into on the basis that there has been no reliance on pre-contractual representations.[266] Such clauses will be considered in detail in Chapter 9.

[266] *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [57] (Moore-Bick LJ), accepted in a series of recent cases at first instance and the Court of Appeal: below, para.9–03, n.9.

CHAPTER 4

RESCISSION OF THE CONTRACT FOR MISREPRESENTATION[1]

I. THE NATURE OF THE REMEDY

(1) Rescission at Common Law and in Equity

The claim for rescission in the modern law. The claim for rescission of the contract for misrepresentation is generally now a claim for the remedy which was developed by the courts of equity during the nineteenth century. The detail of the history of the remedy need not concern us here[2] beyond noting some points necessary for a proper understanding of some of the older cases which are still relied on in the modern law of rescission. 4–01

Rescission at common law. Although it appears that in the early nineteenth century the common law remedy for misrepresentation was only damages, 4–02

[1] Spencer Bower (Misrepresentation), Chs 14, 15; Chitty, paras 7–111 to 7–142; Furmston, paras 4.46 to 4.60; Treitel, paras 9–083 to 9–122; Anson, pp.332–342; Cheshire, Fifoot and Furmston, pp.359–368; Allen, pp.29–39; D. O'Sullivan, S. Elliott and R. Zakrzewski, *The Law of Rescission*, 2nd edn (Oxford University Press, 2014), Ch.4 and Pts III–VI.

[2] D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), pp.208–209, 234–236, 252; J. O'Sullivan, "Rescission as a Self-help Remedy: a Critical Analysis" [2000] C.L.J. 509 at pp.516 et seq.; J.D. Heydon, M.J. Leeming and P.G. Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th edn (Sydney: Butterworths LexisNexis, 2014), Pt 5, Ch.7.

rescission being thought of then as only an equitable remedy,[3] during the century the common law courts accepted that a contract could be rescinded for misrepresentation. The contract was voidable at common law, at the instance of the representee; but the remedy of rescission was available only on proof of fraud.[4] This common law remedy of rescission was never further developed. Since the courts of equity developed a more general remedy of rescission which did not depend on proof of fraud,[5] claims are in practice[6] now made simply for "rescission" of the contract, by which is generally meant the equitable remedy which will be discussed in this chapter. However, the tendency to assimilate the common law and equitable rules hides some of the old distinctions between them which may not have entirely lost their significance in practice.[7]

4–03 **Rescission in equity: the early law.** During most of the nineteenth century it was said, even by judges sitting in the courts of equity before the fusion of the jurisdictions of law and equity by the Judicature Acts, that rescission required proof of fraud.[8] But such statements must be viewed with caution. Many difficulties in reading the old cases, both those decided by the old common law courts and those decided by the courts of equity, flow from the different uses of terminology, and in particular "fraud" which at common law became settled in its definition only by the decision of the House of Lords in *Derry v Peek* in 1889.[9]

[3] *Attwood v Small* (1838) 6 Cl. & Fin. 232 at 395, 444, 502, 7 E.R. 684 at 746, 764, 785, HL.

[4] *Cornfoot v Fowke* (1840) 6 M. & W. 358, 151 E.R. 450; *White v Garden* (1851) 10 C.B. 918, 138 E.R. 364; *Stevenson v Newnham* (1853) 13 C.B. 285, 138 E.R. 1208; *Clarke v Dickson* (1858) El. Bl. & El. 148, 120 E.R. 463; *Kennedy v The Panama, New Zealand and Australian Royal Mail Co Ltd* (1867) L.R. 2 Q.B. 580 at 587; cf. *Redgrave v Hurd* (1881) 20 Ch.D. 1, CA, at 13 (Jessel MR: at common law rescission extended only to a misrepresentation where the representor knew it to be false, or was "reckless, and without care, whether it was true or false, and not with the belief that it was true", i.e. what Lord Herschell was later to define in *Derry v Peek* (1889) 14 App. Cas. 337, HL, below, para.5–14, as *fraud* for the purpose of a claim at common law for damages in the tort of deceit). The common law remedy of damages for misrepresentation in the tort of deceit also requires proof of fraud: see Ch.5.

[5] Below, para.4–04.

[6] e.g. *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876, CA, at 884. There were also other limitations on the common law remedy which made the development of the equitable remedy of rescission more attractive, such as the more limited machinery of the common law to achieve restitution: *Erlanger v New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218, HL, at 1278–1279, below, paras 4–53 to 4–54, and the greater ability under the rules of equity to recognise and enforce the representee's property rights in rescinding a contract under which property had passed at common law: below, para.4–10. There was authority that at common law it was not possible to obtain rescission of a deed under which a lease had been granted; the proper remedy was in equity: *Feret v Hill* (1854) 15 C.B. 207 at 223–226, 139 E.R. 400 at 407–408. There is now no obstacle to rescission of a deed which created an interest in real property: *Hart v Swaine* (1877) 7 Ch.D. 42 (copyhold wrongly sold as freehold).

[7] e.g. the remedial consequences of rescission effected by act of party differ between the common law and equity: below, para.4–11. There is also still some confusion in the case law about the mechanics for rescission: below, para.4–18; J. O'Sullivan, "Rescission as a Self-help Remedy: a Critical Analysis" [2000] C.L.J. 509. See also S. Worthington, "The Proprietary Consequences of Rescission" [2002] R.L.R. 28 at pp.29–32.

[8] *Attwood v Small*, above, n.3; *Smith v Kay* (1859) 7 H.L.C. 750, 11 E.R. 299, HL. But sometimes it was clear that fraud (in the sense required at common law for deceit) was not required: *Duranty's Case* (1858) 26 Beav. 268 at 273–4, 53 E.R. 901 at 903 (Romilly MR).

[9] Below, para.5–14.

But in the cases on rescission in the courts of equity in the nineteenth century, it is clear that the judges often used the word "fraud" in a very different sense from that used even then in the common law: it would be "fraudulent" in the eyes of equity to allow a representor, even one who was ignorant of the falsity of his words at the time he made the statement and at the time they were acted on by the representee, now to retain the benefit of the contract once the truth has been discovered.[10] This is not requiring any dishonest state of mind on the part of the representor at the time of the statement or at the time of the contract: it is simply saying that a representor who has caused the representee to contract by a false statement cannot be allowed to retain the contract. As a rationale of the remedy of rescission, attributing responsibility to the party who caused the other party's misunderstanding and therefore giving the mistaken party the choice to accept or decline the contract, it can be defended.[11] But it is misleading to use the word "fraudulent" to describe the statement, since in this and other remedies for misrepresentation the time at which the defendant's state of mind should be tested for the purpose of establishing a cause of action is the moment when the statement was acted on (or, sometimes, the earlier moment when the statement was made), not the later time of the claim.

4–04 **Rescission in equity: the modern law.** By 1881 the courts had abandoned the language of "fraud" in discussing the equitable remedy of rescission. In *Redgrave v Hurd*[12] Jessel MR said that earlier judges had sometimes explained the rationale of the remedy as resting on "moral fraud" in seeking to take advantage of a contract now known to have been entered into on the basis of a false statement, but he made clear that in the courts of equity it was not necessary to prove that the party who obtained the contract knew at the time when the representation was made that it was false. This contrasted with the position at common law, where fraud was necessary[13]; but since the Judicature Acts the rules of equity prevailed[14] and therefore all courts would apply the equitable rules and grant the equitable remedy of rescission for misrepresentation, without requiring the misrepresentation to have been made fraudulently. Moreover, when the definition of fraud was considered and settled by the House of Lords in *Derry v Peek* it was made clear beyond doubt by Lord Herschell that rescission did not depend on proof of fraud but was also available, in principle, for wholly innocent misrepresentations[15]:

[10] *New Brunswick and Canada Railway Co v Conybeare* (1862) 9 H.L.C. 711 at 724–726, 11 E.R. 907 at 913; *Reese River Silver Mining Co v Smith* (1869) L.R. 4 H.L. 64 at 79; *Hart v Swaine* (1877) 7 Ch.D. 42 at 46–47.

[11] Below, para.4–24; Cartwright (Unequal Bargaining), pp.103–104.

[12] (1881) 20 Ch.D. 1, CA, at 12–13.

[13] Above, n.4.

[14] Supreme Court of Judicature Act 1873 s.25(11); see now Senior Courts Act 1981 s.49(1).

[15] (1889) 14 App. Cas. 337 at 359. There had been some suggestions in the earlier cases that the courts might be looking, if not for dishonesty, still for some fault on the part of the representor (beyond simply having made the misrepresentation) before rescission could be granted in equity: *Pulsford v Richards* (1853) 17 Beav. 87 at 94, 51 E.R. 965 at 968. It has been clear beyond doubt since *Derry v Peek* that rescission is available for even wholly innocent misrepresentations, i.e. negligence is not necessary; and that for fraud the common law requires dishonesty, i.e. negligence is not sufficient: below, para.5–14.

"Where rescission [on the ground of misrepresentation of a material fact] is claimed it is only necessary to prove that there was a misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand."

(2) The Effect of Rescission

4–05 **Contract voidable for misrepresentation.**[16] Where the requirements of the remedy of rescission are satisfied, the contract is not void *ab initio*; it is voidable at the instance of the representee.[17] The contract was therefore, from its creation and until the moment of its rescission, effective to create the rights and obligations which its terms provided. But at the moment of rescission the contract is made a nullity from the beginning: it is retrospectively avoided, and any performance already made under the terms of the contract is reversed, so that the parties are placed in the position in which they would have been had there been no contract. These effects require, however, some elaboration.

4–06 **Rescission is a retrospective remedy.** At the moment of rescission of the contract, the contract becomes avoided ab initio: it is to be as if there had been no contract. This retrospective aspect of the remedy is natural in the context of the English law of contract: the circumstances in which a contract is void or voidable are generally only where there was a defect in its formation.[18] In the case of misrepresentation there was a sufficient agreement between the contracting parties to form a contract (and so the contract was not void ab initio[19]), but on the representee's side it was based on a false assumption which was created or perpetuated by the representor's statement.[20] The remedy therefore operates back

[16] "Rescission" is the proper description for the remedy of avoidance in both common law and equity; it is therefore used also in such other cases as contracts voidable for duress (common law) or undue influence (equity). It is not appropriate to use "rescission" to describe the remedy granted to declare a *void* (not voidable) contract of no effect at common law since in a void contract there are no obligations (and therefore no contract) to rescind: *Bell v Lever Bros Ltd* [1932] A.C. 161, HL, at 190.

[17] This was the rule at common law: *White v Garden* (1851) 10 C.B. 918, 138 E.R. 364; *Stevenson v Newnham* (1853) 13 C.B. 285 at 302, 138 E.R. 1208 at 1215; *Clarke v Dickson* (1858) El. Bl. & El. 148 at 154, 120 E.R. 463 at 466; and is the position which is clearly established in the modern law, which takes over the equitable rules of rescission: *Bristol and West Building Society v Mothew* [1998] Ch. 1, CA, at 22 (Millett LJ); *Lonrho Plc v Fayed (No.2)* [1992] 1 W.L.R. 1 at 11 (Millett J). There are occasional references in the older cases which appear to point to the contract being void for misrepresentation, e.g. *Pawson v Watson* (1778) 2 Cowp. 785 at 788, 98 E.R. 1361 at 1362 (Lord Mansfield: a material misrepresentation which induced an insurer to issue an insurance policy "makes the policy void"); *Carter v Boehm* (1766) 3 Burr. 1905 at 1909, 97 E.R. 1162 at 1164 (Lord Mansfield: non-disclosure: "the policy is void").

[18] In particular mistake (void); duress (voidable); undue influence (voidable): Chitty, paras 1–108 to 1–110. For similar reasons, based on the absence of full, free and informed consent at the moment of formation, legal systems generally take the view that a defect in formation such as misrepresentation will give rise to a remedy which has the effect of nullifying the contract ab initio. However, unlike English law, some systems will give an ab initio remedy also for non-performance: G.H. Treitel, *Remedies for Breach of Contract* (Oxford: Clarendon Press, 1988), para.282.

[19] On the assumption, which is made throughout this chapter, that the representee's mistake which was induced by the representor's statement was not sufficient to render the contract void at common law for mistake, independently of the misrepresentation: above, para.1–03.

[20] Above, para.1–03.

to the time at which the defect arose: the moment of formation. This retrospective remedy of rescission for misrepresentation is to be contrasted with the remedy—sometimes also referred to as "rescission" of the contract, but in this book generally called "termination" of the contract—which is available for some breaches of contract, and involves the future, unaccrued obligations being released without there being any disturbance of those obligations which, at the moment the remedy takes effect, have already accrued.[21]

4–07 **Only the representee can claim rescission.** Since the basis of the representee's claim is that he was misled by the representor's statement, the remedy can be invoked only by the representee. A party cannot be allowed to rely on his own conduct in having brought about the other party's misunderstanding in order himself to escape the contract.[22]

4–08 **Rescission must be possible.** Since rescission is retrospective, and requires the parties to reverse performance—make restitution—so as to return to the position in which they were when they entered into the contract, there can be problems in obtaining the remedy if such reversal of performance is not possible. This may happen because it is in law or as a matter of fact not possible for one of the parties to return what he received under the contract, such as where the subject-matter of the contract has been passed on to a third party, or has been used up. Such situations, which sometimes amount to "bars" to obtaining the remedy of rescission, are considered in detail below.[23]

4–09 **Restitution following rescission of an executed or partly executed contract.** The mere fact that the contract has been partly or even fully performed by one or both parties is not a bar to rescission.[24] But in the case of a contract under which performance has been rendered, the effect of the reversal of that performance sometimes needs to be considered carefully. There is both a legal and a factual dimension to the avoidance of the contract. As a matter of law, the obligations which were created by and pursuant to the (voidable) contract must be annulled. As a matter of fact, the parties' physical performance of those obligations must be reversed: and in consequence restitution must be made by each party of the

[21] Below, para.8–41. Similarly the "right to unwind" under the Consumer Protection from Unfair Trading Regulations 2008 SI 2008/1277 regs 27F and 27G, as inserted by SI 2014/870, below, para.7–79, and the "right to reject" under the Consumer Rights Act 2015 s.20, below, para.8–47, are not rescission ab initio, but involve the consumer treating the contract as ended so that the parties are both released from their obligations, although the consequential refund and collection of the goods by the trader may give a similar effect to rescission.

[22] *Reese River Silver Mining Co v Smith*, above, n.10 at 74 (Lord Hatherley LC: party cannot rely on his own fraud to avoid contract). The representee, if innocent, may also be himself under a *mistake* as to the facts he states; in such cases he may allege that the contract is void for mistake: above, para.1–03. But even then he will not be able to do so if he held the mistaken belief without any reasonable ground: *McRae v Commonwealth Disposals Commission* (1951) 84 C.L.R. 377, HCA, at 408; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 W.L.R. 255 at 268; *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [76]–[80]; below, paras 15–22 to 15–23.

[23] Paras 4–52 (impossibility of restitution) and 4–59 (intervening third-party rights).

[24] Although there was some judicial authority before 1967 that performance of the contract might bar rescission, the Misrepresentation Act 1967 s.1(b), provides that it does not.

benefits of performance received from the other. In a contract of sale, for example, it will often happen that the representee has passed goods to the other party under the terms of the contract which is to be rescinded: rescission will normally require the goods to be returned (and the price, if already paid, to be repaid). Questions have arisen in the cases, however, about the nature of the representee's rights to the property during the period that the contract is voidable (but has not yet been rescinded); and therefore the effect of the remedy on his property rights at the moment of rescission. These issues are considered in the following paragraphs.[25]

There can also be a question of how to value the restitution to be made by one party following rescission of the contract. Where restitution is to be made of property received under the contract, the simple restoration of the property may not in itself make full and satisfactory restitution where the property has been used (to the benefit of the party making restitution) or has decreased in value since the time of the contract (to the detriment of the party to whom restitution is to be made). This issue may be solved by the court in its equitable jurisdiction making an order for the payment of money to accompany the rescission of the contract, but it is linked to the question of whether such use or devaluation of the property goes so far as to constitute a "bar" to rescission by rendering restitution "impossible", and is considered in that context.[26] Such issues do not normally arise in relation to the restitution of money paid under the contract, although it has been held that where, because of currency exchanges, the money received by a fraudulent representor is greater than the sum paid by the representee, restitution should be made of the sum received by the fraudulent representor in order to prevent him from being unjustly enriched at the representee's expense.[27]

4–10 **The "equity to rescind"; property rights before rescission.** The fact that a contract was induced by misrepresentation does not prevent the transfer of legal property rights in goods delivered or land transferred pursuant to the (voidable) contract: on rescission of the contract the representee therefore obtains a revesting of the property.[28] The position as regards the *equitable* property rights in the goods delivered or land transferred has however been the subject of some controversy. A representee who has a right to the remedy of rescission under the rules set out later in this chapter is said to have an *equity to rescind*. Some authorities[29] hold that the representee retains an equitable interest in the property,

[25] Below, paras 4–10 to 4–11.

