltd* [1957] 1 QB 247.

[13] See also *Mason v Clarke* [1955] AC 778, 794.

which the commercial fraud litigator must not shy away from in appropriate circumstances. This is particularly important when considering whether to pursue claims in deceit, where the desire to commence some form of litigation quickly is very much client-driven. The balancing of the need to investigate the merits of the case and the need to move quickly so as to avoid assets being lost is one that is only really learnt with experience. Often the hardest decision in this area is to refuse to plead any claim in fraud or deceit at all.

C. Deceit Versus Other Misstatements

2.07 Whilst this book is concerned with commercial fraud, it is important to appreciate where a claim in deceit differs from other statements giving rise to liability. A false statement, even if made innocently, will give rise to liability without needing to establish any form of fault if that statement is included as a term of a contract. If it is made negligently, a statement may give rise to a damages claim on the *Hedley Byrne & Co Ltd v Heller & Partners*[14] principle so long as the required duty of care relationship is established. If the misrepresentation has induced a contract, s 2(1) of the Misrepresentation Act 1967 renders the maker liable unless he is able to establish the representation was made without fault.[15]

2.08 Consistent with the approach adopted generally in this book, the practitioner is urged to consider whether something less than a full claim in deceit may provide all that the client requires without engaging the higher standards and threshold associated with a claim based on deceit.[16] Indeed, the evidence may simply not support an appropriate plea of deceit.[17] If the evidence supports the plea, it has the advantage of not requiring proof of a duty of care relationship and is likely to have a longer limitation period (due to concealment). In addition, it is not possible to reduce any recoverable damages by reference to contributory negligence or by an argument premised upon reasonable foreseeability, as would be possible in a claim based negligence.

D. Analysis of Requirements

(1) X makes a false representation [of fact] to Y

2.09 Dishonest deception is at the heart of this claim and such deception is dependent upon establishing that a representation has been made which has caused that deception. It is not possible to engage in the exercise of determining the other elements of the claim without first having established, with some precision, the nature of the representation.[18]

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[14] [1964] AC 465.

[15] For a detailed treatment of all types of misrepresentations, see Cartwright, *Misrepresentation* (3rd edn).

[16] *Clerk & Lindsell* (20th edn) para 18-02.

[17] *Mason v Clarke* [1955] AC 778, 794 per Viscount Simonds: 'Charges of fraud should not be lightly made or considered.' There needs to be reasonably credible evidence of a prima facie case of fraud: *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 AC 120.

[18] *AIC Ltd v ITS Testing Services (UK) Ltd ('The Kriti Palm')* [2006] EWCA Civ 1601; [2007] 2 CLC 223, at [252] per Rix LJ: 'At the basis of any claim in deceit is the representation in question. Its falsity, and the honesty of the representor, cannot begin to be considered until the representation in question has been identified. In the case of a written document, the representation can usually be pinpointed (unless questions of implication arise), but of course context remains everything. In the case of an oral representation, the identification may be a more difficult process, involving disputed testimony, but again context remains everything.' See also [254].

(a) Must it be a representation of fact?

2.10 There are two schools of thought on this issue. Both will be outlined briefly here so that the practitioner is aware of the arguments, but we need not dwell on them since both schools ultimately lead to the same answer in all cases, whether the representation is characterized as one of fact or of intention or opinion.

2.11 The first or traditional school of thought is that only representations of fact suffice for the tort of deceit. Representations of intention or opinion in themselves do not suffice for the tort of deceit, but they usually contain an implied representation that the maker of the representation in fact holds the intention or opinion expressed and that does suffice. This approach, endorsed by *Clerk & Lindsell*,[19] finds ready support in the case law.

2.12 Another way of looking at the traditional analysis is to maintain that a representation may be made directly, where the representation expressly states the relevant facts, or it may be made indirectly, where it is possible to derive from an otherwise irrelevant statement about intention or opinion, a representation of fact that the maker genuinely holds such an intention or opinion. In the indirect representation situation, the active representation is not the statement about intention or opinion but the implied statement which says that such an intention or opinion is in fact genuinely held by the maker.

2.13 The second school of thought,[20] whilst recognizing that it is possible to re-interpret representations of intention or opinion in the manner advocated by the traditional analysis, suggests that the preferable approach is to discard the rule altogether and accept that deceit applies to 'any fraudulent statement which was intended to be acted upon by the representee'.[21]

2.14 The basis for this approach appears to lie in the fact that there is some case support for the proposition that even before the House of Lords' decision in *Kleinwort Benson Ltd v Lincoln City Council*[22] had removed the bar on actionable mistakes of law, the courts had been willing to act on fraudulent misstatements of the law, since the fraudulent conduct of the maker of the statement prevents the parties from being *in pari delicto* (i.e. equally at fault for getting the law wrong). So, for example, in *Hirshfeld v London, Brighton and South Coast Railway Co*[23] the court allowed an action to proceed based upon a fraudulent misrepresentation of the legal consequences of a deed of release.[24] In *Andre & Cie SA v Ets Michel Blanc & Fils*[25] Geoffrey Lane LJ stated that whatever the arguments in favour of limiting

[19] *Clerk & Lindsell* (20th edn) para 18-13.

[20] That proposed by Cartwright, in his excellent *Misrepresentation* (3rd edn) para 3.33.

[21] Cartwright, *Misrepresentation* (3rd edn) para 5.08. The attraction of this approach, which does away with fine distinctions between fact and opinion, is that the rule focuses on the crucial issue which is whether the claimant has been deceived by what has been said. That really is the only issue worth considering and the manner in which the deceiver went about his business should not matter. Any concerns of the court on whether the claimant should have been swayed or influenced by what the deceiver said can be dealt with by placing the burden on the claimant to establish he was so influenced in fact or, if the court wished to limit the availability of such claims to an objective test of what would influence an objective reasonable bystander. It is doubtful whether the latter is a route we should go down in the case of deceit and, as for the former, why should it matter if the claimant turns out to be gullible—that is hardly an argument that can come from the mouth of the deceiver.

[22] [1999] 2 AC 349.

[23] (1876) 2 QBD 1.

[24] See *Rashall v Ford* (1866) LR 2 Eq 750; *British Workman's and General Assurance Co Ltd v Cunliffe* (1902) 18 TLR 502; *Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 KB 482.

[25] [1979] 2 Lloyd's Rep 427.

misrepresentations to ones of fact and not law, he was unwilling to extend such reasoning to fraudulent misrepresentations of foreign law.[26]

While there is much merit in the Cartwright approach, if it is necessary for the practitioner to choose between the two approaches, then the traditional analysis is probably to be preferred on the basis that it has greater support in the authorities and the examples drawn upon by Cartwright in support of his suggestion that representations need not be of fact are all limited to fraud in the context of misstatements of the law as opposed to intention or opinion. That said, whichever analysis is favoured is unlikely to lead to different conclusions in any given case. **2.15**

(i) **Representations of intention** A representation of an intention contains two matters. The first, is a statement about what a person intends to do in the future. Such statements, in themselves, are only actionable if they are contractual in nature since it is through the contract that the law binds a person to a statement as to that person's future conduct. Failure to adhere to the statement as to future conduct may lead to a claim in contract but not, per se, to a claim in deceit.[27] The second is a statement that the person does in fact hold that intention as and when the statement was made. That is considered a factual statement and one capable of giving rise to a claim in deceit if made dishonestly. The leading authority on misrepresentations relating to intention is *Edgington v Fitzmaurice*[28] where Bowen LJ famously remarked: **2.16**

> 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.[29]

This case concerned a prospectus which invited subscriptions for debentures indicating that the monies raised were intended to be used to expand the business premises and purchase additional machinery. In fact, the directors intended to use the monies raised to pay off or reduce existing debts. The Court of Appeal held that there was a relevant misrepresentation of fact (as to the present intention to use the subscription monies) giving rise to the tort of deceit.

So in a typical Nigerian advance fee fraud, the fraudster represents that the equivalent of several million pounds is wrongly being held in Nigeria (or some other country) and that if the victim is willing to pay over £50,000 to help with the process of releasing the monies, he will receive the grand sum of £1 million. Typically, if the money (i.e. the £50,000) is paid over, the fraudsters invent additional scenarios to justify increasing the amount to be paid over. Whatever those scenarios, the fraudster has no genuine intention of paying over any money and his representation (of intention) otherwise to the victim is actionable. **2.17**

In a commercial fraud scenario, a claimant who has transferred money or assets and has received no promised counter-performance will need to consider carefully whether the claim is for simple breach of contract or whether the failure to comply is indicative of an *original* intention on the part of the counter-party not to comply with its obligations under the contract. Since 2008, and the marked downturn in the economy, there has been a greater readiness of **2.18**

[26] [1979] 2 Lloyd's Rep 427, 434. This case is not clear support for Cartwright's approach since the question of foreign law has always taken on a peculiar status as an issue of fact to be proved before the English court: see generally Lord Collins of Mapesbury et al (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn Sweet & Maxwell, London 2012) ch 9.

[27] *Clerk & Lindsell* (20th edn) para 18-11, citing *Beckett v Cohen* [1972] 1 WLR 1593.

[28] (1885) 29 Ch D 459. The position differs under criminal law: *R v Dent* [1955] 2 QB 590, where the Court of Appeal (Crim Div) refused to apply the reasoning in *Edgington v Fitzmaurice*.

[29] (1885) 29 Ch D 459, 483.