[26] Below, para.4–56.

[27] *Banwaitt v Dewji* [2014] EWCA Civ 67, [2014] All E.R. (D) 26 (May) at [86] (representee paid sum in sterling, but it was converted to dollars before being received by the (fraudulent) representor; movement in currency after the date of the contract and before rescission meant that repayment of the sterling sum would still leave the representor with a significant financial benefit).

[28] *Stevenson v Newnham* (1853) 13 C.B. 285 at 302–303, 138 E.R. 1208 at 1215–1216. For the means by which the revesting of property is effected, see below, para.4–11. The revesting of legal title in the case of rescission of a contract of sale induced by fraudulent misrepresentation is well established; but for the view that this is a misinterpretation of the old authorities, and incorrect in principle, see W. Swadling, "Rescission, Property, and the Common Law" (2005) 121 L.Q.R. 123.

[29] e.g. *Stump v Gaby* (1852) 2 De G. M. & G. 623 at 630, 42 E.R. 1015 at 1018; *Gresley v Mousley* (1859) 4 De G. & J. 78 at 93, 45 E.R. 31 at 37; *Melbourne Banking Corp Ltd v Brougham* (1882) 7 App. Cas. 307, PC, at 311; L. Tucker, N. Le Poidevin and J. Brightwell, *Lewin on Trusts*, 19th edn

but others[30] deny this and hold that the whole property passes under the contract and that the equity to rescind does not constitute a retained right of property for the representee.

It may be possible to reconcile the cases by accepting that the equity to rescind does not give rise to a full equitable interest in the transferred property of the kind which would arise if the representee transferred the legal title to be held on trust for himself; but that after the transfer the representee retains rights which can be recognised as proprietary for some purposes.[31] The retained rights can be disposed of inter vivos[32] or by will[33] so that the recipient can invoke the right to rescission and therefore recover the full property rights. And where registered land is transferred under a voidable contract the transferor's equity to rescind has

(London: Sweet & Maxwell, 2015 with supplements), para.2–041. Such a position has also been taken in the context of contracts voidable on grounds other than misrepresentation. In *Re Garnett* (1886) 33 Ch.D. 300, CA, at 306 Lindley LJ held that the setting aside of a release by a residuary legatee of her rights under a will, which was entered into without independent advice and in ignorance of the value of the rights in question, "confers no new title. It removes an impediment to the enjoyment of a pre-existing title". And in the context of a contract voidable for undue influence, Cotton LJ suggested that the transferor of property could recover "on the ground that it was property the beneficial interest in which she had never effectually parted with": *Allcard v Skinner* (1887) 36 Ch.D. 145, CA, at 172. In Australia, see *Daly v Sydney Stock Exchange Ltd* (1986) 160 C.L.R. 371, HCA, at 388–389 (duty of disclosure arising out of fiduciary relationship; it "may be that … [the transferor] had an equitable interest in the property from the beginning", but the transferee does not hold as constructive trustee as long as the contract stands); *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 C.L.R. 265, HCA, at 282–284, 290–291. The reasoning behind the idea that a voidable contract gives rise to a continuing equitable interest appears to be similar to the principle that a contract to transfer an interest in land creates an equitable interest where a court would grant specific performance of the contract to order the interest to be conveyed: an operation of the maxim that "Equity looks on as done that which ought to be done": *Walsh v Lonsdale* (1882) 21 Ch.D. 9, CA; Snell, para.5–015; cf. *Stump v Gaby*, above; R. Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1998), pp.174–175. However the cases are not exactly parallel because in the case of rescission for misrepresentation the right to rescind does not (apart from the Misrepresentation Act s.2(2), below, para.4–61) depend on the exercise of the court's discretion; and it is a right which the representee can choose whether to exercise, not a right which the court can presume should be exercised.

[30] *Clough v London and North Western Railway Co* (1871) L.R. 7 Exch. 26 at 32, 34; *Bristol and West Building Society v Mothew* [1998] Ch. 1, CA, at 22; *Barclays Bank Plc v Boulter* [1999] 1 W.L.R. 1919, HL, at 1925; *Twinsectra Ltd v Yardley* [1999] Lloyd's Rep. Bank. 438, CA, at 461–462 (reversed on different grounds [2002] UKHL 12; [2002] 2 A.C. 164); Snell, para.15–020.

[31] *Latec Investments Ltd v Hotel Terrigal Pty Ltd*, above, n.29 at 291; *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch. 183 at 196; *Lewin on Trusts*, above, n.29, para.33–021; *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] Ch. 520 at [80] (Sir Terence Etherton C, applying the *Latec Investments* and *Blacklocks* cases: "The right or power to rescind … was a property right (albeit not a legal or equitable interest) … The rescission, when it was effected, operated to vest in the lead claimants a property interest in their traceable money retrospectively to the date that the equity arose."). For a most thorough discussion, see S. Worthington, "The Proprietary Consequences of Rescission" [2002] R.L.R. 28 (the classical model "suggests that the claimant has a mere equity prior to rescission, but that after rescission legal or equitable title to the underlying property revests in the respective parties. The model is supported by precedent, consistent with legal doctrine, and suited to commercial and public goals": at 67). For a different view, that the transferee of property under a voidable contract holds the recoverable property under a resulting trust, see R. Chambers, *Resulting Trusts*, Ch.7.

[32] *Dickinson v Burrell* (1866) L.R. 1 Eq. 337; *Gross v Lewis Hillman Ltd* [1970] Ch. 445, CA, at 460–461; *Melbourne Banking Corp Ltd v Brougham*, above, n.29.

[33] *Stump v Gaby*, above, n.29; *Gresley v Mousley*, above, n.29.

effect from the time the equity arises—that is, from the time of the contract and therefore before rescission is effected—as an interest capable of binding successors to the registered title.[34]

However, it is clear that the transferee of property under a voidable contract does not hold the property as trustee during the period before the contract is rescinded, nor does he have fiduciary duties to the transferor in respect of his use of the property.[35] And, except in registered land, the equity to rescind is not treated as equivalent to an equitable interest when the issue is whether a later purchaser takes priority over the earlier rights.[36] But an equity to rescind will bind the transferee's trustee in bankruptcy.[37]

[34] Land Registration Act 2002 s.116(b), which is declared "for the avoidance of doubt" and applies to "a mere equity", including the equity to rescind. A registered disponee who gives valuable consideration will take free of the equity unless it is protected by entry of a notice in the register, or as an overriding interest: Land Registration Act 2002 s.29; see E.H. Burn and J. Cartwright, *Cheshire and Burn's Modern Law of Real Property*, 18th edn (Oxford University Press, 2011), pp.903–906. Before the 2002 Act it had already been held that an equity had the quality of a "right" capable of constituting an overriding interest and therefore binding a purchaser under the Land Registration Act 1925 s.70(1)(g) (rights of person in actual occupation of the land or in receipt of rents and profits: see now the Land Registration Act 2002 Sch.3 para.2; *Cheshire and Burn's Modern Law of Real Property*, pp.1105–1106); *Blacklocks v JB Developments (Godalming) Ltd*, above, n.31 (equity to rectify, rather than to rescind; but at 195–196 Mervyn Davies J used rescission cases interchangeably with cases involving rectification); *Nurdin & Peacock Plc v Ramsden & Co Ltd* [1999] 1 E.G.L.R. 119 at 124–126; [1999] Conv. 421 (S. Pascoe). The point was left open by the CA in *Collings v Lee* [2001] 2 All E.R. 332 at 338. Statements by Lord Upjohn and Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] A.C. 1175, HL, at 1238, 1254 appeared to deny that an equity to rescind could bind a purchaser of the land. The earlier statement (obiter) of Upjohn J in *Smith v Jones* [1954] 1 W.L.R. 1089 at 1091 that the equity to rectify did not bind a purchaser of unregistered land can be read as saying not that the equity does not have proprietary characteristics, but that the rules of notice operative in unregistered land would not apply to hold a purchaser bound by such an equity.

[35] *Lonrho Plc v Fayed (No.2)* [1992] 1 W.L.R. 1 at 11 (transferee of shares under contract voidable for fraud has no duty to transferor in respect of use of the shareholding for mounting takeover bid for the remaining shares); *Daly v Sydney Stock Exchange Ltd*, above, n.29 at 389, and in relation to the payment of money under a voidable contract see *Shalson v Russo* [2003] EWHC 1637, [2005] Ch. 281 at [108] (Rimer J, distinguishing at [109]–[111] and [118] contrary dicta of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 715–716, and of Bingham J in *Neste Oy v Lloyds Bank Plc* [1983] 2 Lloyd's Rep. 658 at 665–666). Cf. *Collings v Lee*, above, n.34 at 337 (equitable interest retained where transferors did not intend to transfer property, but transferee acquired transfer of legal estate without their knowledge and consent and in breach of his fiduciary duty to them).

[36] *Phillips v Phillips* (1862) 4 De G. F. & J. 208 at 218, 45 E.R. 1164 at 1167. The rule is that, where equities are equal, the earlier in time prevails; but the purchaser of an equitable interest takes priority over an earlier equity to rescind. In *Latec Investments Ltd v Hotel Terrigal Pty Ltd*, above, n.29 at 286, Taylor J suggested that, rather than the equity to rescind being of a lesser right than an equitable interest, the result might follow because a representee requires "the assistance of a court of equity to remove an impediment to his title as a preliminary to asserting his interest". However, the exercise of the right to rescind for misrepresentation is not dependent upon a court order: below, para.4–18. In *registered* land an equity now has the same priority as an equitable interest: Land Registration Act 2002 s.116(b); above, n.34.

[37] *Re Eastgate* [1905] 1 K.B. 465. Where however, *money* is transferred under a voidable contract, no proprietary rights are retained and therefore the representee has no priority in the representee's bankruptcy: *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, PC, at 102–103; below, para.4–12.

Property rights after rescission. At the moment that rescission takes effect[38] the obligations created by the contract are avoided. The representee immediately regains those legal and equitable property rights that can be revested without further formality,[39] but if the nature of the property is such that a revesting of the legal title requires a particular formality, such as where land[40] or shares have been transferred pursuant to a voidable contract, the representor holds the legal title on constructive trust for the representee.[41] The duties of the representor under such a trust are not the full fiduciary duties of an express trustee; they extend only to the property obtained by the contract and liable to be returned.[42] 4–11

The proprietary (and other remedial) consequences of rescission may depend, however, on whether the misrepresentation was fraudulent or not. At common law, the avoidance of a contract for fraud had the effect of revesting the legal title[43]; and this will be given similar effect in equity.[44] After rescission, which can be effected by act of party without a court order,[45] the representee therefore has sufficient title to sue a third party in possession of the goods in the tort of conversion. However, if the misrepresentation was not fraudulent, and so would not have been recognised at common law as sufficient to render the contract voidable, the effect of rescission by act of party will not revest legal title to

[38] For the mechanism by which rescission is effected, see below, para.4–18.

[39] *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 Q.B. 525, CA; *Newtons of Wembley Ltd v Williams* [1965] 1 Q.B. 560, CA (rescission of a contract of sale of a car revested legal title to the car even though the representee had not yet taken possession of it). For the view that "the remedy of rescission, by which the unjust enrichment of the representor is prevented, though for historical and practical reasons treated in books on the law of contract, is a straightforward remedy in restitution", see *Whittaker v Campbell* [1984] Q.B. 318 at 327 (Robert Goff LJ). However, it is suggested that the better view is that rescission itself is properly viewed as a contractual remedy based on the defective consent of the representee, although the *consequences* of rescission (the revesting of property, etc.) are restitutionary: above, para.4–09; below, para.4–52. The current editors of Goff & Jones decline to resolve the controversy: Goff & Jones, paras 40–15, 40–16.

[40] For formalities relating to the transfer of interests in land, see *Cheshire and Burn's Modern Law of Real Property*, above, n.34, Ch.25. An assured or secure tenancy of a dwelling-house cannot be brought to an end without a court order, even if the landlord was induced by misrepresentation to grant it; the statutory regime for the protection of tenants excludes the common law remedy of rescission: *Islington LBC v Uckac* [2006] EWCA Civ 340, [2006] 1 W.L.R. 1303; but it is a ground for possession that the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly, i.e. fraudulently, by the tenant or a person acting at the tenant's instigation: Housing Act 1985 Sch.2 Pt I, Ground 5 (amended by the Housing Act 1996 s.146) (secure tenancy: public sector); *Merton LBC v Richards* [2005] EWCA Civ 639, [2005] H.L.R. 44; Housing Act 1988 Sch.2 Pt II, Ground 17 (introduced by the Housing Act 1996 s.102) (assured tenancy: private sector). In practice, this ground is rarely used by private landlords, but may be more useful for a public sector or social landlord: [2005] 25 E.G. 191 (S. Murdoch). For a case where the rescission of a contractual tenancy deprived the tenant of statutory protection see, however, *Killick v Roberts* [1991] 1 W.L.R. 1146.

[41] *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* [1998] L.R.I.R. 24 at 28 (Aus. N.S.W. Com. Div); *Alati v Kruger* (1955) 94 C.L.R. 216, HCA, at 224.

[42] *Lonrho v Fayed (No.2)* [1992] 1 W.L.R. 1 at 11 (Millett J, drawing an analogy with the constructive trusteeship of a vendor of property contracted to be sold); *Daly v Sydney Stock Exchange Ltd*, above, n.29 at 389–390. In *El Ajou v Dollar Land Holdings Plc* [1993] 3 All E.R. 717 at 734 Millett J took the view that a representor holds property after rescission not on "some new model remedial constructive trust, but an old-fashioned institutional resulting trust".

[43] *Car and Universal Finance Co Ltd v Caldwell*, above, n.39.

[44] *El Ajou v Dollar Land Holdings Plc*, above, n.42 at 734.

[45] Below, para.4–18.

property which has passed under the contract, but only equitable title.[46] And an equitable title, without possession of the goods, does not suffice to support a claim for conversion.[47]

The revesting of property rights may be treated as operating retrospectively to the time of the contract for limited purposes, such as to the extent necessary to provide the representee with a continuing proprietary base to sustain a claim to trace the property.[48] However, it does not operate to render unlawful the representor's dealings with the property during the period between the contract and its rescission.[49]

4–12 **Property rights in relation to money paid under a voidable contract.** It has been said that the principles discussed above do not apply in the same way where money is transferred under a contract which is voidable for misrepresentation: the whole property in the money passes and no property rights, legal or equitable, remain in the transferor; no property rights revest on rescission; the transferee must repay an equivalent sum, and the transferor's rights are merely personal; even after rescission, the representee therefore cannot claim priority in the representor's bankruptcy.[50] However, although upon rescission restitution *in specie* is not possible in the case of the payment of money, and therefore must be effected by repayment of an equivalent sum, this does not mean that rescission cannot have the effect of revesting in the representee the property in money paid under the voidable contract, entitling him at least to trace it into assets into which it was subsequently applied.[51]

[46] *Alati v Kruger*, above, n.41 at 224.

[47] *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All E.R. 675; *Hounslow LBC v Jenkins* [2004] EWHC 315 (QB), [2004] All E.R. (D) 160 (Feb); Clerk & Lindsell, paras 17–68; S. Green and J. Randall, *The Tort of Conversion* (Oxford: Hart Publishing, 2009), pp.103–106; M. Bridge, *Personal Property Law*, 4th edn (Oxford University Press, 2015), p.102.

[48] *Lonrho v Fayed (No.2)*, above, n.42 at 11 (Millett J); *El Ajou v Dollar Land Holdings Plc*, above, n.42 at 734 (Millett J); *Bristol and West Building Society v Mothew* [1998] Ch. 1, CA, at 22–23 (Millett LJ); *Shalson v Russo*, above, n.35 at [122]; *National Crime Agency v Robb* [2014] EWHC 4384 (Ch); [2015] Ch. 520 at [44]–[45], [51] (Sir Terence Etherton C); *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch) (rescission of transfer of land on basis of unilateral mistake). It has also been held that a tenancy can be rescinded even after its expiry, so that there is retrospectively no contract to found a protected tenancy to continue after the expiry of the contractual term: *Killick v Roberts*, above, n.40.

[49] *Bristol and West Building Society v Mothew*, above, n.48 at 22–23.

[50] *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, PC, at 102–103. For the view that, even in the case of the transfer of goods under a contract voidable for fraudulent misrepresentation, rescission should not have the effect of revesting title, but should leave the defrauded vendor to join the queue of unsecured creditors, see W. Swadling, "Rescission, Property, and the Common Law" (2005) 121 L.Q.R. 123 at p.153; cf. *National Crime Agency v Robb*, above, n.48 at [49] (Sir Terence Etherton C: "William Swadling is the leading academic proponent of the view that no trust of any kind arises on rescission … That, however, is not the present state of the jurisprudence binding on me").

[51] *Shalson v Russo*, above, n.35 at [124]–[127] (Rimer J, explaining *Re Goldcorp Exchange Ltd*, above, n.50, and applying *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 K.B. 321); *National Crime Agency v Robb*, above, n.48 at [44]–[45]. This does not give the representee priority over third parties, such as chargees, who have dealt with the representor in good faith and for value before rescission is effected. But it might allow him to assert property rights as against other creditors: *Shalson v Russo* at [126].

Rescission of the whole contract; rescission of part of the contract. The general rule is that if rescission operates, the contract is set aside in its entirety: it is not simply set aside as regards a limited part of the contract which was directly affected by the misrepresentation relied upon to claim the remedy. This rule has two dimensions. 4–13

First, the representee must rescind the whole contract or none of it: he cannot elect to rescind only the part affected by the misrepresentation, whilst retaining the advantages of the remainder of the contract.[52] Similarly, if the representee is unable to make restitution of part of the benefits obtained under the contract, he cannot rescind as regards the remaining part: if a contract cannot be rescinded *in toto* it cannot be rescinded at all.[53] In deciding whether it is possible for the parties to make restitution, the courts adopt a flexible approach[54] and can sometimes appear to grant remedies which give less than full rescission of the whole of the obligations undertaken in the contract.[55] However, the principle remains that, once a right to rescind is established (including, therefore, there being no impediment to rescission on the basis of impossibility of restitution) the contract can be rescinded only in its entirety.

Secondly, the representor cannot resist rescission of the whole of the contract if the representor has a valid claim for rescission. For example, where a wife was induced to enter into a charge over her interest in the matrimonial home to secure her husband's debts by a misrepresentation that her liability would be limited to a specified figure (whereas in fact the terms of the charge imposed on her unlimited liability), the entire charge was set aside at her request.[56] This view has not prevailed in Australia where the High Court, in a case involving a director who entered into a guarantee of his company's past and future indebtedness following a misrepresentation that the guarantee related only to future debts, allowed the director to rescind the guarantee only in so far as it related to past debts. It was said that to hold the guarantor to the extent of the company's future indebtedness was to do no more than to hold him to what he was prepared to undertake independently of any misrepresentation.[57] These cases are unusual, in that the misrepresentation relates not to a fact which bears on the subject-matter of the

[52] *Urquhart v Macpherson* (1878) 3 App. Cas. 831, PC, at 837–838; *United Shoe Machinery Co of Canada v Brunet* [1909] A.C. 330, PC, at 340.

[53] *Sheffield Nickel and Silver Plating Co Ltd v Unwin* (1877) 2 Q.B.D. 214 at 223; *Hunt v Silk* (1804) 5 East 449, 102 E.R. 1142.

[54] Below, paras 4–54 to 4–56.

[55] e.g. *Cheese v Thomas* [1994] 1 W.L.R. 129, CA (rescission for undue influence: claimant was required to bear proportionate share of fall in value of property with which his contractual payment to defendant had been bought, rather than recovering the whole sum paid).

[56] *TSB Bank Plc v Camfield* [1995] 1 W.L.R. 430, CA, followed in *De Molestina v Ponton* [2002] 1 Lloyd's Rep. 271 at 288 on the basis that *Vadasz v Pioneer Concrete (SA) Pty Ltd*, below, n.57, cannot be accepted into English law since it is inconsistent with *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, HL. In *Scales Trading Ltd v Far Eastern Shipping Co Public Ltd* [2001] Lloyd's Rep. Bank. 29 at 34 the Privy Council, on an appeal from New Zealand, declined to decide between *TSB Bank Plc v Camfield* and *Vadasz v Pioneer Concrete (SA) Pty Ltd*. Where, however, a contract can be severed, it may be possible to avoid only one part: *Barclays Bank Plc v Caplan* [1998] 1 F.L.R. 532 (side-letter extending guarantee avoided for undue influence, although main guarantee still enforceable).

[57] *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 C.L.R. 102. The decision in *TSB Bank Plc v Camfield*, above, n.56, was expressly rejected at 115–116. See also L. Proksch, "Rescission on Terms" [1996] R.L.R. 71; A. Robertson, "Partial Rescission, Causation and Benefit" (2001) 17 J.C.L. 163.

contract, but to the content of the obligations about to be undertaken in the contract itself. If the representee sought to rely on the misrepresentation to obtain not rescission of the contract but rectification of a written contract to reflect the terms as misrepresented[58] or (in the case of a contract not reduced to writing) to assert that the contract stood but on the basis of terms as misrepresented,[59] he may be entitled to do so. But where the representee seeks to rely on the misrepresentation to obtain rescission of the entire contract, it is submitted that the approach taken in the English courts is correct. It flows from the fact that the remedy of rescission of the contract for misrepresentation is not within the discretion of the court, but is available as of right to a representee who satisfies the requirements of the remedy set out later in this chapter.[60] As long as there is no impediment to rescission, such as the representee not being able and willing to make restitution of benefits obtained under the contract,[61] the representor has no choice but to submit to rescission of the entire contract.

4–14 **Severable contracts.** The rules stated in the preceding paragraph apply to entire contracts. If what appears to be a single contract should properly be construed as severable into separate contracts, rescission will be available of the whole of each separate contract which is affected by the relevant misrepresentation.[62] For example, a single insurance policy may be written so as to separate the risks into separate contracts, with the result that a misrepresentation with respect to one risk will vitiate only the contract relating to that risk.[63] And a composite insurance policy—a single insurance policy which insures two or more persons with separate interests (such as the landlord and tenant of property)—will

[58] A fraudulent misrepresentation, or other unconscionable conduct in obtaining the contract in its written form, must be shown: *May v Platt* [1900] 1 Ch. 616 at 623; *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch. 259, CA; below, paras.13–47 to 13–48 (rectification for unilateral mistake).

[59] An innocent misrepresentation as to the terms suffices: *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 K.B. 805, CA (exemption clause incorporated only in its meaning as represented; for the interpretation, however, that the clause was on the facts not incorporated, see *AXA Sun Life Services Plc v Harry Bennett & Associates Ltd* [2011] EWCA Civ 133 at [105] (Rix LJ)).

[60] *TSB Bank Plc v Camfield*, above, n.56 at 438–439 (Roch LJ); *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 Q.B. 525, CA, below, para.4–20. For a different view, see J. Poole and A. Keyser, "Justifying Partial Rescission in English Law" (2005) 121 L.Q.R. 273, who advocate a discretionary remedy of partial rescission, limited to the case where there is a non-fraudulent misrepresentation about the content of the obligations of the contract. This is designed to fulfil the contractual expectations of the parties, but depends on acceptance that rescission for non-fraudulent misrepresentation is a discretionary remedy; cf. below, para.4–18.

[61] Below, para.4–52; *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876, CA; *Midland Bank Plc v Greene* (1995) 27 H.L.R. 350 (charge over house by defendant and husband to secure purchase moneys for purchase and the husband's personal debts: undue influence by husband: court could not set aside charge in part, but would order that it be set aside in full if the defendant repaid the debt in respect of her own share in the property).

[62] *De Molestina v Ponton*, above, n.56.

[63] Cf. *Printpak v AGF Insurance Ltd* [1999] 1 All E.R. (Comm) 466, CA (warranty as to operation of burglar alarm only applied to part of insurance policy dealing with theft risks, and so under the Marine Insurance Act 1906 s.33(3) discharged the insurer from liability under only that section); *The Litsion Pride* [1985] 1 Lloyd's Rep. 437 (extension of cover separate from original contract). There is more extensive authority in American law for severance of contracts for this purpose, e.g. *Hesselberg v Aetna Life Ins Co*, 102 F.2d 23 (1939); *Bethune v New York Underwriters Ins Co*, 98 F.Supp. 366 (1951).

generally be treated as containing separate contracts, so that a pre–contractual misrepresentation by one insured will allow the insurer to rescind the policy only as far as it relates to that insured.[64] A contract for the allotment of shares in a company has also been held to be a severable contract, so that the shareholder could rescind in relation to the shares he still held where he had parted with part of the shareholding before discovering the fraud which induced him to take the shares.[65]

Rescission of chains of contracts and of related contracts. Sometimes there will be a chain of contracts, such as where A sells goods to B, which B sells on to C. If B has a claim against A to rescind the first contract, its exercise is likely to be dependent on C first rescinding his contract with B, since it will generally be impossible for B to restore the goods as long as the contract with C is outstanding. However, if C is willing and able to rescind that contract, B is reinvested with the rights of property in the goods, so allowing the exercise of his right of rescission against A.[66] However, for each link in the chain of contracts the requirements of rescission must be satisfied and the remedy sought by the party with the right to it. So, to take a different example, if by a misrepresentation X induces Y to buy goods, and Y later transfers the goods to Z, Z's remedy of rescission is normally only available against Y. He has no right as against X to require him to take back the goods and hand over the purchase price he received from Y. The misrepresentation made by X to Y is spent when Y buys the property, and Z must find a separate claim, based on Y's own misrepresentation to him, in order to rescind the contract with Y.[67] 4–15

Where there are two or more related contracts, each must normally be considered separately as regards any claim for rescission. So if a purchaser buys two separate items, under two separate contracts from the same vendor, e.g. separate lots at auction, a misrepresentation by the vendor as to one of the items will not normally allow the purchaser to rescind also the second contract, unless both parties knew and understood that the two contracts were interdependent.[68]

Clauses which survive rescission. Although rescission involves the contract being retrospectively avoided, certain clauses will survive rescission: the concept of avoidance ab initio does not compel the conclusion that the former existence of the contract is denied, or that it cannot be recognised for the purpose of working 4–16

[64] *New Hampshire Insurance Co v MGN Ltd* [1997] L.R.L.R. 24, CA; *Arab Bank Plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep. 262.

[65] *Re The Mount Morgan (West) Gold Mine Ltd* (1887) 56 L.T. 622. It would be otherwise if the contract were for the transfer of shares of different descriptions, rather than in a single category of shares in the same company: *Re The Mount Morgan (West) Gold Mine Ltd* at 625 (Kay J).

[66] *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] A.C. 773, HL(Sc.).

[67] *Gross v Lewis Hillman Ltd* [1970] Ch. 445, CA, at 460–461, 463. This is an illustration of the rule that rescission can be sought only by a party to the contract: *Sanctuary Housing Association v Baker* [1998] 1 E.G.L.R. 42, CA, at 44 (landlord's consent to assignment of lease obtained by fraud of tenant and proposed assignee; landlord entitled to rescission of the consent to assignment, but not to rescission of the assignment itself to which it was not party).

[68] *Holliday v Lockwood* [1917] 2 Ch. 47. However, even though rescission of the second contract is not available, a court may still refuse specific performance of it, and leave the purchaser to his remedy in damages: *Holliday v Lockwood*, at 57.

out the consequences of its avoidance.[69] So it has been held that an exclusive jurisdiction clause in a contract can be given effect notwithstanding the avoidance of the contract for misrepresentation.[70] Similarly, a clause requiring disputes to be submitted to arbitration can survive the avoidance.[71] And clauses in the contract which make other provision for the consequences of rescission ought also to have effect—such as limitation and exclusion clauses.[72]

4–17 **Rescission, indemnity and damages.** Upon rescission of the contract the parties must each return to the other what they have received under the contract: so on rescission of a contract of sale the buyer must return the goods, and the seller must return the price.[73] Rescission will therefore often restore the representee to his original financial position. However, if in connection with the contract he has undertaken obligations to third parties, or has incurred expenses

[69] *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* [1998] Lloyd's Rep. I.R. 24 at 28 (Giles CJ, Aus. N.S.W. Com. Div.): "a contract avoided ab initio is not, in Newspeak, an uncontract". The same logic would not apply to a *void* (as opposed to only *voidable*) contract: *Mackender v Feldia AG* [1967] 2 Q.B. 590, CA, at 602–603; but see *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep. 81 at 90–93 holding that an arbitration clause can extend to a claim to voidness of a contract, e.g. for mistake at common law; Arbitration Act 1996 s.7 (unless otherwise agreed by the parties, arbitration agreement is to be treated as distinct and is unaffected by invalidity of the substantive contract of which it forms part).

[70] *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association*, above, n.69 (the clause must, of course, on its proper construction extend to disputes over the claim to avoidance: *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association*, at 31); *Mackender v Feldia AG*, above, n.69 at 603 (Diplock LJ, reserving his position in relation to a claim for fraud; Russell LJ at 605 reserved his position in relation to a claim for both fraudulent and innocent misrepresentation). See also *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091, [2008] 2 C.L.C. 520 at [24], [29] (jurisdiction clause, like an arbitration clause (below, n.71), is a separable agreement from the agreement as a whole, and disputes about the validity of the contract must be resolved under the terms of the clause, unless the jurisdiction clause is itself under some specific attack (e.g. fraud alleged in relation specifically to the clause, or (perhaps) if the signatures to the agreement were alleged to be forgeries), but not merely if there is a plausible allegation that the contract in which the clause is contained is vitiated by mistake, misrepresentation, illegality, lack of authority or lack of capacity).

[71] *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*, above, n.69 at 90–91: the clause must be sufficiently widely drawn to cover the dispute, but the "inexorable logic of *Mackender v Feldia AG*," above, n.69, means that an arbitration clause can even extend even to claims for fraudulent misrepresentation; [1993] QB 701 (CA). The House of Lords has said that the older authorities should no longer be relied on: in line with Arbitration Act 1996 s.7 (above, n.69), "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction": *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All E.R. 951 at [13] (Lord Hoffmann).

[72] e.g. a clause excluding remedies in damages for the misrepresentation (but not excluding rescission of the contract). Such a clause would be subject to the statutory controls on exemption clauses, and in particular the Misrepresentation Act 1967 s.3 (as amended by the Unfair Contract Terms Act 1977 s.8 and Consumer Rights Act 2015 Sch.4, para.1); below, paras 9–19 to 9–30.

[73] The goods must normally be returned *in specie*; but the buyer does not recover "his" money, just an equivalent sum: above, para.4–12.

in favour of third parties, rescission will not of itself be sufficient to restore the representee to his original position. There are two possible remedies to deal with this: an indemnity, or damages.

The courts of equity allowed a representee to recover an "indemnity" to compensate him for the obligations undertaken or expenditure incurred in favour of third parties under the contract which is rescinded.[74] This is not a general remedy in damages. It is available only as an adjunct to the remedy of rescission, and is the consequence of setting aside the contract into which the claimant was induced to enter: he is not put back into his original (pre-contract) position unless he is relieved from the consequences and obligations which are the result of the contract which is set aside.[75] There is some disagreement in the cases about the scope of the indemnity. It certainly covers the cost of performing obligations which were created by the contract itself[76]; but it has sometimes been said to go beyond this and to cover the cost of performing any obligation which was entered into under the contract which is rescinded.[77] The better view seems to be that the representee will be entitled to be indemnified only in respect of the expenditure incurred under the terms of the contract itself,[78] although the term requiring that expenditure might be either an express term or an implied term.[79]

But if following rescission the representee has losses beyond those in respect of which he can claim an indemnity against the representor,[80] he must seek a remedy in damages to make good those losses. If the representation was fraudulent, he may seek to recover damages from the representee in the tort of deceit[81]; if it was not fraudulent he may claim under section 2(1) of the Misrepresentation Act 1967,[82] or sometimes in the tort of negligence.[83] A claim for damages in tort is compatible with rescission of the contract, and the representee is therefore entitled to both rescission and damages if he can establish

[74] *Newbigging v Adam* (1886) 34 Ch.D. 582, CA; *Whittington v Seale-Hayne* (1900) 82 L.T. 49; *Brown v Smitt* (1924) 34 C.L.R. 160, HCA.