> it is often fallaciously assumed that a statement of opinion cannot involve the statement of a 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 a 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 known to both sides, then a statement of opinion by the 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.

2.21 In *AIC Ltd v ITS Testing Services (UK) Ltd ('The Kriti Palm')*[34] Rix LJ cited at [255] with approval the following guidance from *Clerk & Lindsell*[35] on the approach to statements as to opinions where there is a divergence in level of knowledge between the parties:

> the tests as to whether a statement of opinion involves such a further implied representation [of fact (e.g. that the person stating the opinion has reasonable grounds for his belief)] will involve a consideration of the meaning which is reasonably conveyed to the representee; and the material facts of the transaction, the knowledge of the parties respectively, their relative positions, the words of the representation and the actual condition of the subject-matter are all relevant to this issue.

2.22 In reaching his conclusion in *Barings plc (In Liquidation) v Coopers & Lybrand*,[36] Mr Justice Evans-Lombe emphasized that the *Brown v Raphael* test was to be applied to a representation by a professional man in a position where he would be expected to have significantly greater knowledge of the facts represented than did the representee. On the facts, Evans-Lombe J found that the finance director had a far more detailed understanding of the financial statements of the company than its auditors could possibly have acquired after two to three weeks of investigation. Accordingly, the court held that the finance director's representations included the implied representation that he had reasonable grounds for making the statements he did.

2.23 One might question how to interpret the reasoning of Evans-Lombe J consistently with that of the Court of Appeal in *Economides v Commercial Assurance*[37] where the Court held that the maker of the statement of belief does not need to show he has an objectively reasonable basis for that belief. The test is one of honesty and not one based upon the existence of any form of duty of care.[38]

2.24 Evans-Lombe J distinguished *Economides* on the grounds that the Court of Appeal was there concerned with a representation made by a layman with no particular skills, as opposed to a representation made by a professional who could be expected to be in a better state of knowledge in respect of the matters relating to the representation.[39] Further, a lay person, unless expressly asked so to do, will not be expected to undertake the type of research which one can reasonably expect to underpin an answer or statement given by a professional.

[34] [2006] EWCA Civ 1601; [2007] 2 CLC 223.
[35] (20th edn) para 18-14.
[36] [2002] EWHC (Ch) 461; [2002] PNLR 823 at [48]–[52].
[37] [1998] QB 587. Simon Brown LJ went on to add that if the insurers had wanted the assured to undertake detailed inquiries to support the valuations requested, they should have spelt out that requirement clearly (599–600).
[38] '... the plaintiff had to have some basis for his statement of belief in his valuation; he could not simply make a blind guess: one cannot believe to be true that which one has not the least idea about. But ... the basis of belief does not have to be an objectively reasonable one ... he was under a duty of honesty, not a duty of care' per Simon Brown LJ [1998] QB 587, 598.
[39] See Peter Gibson LJ in *Economides v Commercial Assurance* [1998] QB 587, 606.

2.25 It may also be suggested that much may depend on the nature of the opinion being expressed. Some such opinions will carry with them an expectation that they are based upon a level of factual knowledge, whereas others will be considered nothing more than someone's opinion. So a finance director expressing his opinion on the financial health of his company will fall into the former category whereas that same finance director giving his opinion on who will win this season's football Premier League clearly falls into the second category.

2.26 **(iv) Representations of law** The traditional position is that all parties are expected to know the law. The court therefore considered the representor and the representee to be *in pari delicto* (i.e. on an equal footing and equally responsible for any misunderstanding of the law) when considering whether to act on a misrepresentation of the law. In the absence of fraudulent intent, the court would refuse to act.

2.27 Such a position must now be re-assessed in the light of the House of Lords' decision in *Kleinwort Benson Ltd v Lincoln City Council*[40] to remove the bar on recovery based upon a mistake of law (as opposed to fact). Given the removal of such a bar in the case of mistake, logically the same attitude must be shown to any misrepresentations relating to matters of law as well. This is indeed the case as held by the court (Rex Tedd QC) in *Pankhania v Hackney LBC*:[41]

> I have concluded that the 'misrepresentation of law' rule has not survived the decision in the *Kleinwort Benson* case. Its historical accident is as an off-shoot of the 'mistake of law' rule, created by analogy with it, and the two are logically interdependent . . . The distinction between fact and law in the context of relief from misrepresentation has no more underlying principle to it than it does in the context of relief from mistake. Indeed, when the principles of mistake and misrepresentation are set side by side, there is a stronger case for granting relief against a party who has induced a mistaken belief as to law in another, than against one who has merely made the same mistake himself. The rules of the common law should, so far as possible, be congruent with one another, and based on coherent principle. The survival of the 'misrepresentation of law' rule following the demise of the 'mistake of law' rule would be no more than a quixotic anachronism. Its demise rids this area of the law of a series of distinctions, such as the 'private rights' exception, whose principal function has been to distinguish the 'mistake of law' rule, and confine it to a very narrow compass, albeit not to extinguish it completely.

The judgment of Rex Tedd QC was quoted with approval by Maurice Kay LJ in *Brennan v Bolt Burdon (a firm)*[42] where it was described as a 'lucid and trenchant judgment'. It has been endorsed by some of the leading commentators.[43]

2.28 Accordingly, it is unlikely now that a deceit claim would fail simply because the fraudulent statement was in relation to an issue of law as opposed to a pure representation of fact. However, it may be more difficult to establish the necessary knowledge and dishonesty in relation to such statements to found a claim in deceit.

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[40] [1999] 2 AC 349.
[41] [2002] EWHC 2441 (Ch); [2002] NPC 123.
[42] [2005] QB 303 at [10]. See also Bodey LJ at [25].
[43] *Halsbury's Laws of England* (4th edn re-issue (1999)), vol 32, para 11. *Clerk & Lindsell* (20th edn) suggests that 'in the law of deceit misstatements of law now fall to be treated on a similar footing to misstatements of fact' though the editors are quick to emphasize that proof of knowing misrepresentation of the law will be difficult: para 18-15.

(b) Representation by words or conduct

A representation can be made in a variety of ways. The most obvious and uncontroversial is by way of an express statement of fact, which can, subject to one exception, be made orally, in writing or by conduct. **2.29**

(c) Clarity of expression and ambiguous statements

Whichever method is adopted, it is important that the representation is clear in its terms and this will typically require evidence of the context in which the representation is made. This is especially the case if the representation is made orally in a conversation. In *AIC Ltd v ITS Testing Services,* Rix LJ made the following 'general point relating to human conversation: although it is of course possible to be more or less deliberate about one's speech, nevertheless the natural ebb and flow of conversation as part of an essentially interactive process means that it differs significantly from a written document. It does not necessarily have a single writer's logic, it is not composed, and it cannot be read as a whole before its communication. For both these reasons,[44] evidence of contemporary views of what the parties to the relevant conversation understood themselves to be saying or hearing may be of special importance.'[45] **2.30**

Whilst clarity of understanding of the representation is central to a deceit claim, such clarity is not confined to the use of unambiguous words or conduct. A claim in deceit may arise from an ambiguous statement so long as the 'representor should have intended the statement to be understood in the sense in which it is understood by the claimant (and of course a sense in which it is untrue) or should have deliberately used the ambiguity for the purpose of deceiving him and succeeded in doing so'.[46] **2.31**

It will not assist a claimant to establish that the more reasonable interpretation of an ambiguous statement is false if either (i) the representor did not intend that it be understood in that sense[47] or (ii) it was not in fact understood in that sense by the representee.[48] **2.32**

Instead of uttering the representation himself, the defendant may simply adopt something said by a third party. That will suffice for the purpose of making a representation. In *Bradford Third Equitable Benefit Building Society v Borders,*[49] Viscount Maugham stated that a representation of fact is established 'where the defendant has manifestly approved and adopted a representation made by some third person'.[50] **2.33**

Further, it may be possible to make a representation, not by uttering any words or adopting the words of others, but by clear and unequivocal conduct.[51] The oft-cited example is that of the defendant who dressed up as a student of a university in order to gain financial credit. **2.34**

[44] The other reason was because Rix LJ found that the representation was based upon an 'overall impression' derived from the use of certain words: 'We will be standing by that certificate.'

[45] *AIC Ltd v ITS Testing Services (UK) Ltd ('The Kriti Palm')* [2006] EWCA Civ 1601; [2007] 2 CLC 223.

[46] *AIC Ltd v ITS Testing Services (UK) Ltd ('The Kriti Palm')* [2006] EWCA Civ 1601; [2007] 2 CLC 223 at [253]; *Clerk & Lindsell* (20th edn) para 18-25; *Akerhielm v De Mare* [1959] AC 789.

[47] *Akerhielm v De Mare* [1959] AC 789, 805–6. Clearly, the more unnatural or unreasonable an interpretation said to be held by the representor, the more difficult it is likely, in practice, to be to persuade a court that such an interpretation was, in fact, held.

[48] Without such understanding there cannot be 'reliance'.

[49] [1941] 2 All ER 204.

[50] [1941] 2 All ER 204, 211.

[51] See e.g. *Gordon v Selico Ltd* (1986) 18 HLR 219 (taking steps to disguise presence of rot in a flat in order to encourage others to rent it).