[75] *Newbigging v Adam*, above, n.74 at 589.

[76] *Newbigging v Adam*, above, n.74 at 589 (Cotton LJ), 593, 595 (Bowen LJ).

[77] *Newbigging v Adam*, above, n.74 at 596 (Fry LJ, who thought that in this he was agreeing with Cotton LJ This seems, however, doubtful: *Whittington v Seale-Hayne*, above, n.74 at 51).

[78] *Whittington v Seale-Hayne*, above, n.74.

[79] Treitel, para.9–081. Under the Partnership Act 1890 s.41, a party who rescinds the partnership contract on the ground of fraud or misrepresentation is entitled to, inter alia, an indemnity against the person guilty of the fraud or making the misrepresentation against the debts and liabilities of the firm to third parties for which he continues to be liable.

[80] e.g. in *Whittington v Seale-Hayne*, above, n.74, the claimants rescinded a lease of property used for a poultry breeding business which had been induced by a misrepresentation as to the condition of the premises. They were entitled to recover as an indemnity the rates paid to the local authority and repairs to the property which were incurred in fulfilment of their obligations as tenants under the lease; but they could not recover the loss of their poultry stock and the losses incurred in running the business, since those were general losses and not costs which they were required by the terms of the lease to incur.

[81] Ch.5.

[82] Which gives a remedy of damages on the tort measure, the case of a misrepresentation where there is no right of redress under the Consumer Protection from Unfair Trading Regulations 2008, where the representor cannot prove that he honestly and on reasonable grounds believed his statement: Ch.7.

[83] Ch.6.

his claim to each under the respective rules of the remedies.[84] A claim for any remedy for breach of contract is not, however, compatible with rescission (since the one remedy asserts that there is a contract under which a remedy can be granted; the other seeks to nullify that contract). If, therefore, the representee has losses which he wishes to recover as damages for breach of contract,[85] he must elect between the claims for damages and rescission.

[84] *Archer v Brown* [1985] Q.B. 401 at 415. In practice, any sum recoverable as an *indemnity* will also be recoverable within damages on the tort measure; the remedy of the indemnity is therefore useful only when there is no independent claim for damages, i.e. a wholly innocent misrepresentation which does not even give rise to a claim under the Misrepresentation Act 1967 s.2(1).

[85] Ch.8.

(3) The Mechanics of Rescission

Rescission by election of the representee, not by order of the court. No court order is necessary for rescission to take effect: "the right to set aside or rescind the transaction is that of the representee, not that of the court".[86] Rescission is effected[87] 4–18

> "by an unequivocal act of election [by the representee] which demonstrates clearly that he elects to rescind [the contract] and to be no longer bound by it."

A court may of course become involved in determining a dispute between the representor and the representee as to whether there was a right to rescind, but if it decides that rescission was justified the court order does not constitute the rescission: it merely confirms that the earlier act of election by the representee did validly rescind the contract, and then gives effect to it and makes any appropriate consequential orders. Even if there was no sufficient act of election

[86] *TSB Bank Plc v Camfield* [1995] 1 W.L.R. 430, CA, at 438. See also *Reese River Silver Mining Co v Smith* (1869) L.R. 4 H.L. 64, HL, at 73; *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] A.C. 773, HL (Sc.), at 781; *Alati v Kruger* (1955) 94 C.L.R. 216 at 224, HCA; *Horsler v Zorro* [1975] Ch. 302 at 310; *Drake Insurance Plc v Provident Insurance Plc* [2003] EWHC 109 (Comm), [2003] 1 All E.R. (Comm) 759 at [31] (reversed on different grounds [2003] EWCA Civ 1834, [2004] Q.B. 601; see at [102]: insurer's avoidance is a unilateral act); *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch. 281 at [122]; *Brotherton v Aseguradora Colseguros SA* [2003] EWCA Civ 705, [2003] 2 C.L.C. 629 at [27], [45]. Snell, para.15–012 (in a change to the position stated in 31st edn, 2005, para.13.13) says that, notwithstanding these decisions, the foundational authorities presuppose the parallel operations of different mechanisms at law (act of party) and in equity (rescission only by court order) and that the judicial mechanism developed in Chancery still continues to exist today. However, the modern cases there cited concerned rescission for undue influence, abuse of confidence and breach of fiduciary duty (and note *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 164, [2002] Lloyd's Rep. P.N. 309 at [78] (Dyson LJ: "*whatever the position in relation to a claim to rescind based on misrepresentation*, the right to rescission on grounds of undue influence, abuse of confidence or breach of fiduciary duty depends on the exercise of the discretion by the court to intervene in the enforcement of legal rights"; emphasis added)). The early cases which acknowledged rescission by act of party were in the common law—and limited, therefore, to rescission for fraudulent misrepresentation: above, para.4–02. But it has clearly become accepted in the modern law that rescission can be effected by act of party also in the case of non-fraudulent misrepresentation; and this appears to be assumed by the Misrepresentation Act 1967 s.2(2); below, n.89. See also B. Häcker, *Consequences of Impaired Consent Transfers* (2013), p.107 (right to rescind an executory contract as "a power *in personam* retroactively to cancel out mutual contractual claims"). For the proposal that the remedy of rescission should be effected by the court, rather than by the party concerned, see J. O'Sullivan, "Rescission as a Self-help Remedy: a Critical Analysis" [2000] C.L.J. 509; see also J. Poole and A. Keyser, "Justifying Partial Rescission in English Law" (2005) 121 L.Q.R. 273. See also D. O'Sullivan, S. Elliott and R. Zakrzewski, *The Law of Rescission*, 2nd edn (Oxford University Press, 2014), Ch.11, who conclude at para.11.108 that, even where rescission is effected in equity, it is only in the case of fraud that no court order is required (note, however, that the authors of this work maintain a rather strong non-fusionist stance to the law of rescission in general: see esp. Ch.10); and see *Peak Hotels and Resorts Ltd v Tarek Investments Ltd* [2015] EWHC 1997 (Ch) at [131] (Barling J: "a debate still seems to rage about whether, at least in the case of innocent and negligent misrepresentation, rescission is essentially by act of a party or act of the court, and also about the existence and nature of the court's power to impose terms on the grant of the remedy", claiming this paragraph in support).

[87] *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 Q.B. 525 at 531 (Lord Denning MR, sitting as trial judge). See also *Reese River Silver Mining Co v Smith*, above, n.86 at 73; *Abram Steamship Co Ltd v Westville Shipping Co Ltd*, above, n.86 at 781.

before the proceedings were begun, the plea in the action that the contract has been or should be set aside will suffice, and therefore any order of the court will relate back at the latest to that time.[88]

Since 1967 the court has had a statutory discretion to declare the contract subsisting and to award damages in lieu of rescission in certain circumstances.[89] This emphasises that, but for the statute, the court has no power to declare the contract subsisting when the representee has exercised his right to rescind.[90] And since rescission is available as of right to a representee who can show that the requirements of the remedy, set out later in this chapter, have been satisfied, the court has no general power to impose terms on the grant of the remedy.[91]

4–19 **Form of election to rescind.** The question, then, is what constitutes a sufficient "unequivocal act of election" by the representee. It is clear that a formal notice to the representor that the representee now treats the contract as rescinded will normally[92] suffice and will take effect, at the latest, at the moment of its receipt by the representor. Similarly, any informal notice or any act by the representee which sufficiently communicates his decision to rescind will suffice.

4–20 **Rescission without actual communication to the representor.** The general rule is that there must be communication[93] to the representor, because the representor is entitled to treat the contract as continuing until he is made aware of

[88] *Reese River Silver Mining Co v Smith*, above, n.86 at 73; *Clough v London and North Western Railway Co* (1871) L.R. 7 Exch. 26 at 36; *TSB Bank Plc v Camfield*, above, n.86 at 438–439; *Alati v Kruger*, above, n.86 at 224.

[89] Misrepresentation Act 1967 s.2(2); below, para.4–61. The section only applies where the representation was made "otherwise than fraudulently" and, since 1 October 2014, only where there is no right to redress under the Consumer Protection from Unfair Trading Regulations 2008: Misrepresentation Act 1967 s.2(4), added by SI 2014/870 reg.5; below, para.4–62.

[90] *TSB Bank Plc v Camfield*, above, n.86 at 960. The assertion of Jacob J to the contrary in *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573 at 586 (discussing rescission for fraudulent misrepresentation) appears to be mistaken.

[91] *TSB Bank Plc v Camfield*, above, n.86. But see *Killick v Roberts* [1991] 1 W.L.R. 1146, CA, at 1150 (Nourse LJ: rescission is "an equitable remedy… sometimes granted only on terms"; but it is not clear that he was considering the issue discussed here, and it is true that in other contexts the remedy has been granted subject to terms, e.g. mistake: *Cooper v Phibbs* (1867) L.R. 2 H.L. 149; but see now below, paras 15–32 to 15–33). Sometimes it may appear that terms are being imposed, such as when a representor is required to compensate the representee for the use of a chattel which he received under the contract which is being rescinded. However, this is not the general exercise of an equitable discretion to impose terms on the award of the remedy but a determination by the court of one of the requirements of the remedy itself: that such compensation is necessary as part of the requirement of restitution: below, para.4–54.

[92] There is an exception in the case of a contract to take an allotment of new shares in a company where, in addition to indicating a desire to rescind, the shareholder must take steps to have his name removed from the register of shareholders: rescission of the allotment of shares will take place when an action for removal is begun: *Re Scottish Petroleum Co* (1883) 23 Ch.D. 413, CA; *First National Reinsurance Co Ltd v Greenfield* [1921] 2 K.B. 260; *Reese River Silver Mining Co Ltd v Smith* (1869) L.R. 4 H.L. 64, HL; Gore-Brown, para.43[17]. If, however, the company has already forfeited the representee's shares because he has failed to pay calls due in respect of the allotment, he has then ceased to be a member and has become a mere debtor to the company, and he can rescind the contract in the usual way: *Aaron's Reefs Ltd v Twiss* [1896] A.C. 273, HL.

[93] Consistently with the general approach to the interpretation of communications between contracting parties, the question is not whether the representor actually realised that the representee was exercising his right to rescind, but whether he ought to have realised it, from what the representee said or did; *Scarf v Jardine* (1882) 7 App. Cas. 345, HL, at 361; cf. above, para.3–06.

the representee's intention to exercise the right to rescind.[94] There is one general exception to this: that in the case of a contract pursuant to which property is transferred, such as a contract for the sale of goods, it is sufficient for the transferor to retake possession of the property in order to rescind—even if the transferee is not yet aware of the transferor's act in retaking the property.[95] But the courts have sometimes been prepared to accept that an election is made without such communication or actual recaption of the property transferred.

In *Car and Universal Finance Co Ltd v Caldwell*,[96] Caldwell contracted to sell a car to Norris and was persuaded to allow Norris to take the car in return for a cheque which was not met when presented. Caldwell then immediately reported the fraud to the police and the Automobile Association, asking for their assistance in tracing Norris and the car. It was held by Lord Denning MR (sitting as the trial judge) and the Court of Appeal that Caldwell had successfully rescinded the contract by his action in attempting to trace Norris and recover the car. In consequence, a later contract of sale of the car did not operate to extinguish Caldwell's title to the car because the rescission had already revested the legal and equitable title in him.[97]

It is important to understand the limits of this decision. It is authority that, at least where the claim to rescind is based on a fraudulent misrepresentation, and the representor has deliberately absconded so that he cannot be contacted by the representee who wishes to exercise his right to rescind by the normal means of communicating his election, the representee is entitled to rescind by the best other overt means possible; and that Caldwell's attempt to trace the representor and the car by contacting the police and the Automobile Association satisfied this

[94] *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 Q.B. 525, CA, at 554; *Reese River Silver Mining Co v Smith*, above, n.92 at 74.

[95] This was accepted as a general rule in *Car and Universal Finance Co Ltd v Caldwell*, above, n.94, although Davies LJ at 558 noted that there was no very clear authority to this effect; *Re Eastgate* [1905] 1 K.B. 465 (rescission effected by breaking into house of buyer, who had absconded, and retaking goods). It might be argued that generally recaption of the goods constitutes sufficient notice to the representor, just as posting a letter containing a formal notice of rescission through the representor's letter box might also be argued to be a sufficient communication without waiting for the representor to open the letter and read it; but on recaption of the goods in the absence of the representor the representee knows that the representor does not yet know of the rescission—yet the rescission dates from the moment of recaption. In *Car and Universal Finance Co Ltd v Caldwell* at 555 Upjohn LJ was not convinced that recaption can be treated as simply a method of communication. It appears therefore to be better thought of as a separate rule.

[96] Above, n.94; followed in *Newtons of Wembley Ltd v Williams* [1965] 1 Q.B. 560, CA (car obtained by fraud: sellers unable to communicate with buyer but took all possible steps to trace him, and notified Hire Purchase Information Bureau that the car was theirs. The trial judge was Davies LJ, and Sellers LJ presided in the Court of Appeal—both had sat in the CA in *Caldwell*). Cf. however, in Scottish law, *MacLeod v Kerr* 1965 S.C. 253, Ct. Sess. (contract not avoided by representee's notification of fraud to police: "an invocation of the powers of the criminal authorities cannot possibly be the avoidance of a contract entered into under the civil law": at 259 (Lord Guthrie)).

[97] For this principle, see below, para.4–60. Lord Denning MR held in the alternative that, if there had been no valid rescission by Caldwell before the later contract, the purchaser had notice of the earlier defect in title and so the later contract did not extinguish Caldwell's right to rescind. The CA disagreed with this second ground, but affirmed Lord Denning MR's decision on the primary ground that rescission had been effected notwithstanding the absence of communication to the representor.

requirement on the facts. It does not undermine the general rule that rescission requires communication to the representor of the election to rescind or actual recaption of the property transferred. Statements in the judgment of Lord Denning might suggest a greater relaxation of the requirement of actual communication: in particular, he used as analogies other cases of election which do not require actual communication but are satisfied by any unequivocal act clearly evincing his election.[98] However, such analogies were rejected in the Court of Appeal[99] where the judges were careful to make clear that they regarded their decision as laying down only a limited exception to the general rule. Indeed, it is not helpful even to use as an analogy the rules for affirmation of the contract by the representee on discovering the misrepresentation.[100] In that case, the election to affirm may be evidenced by the representee's words or acts alone without requiring the words or acts to have been communicated to the representor. It can be justified because the representee's election operates only against his own interest: he deprives himself of his right to rescind, and as far as the representor is concerned the contract simply remains on foot. But in the case of an election to rescind, it ought not to be sufficient for the representee to exercise his election without communication to the representor, because the election deprives the representor of the benefit of the contract. Taking this argument further leads to a convincing rationale for the decision in *Caldwell*, and also shows where its limit should lie: the circumstances in which it is appropriate for the representee to rescind without actual communication to the representor are where the conduct of the representor has been such as to deprive himself of the right to require actual communication. This approach, in substance, underlies the judgments in *Caldwell*. Sellers LJ said[101]:

> "in circumstances such as the present case the other contracting party, a fraudulent rogue who would know that the vendor would want his car back as soon as he knew of the fraud, would not expect to be communicated with as a matter of right or requirement, and would deliberately, as here, do all he could to evade any such communication being made to him. In such exceptional contractual circumstances, it does not seem to me appropriate to hold that a party so acting can claim any right to have a decision to rescind communicated to him before the contract is terminated. To hold that he could would involve that the defrauding party, if skilful enough to keep out of the way, could deprive the other party to the contract of his right to rescind, a right to which he was entitled and which he would wish to exercise, as the defrauding party would well know or at least confidently suspect."

This principle need not then be restricted to cases of fraudulent misrepresentation. It is true that it is in cases of fraud that it is most likely to apply, since it is

[98] Forfeiture by a lessor; ratification of an agent's acts by his principal; acceptance of a repudiation of a contract; affirmation of a contract: see [1965] 1 Q.B. 525 at 532. Cf. Lord Denning's general position in the formation of a contract that communications should be viewed from the perspective of an external observer, rather than from the more limited perspective of the other contracting party: *Solle v Butcher* [1950] 1 K.B. 671, CA, at 691; *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 Q.B. 450, CA, at 460; Cartwright (Unequal Bargaining), pp.21–24; below, para.13–07, n.15.