He was convicted of obtaining credit by false pretences.[52] Similarly, by agreeing to appear in a scooter commercial, it was held that the *Spice Girls* had impliedly represented that they would not split up as a group during the running of that campaign.[53]

2.35 More recently, the act of pledging goods carried with it the implied representation that the pledgor is the owner of the goods and/or otherwise entitled or authorized to pledge those goods. If, in fact, the goods belong to a third party and the pledgor had no authorization to enter into any pledge arrangements, the pledgor may be liable in deceit.[54]

2.36 An individual who had succeeded in an earlier auction for the purchase of goods and who decides to take those goods away from the auction impliedly represents that he intends to pay for them.[55] Similarly, a defendant who enters a restaurant, sits down at a table and orders from the menu impliedly represents that he has the intention and ability to pay for the meal to be ordered.[56] The use of a forged signature on a mortgage application form or a bank transfer form is an actionable misrepresentation to the bank as to the true identity of the mortgage applicant or the person wanting to transfer money. A seller of a ship who deliberately floated the ship in water so as to conceal the defects in the ship's hull below the waterline is liable to the purchaser.[57]

2.37 Although the above examples illustrate that it may be possible to derive a representation from conduct without needing to rely upon the use of express words, mere silence alone is not generally sufficient to give rise to deceit. The essence of an actionable deceit is that the defendant has *caused* or *contributed to* the deception and not simply that the defendant has failed to correct any misunderstanding it knows the claimant is acting under.[58] The distinction lies between causing or contributing to a misunderstanding and simply failing to correct one entirely of the other party's own making. Liability for deceit can only arise in respect of the former but not the latter. In *Walters v Morgan*,[59] the Lord Chancellor (Lord Campbell) said:

> There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, however it may be viewed by moralists. But a single word, or (I may add) 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 sufficient ground for a Court of Equity to refuse a decree for a specific performance of the agreement.
>
> So, a fortiori, would a contrivance on the part of the purchaser, better informed than the vendor of the real value of the subject to be sold, to hurry the vendor into an agreement without

[52] *R v Barnard* (1837) 7 C & P 784.
[53] *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15; [2002] EMLR 510.
[54] *Advanced Industrial Technology Corp Ltd v Bond Street Jewellers Ltd* [2006] EWCA Civ 923; [2006] All ER (D) 21 (July).
[55] *Ex p Whittaker* (1875) LR 10 Ch App 446.
[56] See e.g. *DPP v Ray* [1974] AC 370, such conduct sufficing for the purposes of criminal 'deception'. Although one might add the caveat that the diner is willing to pay for the meal 'so long as it is as ordered and properly cooked'.
[57] *Schneider v Heath* (1813) 3 Camp 506.
[58] *Peek v Gurney* (1873) LR 6 HL 377. Unless, of course, that misunderstanding is a direct result of something said or done by the defendant.
[59] (1861) 3 De G F & J 718.

> 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 obviously no such honest belief. It matters not that there was no intention to cheat or injure the person to whom the statement was made.[69]

2.48 It is important to appreciate that the state of the representor's mind is directed towards the question of the falsity of the statement and not to whether he wishes to injure or cheat the claimant.[70] Whilst it may appear a little striking at first, the latter is irrelevant to a claim in deceit.

2.49 The use of the word 'careless' by Lord Herschell is apt to confuse: it is being used in the 'had no care' sense—complete indifference to the truth—and not as a means of incorporating some form of negligence into the test for deceit. Negligence has nothing to do with a claim in deceit.

2.50 The burden is on the representee to establish the representor's dishonesty and so he must prove that he did not have an honest belief in the representation's truth.[71]

2.51 **(ii) Representor's state of mind—representation made by employee** An entirely innocent employer will be vicariously liable for a deceit committed by its employee in the course of his employment.[72] However, as made clear in *Credit Lyonnais Nederland NV v Export Credits Guarantee Department*[73] it is essential that all the elements of the tort of deceit are performed by the employee in the course of his employment. So if the employee was only liable for the deceit by combining acts within the course of his employment with those committed outside his course of employment, then the employer could not be vicariously liable. On the facts, in *Credit Lyonnais Nederland NV v Export Credits Guarantee Department*,[74] the House of Lords held that the employee's acts of authorizing the guarantee with an intent to assist in a wrongful act did not amount to an actionable tort committed in the course of his employment, and therefore his employer was not vicariously liable for any loss caused to the bank.

2.52 This is understandable: an employer should not be vicariously liable for deceit based upon the combination of acts, only some of which were undertaken by its employee within the course of employment and which acts, if considered in isolation, would not amount to a claim in deceit. If the employee's acts fall within its course of employment, then it justifies imposing vicarious liability on his employer since the victim of the employee's fraud will have incurred loss by relying upon the employee doing his job.[75]

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[69] (1889) 14 App Cas 337, 374.

[70] *Bradford Third Benefit Building Society v Borders* [1941] 2 All ER 205, 211: 'If fraud be established it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made'. See also *Polhill v Walter* (1832) 3 B & Ad 114.

[71] *Derry v Peek* (1889) 14 App Cas 337, 374; *Glasier v Rolls* (1889) 42 Ch D 436, 458.

[72] *Lloyd v Grace, Smith & Co* [1912] AC 716; *Barings plc (in Liquidation) v Coopers & Lybrand* [2003] EWHC 1319 (Ch); [2003] PNLR 639.

[73] [2000] 1 AC 486.

[74] [2000] 1 AC 486.

[75] *The Ocean Frost* [1986] 1 AC 717, 780 per Lord Keith; *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248; See generally Carty, *Economic Torts* (2nd edn) 196–7.

2.53 **(iii) Representor's state of mind—representation made by an agent** One of the main issues when determining whether and to what extent a principal is to be liable for the deceit of its agent is deciding how to deal with the state of mind requirement for this tort.

2.54 Based upon the guidelines provided by the Court of Appeal in *Armstrong v Strain*,[76] *Bowstead & Reynolds*[77] has helpfully set out the following series of propositions:

(a) The principal is liable if he authorized the agent to make the false representation which he (the principal) knew to be untrue (or did not believe to be true), whether the agent knew the truth or not.

(b) The principal is liable if, while not expressly authorizing the agent to make the false representation, he knew it to be untrue and was guilty of some positive wrongful conduct, as by consciously permitting the agent to remain ignorant of the true facts, so as to prevent the disclosure of the truth to the third party, if the third party should ask the agent for information, or in the hope that the agent would make some false representation. The agent's representation when made would of course require to be within the scope of his actual or apparent authority.

(c) The principal is liable if the agent made the false representation fraudulently, it being within the scope of his actual or apparent authority and within the course of his employment, to make such a representation, sometimes even where the representation reached the third party by way of another agent, or by way of the innocent principal himself, because in such a case the innocent second agent or principal may be no more than a conduit for the fraud of the guilty agent.

(d) The principal is not liable if the agent made the false representation innocently, the principal knowing the true facts but not having authorized the agent to make the representation, nor knowing that it would be made, nor being guilty of fraudulent conduct as in (b).

(e) Conversely, the principal is not liable if he himself made the false representation innocently, notwithstanding that the agent knew the true facts.

2.55 A principal is liable in deceit in circumstances where his agent, acting within his actual or ostensible authority, knowingly or recklessly, makes a false statement intending that it be relied upon by the claimant.[78]

(3) X intends Y to rely upon the representation

2.56 In addition to having knowledge of the falsity of the statement, the representor must also be shown to have an intention that Y actually relies upon the false statement in the manner which caused loss or damage.[79] It is the knowledge of the falsity coupled with the intention that the representee rely upon the false statement that gives rise to the dishonest conduct required for deceit.

[76] [1952] 1 KB 232.

[77] P Watts (ed), *Bowstead & Reynolds on Agency* (19th edn Sweet and Maxwell, London 2010) para 8-185. See also Cartwright, *Misrepresentation* (3rd edn) para 5.21.

[78] *Briess v Woolley* [1954] AC 333; *Bowstead & Reynolds* (19th edn) para 8-185.

[79] E.g. *Peek v Gurney* (1873) 6 LR HL 377, esp Lord Cairns at 411–13; *Bradford Equitable Building Society v Borders* [1941] 2 All ER 205, 211; *Kitcher v Fordham* [1955] 2 Lloyd's Rep 705; *Barton v County Natwest Ltd* [1999] Lloyd's Rep Bank 408.

2.57 It is not necessary for the representor to intend that Y rely upon the representation by carrying out the very specific action which has caused loss. As the Court of Appeal in *Goose v Wilson*[80] held, the more 'normal formulation is that the representor should intend to deceive the representee, with intent, that is to say, that it shall be acted upon by him' without the representor intending the specific act which constitutes the reliance. Similarly in *Mead v Babington*[81] the Court of Appeal held, applying *Goose v Wilson*, that there was no requirement that the representation had been intended to be acted on in the manner in which damage resulted to the claimant. It was not the specific action of the claimant which had to be intended; it was only necessary that there should be an intention that the representation should be acted on, subject only to the rules on remoteness of damage.

2.58 If a fraudulent misrepresentation is found to have been made, the Court of Appeal in *Goose v Wilson*[82] has held it will give rise to a rebuttable presumption of fact that the representor intended the representee to act in reliance on it.[83]

2.59 The relevant intention for a claim in deceit includes not only the obvious category of a desire by the representor that the representee will rely upon the false statements but also the situation where the representor is well aware that in the absence of unforeseen circumstances the representee will actually rely upon it. So, for example, where a purchaser is content to sign receipts for goods he knows have not been delivered and where he knows that the seller will be using those signed receipts to obtain bank finance, that suffices to establish liability on the part of the purchaser to the bank.[84]

2.60 This intention is likely to be relevant when considering the liability of professionals. To open bank accounts, obtain finance, release funds or assets, transfer property, etc. it is usually necessary that certain forms are signed by professionals. If the professional is aware of the falsity, or reckless as to the truth, of the contents of the document he is willing to sign or certify, he runs the real risk that he may subsequently be found to have deceived another professional who would typically rely upon the document so signed or certified in determining whether to act. If so, that will suffice to establish the relevant intention.