[99] [1965] 1 Q.B. 525 at 549–550, 556, 559.

[100] Below, para.4–39. See [1965] 1 Q.B. 525 at 550.

[101] [1965] 1 Q.B. 525 at 550–551. See also Upjohn LJ at 555. Davies LJ at 558–559 went further and suggested that there was a term implied into the contract between Caldwell and Norris that Caldwell would be entitled to rescind by the best possible means other than actual communication.

then most likely that the representor will in fact abscond, and also then easiest to infer that by absconding he intended to avoid communication. The focus should not, however, be on the nature of the misrepresentation, but on the reason for the representee's inability to communicate with the representor: it is possible for a representor, though not fraudulent at the time of the contract, none the less later to take steps deliberately to avoid communication: the principle underlying *Caldwell* ought also then to be applicable.[102]

Another reason for wishing to restrict the application of the principle in *Caldwell* is its impact on the property rights of later innocent purchasers who can find that they have no title because of an effective earlier election to rescind.[103] However, this raises broader questions about the relative claims of innocent parties where there have been successive contracts of sale of goods, which ought to be addressed in the context of the property law issues which are involved.[104] When considering the question of whether the contract has been rescinded, the Court of Appeal in *Caldwell* properly took the view that it is the position of the two contracting parties which must be considered.[105]

II. ELEMENTS OF THE CLAIM

Overview of the elements of the claim. In general terms, the equitable[106] remedy of rescission is available to a representee who can show that a false representation was made to him by or on behalf of the other party to the contract; that *either* the representation was made fraudulently *or* it was a representation of fact; and that the representation acted as an inducement to his decision to enter into the contract.[107] Some of these elements have been discussed already in Chapter 3; in such cases references will be made back to detailed discussion in that chapter. Other elements of the representee's claim will be discussed in detail in this section. **4–21**

[102] The CA was careful to reserve its position in cases of non-fraudulent misrepresentation, and Sellers LJ went so far as to doubt whether a representor would deliberately avoid communication after making a non-fraudulent misrepresentation: [1965] 1 Q.B. 525 at 551–552.

[103] Law Reform Committee Twelfth Report, *Transfer of Title to Chattels*, Cmnd. 2958 (1966), para.16, recommending that the *Caldwell* rule should be reversed, and that "unless and until notice of the rescission of the contract is communicated to the other contracting party an innocent purchaser from the latter should be able to acquire a good title". The Law Commission announced in 2005 that it would open a new project on the transfer of title to goods by non-owners in its Ninth Programme of Law Reform: Law Com. No.293 (2005), paras 3.51–3.57. However, because "the issues involved in this project remain controversial" it was deferred in the Tenth Programme of Law Reform: Law Com No.311 (2008), paras 4.2–4.4, for further consideration in the Eleventh Programme "to see whether the climate has become more conducive to tackling this long-standing problem." The project was not however included in the Eleventh Programme: Law Com No.330 (2011), paras 3.4–3.6.

[104] Below, paras 4–60 and 14–39. The effect of the Sale of Goods Act 1979 s.25(1) appears to be that the buyer in good faith and without notice will be protected, even after the representor has rescinded the contract, since he takes from a seller who has obtained possession with the consent of the representor: *Newtons of Wembley Ltd v Williams*, above, n.96; Chitty, para.44–209; Benjamin, para.7–025.

[105] [1965] 1 Q.B. 525 at 551, 555.

[106] Above, para.4–02.

[107] It need not be shown that the terms of the contract were disadvantageous to the representee: *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200, HL, at 209.

CHAPTER 9

EXCLUSION AND LIMITATION OF LIABILITY FOR MISREPRESENTATION

I. DIFFERENT FORMS OF CLAUSE OR NOTICE EXCLUDING OR LIMITING LIABILITY

Varieties of exclusion and limitation clause. A person may, by the use of a contractual term or a non-contractual notice, seek to exclude or limit the liability or the range of remedies to which he would otherwise be exposed by reason of his statements, his acts or his omission to speak or to act. This is not the place to discuss this topic in detail,[1] but this chapter will explore the use of exclusion and limitation clauses and notices in the context of liability for misrepresentation. There is a wide range of types of clause and notice in common use, and a range of techniques available to the courts to control them. A clause in a contract may seek to exclude altogether, or to limit in some way, a liability which arises either under the contract or outside the contract (for example, in tort). And a notice, even if it is not contained in a contract, can in some circumstances have the effect of limiting or excluding non-contractual liability or remedies.[2] The characteristics of a successful clause or notice will therefore vary according to the remedy which the draftsman wishes to exclude or limit. Moreover, the mechanism by which the **9–01**

[1] For a fuller discussion of the topic, see Chitty, Ch.15; Furmston, paras 3.53 to 3.119; Treitel, Chs 7, 23; Anson, Ch.6; Cheshire, Fifoot & Furmston, pp.205–259; Clerk & Lindsell, paras 3–122 to 3–132; R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, 11th edn (London: Sweet & Maxwell, 2014); E. MacDonald, *Exemption Clauses and Unfair Terms*, 2nd edn (Haywards Heath: Tottel, 2006), but note that editions published before the enactment of the Consumer Rights Act 2015 will have some outdated legislative references.

[2] In general terms, a liability or remedy *under* the contract can be excluded or limited only by a clause *in* that or another contract which binds the claimant and of which the defendant has the benefit: cf. *White v Blackmore* [1972] 2 Q.B. 651, CA, at 667 (occupiers' liability). For a discussion of the courts' approach to contractual clauses and non-contractual notices, see below, para.9–08. Throughout this chapter, reference is made to exclusion and limitation *clauses*, but this should be understood to refer also in appropriate cases to exclusion and limitation *notices*.

clause seeks to achieve its object may vary: it may exclude or limit a liability once it has arisen, in substance operating as a defence to a claim once the claim is established; or it may be drafted so as to avoid the claim itself being successful by negativing an element necessary to establish liability in the first place. It may appear by its language not to be an exclusion clause but may still have that effect, by requiring a person (sometimes even the other party) to indemnify against the liability.[3] And a clause or notice may not seek to avoid all liability: it may limit the range of remedies available; or it may limit the full application of one or more particular remedies (for example, by limiting liability to a particular sum of money). Examples of these varieties of clause and notice will be given in this section. The different techniques available to the courts to control such clauses and notices will be discussed in the following sections of this chapter.

9–02 **Clauses which exclude an established liability.** A clause might simply exclude a particular liability, or all liability, for misrepresentation. For example, a contractual clause might provide that[4]

> "all liabilities for and remedies in respect of any representations made are excluded save in so far as provided in this contract."

The clause might be drafted even more widely, and exclude all liability in respect of representations, both liability in respect of pre-contractual representations and liability for breach of contract arising out of an incorporated representation. Or if the only liability which could arise on the facts is for pre-contractual misrepresentation, such as in tort, a non-contractual notice may be so drafted as to purport to exclude all such liability.

9–03 **Clauses which negative an element necessary to establish liability.** A clause or notice may seek to negative one or more of the elements of a claim for misrepresentation. Such clauses will vary according to the claim they are seeking to negative, but in the context of claims for misrepresentation most commonly they assert that the claimant has not relied on the representation in question. For example[5]:

[3] *Phillips Products Ltd v Hyland* [1987] 1 W.L.R. 659, CA; cf. *Thompson v T Lohan (Plant Hire) Ltd* [1987] 1 W.L.R. 649, CA.

[4] *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 W.L.R. 2333. These words were only part of the relevant clause in that case, which also contained an "entire agreement" provision, and a "non-reliance" provision: below, para.9–07.

[5] *Government of Zanzibar v British Aerospace (Lancaster House) Ltd*, above, n.4. See also *EA Grimstead & Son Ltd v McGarrigan* [1999] All E.R. (D) 1163, CA ("The Purchaser confirms that it has not relied on any warranty representation or undertaking of or on behalf of the Vendors … or of any other person in respect of the subject matter of this Agreement save for any representation or warranty or undertaking expressly set out in the body of this Agreement"); *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573 ("the Purchaser acknowledges that it has not been induced to enter into this Agreement by any representation or warranty other than the statements contained or referred to [in a Schedule]"); Standard Conditions of Sale (5th edn, 2011), special condition 6 ("Neither party can rely on any representation made by the other, unless made in writing by the other or his conveyancer, but this does not exclude liability for fraud or recklessness"); *Encyclopaedia of Forms and Precedents*, 5th edn, Vol.4(3) (2008 reissue), Forms 27.4 and 27.6.

> "The parties agree that neither party has placed any reliance whatsoever on any representations agreements statements or understandings whether oral or in writing made prior to the date of this contract other than those expressly incorporated or recited in this contract."

Sometimes a clause may go further and seek to negative the representation itself. It is possible for a clause or notice in an appropriate case to make clear that statements made are only opinions on which the claimant is not entitled to rely without making further enquiries: in substance, to provide that, for certain remedies at least, the statement is not a "representation". A clause may, however, simply deny that any representations have been made during the pre-contractual negotiations.[6] There have been some doubts about whether,[7] and (if so) how,[8] such "no representation" and "non-reliance" clauses can take effect, but it is has recently become accepted that the parties can agree in their contract that the contract is entered into on the basis that there has been no reliance on

[6] See also *Encyclopaedia of Forms and Precedents*, above, n.5, Form 27.5 (in conjunction with an "entire agreement" provision, below, para.9–06: party acknowledges that "no representations or promises not expressly contained in this agreement have been made by [the other party or his agents]"); *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016, CA, at 1034 (clauses, including National Conditions of Sale (20th edn), condition 14, did not exclude liability for misrepresentation but qualified any representation which would otherwise have been implied under seller's implied covenants for title).

[7] For the courts' reluctance to admit that a clause can effectively provide that what as a matter of fact is a representation is not in law a representation, see *McCullagh v Lane Fox & Partners Ltd* [1996] 1 E.G.L.R. 35, CA (estate agents' standard form disclaimer included a notice: "None of the statements contained in these particulars as to this property are to be relied on as statements or representations of fact. Any intending purchaser must satisfy themselves by inspection or otherwise as to the correctness of each of the statements contained in these particulars"); *Cremdean Properties Ltd v Nash* [1977] E.G.D. 63, CA, at 72 ("Any intending purchaser must satisfy himself by inspection or otherwise as to the correctness of each of the statements contained in these particulars": held not to destroy the representation but to confirm that it is a representation). See also a similarly worded notice in *Walker v Boyle* [1982] 1 W.L.R. 495 at 501, followed in *Cooper v Tamms* [1988] 1 E.G.L.R. 257 at 263. See also *Lowe v Lombank* [1960] 1 W.L.R. 196, CA, at 204 (Diplock LJ: "To call it an agreement as well as an acknowledgment by the plaintiff cannot convert a statement as to past facts, known by both parties to be untrue, into a contractual obligation, which is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future … it can give rise to an estoppel: it cannot give rise to any positive contractual obligation"), now explained in *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705 at [145]–[153]; A. Trukhtanov, "Misrepresentation: Acknowledgement of Non-Reliance as a Defence" (2009) 125 L.Q.R. 648 at 649–651.

[8] For the suggestion that such a representation of non-reliance might operate as an evidential estoppel, see the judgments of Chadwick LJ in *EA Grimstead & Son Ltd v McGarrigan* [1999] All E.R. (D) 1163, CA, and *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All E.R. (Comm) 696 at [39]–[40]. This would require the defendant to plead and prove the three requirements identified in *Lowe v Lombank Ltd*, above, n.7 at 205: (1) that the representation of non-reliance is clear and unambiguous; (2) that the claimant meant it to be acted upon by the defendant or at any rate so conducted himself that a reasonable man in the position of the defendant would take the representation to be true and believe that it was meant that he should act upon it; (3) that the defendant in fact believed it to be true and was induced by such belief to act upon it. However, as Chadwick LJ noted, this last requirement may present insuperable difficulties, because it may be impossible for a party who has made representations which he intended should be relied upon to satisfy the court that he entered into the contract in the belief that a statement by the other party that he had not relied upon those representations was true. See also *Quest 4 Finance Ltd v Maxfield* [2007] EWHC 2313 (QB), [2007] 2 C.L.C. 706 ("non-reliance" clause failed where representor could not show it believed declaration of non-reliance to be true and relied on it: *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*, below, n.9, was not cited).

pre-contractual representations, or that no misrepresentations have been made: both parties are then estopped by their contract from raising the (mis)representations, which were in fact made, in order to obtain a remedy.[9]

Another variation on this is a clause which seeks to ensure that, even if there is a representation which has been relied on, it is not a representation which binds the defendant. A common example is a clause which provides that any statement made by the defendant's agent does not in law bind the defendant as principal, by making clear that the agent has no authority to make such a statement.[10]

Where the claim is in the tort of negligence, a clause might seek to negative the duty of care[11]:

[9] This solution was suggested by Moore-Bick LJ in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [57]. A contractual estoppel does not require the representee to have believed the assumed state of facts, and therefore avoids the problems identified by Chadwick LJ in relation to estoppel by representation (above, n.8), although Moore-Bick LJ noted that a non-reliance clause may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established. *Peekay* has been followed in a series of cases at first instance: *Bottin International Investments Ltd v Venson Group Plc* [2006] EWHC 3112 (Ch), [2006] All E.R. (D) 111 (Dec) at [154] (non-reliance clause; but would not prevent claim in deceit); *Donegal International v Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep 397 at [465] (non-reliance clause); *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep. 581 at [36] (no representation; the appeal at [2009] EWCA Civ 290, [2010] Q.B. 86 proceeded on different grounds: below, para.9–20, n.82); *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92 at [87]–[88] (clause negativing reliance on advice); *Foodco UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [168]–[171] (non-reliance clause); *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123 at [255] (no representation); and has been confirmed by the Court of Appeal: *Springwell Navigation Corp v JP Morgan Chase Bank*, above, n.7 at [169] (non-reliance and no representation), approving [2008] EWHC 1186 (Comm), [2008] All E.R. (D) 167 (Jun) at [538]–[567]. For further cases, now following both *Peekay* and *Springwell*, see *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701 at [505]; *Bank Leumi (UK) Plc v Wachner* [2011] EWHC 656 (Comm), [2011] 1 C.L.C. 454 at [184]; *Standard Chartered Bank v Ceylon Petroleum Corp* [2011] EWHC 1785 (Comm), [2011] All E.R. (D) 113 (Jul) at [527]–[529] (the appeal at [2012] EWCA Civ 1049 proceeded on different grounds); and there are also many other cases applying these principles to various forms of this very common clause in commercial contracts. On contractual estoppel contrasted with estoppel by representation and estoppel by convention, see A. Trukhtanov, "Misrepresentation: Acknowledgement of Non-Reliance as a Defence" (2009) 125 L.Q.R. 648; P. Feltham, D. Hochberg and T. Leech, *Spencer Bower: Estoppel by Representation*, 4th edn (London: LexisNexis, 2004), para.VIII.8.1; K.R. Handley, *Estoppel by Conduct and Election*, 2nd edn (London: Sweet & Maxwell, 2016), esp. Ch.8. For the operation of s.3 Misrepresentation Act 1967 in relation to "non-reliance" clauses, see below, para. 9–22; and for the Unfair Terms in Consumer Contracts Regulations 1999 (now replaced by Pt 2 of the Consumer Rights Act 2015: below, para.9–37) see *Shaftsbury House (Developments) Ltd v Lee* [2010] EWHC 1484 (Ch) at [67] (Proudman J, obiter: "it would be strange if a contracting party could get round the Regulations by such a device").

[10] *Collins v Howell-Jones* [1981] E.G.D. 207, CA (clause defining actual authority); *Overbrooke Estates Ltd v Glencombe Properties Ltd* [1974] 1 W.L.R. 1335 (clause negativing estate agent's ostensible authority). A clause which defines the authority of the representor may operate in a different way, so as to make clear that the agent does have authority and that the representation is made in such a way as to bind the principal without imposing any personal liability on the agent: *Stewart v Engel* [2000] 2 B.C.L.C. 528 (clause made clear that liquidator acted only for company and had no personal responsibility).

[11] *McCullagh v Lane Fox & Partners Ltd*, above, n.7 at 45, 47. See also *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465, HL (credit reference given by bank "without responsibility");

> "All statements contained in these particulars as to this property are made without responsibility on the part of [the estate agent] or the vendors or lessors."