2.61 It is not necessary to establish that a particular individual was intended to rely upon the statement, so long as that individual formed part of a class or category of individuals intended to rely.[85] So, for example, if documentation necessary for opening a bank account contains fraudulent misrepresentations there is, not surprisingly, no need to show that any particular individual within the bank was intended to rely upon them. It suffices that the completion of the bank forms and sending them to the bank indicates that an employee within the bank charged with the responsibility of dealing with account openings was intended to rely upon the misrepresentations contained within the documentation.

[80] [2001] Lloyd's Rep PN 189 at [48].
[81] [2007] EWCA Civ 518; [2007] All ER (D) 226 at [16].
[82] [2001] Lloyd's Rep PN 189 at [47] citing in support *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, 542A; *Barton v County Natwest Ltd* [1999] Lloyd's Rep Bank 408, 421.
[83] Cartwright suggests that the Court of Appeal in *Goose v Sandford* has misinterpreted *Barton v County Natwest Ltd* and confused intention to rely with actual reliance: *Misrepresentation, Mistake and Non-Disclosure* (3rd edn) para 5-19, n 87.
[84] *Shinhan Bank Ltd v Sea Containers Ltd* [2000] 2 Lloyd's Rep 406.
[85] Viscount Maughan in *Bradford Equitable Building Society v Borders* [1941] 2 All ER 205, 211 talked in terms of 'a class of persons which will include the plaintiff'.

2.62 In *Goose v Sandford*[86] the Court of Appeal emphasized that the tort of deceit required that the representee establish that the representor intended his statement to be understood by the representee in the sense in which it is false.[87] Where there is no ambiguity in the language used, that is unlikely to present any difficulty. The problems potentially arise where the statement is ambiguous. The Court of Appeal stated that, in such circumstances, the representee is required to prove more than simply that on its ordinary meaning the representation was false: it must have been intended to be understood in that sense and was in fact understood in that sense. Obviously the greater the departure from the generally accepted understanding the less likely it is that it was intended to be understood in that sense and/or that it was in fact understood in that sense.

2.63 The difficulty is illustrated by the facts of *Akerhielm v De Mare*.[88] The defendant had made a representation (c) that 'one third of the share capital had been subscribed in Denmark'. This was not true as some had been allotted to persons resident in Kenya for services rendered in Denmark. Lord Jenkins, delivering the Speech of the Privy Council, made the following observations:

> The Court of Appeal construed the language of representation (c) as they thought it should be construed according to the ordinary meaning of the words used, and having done so went on to hold that on the facts known to the defendants it was impossible that either of them could ever have believed the representation, as so construed, to be true. Their Lordships regard this as a wrong method of approach. The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made. This general proposition is no doubt subject to limitations. For instance, the meaning placed by the defendant on the representation made may be so far removed from the sense in which it would be understood by any reasonable person as to make it impossible to hold that the defendant honestly understood the representation to bear the meaning claimed by him and honestly believed it in that sense to be true . . . (For the general proposition that regard must be had to the sense in which a representation is understood by the person making it, see *Derry v Peek*;[89] . . . *Angus v Clifford*[90] . . .; *Lees v Tod*[91] . . . which authorities must in their Lordships' view be preferred to *Arnison v Smith*[92] . . . so far as inconsistent with them).[93]

(4) Y relies upon the representation

2.64 It suffices to show that a false representation is *a* cause of the representor acting in a certain way. It is not necessary to show it was *the* cause of the representor so acting or indeed that it was the main cause thereof.[94] If the representee would have acted in the same manner even

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[86] [2001] Lloyd's Rep PN 189.

[87] See also *Barton v County Natwest Ltd* [1999] Lloyd's Rep Bank 408 at [32]; *Gross v Lewis Hilman Ltd* [1970] Ch 445, 459G–H.

[88] [1959] AC 789.

[89] (1889) 14 App Cas 337.

[90] [1891] 2 Ch 449.

[91] (1882) 9 Rettie 807, 854.

[92] (1889) 41 Ch D 348.

[93] [2001] Lloyd's Rep PN 189 at [41].

[94] *Barton v County NatWest Ltd* [1999] Lloyd's Rep Bank 408, 421. See also *Attwood v Small* (1838) 6 Cl & Fin 232, 502.

(5) Y is caused loss and damage in reliance on the false statement[100]

2.67 Damage is at the heart of any claim in deceit. Without it, no claim can be pursued. It is often called the *gist* of the action.[101]

2.68 As *McGregor on Damages*[102] correctly warns, it is necessary to be careful when assessing damages for deceit. Very often the factual context in a large scale commercial fraud will be that the deceit has resulted in the claimant having entered into a contract or transaction he would not otherwise have entered or at a price he would not otherwise have paid. In these circumstances, it would be very easy to confuse the tortious and contractual measures of damages. A claim in deceit gives rise to tortious damages which are assessed on the basis of the representation *not having been made* and not on a contractual basis, namely the representation which was made being true. So if the deceit led to the claimant entering into a contract for the purchase of shares, the settled rule is that the measure of damages is the price paid less the value received.[103] The value received is not necessarily the actual market price at the time of purchase if it can be shown that that market is a false one, having been misled by the deceit as well. If so, the proper approach, as per the House of Lords in *Smith New Court Securities v Scrimgeour Vickers*[104] is to work out the actual value of the shares in the market if the defendant's fraud was made known to the market and all relevant facts, previously concealed, known.[105]

2.69 The correct measure of damages for a claim in deceit is the loss directly flowing from the representee's reliance on the false statement—typically a sum sufficient to put the representee in the same position *as if he had not relied upon it*.[106] Unlike contract damages, the claim in deceit is not limited by what might have been in the reasonable contemplation of the parties at the time of entering the contract and, unlike tort generally, there is no restriction in deceit based upon reasonable foreseeability.[107]

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[100] GH Treitel, 'Damages for Deceit' (1969) 32 MLR 556; H McGregor, *McGregor on Damages* (18th edn Thomson/Sweet and Maxwell, London 2009) paras 41-002–41-039; *Clerk & Lindsell* (20th edn) paras 18-39–18-48.

[101] *Smith v Chadwick* (1884) 9 App Cas 187, 190 (Lord Blackburn); *Diamond v Bank of London & Montreal Ltd* [1979] QB 333, 349 (Stephenson LJ).

[102] *McGregor on Damages* (18th edn) para 41-002.

[103] See the Court of Appeal's decision in *Peek v Derry* (1887) 37 Ch D 541. Reversed by House of Lords only on issue of liability. See also *McConnell v Wright* [1903] 1 Ch 546.

[104] [1997] AC 254.

[105] See also *GE Commercial Finance Ltd v Gee* [2005] EWHC 2056 (QB); [2006] 1 Lloyd's Rep 337 at [335] per Tugendhat J.: 'The principles set out in *Smith New Court* are an elaboration of the general principle that the correct measure of damages in the tort of deceit is an award which serves to put the claimant into the position he would have been in if the representation had not been made to him… So where no contract is entered into the measure of damages is the actual damage directly flowing from the fraudulent inducement … So in *Standard Chartered* (as summarised in *McGregor* at para 41-033) the claim in deceit and conspiracy: "gave rise to a loss which led to a somewhat different measure of recovery. Payment having been made by the claimant bank to the seller of a cargo upon the presentation of fraudulently dated bills of lading, the bank successfully claimed as damages against a variety of defendants the difference between the amount of its payment and the amount it recovered on the sale of the cargo together with the additional expenses incurred in trying to dispose of the cargo. Mitigation was the main issue. There being no available market in which to sell the documents or the cargo the Court of Appeal held … that it was reasonable to take the bank's actual sale price, and at a later date than the commission of the deceit, despite the contention of the defendants that the market value of the cargo was at all times greater than the amount paid over by the bank." ' Thereafter, *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2002] UKHL 43; [2003] 1 AC 959 held that this amount was not to be reduced by any deceitful conduct on the part of the claimant bank.

[106] *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, 167; *Clerk & Lindsell* (20th edn) para 18-41; *McGregor on Damages* (18th edn) paras 41-002–41-006.

[107] *Smith New Court Securities v Citibank NA (sub nom Scrimgeour Vickers)* [1997] AC 254.

As indicated above, the claimant is not entitled to damages assessed on the basis that the false statement was in fact true. So, if the claimant has been misled into buying something he was told was worth £1 million, when in fact it was only worth £300,000, and he paid £900,000 as the purchase price, his damages in a claim for deceit would be assessed at £900,000 minus the £300,000, being £600,000.[108] **2.70**

Similarly, the claimant cannot usually seek to recover by way of damages profits expected to be achieved had the statement been true.[109] Such loss of profits is typically only awarded as part of contractual damages. In certain limited circumstances it is possible to recover loss of profits but care needs to be taken properly to characterize precisely what the court is doing when awarding such damages. **2.71**

(1) The deceit may result in a claimant ceasing to operate an otherwise successful business. If so, it may be possible to claim, as damages, the profits that business would otherwise have made during the cessation in operation.[110] Although the claimant is recovering loss of profits caused by the deceit, the claim is not premised upon the representation in fact being true (as it would in a contract claim) but rather that it had never occurred (i.e. would have continued to operate profitably).

(2) The deceit may have resulted in a business being purchased which proves not to be profitable or as profitable as the claimant was led to believe. The court will consider awarding, as damages, the profits which might have been made on the purchase of such a business on the basis that the representation was not made at all. Importantly, such an approach does not award loss of profits based on the representation in fact being true (which is the contractual measure) but instead is awarded on the basis of a notional business having been purchased without the representation being made at all. This is premised on an understanding that had *that* business not been purchased as a result of the misrepresentations, then the claimant would have purchased *another* business which would have been capable of making those profits. So in *East v Maurer*[111] the Court of Appeal reduced the loss of profit damages awarded by the trial judge calculated based upon the hairdressing salon in fact purchased and assuming the representation was true, saying that the Judge 'should have begun by considering the kind of profit which the second claimant might have made if the representation which induced her to buy the business in Exeter Road had not been made and that involved considering the profits which she might have expected to make in another hairdressing business bought for a similar sum'.[112] The claimant's damages for loss of profits were reduced to the 'profits which would have been derived from the putative new Bournemouth business'.[113] Another way of looking at this is to say the Court may well award a claimant damages based on the level of profits which would usually be earned by that type of business valued at that price in that area.

[108] *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; see also *Pearson v Wheeler* (1825) Ry & M 303; *Saunders v Edwards* [1987] 1 WLR 1116, 1121; *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, 282–382.

[109] *East v Maurer* [1991] 1 WLR 461.

[110] *Barley v Walford* (1846) 9 QB 197. The deceit involved telling the claimant that he was infringing a registered design by printing certain silk goods. As a result, he stopped the business only to discover the truth. He was entitled to damages based upon the profits lost as a result of the cessation of business caused by the deceit.

[111] [1991] 1 WLR 461.

[112] [1991] 1 WLR 461, 467E.

[113] [1991] 1 WLR 461, 468G.

(3) If the deceit has caused a claimant to enter into a contract which is nevertheless profitable (i.e. no loss) but the deceit has resulted in the claimant entering into the contract on less favourable terms than would otherwise have been the case (thereby reducing the level of profits the claimant would make), the Court has been prepared to award damages based upon the increased or extra profits that would have been earned from that very contract (and not a notional other contract as in *East v Maurer*) had that contract been negotiated without the influence of the deceit.[114]

(4) If the deceit has resulted in the claimant purchasing one business when, but for the representations, it would otherwise have purchased another more profitable business, the Court has allowed damages for *loss of a chance* directly caused by that deceit which could include damages based on both income and capital loss providing there is no double recovery and the claimant has established, on the balance of probabilities, that it could and would have purchased the alternative business and there was a real and substantial chance that its owners would have sold it.[115]

(5) If the deceit has reduced a trading fund which the claimant has a track record of investing on a profitable basis, the Court may award damages to include the loss of profits which can be shown would have been made had the missing funds been available not only up to the period when the fraud was discovered but also up and until trial. Flaux J's decision in *Parabola Investments Ltd v Browallia Cal Ltd*[116] was affirmed by the Court of Appeal which refused to limit damages to the amount by which the deceit depleted the funds.[117]

2.72 The relevant time for calculating damages will be important in a moving market. The general rule is that such damages are measured as at the date of reliance upon the representation,[118] which in a claim based upon the purchase of an asset that typically will be the date of purchase. However, another date can be chosen if special factors arise such as the claimant being considered locked into the transaction, then damages can be assessed by reference to the later time.[119]

2.73 Damages are considered at large in a deceit claim, and there are precious few authorities dealing directly and expressly with recovery of consequential losses.[120] *McGregor on Damages*[121] provides:

> The wealth of authority on measure of damages disappears when it comes to consequential losses. Indeed, the measure as stated in the cases dealt with in relation to normal measure would exclude consequential losses entirely. It is submitted that it is for this reason that Lord Atkin in *Clark v Urquhart*[122] suggested that the rule [i.e. price paid less actual value] as stated

[114] *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488; *McGregor on Damages* (18th edn) para 41-030.

[115] *4 Eng Ltd v Harper* [2008] EWHC 915 (Ch); [2009] Ch 91 (David Richards J) (noted P Mitchell, (2009) 125 LQR 12); *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486; [2011] QB 477.

[116] *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 1492 (Comm).

[117] *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486; [2011] QB 477.

[118] *Twycross v Grant* (1877) 2 CPD 469; *McConnell v Wright* [1903] 1 Ch 546; *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 267 (per Lord Browne-Wilkinson).

[119] *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 266; *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; *Downs v Chappell* [1997] 1 WLR 426; *Standard Chartered Bank v Pakistan National Shipping Corp (Assessment of Damages)* [2001] EWCA Civ 55; [2001] 1 All ER (Comm) 822; *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486; [2011] QB 477.

[120] See paras 7.94 et seq for a detailed assessment of 'damages at large'.

[121] *McGregor on Damages* (18th edn) para 41-21.

[122] [1930] AC 28.

in *McConnell v Wright*[123] *'may be expressed in too rigid terms'*. In his view the measure of damages should be 'based on the actual damage directly flowing from the fraudulent inducement.' This formulation would easily include consequential losses, and the propriety of recovery for such losses is supported by the decisions where conclusion of contracts other than the purchase of shares has been induced by the deceit; support is also derived from the expanding number of cases where negligent misrepresentation has brought about the conclusion of contracts and where it is now established that the same tortious measure applies as with deceit.

2.74 The decision of David Richards J in *4 Eng Ltd v Harper*[124] is a good illustration of the range of remedies potentially available to a victim of deceit. The claimant company had been deceived by H into purchasing share capital in a worthless company (X). The claimant obtained summary judgment on its claim in deceit. The court held that the claimant was entitled to (i) damages based upon the loss of the purchase price; (ii) recovery of costs and expenses incurred in making the share acquisition; (iii) recovery of costs of investigating the extent of the fraud by the claimant's managers. These costs were expressly stated to be recoverable as compensation for cost of the investigation and not as an award of damage for business disruption under *Aerospace Publishing Ltd v Thames Water Utilities Ltd*;[125] (iv) it was generally accepted that a claimant was in principle entitled to recover damages for loss of profits based upon the loss of a chance to make an alternative investment which is established on the balance of probabilities: *East v Maurer*.[126] The court held that the same approach should be adopted for such a claim based upon loss of a chance so long as the loss of a chance claim was directly caused by the deceit. It was not necessary to establish the foreseeability of the head of loss so long as it was caused by the deceit. The court allowed the claim for presumed loss of income based on loss of income profits up to the date of trial and thereafter loss of capital profits on resale of alternative investment as at the date of trial, both subject to 20 per cent discount since it was assessed that there was an 80 per cent chance the claimant would have been able to purchase the alternative investment shares.

2.75 *Clerk & Lindsell* is more forthright in its view that deceit damages do indeed include, in principle, the right to recover consequential losses.[127] So, if a person has been forced to borrow money to be used as the purchase price for shares which he has been fraudulently induced to buy, he is entitled to recover the interest charged on the money borrowed.[128] Also recoverable are loss of management time, extra borrowing costs incurred as a result in downturn in apparent creditworthiness due to the fraud, more onerous conditions offered to potential investors to invest notwithstanding association with a fraud, and costs of investigating the fraud.[129] This approach is consistent with the views of Lord Denning MR expressed in *Doyle v Olby (Ironmongers) Ltd*:[130]

> The defendant is bound to make reparation for all the actual damage directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say: 'I would not

[123] [1903] 1 Ch 546.
[124] [2008] EWHC 915 (Ch); [2009] Ch 91.
[125] [2007] EWCA Civ 3.
[126] [1991] 1 WLR 461.
[127] *Clerk & Lindsell* (20th edn) para 18-46; *Comp Properties (UK) Ltd v Dentsply Research and Development Corp* [1991] 34 EG 62.
[128] *Archer v Brown* [1985] QB 401. See also *Hornal v Neuberger Products Ltd* [1957] 1 QB 247.
[129] *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 254 (Comm); [2010] 1 WLR 258. *4 Eng Ltd v Harper* [2008] EWHC 915 (Ch); [2009] Ch 91 (David Richards J).
[130] [1969] 2 QB 158, 167.

> have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages.' All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen.

However, in a case where the claimant was fraudulently induced to purchase the share capital of a company based on misrepresentations as to its financial status, the court refused to award damages based on the cost incurred in undertaking trading loans to assist to keep the ailing company afloat which ultimately were rendered irrecoverable when the company went into liquidation. The court held that the claimant was not locked into the transaction (it being possible to rescind or to allow the company to go into administration or liquidation) and the decision to incur the additional costs of the loan was simply a 'commercial decision' on the part of the claimant buoyed by its 'over-optimistic' attitude about the likelihood of being able to trade out of difficulties, which attitude was not caused by the deceit. Finally, the Court rejected the argument that the loans had been incurred as part of mitigation, characterising the conduct as 'not a reasonable attempt at mitigation, but a commercial gamble' and the claimant was not entitled to treat the defendants as 'insurers if the gamble went wrong.'[131]

2.76 There has been some suggestion that it may be possible to obtain restitution of profits made through the deceit,[132] but the position remains unclear after the Court of Appeal decision in *Murad v Al-Saraj*[133] which suggested that the account of profits awarded by Etherton J in that case at first instance was based upon the existence of a breach of fiduciary duty and not the deceit as such. It is also to be noted that in *Smith New Court Securities Ltd v Citibank NA*[134] Lord Steyn emphasized that the settled rule for deceit damages was the loss flowing from the victim having entered into the transaction. It is possible that some of the confusion in this area derives from the characterization of bribery as part of the law of fraud or deceit. As explored in Chapter 10, bribery can give rise to several different types of claim and remedies including restitutionary remedies to recover the bribe on the basis of unjust enrichment. Great care would need to be taken before the approach adopted for the somewhat unique claim of bribery should be applied more generally to the law of deceit.