The purpose of such a clause is to negative the assumption of responsibility which might otherwise arise in the circumstances in which the defendant provides information or advice to the claimant.[12]

Clauses which limit the range of remedies available for misrepresentation. 9–04
A clause or notice might not limit or exclude remedies for misrepresentation generally, but might instead exclude a particular remedy or remedies, and so have the effect of defining the range of remedies which will be available if a misrepresentation is established. For example, it might exclude rescission, without touching on the question of remedies in damages[13]:

> "This contract is neither cancellable nor voidable by either party."

Or it might exclude claims in respect of pre-contractual misrepresentations, and limit the remedy to damages for breach of contract in respect of representations which are expressly incorporated into the contract.[14]

Clauses which impose restrictions on the availability of a particular remedy, or which limit the quantum recoverable. 9–05
A clause or notice might sometimes seek not to exclude a particular remedy altogether, but to impose conditions on its availability or scope. For example, it might set a limit on the quantum of damages recoverable in respect of misrepresentation, either generally or in a claim for a particular remedy.[15] Or it might require a claim to be made in a prescribed form,

Smith v Eric S Bush [1990] 1 A.C. 831, HL (mortgagors in two cases signed forms requesting mortgage which contained terms providing that "no responsibility whatsoever is implied or accepted" by valuer; and "the surveyor's report will be supplied without any acceptance of responsibility on their part to me": different views were however expressed in the CA and within the HL as to the effect of these causes—whether they negatived the duty or excluded liability); *De Balkany v Christie Manson and Woods Ltd* [1997] Tr. L. 163 (auction house would owe duty to buyer in respect of negligent statements in catalogue entries but for statements in catalogue which made reasonably clear that they did not assume responsibility); *IFE Fund SA v Goldman Sachs International* [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449 at [28]; *Titan Steel Wheels Limited v Royal Bank of Scotland Plc*, above, n.9, at [89].

[12] For the duty of care, and "assumption of responsibility", see above, para.6–25. It has been held that the words "without responsibility" attached to a statement are not sufficiently clear to exclude the remedy of rescission for misrepresentation: *Credit Lyonnais Bank Nederland v Export Credit Guarantee Department* [1996] 1 Lloyd's Rep. 200 at 218.

[13] *Toomey v Eagle Star Insurance Co Ltd (No.2)* [1995] 2 Lloyd's Rep. 88.

[14] See the clause in *Government of Zanzibar v British Aerospace (Lancaster House) Ltd*, quoted above, para.9–02. An "entire agreement" clause has the effect of limiting claims for breach of contract to those arising in the main contract itself, but does not necessarily exclude other remedies for pre-contractual misrepresentation: below, para.9–06. For a clause defining the remedies available for misleading or inaccurate pre-contractual or contractual statements in a contract for the sale of land, see Standard Conditions of Sale (5th edn, 2011), cl.7.1; Standard Commercial Property Conditions of Sale (2nd edn, 2004), cl.9. The most recent versions of these Conditions of Sale are printed in the Appendices to F. Silverman, *Conveyancing Handbook* (London: Law Society, re-issued annually).

[15] See, e.g. *Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep. 387, CA (but the clause did not there on construction cover all liabilities); *St Albans City and District Council v International Computers Ltd* [1996] 4 All E.R. 481, CA. A clause might seek to

or notified to the defendant within a prescribed time period; or it might set a time-limit within which a claim must be initiated by way of litigation, in effect providing for a more restrictive limitation period than would normally apply under the general law[16]:

> "the Vendor shall not be liable (by way of damages or otherwise) in respect of a breach of this Agreement or claim by the Purchaser in respect of a Warranty unless the Vendor shall have been given written notice by the Purchaser of such breach or claim on or prior to 1st January 1992. Such notice shall be in writing and shall contain the Purchaser's then best estimate of the amount claimed and the basis on which such estimate is made. Any liability in respect of a breach or claim of which notice is given as aforesaid shall cease unless proceedings in respect of such breach or claim are issued and served within 6 months of the date of the written notice."

A clause might also seek to restrict the mechanisms available to enforce claims for misrepresentation: for example, by excluding a defendant's rights of set-off including, therefore, set-off arising from the claimant's pre-contractual misrepresentations or claims for breach by the claimant of contractual warranties.[17]

9–06 **"Entire agreement" clauses.** It is not uncommon for a commercial contract to contain an "entire agreement" clause: for example, a clause which provides that[18]

> "this Agreement constitutes the entire agreement between the parties."

Such a clause constitutes an agreement that the full contractual terms to which the parties agree to bind themselves are to be found in the agreement[19] and nowhere else: there cannot be any claim based on a side agreement or collateral contract.[20]

exclude the operation of the principles of joint and several liability, above, para.2–14, and so provide that, in the event that the defendant is liable to the claimant for damage in respect of which another person is also liable (whether jointly or severally), the defendant shall be liable only for his own share of the damage. The defendant thereby avoids running the risk of having no valuable claim under the Civil Liability (Contribution) Act 1978 against other such potential co-defendants who are insolvent. For the ability of a company to agree under the Companies Act 2006 ss.532–538 to limit its auditors' liability in this a way, see above, para.6–33, n.191.

[16] *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573 at 599: the clause restricted claims for breach of contract, but not in respect of any misrepresentation which induced the contract. See also *Daroga v Wells*, unreported, 11 May 1994, CA (notice of claim in respect of warranties given by seller in share-sale contract to be given to seller within 24 months after completion). For standard form exclusion clauses to protect the vendor in a share-sale agreement, see *Encyclopaedia of Forms and Precedents*, 5th edn, Vol.11 (2010 reissue), Form 8, esp. cl.0.4 (time-limit for claim under warranties).

[17] *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600, CA; *Society of Lloyd's v Leighs* [1997] C.L.C. 1398, CA; *WRM Group Ltd v Wood* [1998] C.L.C. 189, CA; *Skipskredittforeningen v Emperor Navigation* [1998] 1 Lloyd's Rep. 66; below, para.9–16.

[18] *Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] 2 Lloyd's Rep. 611; followed *Inntrepreneur Pub Co (CPC) v Sweeney* [2002] EWHC 1060 (Ch), [2002] 2 E.G.L.R. 132.

[19] Whether the clause excludes implied terms will depend on its construction: *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2003] EWHC 1964 (Comm), [2003] 2 Lloyd's Rep. 686 at [25]–[27] (clause excluded terms implied by usage and course of dealing, but might not exclude implication based on business efficacy).

[20] *Inntrepreneur Pub Co (GL) v East Crown Ltd*, above, n.18 at 614. In *McGrath v Shah* (1987) 57 P. & C.R. 452 at 460, Chadwick QC appeared to accept that such a clause did not necessarily exclude another, collateral, contract. However, he was there focusing on the significance of an entire agreement clause as ensuring that the written contract contained all the terms of a contract for the sale

But it does not preclude a claim in misrepresentation. It only denies contractual force to statements which are not contained in the contract; it does not purport to affect the status of any statement as a (pre-contractual) misrepresentation.[21]

9–07 **Mixed clauses.** Often a contract will contain a clause which is not simply one of the provisions described above, but is a combination of different forms of exclusion and/or limitation of liability. For example, a clause which combines an "entire agreement" provision, an exclusion of liability for misrepresentation and a "non-reliance" clause[22]:

> "The parties have negotiated this contract on the basis that the terms and conditions set out herein represent the entire agreement between them relating in any way whatsoever to the

of land and therefore avoiding a challenge based on non-compliance with the Law of Property Act 1925 s.40 (see now the Law of Property (Miscellaneous Provisions) Act 1989 s.2(1)). For the particular approach to finding a collateral contract in the case of contracts for the sale of land, see above, para.8–07, n.34. An entire agreement clause does not, however, exclude a claim to rectify the contract in which it is contained: *Surgicraft Ltd v Paradigm Biodevices Ltd* [2010] EWHC 1291 (Ch), [2010] All E.R. (D) 249 (May) at [73], following *JJ Huber (Investments) Ltd v Private DIY Co Ltd* (1995) 70 P. & C.R. D33. See also D. McLaughlan, "The Entire Agreement Clause: Conclusive or a Question of Weight?" (2012) 128 L.Q.R. 521.

[21] *Inntrepreneur Pub Co (GL) v East Crown Ltd*, above, n.18 at 614; *Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals & Polymers Ltd*, above, n.15 at 395; *Alman & Benson v Associated Newspapers Group Ltd*, unreported, 20 June, 1980; *Thomas Witter Ltd v TBP Industries Ltd*, above, n.16 at 595; *Government of Zanzibar v British Aerospace (Lancaster House) Ltd*, above, n.4 at 2344; *SERE Holdings Ltd v Volkswagen Group UK Ltd* [2004] EWHC 1551 (Ch), [2004] All E.R. (D) 76 (Jul) at [22] (Nugee QC: entire agreement clause negatives intention to create legal relations with respect to pre-contractual statements and collateral agreements); *Sutcliffe v Lloyd* [2007] EWCA Civ 153, [2007] 2 E.G.L.R. 13 at [23]–[28] (clause did not cover understandings between the parties outside the scope of the contract which gave rise to claim based on proprietary estoppel, nor understandings which arose after the date of the entire agreement clause); *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC), (2010) 129 Con. L.R. 147 at [382] ("this Agreement and the Schedules shall together represent the entire understanding and constitute the whole agreement between the parties in relation to its subject matter and supersede any previous discussions, correspondence, representations or agreement between the parties with respect thereto ..." only prevented representations becoming terms of the agreement: a clause intended to withdraw representations for all purposes would have had to go further), approved in *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 1 C.L.C. 312 at [92] (Rix LJ: clause providing "This Agreement ... constitute the entire agreement and understanding between you and us in relation to the subject matter thereof ... this Agreement shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this Agreement" did not exclude liability for misrepresentations of any kind); *Mears Ltd v Shoreline Housing Partnership Ltd* [2013] EWCA Civ 639, [2013] C.P. Rep. 39 at [17] (simple "entire agreement" clause does not bar claim based on estoppel by representation or by convention). See also *Encyclopaedia of Forms and Precedents*, 5th edn, Vol.4(3) (2008 reissue), "Boilerplate Clauses", paras 27.1 to 27.3 and Form 27.1.

[22] *Government of Zanzibar v British Aerospace (Lancaster House) Ltd*, above, n.4. See also *Thomas Witter Ltd v TBP Industries Ltd*, above, n.16 (two separate clauses containing (a) a combination of "entire agreement" and "non-reliance" elements, and (b) limitation of claims for breach of contract unless notice given within prescribed period); *Inntrepreneur Pub Co (GL) v East Crown Ltd*, above, n.18 (successive sub-clauses containing (a) entire agreement clause and (b) clause excluding liability for misrepresentation and breach of duty). See also *Encyclopaedia of Forms and Precedents*, 5th edn, Vol.4(3) (2008 reissue), Forms 27.2–267.5 ("boilerplate" clauses: entire agreement, non-reliance and no representation); Vol.36 (2014 reissue), Form 92, cl.10 (disclaimer for contract for sale of freehold property: non-reliance and entire agreement), Forms 225–226 (various forms of exclusion of liability for misrepresentation in contract for sale of land).

[goods] which form the subject matter of this contract and accordingly they agree that all liabilities for and remedies in respect of any representations made are excluded save in so far as provided in this contract. The parties further agree that neither party has placed any reliance whatsoever on any representations agreements statements or understandings whether oral or in writing made prior to the date of this contract other than those expressly incorporated or recited in this contract."

In such a case the separate elements of the clause must be identified and each different form of exclusion or limitation must be applied separately. As will be described in the later sections of this chapter, the controls available to the courts in respect of the separate forms of exclusion or limitation will vary.

II. COMMON LAW CONTROLS OF EXCLUSION AND LIMITATION CLAUSES

(1) The Scope of the Common Law Controls

9–08 **Common law controls generally limited to questions of incorporation and interpretation of the clause.** The courts have no inherent power at common law to control the substantive fairness of contractual clauses and non-contractual notices: there is no rule at common law that a clause will not be given effect if it is unreasonable.[23] There are statutory controls, which will be discussed in a later section of this chapter. But there is no similar general control at common law. This is not, however, to say that the courts have not developed techniques at common law to regulate exclusion and limitation clauses and notices.[24] Although in the case of contractual exclusion clauses they start from the position that the parties are free to negotiate the terms of their contract, the courts view an onerous clause, such as a clause excluding or limiting a party's potential liability under the contract,[25] with suspicion. They will require evidence that the party who will be adversely affected by the clause intended it to be part of the bargain; and they will examine the language of such a clause very carefully to determine its proper scope.

9–09 **Incorporation of the clause.**[26] The court must be satisfied that the clause was properly incorporated into the contract.[27] In the case of a written contract, signed by both parties, this presents little difficulty. The claimant's signature is taken as his assent to all the written terms of the document he has signed and any other

[23] *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, HL, at 851; *Grand Trunk Railway Co of Canada v Robinson* [1915] A.C. 740, PC, at 747.

[24] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433, CA, at 439, 445; *Laceys Footware (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep. 369, CA, at 384–385.

[25] The approach at common law is not limited to exclusion and limitation clauses, but extends also to other onerous or unusual clauses: *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, above, n.24. It applies also to non-contractual notices in so far as such notices can operate to exclude or limit liabilities, e.g. in tort: *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 Q.B. 409, CA (notice excluding occupier's liability in negligence towards entrant on land).

[26] For further discussion, see Chitty, paras 13–008 to 13–017, 15–002; Furmston, paras 3.8 to 3.18; Treitel, paras 7–004 to 7–013; Anson, pp.188–193; Cheshire, Fifoot and Furmston, pp.207–215.

[27] Or that a non-contractual notice was sufficiently brought to the attention of the claimant so as to be binding on him in relation to a claim in tort: *Ashdown v Samuel Williams & Sons Ltd*, above, n.25.

terms which are expressly incorporated by a reference in the signed document.[28] But where the contract is not wholly reduced to writing, it can sometimes be difficult to decide whether a clause intended by one party to form part of the contract was in fact incorporated. The general approach in such cases is for the courts to ask whether, at the time when the contract was concluded, the defendant had taken such steps as were reasonably necessary to attempt to bring the clause to the claimant's attention.[29] If so, the claimant may be held to have agreed to the clause, even if he had not in fact intended to include it in the contract, and even if he had not seen or read the clause. This is in reality just part of the court's normal enquiry into the terms of a contract.[30] But the fact that the clause in question is an onerous or unusual clause leads the courts to approach this stage of the enquiry with particular care.[31]

9–10 **The general approach to interpretation: construction *contra proferentem*.** This is not the place for a detailed discussion about the interpretation of contracts. There are various canons of construction which are generally employed to assist a

[28] *L'Estrange v F Graucob Ltd* [1934] 2 K.B. 394, CA, at 403 (Scrutton LJ: "When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not"); *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [43] (misrepresentation corrected by the terms of the contract which the claimant signed and by which he was bound although he did not read them: the terms were "not buried in a mass of small print but appeared on the face of the documents"; the principle applied in *L'Estrange v F Graucob* "is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community": Moore-Bick LJ at [43]). For cases in Canada where the signature has been held not to show assent to unusual terms, see *Tilden Rent-a-Car Co v Clendenning* (1978) 83 D.L.R. (3d) 400 (CA Ontario); *Colonial Investment Co of Winnipeg, Man. v Borland* (1911) 1 W.W.R. 171 (Sup. Ct. Alta, affirmed on different grounds (1912) 6 D.L.R. 211); *Gray-Campbell Ltd v Flynn* [1923] 1 D.L.R. 51 (Sup. Ct. Alta; see Beck JA, dissenting). In England, see *Lloyds Bank Plc v Waterhouse* [1993] 2 F.L.R. 97, CA (esp. Sir Edward Eveleigh at 123); J. Cartwright, "A Guarantee Signed by Mistake" [1990] L.M.C.L.Q. 338 at pp.340–341; *Amiri Flight Authority v BAE Systems Plc* [2003] EWCA Civ 1447, [2003] 2 C.L.C. 662 at [15] (Mance LJ, not deciding whether there may be contracts in writing to which the principle of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, below, n.31, might apply to exclude "a provision of an extraneous or wholly unusual nature"); *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd's Rep. 446 at [48] (Evans LJ: the *Interfoto* test might apply in "an extreme case, where a signature was obtained under pressure of time or other circumstances"); cf. *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161 at [209] (Rix LJ: *Interfoto* not applicable to signed documents); *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm), [2008] All E.R. (D) 167 (Jun) at [585] (Gloster J: "Whatever the precise scope of the principle, I conclude that it must, on any basis, have a very limited application to signed contracts between commercial parties operating in the financial markets").