[131] *Invertec Ltd v De Mol Holding BV* [2009] EWHC 2471 (Ch) (Arnold J) at [385]; not followed on the issue of representations (as opposed to warranties) having been made: *Sycamore Bidco Ltd v Sean Breslin* [2012] EWHC 3443 (Ch) at [200]–[211] per Mann J.

[132] Lord Goff of Chieveley and G Jones, *Goff & Jones: The Law of Restitution* (7th edn Thomson/Sweet and Maxwell, London 2007) para 36-005 citing *Hill v Perrott* (1810) 3 Taunt 274; *Abbots v Barry* (1820) 2 Brod & B 369. The 8th edn of *Goff & Jones* no longer includes a section based upon restitution for wrongs. Reliance was also placed on the comment, at first instance, by Etherton J in *Murad v Al-Saraj* [2005] EWCA Civ 959, that this was 'well established'. However, the majority of the Court of Appeal considered that the account of profits was awarded not because of the deceit but because the defendant had breached his fiduciary relationship: see [2005] EWCA Civ 959 per Arden LJ at [46]. The relevance of fraud was to the allowances which would be made on an account of profits case for breach of fiduciary duty. For further discussion, see G Virgo, *The Principles of the Law of Restitution* (2nd edn OUP, Oxford 2006) 473–4; J Edelman, *Gain-Based Damages* (Hart, Oxford 2002) 141–3; Cartwright, *Misrepresentation* (3rd edn) para 5-43: 'What can certainly be said is that any claim for disgorgement of the defendant's profits, as such, is not a claim in the tort of deceit, but must be based on some other cause of action.'

[133] [2005] EWCA Civ 959. In *Renault UK Ltd v FleetPro Technical Services Ltd* [2007] EWHC 2541 (QB), HHJ Richard Seymour QC expressed doubt whether the judgments in *Murad v Al-Saraj* could be interpreted in a manner that bound him to the conclusion that an account of profits was an appropriate remedy for a claim in deceit: see [157]–[158].

[134] [1997] AC 254, 283.

E. Miscellaneous Issues

(1) Contributory negligence as a defence

2.79 Contributory negligence under the Law Reform (Contributory Negligence) Act 1945 is not available as a defence to a claim in deceit.[140] It is no defence to a claim in deceit for the defendant to say that the victim could have discovered the truth or even was careless in failing to discover the truth. The only issue that really matters is whether the victim in fact relied upon the false statement. If he did, then foregone or missed opportunities to discover the falsity of that statement will not give rise to any defence.[141] This remains the case even if the victim has been told the truth by a third party.[142]

(2) Civil Liability (Contribution) Act 1978

2.80 The court has jurisdiction to apportion losses as between more than one defendant where each is jointly and severally liable to the claimant for the same damage even if not for the same deceit or tort.

(3) Limitation periods

2.81 A claim in deceit is subject to the usual tort limitation period of six years from the accrual of the cause of action.[143] However, the fraud element of a claim in deceit means that the limitation period will not commence to run until the claimant has in fact discovered the fraud or could with reasonable diligence have discovered it.[144]

2.82 The test for whether or not a fraud has been discovered is whether the claimant is aware or could with reasonable diligence have become aware of sufficient material facts in order to plead out such a claim.[145]

[140] *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)* [2002] UKHL 43, [2003] 1 AC 959; *Alliance & Leicester Building Society v Edgestop Ltd* [1993] 1 WLR 1462; *Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd* [1997] 1 WLR 1396.

[141] *Attwood v Small* (1838) 6 Cl & Fin 232, 502–3.

[142] *Flack v Pattinson* [2002] EWCA Civ 1820 (claimant purchases a vintage car relying on representations it used to operate in Formula 1, notwithstanding evidence that a third party had previously told the claimant the car had not done so).

[143] Limitation Act 1980, s 2.

[144] Limitation Act 1980, s 32(1)(a).

[145] *Law Society v Sephton* [2004] EWCA Civ 1627; [2005] QB 1013. The burden is on the claimant to show he could not have discovered the fraud: *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400.

3

UNJUST ENRICHMENT[1]

A. Overview of Claim

The basic requirements for a claim in unjust enrichment may be summarized as follows:[2] **3.01**

(1) Has the defendant ('D') been enriched?
(2) Was that enrichment at the expense of the claimant ('C')?
(3) Was the enrichment unjust?
(4) Are there any defences?
(5) What remedies are available to the claimant?

[1] Throughout this chapter, references to *Goff & Jones* (7th edn) will be to the 7th and last edition prepared by Gareth Jones. The new edition has undergone significant re-writing and re-structuring under the new team of editors of Charles Mitchell, Paul Mitchell and Stephen Watterson with the result that certain aspects of the previous editions are no longer covered (as they fall outside unjust enrichment) and, in respect of some of those areas which remain, the new editorial team expresses different views and opinions. The new edition will be cited *Goff & Jones* (8th edn). See also A Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP, Oxford 2012).

[2] The structure of a claim in unjust enrichment involving the first four questions has been endorsed by Lord Steyn in *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221; Lightman J in *Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418; Mance LJ in *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47, [2004] 1 WLR 2775. The fifth question comes from Sir Peter Millett in 'Restitution and Constructive Trusts' in W Cornish, R Nolan, J O'Sullivan and G Virgo (eds), *Restitution: Past, Present & Future* (Hart Publishing, Oxford 1998) 208.

3.02 These five questions form the basic structure of any claim in unjust enrichment. That is not to say, of course, that there is no debate as to whether these are the correct questions to ask and if so how to answer them but there is, in general, a consensus about this approach.

B. Introduction

3.03 Until 1991, the English law development of the law of unjust enrichment was hampered by a reluctance to free the subject from the shackles and restraints of being characterized as little more than an adjunct to the law of contract and based upon the fictitious quasi-contract theory of restitution. In 1991, as a result of the landmark decision, *Lipkin Gorman v Karpnale*,[3] English law finally rejected the notion that relief was justified by reference to an implied promise to repay in favour of recognition of a free-standing principle based upon avoiding unjust enrichment, thereby enabling, for the first time, proper focus to be made on identifying what factors render any enrichment unjust. Its development to this point is well mapped-out in the leading texts.[4]

3.04 The purpose of this chapter is to identify and explain the role to be played by the law of unjust enrichment in a typical commercial fraud setting. All examples of commercial fraud can be re-characterized as giving rise to a claim in unjust enrichment. This is important precisely because, unlike most claims based upon dishonest conduct such as deceit, a claim in unjust enrichment is a matter of strict liability, where any fault on the part of the recipient is relevant only to the availability of defences.[5] The availability of a claim in unjust enrichment therefore removes the need to satisfy the high burden of establishing dishonesty in order to prove the claim. At the very least, it allows the claim to commence, and appropriate pre-emptive relief to be obtained in support of such a claim, without having been required to show a good arguable case of dishonest conduct. By focusing too much on the wrongful nature of the defendant's conduct it is easy to underestimate the significance of the law of unjust enrichment in commercial fraud claims.

3.05 An examination of unjust enrichment illustrates one of the aims of this book which is to show that even if a case involves actual fraud, it may be in the client's better interests to pursue a claim which obviates the need to plead and prove the more difficult aspects of a fraud claim. Depending on the facts, of course, such a claim in unjust enrichment is likely to be more easily proved. Fault will only become relevant, if at all, as an issue in relation to the availability of certain remedies or defences such as change of position. So if the defendant has the resources for enforcement of any money judgment, serious consideration needs to be given to whether the benefits of pursuing the more difficult, time-consuming and

[3] [1991] 2 AC 548. Prior to *Lipkin Gorman v Karpnale* there had been other authorities which had identified the principle of unjust enrichment but to little avail: *Moses v Macferlan* (1760) 2 Burr 1005, 1012 (Lord Mansfield); *Fibrosa Spolka v Fairbairn Lawson Coombe Barbour Ltd* [1943] AC 32, 61 (Lord Wright).

[4] C Mitchell, 'Unjust Enrichment' in A Burrows (ed), *English Private Law* (3rd edn OUP, Oxford 2013); C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (8th edn Sweet & Maxwell, London 2011) ch 1; P Birks, *Unjust Enrichment* (2nd edn Clarendon Press, Oxford 2005); A Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2010) ch 1; G Virgo, *The Principles of the Law of Restitution* (2nd edn OUP, Oxford 2006).

[5] See e.g. *Kelly v Solari* (1841) 9 M&W 54. More generally, see P Birks, 'The Role of Fault in the Law of Unjust Enrichment' in W Swaddling and G Jones (eds), *The Search for Principles: Essays in Honour of Lord Goff of Chieveley* (OUP, Oxford 2000).

undoubtedly more expensive fraud claim justify adopting that course of action rather than one in unjust enrichment. That said, it would be wrong to characterize the law of unjust enrichment as some form of panacea for commercial fraud. It has its own drawbacks and limitations such as the traditionally held view that a claim in unjust enrichment does not extend to an indirect recipient, thereby limiting, significantly, the pool of potential defendants in any claim.