[29] *Parker v South Eastern Railway Co* (1877) 2 C.P.D. 416.

[30] The objective test to ascertain what obligations each party by his words and conduct has reasonably led the other to believe he was undertaking: *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1966] 1 W.L.R. 287, CA, at 339; *Harris v Great Western Railway Co* (1876) 1 Q.B.D. 515 at 530 (Blackburn J); *Smith v Hughes* (1871) L.R. 6 Q.B. 597; below, Ch.13, and see esp. para.13–34.

[31] "The more unreasonable the clause is, the greater the notice which must be given of it": *J Spurling v Bradshaw* [1956] 1 W.L.R. 461, CA, at 466 (Denning LJ); *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163, CA, at 170, 172; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433.

court in its interpretation of a contract,[32] but for the purposes of this book it is sufficient to note that where there is doubt about the meaning of a clause it will be construed *contra proferentem*: that is, against the party for whose benefit it was inserted, or who is seeking to rely on it to his advantage.[33] It is for that party to show that the clause clearly and unambiguously confers on him the benefit which he claims. This approach, originally adopted in relation to the interpretation of a grant contained in a deed,[34] was long ago extended to all contracts; and since an exclusion or limitation clause is one which can clearly have the effect of protecting one of the parties to the exclusion of the other, it is in the context of such clauses that in the modern law the courts have most often emphasised the need to construe clauses *contra proferentem*. A defendant who seeks to rely on a clause to exclude or limit his liability must therefore show that by its language the clause clearly and unambiguously applies to the liability in question.[35] If the clause might have been intended to apply to a different liability, or even if it might cover a different liability as well as the kind of liability against which the defendant seeks to protect himself,[36] the clause will be held not to cover the defendant's case.

9–11 **Modern approaches to construction *contra proferentem*.** There have been some indications that the courts might now not make quite so strict an application of the *contra proferentem* rule. There is no doubt that the rule remains that words in a contract must be read *contra proferentem* and that in order to escape from the consequences of one's own wrongdoing clear words are necessary.[37] But before Parliament intervened and provided the statutory controls in relation to unfair terms which will be discussed later in this chapter, the courts sometimes applied the *contra proferentem* rule so strictly that they placed very strained constructions on exclusion clauses to limit their effectiveness. Now, however, the courts are less likely to place strained constructions on clauses, preferring instead to implement the policy in relation to the effectiveness of clauses which is contained in the controls provided by Parliament and only to ask whether the language of

[32] Lewison, Ch.7.

[33] *ibid.*, para.7.08; E. Peel, "Whither *contra proferentem*" in A. Burrows and E. Peel (eds), *Contract Terms* (Oxford University Press, 2007).

[34] "Verba cartarum fortius accipiuntur contra proferentem": Co. Litt. 36a; Blackstone, *Commentaries*, II.xxiii.380.

[35] *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573 at 595–596 (Jacob J: "if a clause is to have the effect of excluding or reducing remedies for damaging or untrue statements then the party seeking that protection cannot be mealy-mouthed in his clause. He must bring it home that he is limiting his liability for falsehoods he may have told"). But the courts will not apply the strict rules of construction appropriate for exclusion clauses where the clause, although it has the effect of excluding liability, does so by defining an element in the claim itself: *McCullagh v Lane Fox & Partners Ltd* [1996] 1 E.G.L.R. 35, CA at 45 (disclaimer of responsibility which negatived duty of care in the tort of negligence; but such a clause is still subject to the control of the Unfair Contract Terms Act 1977: below, para.9–33); *Trade and Transport Inc v Iino Kaiun Kaisha Ltd* (*The Angelia*) [1973] 1 W.L.R. 210 at 230.

[36] e.g. clauses which might cover both negligent and non-negligent breaches of duty: below, para.9–15.

[37] *Photo Production Ltd v Securicor Transport Ltd*, above, n.23 at 846, 850.

the clause is clear and fairly susceptible of only one meaning, giving allowance for the presumption against effective exclusion which is embodied in the notion of construction *contra proferentem*.[38]

(2) Examples of the Courts' Construction of Clauses

9–12 **"Entire agreement" clauses.** It is well established that a clause in a written contract providing that the contract constitutes the "entire agreement" between the parties normally[39] has the effect that the parties' contractual obligations are to be found only in the written contract itself and not, for example, in any side agreement or collateral contract.[40] But it goes no further than this. This is simply the natural interpretation of the clause: if it were to be intended to have any wider effect, such as to exclude liability for misrepresentation, or even to exclude all remedies which are not expressly provided for in the contract,[41] clear words

[38] *Photo Production Ltd v Securicor Transport Ltd*, above, n.23 at 851 (Lord Diplock: "any need for this kind of judicial distortion of the English language has been banished by Parliament's having made these kinds of contract subject to the Unfair Contract Terms Act 1977"). For a similar point in relation to the effect of the Misrepresentation Act 1967 on the interpretation of clauses excluding liability for pre-contractual misrepresentation, see *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] Q.B. 574, CA, at 594 (Lord Denning MR, dissenting on the construction of the relevant clause). See also *Thomas Witter Ltd v TBP Industries Ltd*, above, n.35 at 598 (Jacob J: it is unnecessary after the Unfair Contract Terms Act to adopt artificial construction: "it is not for the law to fudge a way for an exclusion clause to be valid"; this decision has however been doubted in so far as it interpreted a clause widely as covering fraud: below, n.49); *AEG (UK) Ltd v Logic Resource Ltd* [1996] C.L.C. 265, CA, at 277; *Society of Lloyd's v Leighs* [1997] C.L.C. 1012 at 1033 (in the light of the Unfair Contract Terms Act, principles of narrow construction of exclusion and indemnity clauses need not now be extended to prevent clause excluding set-off for fraud from being effective). In *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep. 483 at [119] Rix LJ speculated whether this development of the rules of interpretation of exclusion clauses might call into question the strictness of the *Canada Steamship* approach to clauses excluding liability for negligence: below, para.9–15.

[39] The courts have, however, denied this normal effect to an "entire agreement" clause where, properly construed in the context of the formation of the contract, the parties did not intend the written contract to contain all the terms, but intended that the provisions of a letter of offer which enclosed the written contract for signature should continue to have effect notwithstanding the clause: *Fulton Motors Ltd v Toyota (GB) Ltd*, unreported, July 6, 1999, CA. See also *1406 Pub Co Ltd v Hoare* [2001] 23 E.G. 154 (C.S.) (collateral contract prevailed over entire agreement clause); doubted in *Inntrepreneur Pub Co (CPC) v Sweeney* [2002] EWHC 1060 (Ch), [2002] 2 E.G.L.R. 132 at [47] (Park J).

[40] Above, para.9–06. See in particular *Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] 2 Lloyd's Rep. 611 at 614. On the question of whether it excludes implied terms, See *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2003] EWHC 1964 (Comm), [2003] 2 Lloyd's Rep. 686, above, n.19.

[41] *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd* (1997) 87 B.L.R. 52, CA (clause providing that the parties "intend that their respective rights, obligations and liabilities as provided for in the Conditions shall be exhaustive of the rights, obligations and liabilities of each of them to the other arising out of, under or in connection with the Contract or the Works, whether such rights, obligations or liabilities arise in respect or in consequence of a breach of contract or of statutory duty or a tortious or negligent act or omission which gives rise to a remedy at common law" (MF/1 General Conditions, condition 44.4) held to be a comprehensive exclusion clause which excluded, inter alia, a claim under the Misrepresentation Act 1967 s.2(1), since it was a claim "arising … in connection with the Contract").

would have to be used.[42] And the courts in construing such a clause have rejected the argument that it is too technical to draw a distinction between misrepresentations and collateral warranties based on the selfsame representations: the words "this contract comprises the entire agreement between the parties" simply do not themselves exclude misrepresentations.[43]

9–13 **Exclusion of liability for fraudulent misrepresentation.** A clause might attempt to limit or exclude a party's liability for fraudulent misrepresentation either by expressly referring to liability for fraud, or by being drafted so wide as apparently to cover fraudulent, as well as non-fraudulent, misrepresentations. It is generally accepted, however, that a clause which expressly excludes or limits[44] a party's personal liability for fraud would be held ineffective at common law.[45] At

[42] *Thomas Witter Ltd v TBP Industries Ltd*, above, n.35 at 595–596 (Jacob J: "Unless it is manifestly made clear that a purchaser has agreed only to have a remedy for breach of warranty I am not disposed to think that a contractual term said to have this effect by a roundabout route does indeed do so"); *Alman & Benson v Associated Newspapers Group Ltd*, unreported, 20 June 1980; *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 W.L.R. 2333 at 2344; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 1 C.L.C. 312 at [94] (Rix LJ: "the exclusion of liability for misrepresentation has to be clearly stated. It can be done by clauses which state the parties' agreement that there have been no representations made; or that there has been no reliance on any representations; or by an express exclusion of liability for misrepresentation. However, save in such contexts, and particularly where the word 'representations' takes its place alongside other words expressive of contractual obligation, talk of the parties' contract superseding such prior agreement will not by itself absolve a party of misrepresentation where its ingredients can be proved").

[43] *Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep. 387, CA, at 395.

[44] In *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 Q.B. 621, CA, an *indemnity* against damages payable in deceit was ineffective on the basis of the doctrine of illegality; for the doctrine of illegality in the modern law, see above, para.5–32.

[45] *S Pearson & Son Ltd v Dublin Corp* [1907] A.C. 351, HL, at 353, 362; *Boyd & Forrest v Glasgow and South Western Railway Co*, 1915 S.C. (H.L.) 20 at 36; *Pan-Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyd's Rep. 496, CA, at 502 (non-disclosure); *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] 1 Lloyd's Rep. 378 at 386; see also in CA [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161 at [128] (concealment or misrepresentation inducing insurance contract); *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [16] (Lord Bingham: "it is clear that the law, on policy grounds, does not permit a contracting party to exclude liability for his own fraud in inducing the making of the contract"; see also Lord Hoffmann at [76] ("no doubt") and Lord Scott at [122]). The position may be different in relation to fraud of agents or employees: HL in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* did not decide whether a principal or employer may in law exclude his own liability for the agent/employee's fraud, but held that, if such an exclusion is possible, it must be done "in clear and unmistakeable terms on the face of the contract": see Lord Bingham (with whom Lord Steyn agreed) at [16]; Lord Hoffmann at [76]–[82] (who saw force in the submission that it may be possible to exclude liability for an agent's fraud in *performance* of the contract, but not in its *formation*); Lord Hobhouse at [98] appears to have thought that an exclusion in relation to formation of the contract is not possible (the principal should insure against his agent's fraud); Lord Scott at [122] saw no reason of public policy why a party should not exclude his liability or other remedies, for the agent's fraud in which he is not personally complicit. In *Smith v Chadwick* (1882) 20 Ch.D. 27, CA, at 44–45, Jessel MR assumed that an appropriately-drafted clause could negative a claim of deceit by negativing reliance on the fraudulent statement. Such a clause will, however, be viewed with suspicion, given the statement by Lord Loreburn LC in *S Pearson & Son Ltd v Dublin Corp* at 353–354: "it seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them".

least until the enactment of the Misrepresentation Act 1967[46] the courts used to construe widely-drafted exclusion clauses so that they did not apply to fraud: they presumed that the parties must have intended the clause only to apply to liability arising from honest (non-fraudulent) misrepresentations.[47] It has been said that such a construction is now no longer necessary, since a clause which is sufficiently general to cover liability for fraud can instead be held unreasonable, and therefore to that extent of no effect, under section 3 of the Misrepresentation Act 1967.[48] However, the courts continue generally to adopt an approach to construction which presumes that a clause was not, in the absence of clear words, intended to apply to exclude or limit liability for fraud: not only because this may more closely reflect reality,[49] but also because, if the clause is construed so as to cover fraud, it is for that reason likely to be held unreasonable in its entirety.[50]

9–14 **Exclusion of liability *except for* fraud.** In order to avoid a successful challenge to a clause on the basis that it is sufficiently wide to contravene either the common law rule that a party cannot exclude liability for his own fraud, or that the clause, by extending to claims for fraud, might thereby be held unreasonable within the statutory controls on exclusion clauses, it is not uncommon for a well-drawn exclusion clause to provide expressly that the clause does not seek to exclude or limit the parties' liability for fraud. The precise scope of such a clause depends on the language used, but if it refers generally to "fraud" it is unlikely to leave intact only claims in the tort of deceit, but may well also allow other claims where fraud has been established, such as rescission of the contract on the basis of a fraudulent misrepresentation, or claims in equity for a party's dishonest abuse of his fiduciary position.[51]

[46] Below, para.9–19.

[47] *S Pearson & Son Ltd v Dublin Corp*, above, n.45; *Walker v Boyle* [1982] 1 W.L.R. 495 at 503.

[48] *Thomas Witter Ltd v TBP Industries Ltd*, above, n.35 at 598. For the application of Misrepresentation Act 1967 s.3, see below, paras 9–19 to 9–30.

[49] *Government of Zanzibar v British Aerospace (Lancaster House) Ltd*, above, n.42 at 2346–2347, Judge Jack QC (expressly disagreeing with the approach of Jacob J in *Thomas Witter Ltd v TBP Industries Ltd*, above, n.35): "even in the contracts of today it surely has the ring of common sense that clauses dealing with representations are not intended by the parties to apply where a representation has been fraudulently made"). This general approach is confirmed by *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*, above, n.45 at [16], [68], [97] (Lord Hobhouse: "Fraud and negligence are different from each other in kind. Commercial men recognize the risk of want of care or skill; they do not contemplate fraud in the making of the contract"); *Bottin International Investments Ltd v Venson Group Plc* [2006] EWHC 3112 (Ch), [2006] All E.R. (D) 111 (Dec) at [154] (non-reliance clause would not prevent claim in deceit); *Foodco UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [166]–[167] ("non-reliance" clause cannot exclude liability for party's own fraud).

[50] *Government of Zanzibar v British Aerospace (Lancaster House) Ltd*, above, n.42 at 2346–2347, Judge Jack QC. For the difficulties of severance, see below, para.9–24.

[51] Cf. *Cavell USA Inc v Seaton Insurance Co* [2009] EWCA Civ 1363, [2009] 2 C.L.C. 991 at [24]–[29] (contractual release of claims "whether at law or in equity … save … in the case of fraud" allowed claim to proceed for at least some cases of dishonesty abuse of fiduciary position: reference to "equity" assisted the argument that it was not referring only to the (common law) tort of deceit, but "fraud" is wider than simply the tort of deceit). The "no-reliance" clause in the *Law Society Standard Conditions of Sale* (5th edn, 2011), special condition 6, "does not exclude liability for fraud or recklessness": a curious provision, since fraud includes "recklessness": above, para.5–15.

9–15 **Exclusion of liability for negligence.** At common law a clause may have the effect of excluding or restricting liability for negligence, whether the claim be based on the defendant's breach of a duty of care arising in tort[52] or in contract,[53] or a claim based on negligence brought in equity[54] or under statute.[55] English law does not distinguish for this purpose between negligence and gross negligence: the dividing line is between negligence (which may be excluded by an appropriately-drawn clause) and fraud or dishonesty (which may not[56]).[57] However, the courts are cautious in their construction of a clause on which a defendant seeks to rely to exclude his liability for negligence. If a clause expressly and unambiguously covers the defendant's liability in negligence, the courts will give effect to the exemption at common law.[58] But a clause which is drafted more generally will be held to cover the liability only if the wording of the clause is wide enough on its ordinary meaning to cover negligence and if there is no head of liability, other than negligence, which it might realistically have been intended to cover.[59] This approach to the construction of exclusion clauses is based on the assumption that[60]:

[52] e.g. *Smith v Eric S Bush* [1990] 1 A.C. 831, HL.

[53] *Alderslade v Hendon Laundry Ltd* [1945] K.B. 189, CA.

[54] *Armitage v Nurse* [1998] Ch. 241, CA, at 253–254 (exclusion of trustee's liability under settlement "unless such loss or damage shall be caused by his own actual fraud").