3.06 A claim in unjust enrichment has certain advantages over the alternative common law claim of conversion.[6] It is wider in scope and includes the ability to recover money, when used as currency (as it nearly always is), which cannot form the basis of a conversion claim.[7] That said, unjust enrichment claims are subject to the defence of change of position which does not apply to conversion claims.

3.07 The limits of this chapter should be noted. Its aim is to highlight the role which can be played by the law of unjust enrichment in a commercial fraud setting. It examines the structure and outline of any and all claims in unjust enrichment to enable the practitioner to recognize whether, in principle, unjust enrichment may assist in any given fact-situation. Space does not permit detailed examination of each category of unjust factor—that will be left to the established texts—and so focus will be given to those, such as mistake, ignorance, and failure of consideration, which typically play a more prominent role in commercial fraud claims. Other examples where unjust enrichment may arise but which will not be examined in detail include duress, undue influence, necessity, and payment under compulsion.

3.08 Further, given this chapter is concerned with unjust enrichment, it will not be dealing with topics which typically fall within the category of restitution for wrongs. A great deal of confusion has arisen by a failure properly to distinguish these two different types of claims. A claim in unjust enrichment focuses on the transferor and whether he had the necessary and proper intention to transfer the relevant assets. At the liability stage, there is no focus at all on the conduct of the defendant recipient. In a claim for restitution for wrongs, the focus is entirely upon the defendant (i) to establish the relevant 'wrong' he has committed, which can arise under any one of several different causes of action, e.g. breach of contract,[8] or in tort,[9] or for breach of fiduciary duty[10] and (ii) to see what benefits or enrichment he has received as a result of that wrong. It is immediately evident that the reason for the claim is the commission

[6] See Chapter 4.

[7] Ordinary money does not fall within 'goods' for the purposes of the Torts (Interference with Goods) Act 1977, s 14(1); see paras 4.11 and 4.25.

[8] P Birks, 'Misnomer' in Cornish et al (eds), *Restitution: Past, Present & Future*, 9–10.

[9] Birks, 'Misnomer', commented on by M. McInnes, 'Misnomer: A Classic' [2004] RLR 79; Birks, *Unjust Enrichment* (2nd edn).

[10] Lord Goff of Chieveley and G Jones, *Goff & Jones: The Law of Restitution* (7th edn Thomson/Sweet and Maxwell, London 2007) fn 1 explains that at the date of the first edition, 1966, the topic was unknown in England and they took the title of the book from the American Law Institute and called it *The Law of Restitution*. The learned editor (Professor Jones) recognizes the arguments in favour of the use of 'unjust enrichment' but concludes that they decided not to abandon their title which has become synonymous with unjust enrichment whilst recognizing that such a title may call for greater explanation in any given case. The problem with this approach is when readers come across bold statements such as 'Foskett v McKeown leads to the firm conclusion that English law does not recognize a restitutionary proprietary claim' (*Goff & Jones* (7th edn) 86). It would have been more accurate to have said the House of Lords did not recognize a proprietary claim based upon unjust enrichment.

D. Pleading a Claim in Unjust Enrichment

3.13 By clearly distinguishing 'unjust enrichment' from 'restitution', it is hoped that additional clarity may find its way into the manner in which these claims are pleaded. There is little point now to revert to the old language of forms of action (i.e. money had and received, etc). It would be preferable to set out the claim including all material facts and clearly identify whether it is one in unjust enrichment by subtraction or in restitution for wrongdoing. And if it is the former, what unjust factor is being relied upon, what enrichment received, at whose expense. At the moment, however, there appears to be some reticence on the part of the courts to embrace wholeheartedly the pleading of unjust enrichment (as opposed to a claim in money had and received) as a separate cause of action. The view appears to be that it is nothing more than the principle underpinning certain established categories of claim, such as money had and received and so should not be separately pleaded as such.[16] In *South Tyneside Metropolitan BC v Svenska International plc*,[17] Clarke J said that unjust enrichment was not a new cause of action and 'is simply another way of describing the same thing'.

3.14 To the extent that the reservations in the authorities derive from a concern that the courts will be facing claims pleaded on general and unparticularized notions of a defendant having been unjustly enriched, the concerns are understandable. Personalized notions of what constitutes unjust or *unfair* conduct are unlikely to assist the cause. The development of this area of the law would be hindered if claims were permitted which did not lend themselves to rigorous analysis. The desire to stay within established categories of claim (such as mistake or duress) is again an understandable method of incrementally developing the law. However, it is submitted that whilst it is correct that unjust enrichment underpins claims such as money had and received, now that is expressly recognized, the principle should be allowed to come to the fore and be expressly pleaded. After all, the factors which establish the existence of an unjust enrichment are precisely the factors which should be pleaded out and properly identified in the statement of case so that the other party is in a position to respond to the material factors and plead out any defence. It is no longer necessary to fit any particular claim into any particular 'form' of action.[18]

3.15 It is further suggested, with respect to the views expressed in these authorities, that the sooner unjust enrichment is expressly pleaded as a claim the better it will be for a more coherent development of the claim. So long as the relevant issues underlying a claim in unjust enrichment are addressed in the pleading, it will be very difficult for a court to contend that the relevant factors for the cause of action have not been properly pleaded rendering the claim liable to be struck out.

3.16 Finally, consistent with this call for greater clarity in the pleaded claims, there has been a gradual but clear move in the case law to adopting openly the language of unjust enrichment

[16] *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) at [16] (Mann J). Whilst keen to emphasize the need to bring a claim in unjust enrichment within established categories of claim, Mann J does make it clear that he would not allow a claim to fail which set out all relevant facts simply because there was no pleading of a particular category of restitutionary claim: *Primlake Limited (In Liquidation) v Matthews Associates* [2006] EWHC 1227 (Ch); [2007] 1 BCLC 666 at [335].

[17] [1995] 1 All ER 545.

[18] *Letang v Cooper* [1965] 1 QB 232 cited with approval in *Armstrong DLW GMBH v Winnington Networks Ltd* [2012] EWHC 10 (Ch) at [90] (Stephen Morris QC, sitting as Deputy High Court Judge).

ever since this cause of action was first recognized in English law in *Lipkin Gorman v Karpnale Ltd*[19] and *Woolwich Equitable Building Society v Inland Revenue Commissioners*.[20]

E. Unjust Enrichment and Contract

3.17 One of the difficulties to be faced when dealing with commercial fraud is the potential overlap between contractual and unjust enrichment claims. Most commercial frauds involve some form of a contract since it is through the use of the contract that the fraudster instils the confidence in the claimant victim to part with assets in return for a promised counter-performance that never materializes. This gives rise to a difficult question: when is a claimant constrained to find his remedy within the law of contract and when is he permitted to bring a claim outside the contractual regime, making use of the law of unjust enrichment? Surprisingly, with some notable exceptions,[21] there is not as much guidance as one might expect in the leading texts on the interrelationship between contract and claims in unjust enrichment.

3.18 In short, in general, where the law of contract and the law of unjust enrichment collide, it is the law of contract which prevails.[22] This well established proposition was confirmed in the decision of Cooke J in *Taylor v Motability Finance Ltd*:[23]

> Not only is it true that, historically, restitution has emerged as a remedy where there is no contract or no effective contract, but there is no room for a remedy outside the terms of the contract where what is done amounts to a breach of it where ordinary contractual remedies can apply and payment of damages is the secondary liability for which the contract provides.[24]

3.19 In *Taylor v Motability*, the court was concerned with an employment contract which had been terminated by the defendant. The claimant had fully performed his side of the contract. He argued that the termination by the defendant amounted to a repudiatory breach by the defendant entitling the claimant to seek relief outside the contract terms. Cooke J held otherwise, maintaining that the claimant was entitled to damages for having provided services for which he had not been paid. That was a contractual matter.

3.20 Cooke J went on to say:

> [24] . . . The decisions of the House of Lords in *Johnson v Agnew* [1980] AC 367, *Photo Products v Securicor Transport* [1980] AC 827 and *Lep Air Services Limited v Rolloswin Investments*

[19] [1991] 2 AC 548.
[20] [1993] AC 70.
[21] Virgo, *The Principles of the Law of Restitution* (2nd edn) ch 2; Birks, *Unjust Enrichment* (2nd edn) 89–93; G McMeel, 'Unjust Enrichment, Discharge for Breach, and the Primacy of Contract' in A Burrows and Lord Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, Oxford 2006); *Goff & Jones* (8th edn) at para 2.10 *et seq*.
[22] *Thomas v Brown* (1876) 1 QBD 714; *Dimskal Shipping Co Ltd v International Transport Workers Federation* [1992] 2 AC 152, 165 per Lord Goff; *Taylor v Bhatil* (1995) 50 Con LR 70, 77 per Millett LJ; *Pan Ocean Shipping Co v Creditcorp Ltd ('The Trident Beauty')* [1994] 1 All ER 470, 473–4, per Lord Goff.
[23] [2004] EWHC 2619 (Comm). See also, Virgo, *The Principles of the Law of Restitution* (2nd edn) 40–2; R Grantham and C Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 LQR 273; A Burrows, *Understanding the Law of Obligations* (Hart Publishing, Oxford 1998) ch 2.
[24] [2004] EWHC 2619 (Comm) at [23]. Cooke J was influenced by the comments of Lord Goff in *Henderson v Merrett* [1995] 2 AC 145, 193 where Lord Goff said there could be no concurrent liability in contract and tort if the tortious liability was so inconsistent with the contractual liability that it must be taken to have been excluded by the parties. The same approach applied with contract and restitution. But see A Tettenborn, 'Subsisting Contracts and Failure of Consideration' [2002] RLR 1 where Professor Tettenborn argues that there are at least three circumstances where it may be possible to raise a restitutionary claim notwithstanding the fact that the contract has not been terminated. The author of *Goff & Jones* (7th edn) para 1-063, fn 89 is not convinced.

Limited [1973] AC 331 establish the position where there is a repudiation of the contract which is accepted or which is effective to bring the contract to an end. In those circumstances the contract is not rescinded ab initio, but future obligations are discharged from the moment the contract comes to end. All accrued rights remain in being and, so far as executor elements are concerned, the primary obligation to perform is replaced by a secondary obligation to pay damages.

[25] The position is wholly different from that where money is paid for a consideration which wholly fails. In such a case there is a total failure of consideration and the money is recoverable. Although this means the payer may escape from the consequences of a bad bargain, there is no room for extending this to a situation where both parties have performed substantially and there is a full and adequate remedy for breach of contract which will compensate the claimant for any loss suffered. The point is clearly set out in *Goff & Jones*... paragraphs 20-007 and between paragraphs 20-019 and 20-023. The authors there say that there is no English authority to suggest that an innocent party, who has rendered services or supplied goods, may elect to sue in restitution if he has performed or substantially performed his part of the contract. If therefore he can claim under the contract whether in debt or in damages, that is the true measure of his entitlement, because it is that which he bargained for. If it were otherwise, not only would the claimant be able to recover more than his contractual entitlement in respect of bonus, but he could also seek to establish that he was underpaid in terms of salary despite his agreement thereto.

[26] Moreover,... there can also be no justification, even if a restitutionary claim is available, for recovery in excess of the contract limit. Such recovery in itself would be unjust since it would put the innocent party in a better position than he would have been if the contract had been fulfilled. In deciding any quantum meruit regard must be had to the contract as a guide to the value put upon the services and also to ensure justice between the parties...

3.21 It is essential that the relationship between the existence of a contract and the entitlement to bring a claim in unjust enrichment is properly understood. In essence, a claim in unjust enrichment must not interfere with the ability of the law of contract, and the remedies available thereunder, to deal with a contractual situation. This is not premised upon an antiquarian view of the hierarchy of claims but because the presence of a contract has a direct impact on the identity of the proper parties to a claim in unjust enrichment. Accordingly, in a time charter dispute concerning the recovery of overpaid hire, the House of Lords held in *Pan Ocean Shipping Ltd v Creditcorp Ltd*[25] that the existence of a contractual regime to deal with the issue of overpayments as between shipowner and charterer prevented any resort to unjust enrichment arising between charterer and shipowner's assignee. Lord Goff observed: '... as between shipowner and charterer, there is a contractual regime which legislates for the recovery of the overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate. Of course, if the contract is proved never to have been binding, or if the contract ceases to bind, different considerations may arise...'[26]

3.22 It is sometimes said that the availability of claims in unjust enrichment must await the termination of the contract. It is certainly true that in most cases a claim in unjust enrichment will not arise whilst the contract is afoot.[27] However, it is not every case where the

[25] [1994] 1 WLR 161.
[26] [1994] 1 WLR 161, 164E–F.
[27] But see *Goff & Jones* (8th edn) ch 3 where the authors prefer a more focused approach based upon assessment of allocation of risk under the contract as opposed to a blanket ban based upon the presence of a contract.

contract has been terminated that the door is open to a claim in unjust enrichment. It may well be that the contract has stipulated liquidated damages or restricts the entitlement to recover damages generally. It may be that damages are due for partial performance as Cooke J indicated above.

(1) Proper parties to claim

3.23 Consider the position where one party (A) has clearly physically received the benefit of services provided by another party (B) but pursuant to the terms of a contract entered into with a third party (C), where C is associated with A, such as being A's wholly owned company. Can B bring a claim in unjust enrichment against A, notwithstanding his contractual relationship exists with C? The answer is no.

3.24 In the recent Court of Appeal case of *MacDonald v Costello*[28] A owned land upon which B, as a builder, agreed with A's company, C, to undertake construction work. The contract relating to the construction was as between B and C, A's company. As owner of the land on which the construction work took place, A clearly received a benefit, but the services giving rise to the benefit were performed pursuant to the contract between B and C. A successfully appealed against the trial judge's order that it was liable in unjust enrichment for the benefit received.

3.25 The appeal raised two issues.

(1) First, whether the enrichment received by A can be said to have been at the expense of B. The Court of Appeal ultimately decided, having succinctly outlined the arguments for and against, that in the absence of full submissions on the point, they would not determine this issue.[29]

(2) Secondly, whether the claim in unjust enrichment should be permitted to undermine the terms of the contract between B and C and the agreement as to the allocation of risks. As Etherton LJ remarked:

> The parties arranged the transaction as one in which legally enforceable promises were made only between [C] and [B], even though the benefit of the contract was to be conferred on [A]. The obligation to pay for [B's] services, and so the risk of non-payment, was contractually confined to [C]. If a claim was permitted directly against [A] it would shatter that contractual containment. It would also alter the usual consequences of [C's] insolvency, which was one of the risks assumed by [B] in contracting with [C], since a direct claim against [A] would improve [B's] position over [C's] other unsecured creditors . . .[30]
>
> I am clear . . . that the unjust enrichment claim against [A] must fail because it would undermine the contractual arrangements between the parties, that is to say, the contract between [B] and [C] and the absence of any contract between [B] and [A]. The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation.[31]

[28] [2011] EWCA Civ 930; [2011] 3 WLR 1341.
[29] [2011] EWCA Civ 930; [2011] 3 WLR 1341 at [20]–[22].
[30] [2011] EWCA Civ 930; [2011] 3 WLR 1341 at [21].
[31] [2011] EWCA Civ 930; [2011] 3 WLR 1341 at [23].

In support, the Court of Appeal referred to various decisions such as *Hampton v Glamorgan CC*,[32] *Brown & Davis Ltd v Galbraith*,[33] *Pan Ocean Shipping Co Ltd v Creditcorp Ltd*,[34] and the Australian High Court decision of *Lumbers v W Cook Builders Pty Ltd*[35] which support the proposition that English (and Australian) law does not permit a claim in unjust enrichment against A to recover a benefit obtained from B and which was provided pursuant to a contract between B and C. **3.26**

In *Pan Ocean Shipping v Creditcorp*, Lord Goff provided the following observations: **3.27**

> . . . as between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate. Of course, if the contract is proved never to have been binding, or if the contract ceases to bind, different considerations may arise, as in the case of frustration . . . before the date of determination of the contract, Trident's obligation under clause 18 to repay the hire instalment in question had already accrued due; and accordingly that is the relevant obligation, as between Pan Ocean and Trident, for the purposes of the present case. It follows that, in the present circumstances and indeed in most other similar circumstances, there is no basis for the charterer recovering overpaid hire from the shipowner in restitution on the ground of total failure of consideration . . .
>
> . . . Pan Ocean never had any remedy against Trident in restitution on the ground of failure of consideration in the present case, its only remedy against Trident lying under the contract . . .
>
> I am of course well aware that writers on the law of restitution have been exploring the possibility that, in exceptional circumstances, a plaintiff may have a claim in restitution when he has conferred a benefit on the defendant in the course of performing an obligation to a third party . . . . But, quite apart from the fact that the existence of a remedy in restitution in such circumstances must still be regarded as a matter of debate, it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract.[36]

Understanding the relationship enables one to identify the real enricher and enrichee for the purposes of a claim in unjust enrichment arising out of a contractual performance. It is often counter-intuitive: **3.28**

> Appearances can deceive. It is quite often true that a defendant is not the immediate enrichee of the person who actually conferred the enrichment. This happens where that person, in conferring the enrichment, acts at the behest of and on the credit of another. If I want to pay

[32] [1916] AC 13. (A subcontractor could not recover from the respondent landowner for fees incurred in building on that land pursuant to a contract between the subcontractor and the main contractor in circumstances where the main contractor had become insolvent. There was no evidence that the main contractor had acted as the respondent's agent.)

[33] [1972] 1 WLR 997. (After an accident causing damage to A's car, A's insurers (C) entered into a contract with the garage (B) to repair it. C failed to pay the bill and became insolvent. B's attempts to recover the monies from A failed.)

[34] [1994] 1 WLR 161. (X time chartered a vessel from T with a provision for advance payments. T had entered into credit facilities with R and assigned the time charter receivables to R. T failed to pay for repairs to the vessel and its repudiatory conduct was accepted by X, thereby terminating the time charter. T was not worth suing and so X unsuccessfully sued R for recovery of the money on the grounds of total failure of consideration.)

[35] [2008] 4 LRC 683. (L owned land and entered into a contract with C for C to undertake building work on the land. C in fact, and without knowledge or consent of L, used B to carry out the work. B went into liquidation and its liquidator sought recovery of cost of building from L. The High Court of Australia allowed L's appeal and denied the liquidator was entitled to recover from L.)

[36] [1994] 1 WLR 161, 164–6.