[55] A claim under the Misrepresentation Act 1967 s.2(1), although in substance relating to misrepresentations made negligently (above, para.7–24) is not a claim in negligence and so is not necessarily effectively excluded by a clause which expressly refers to a "negligent act or omission"; nor is it a claim based on breach of statutory duty. But it can be excluded by an appropriately-drawn clause: *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd*, above, n.41 at 70. Whether the strict rule of interpretation in the *Canada Steamship* case (below, n.59) applies to a clause purporting to exclude claim under s.2(1) depends on whether it is treated as a claim in "negligence" for the purposes of that rule, a question raised (but not answered) by Rix LJ in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep. 483 at [117]. Cf. however *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161 at [136] (Rix LJ: "since negligence is not a condition precedent of a right to claim under s.2(1), I do not see why it needs to be expressly or impliedly excluded").

[56] Above, para.9–13.

[57] *Armitage v Nurse*, above, n.54 at 254. Civil law systems, however, generally treat gross negligence (*culpa lata; faute lourde*) in the same manner as fraud; G.H. Treitel, *Remedies for Breach of Contract* (Oxford: Clarendon Press, 1988), p.11.

[58] There is then a second question: whether the defendant will be prevented from relying on the clause under the statutory rules discussed below, paras 9–18 et seq.

[59] *Canada Steamship Lines Ltd v The King* [1952] A.C. 192, PC, at 208, Lord Morton, applying the law of Canada but basing his analysis on the earlier English case of *Alderslade v Hendon Laundry Ltd*, above, n.53. Lord Morton's judgment has been regularly cited and followed in later English cases: see, e.g. *Smith v South Wales Switchgear Co Ltd* [1978] 1 W.L.R. 165, HL, at 167, 172, 178 (applied to indemnity clause); *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400, CA, at 419–420, 421–422 (Lord Denning MR differed at 413–415); *The Raphael* [1982] 2 Lloyd's Rep. 42, CA; *EE Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 W.L.R. 1515, CA, at 1521. See also *Macquarie Internationale Investments Ltd v Glencore (UK) Ltd* [2008] EWHC 1716 (Comm), [2008] 2 C.L.C. 223 at [70] (Walker J: clause did not expressly exclude negligence, but "the obvious claim … which everyone must have had in mind when clause 6.8 was drafted, was a claim in negligence").

[60] *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd*, above, n.59 at 419 (Buckley LJ); *Toomey v Eagle Star Insurance Co Ltd (No.2)* [1995] 2 Lloyd's Rep. 88 at 92–93; *Greenwich Millennium Village Ltd v Essex Services Group Plc* [2014] EWCA Civ 960, [2014] 1 W.L.R. 3517 at [91], [94] (Jackson LJ: "The *Canada Steamship* principle is a rule of construction, not a rule of law. As Devlin LJ stated in *Walters v Whessoe* [(1960) 6 B.L.R. 23, CA, at 34] the rule of construction rests on the

> "it is inherently improbable that one party to the contract should intend to absolve the other party from the consequences of the latter's own negligence. The intention to do so must therefore be made perfectly clear, for otherwise the court will conclude that the exempted party was only intended to be free from liability in respect of damage occasioned by causes other than negligence for which he is answerable."

If, therefore, the clause does not expressly cover liability in negligence, and if it might have been intended to cover a head of liability other than negligence, the courts will construe it as not excluding negligence. This is again an illustration of the general approach to construction of the contract *contra proferentem*.

Where, however, the remedy sought is one which does not depend on whether negligence is proved (such as rescission of the contract, which is available for all misrepresentations, whether fraudulent, negligent or innocent[61]) it is not appropriate to apply this rule so as to limit the effect of an exclusion clause to only innocent misrepresentations, although it is still necessary to construe the exclusion or limitation clause to check that there is a sufficiently clear intention to exclude the remedy in the circumstances which have occurred.[62]

9–16 **Limitation clauses.** In construing exclusion and limitation clauses the courts always pay attention to the scope of the clause: in general terms the less wide-ranging the scope, the less strict the approach to its interpretation. This follows from a belief that it is more likely that a clause was intended to have its literal meaning where the impact of the clause on the defendant's liability is more limited. The courts have said, for example, that they will take a less strict approach in construing a clause which does not exclude liability altogether, but only limits liability to a particular sum of money,[63] or limits the range of recoverable losses.[64] Such a clause will be read *contra proferentem* and must be

presumed intention of the parties … In my view the rule of construction stated in the *Canada Steamship* case and *Walters v Whessoe* is of general application. Nevertheless it is based on the presumed intention of the parties. In applying that rule the court must have regard to the commercial context of the contract under consideration.").

[61] Above, para.4–04.

[62] *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep 61 at [12], [67], [95], [116]; see also *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161 at [126]–[141] (Rix LJ), disapproving on this point the approach of Coleman J in *Toomey v Eagle Star Insurance Co Ltd (No.2)*, above, n.60 at 93, who applied *Canada Steamship Lines Ltd v The King*, above, n.59, and held that a clause which provided that a "contract is neither cancellable nor voidable by either party" successfully excluded the remedy of rescission but only in relation to innocent misrepresentation because it was not sufficiently clear that the clause was intended to cover negligent misrepresentation, and therefore prima facie was to be construed as directed at the non-negligent ground of liability. In *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* Lord Bingham in HL at [16] said that it was "common ground, and rightly so" that a clause which provided that the insured "shall have no liability of any nature to the insurers for any information provided by any other parties" precluded avoidance of the policy by the insurers on the ground of innocent misrepresentation by the brokers negotiating the policy. Cf. however, the Misrepresentation Act 1967 s.3, which provides for both exclusions of "any liability" and exclusions of "any remedy"; and rescission is a remedy rather than a liability.

[63] *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 W.L.R. 964, HL; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, HL.

[64] *EE Caledonia Ltd v Orbit Valve Co Europe*, above, n.59 at 1521 (clause excluding liability for consequential loss in favour of both parties).

(1) Misrepresentation Act 1967, Section 3[75]

9–19 **Scope of the provision.** Section 3 of the Misrepresentation Act 1967[76] provides as follows:

> "3.—
> (1) If a contract contains a term which would exclude or restrict—
> (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
> (b) any remedy available to another party to the contract by reason of such a misrepresentation,
> that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.
> (2) This section does not apply to a term in a consumer contract within the meaning of Part 2 of the Consumer Rights Act 2015 (but see the provision made about such contracts in section 62 of that Act)."

Under this provision a contractual term in a non-consumer contract,[77] even if at common law it is effective to exclude or restrict the defendant's liability for misrepresentation or the remedies for misrepresentation which would otherwise be available to the claimant, is only effective to the extent that the defendant can show that it is reasonable.

9–20 **"If a contract contains a term".** Section 3 only applies to limit the effectiveness of *contractual* terms which exclude or restrict the liability or remedy. It does not therefore apply to a non-contractual notice, such as a disclaimer in the particulars of sale issued by an estate agent which do not

[75] Chitty, paras 7–143 to 7–153; Furmston, paras 3.95 to 3.96; Treitel, paras 9–123 to 9–134; Anson, pp.352–355; Cheshire, Fifoot and Furmston, pp.376–378.

[76] As substituted by Unfair Contract Terms Act 1977 s.8, and amended by Consumer Rights Act 2015, Sch.4 para.1. The original text read:

"3.—If any agreement (whether made before or after the commencement of this Act) contains a provision which would exclude or restrict—

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation;

that provision shall be of no effect except to the extent (if any) that, in any proceedings arising out of the contract, the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case."

The purpose of the substitution was to bring the provision into line with the scheme of the Unfair Contract Terms Act 1977, and to enable a direct cross-reference to be made to the test of "reasonableness" under the 1977 Act. See also below, para.9–25. The Tenth Report of the Law Reform Committee, Cmnd. 1782 (1962) paras 23–24, had proposed only to restrict effective exclusion clauses to cases where the representor could not show that he had reasonable grounds for believing the representation to be true.

[77] That is, any contract except one between a trader and a consumer within the meaning of the Consumer Rights Act 2015 (but excluding a contract of employment or apprenticeship): 2015 Act s.61(1)–(3), and "trader" and "consumer" are defined in s.2 (see s.76(2)); below, para.9–37. S.3 of the 1967 Act therefore covers not only business-to-business contracts, but also contracts between two private individuals, neither acting for purposes relating to their trade, business, craft or profession.

themselves form part of the contract of sale.[78] The section does not require the exclusion clause to be in the same contract in respect of which it constitutes an exclusion or limitation of liability,[79] but before the clause can be relied on by the defendant as effective at common law to exclude or limit the particular liability[80] it will have to be sufficiently clear that it is referring to that liability.

The operation of the section is not, however, limited in its effect to clauses contained in standard terms of business: it applies to *any* non-consumer[81] contract containing a term which would exclude or restrict liability or remedies arising by reason of a misrepresentation by a party to a contract.[82]

9–21 **"exclude or restrict any liability … or any remedy".** Section 3 controls not only clauses which wholly exclude liability, but also clauses which restrict the liability or exclude or restrict any remedy arising from misrepresentation. A clause which imposes a limit on the quantum of damages recoverable for misrepresentation will therefore be covered by the section. So will a clause which excludes a particular remedy for misrepresentation,[83] even though it does not touch on the availability of other remedies.

Sometimes a clause has to be analysed very carefully to check whether in substance, even if not by its literal language, it excludes or restricts liability or a remedy for misrepresentation.[84] So a clause which seeks to negative an element of a claim for misrepresentation might, in substance, be a clause which excludes

[78] *McGrath v Shah* (1989) 57 P. & C.R. 452 at 460–461; *Collins v Howell-Jones* [1981] E.G.D. 207, CA, at 212; *Cremdean Properties Ltd v Nash* [1977] E.G.D. 55 at 59, [1977] E.G.D. 63, CA, at 72.

[79] If such a narrow provision had been intended s.3(1)(a) would have been drafted: "any liability to which a party to *the* contract", rather than "*a* contract". In *Society of Lloyd's v Leighs*, above, n.68 at 1036 Colman J was rather too hesitant on this issue.

[80] Without which s.3 is unnecessary anyway: above, para.9–10. Notice also the opening words of s.3(1): "If a contract contains a term *which would exclude or restrict*…"; i.e. the section presupposes that the common law rules have been satisfied already and the clause will be effective but for the operation of s.3.

[81] Above, n.77.

[82] *British Fermentation Products Ltd v Compair Reavell Ltd* (1999) 66 Con. L.R. 1 at 14. Cf. the limit on the operation of the Unfair Contract Terms Act 1977: below, paras 9–32, 9–34. However s.3 does not extend to exclusions or restrictions of liability or remedies under contracts for the international sale or supply of goods: Unfair Contract Terms Act 1977 s.26 (on which see, e.g. *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 C.L.C. 145); *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2009] EWCA Civ 290, [2010] Q.B. 86 at [19] (reference in s.3 to the 1977 Act makes the latter the controlling instrument). Note, however, that other significant exclusions from scope of the 1977 Act (e.g. insurance contracts, contracts relating to creation or transfer of interest in land, intellectual property rights, securities: Sch.1) apply by their terms only to particular sections of the 1977 Act and will not limit the scope of operation of s.3 Misrepresentation Act 1967.

[83] Clauses excluding rights of set-off: *WRM Group Ltd v Wood*, above, n.68; *Skipskreditforeningen v Emperor Navigation*, above, n.68 at 74 (Mance J: "the right of set-off represents a means of recovery, and so a remedy in any ordinary sense of the word and within section [3(1)(b)]", disapproving the contrary view of Colman J in *Society of Lloyd's v Leighs*, above, n.68 at 1035–1036).

[84] There is no equivalent within the Misrepresentation Act of the provision in the Unfair Contract Terms Act 1977 s.13(1), to the effect that the 1977 Act also prevents "excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty"; and during the passing of the Misrepresentation Bill the Solicitor-General did not give a direct answer to a question about how non-reliance clauses would be caught by s.3: *Hansard*, HC Vol.741, 20 February 1967, cols 1375–1376, 1387–1390. However, even without an equivalent provision the courts have

CHAPTER 16

INTRODUCTION: NO GENERAL DUTY OF DISCLOSURE[1]

I. SCOPE OF THIS PART

Duties of disclosure in the formation of contracts. This Part of the book is concerned with the liability of one contracting party to the other party for the failure to disclose information that was relevant to the latter's decision to enter into the contract. Such a liability will necessarily constitute a breach of a duty of disclosure, and therefore our inquiry is into the situations in which the courts recognise duties of disclosure in the formation of a contract. There are other situations in which the law will hold that one party owes a duty to disclose information to the other; for example, during the performance of a contract, or in dealings between them during the currency of a particular relationship between the parties. These are not, however, within the scope of this book and will therefore not be considered in detail. **16–01**

II. THE GENERAL RULE: NO LIABILITY FOR NON-DISCLOSURE

The traditional starting-point: no general pre-contractual duty to disclose. English law does not impose on parties who are negotiating for a contract a general obligation to disclose information: that is to say, the starting-point is that each negotiating party may remain silent, even as to facts which he believes would be operative on the mind of the other.[2] This does not mean that no party ever has an obligation to disclose information: the circumstances in which the law does recognise a duty to disclose are discussed in Chapter 17. But the burden **16–02**

[1] On non-disclosure generally, see Spencer Bower (Non-Disclosure); Chitty, paras 1–162, 7–155 to 7–181; Furmston, paras 4.28–4.31; Treitel, paras 9–136 to 9–166; Anson, pp.358–373; Cheshire, Fifoot and Furmston, pp.378–387; A. Duggan, M. Bryan and F. Hanks, *Contractual Non-Disclosure* (Melbourne: Longman, 1994).

[2] *Davies v London and Provincial Marine Insurance Co* (1878) 8 Ch.D. 468 at 474. The strongest statement is by Blackburn J in *Smith v Hughes* (1867) L.R. 6 Q.B. 597 at 607; below, para.16–04; see also Cockburn CJ at 603–604 and Hannen J at 610–611, statements which are more closely tied to the facts of the case (which involved a sale by sample). For a more recent reaffirmation of this position relying, inter alia, on the judgment of Blackburn J, see *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665, CA, at 798–799.

is on the party who claims a remedy in consequence of the defendant's failure to speak to show that there was, in the circumstances, a duty to disclose.[3]

16–03 **Non-disclosure, misrepresentation and mistake.** This approach to a claim of non-disclosure is in marked contrast to that taken to a claim of misrepresentation. Part I of this book showed that once a misrepresentation is established the claimant has a range of remedies. The more cautious approach to a claim of non-disclosure is a consequence of the distinction between misrepresentation and non-disclosure, viewed in the context of the approach taken by English law to the formation of a contract. A claimant who seeks to avoid a contract on the ground of either non-disclosure or misrepresentation will typically be claiming that he made a mistake, or entered into the contract on the basis of assumptions as to the relevant surrounding circumstances which he now knows were inaccurate; and now that he knows the truth, he says that he would not have entered the contract had he not made the mistake or made those assumptions.[4] In the case of a misrepresentation, he alleges that it was the defendant's misrepresentation that caused him to make the mistake: the defendant's words or conduct communicated information on which the claimant relied in deciding to enter into the contract.[5] But in the case of non-disclosure the defendant has done nothing to cause the mistake or to give rise to the claimant's assumptions as to the circumstances surrounding the contract; he failed to give the claimant relevant information which would have corrected the mistake or false assumption. A claim of non-disclosure therefore falls between mistake and misrepresentation: the claimant is not simply relying on his own mistake or misunderstanding; but nor does he say that the defendant caused it. He claims that the defendant should have told him something to correct the mistake or to inform him better about the circumstances relevant to his decision to enter into the contract, and that he is entitled to a remedy in consequence of the defendant's failure to fulfil this duty.

16–04 **The reluctance to impose duties of disclosure.** Legal systems differ in their general approach to duties of disclosure; and the contrast in this area between English law and European civil law jurisdictions is particularly sharp. This is therefore an area where a brief comparison with other systems' approaches can illuminate the underlying rationale of the approach taken by English law. Two particular features of the English law of contract, which contrast with the corresponding rules within civil law systems, can be mentioned by way of explanation: the general view of the relationship between parties during the negotiations; and the significance given to a party's mistake in the formation of a contract.

First, it can be said that English law takes a very narrow view, not only about duties of disclosure, but more generally about liability between negotiating

[3] *Davies v London and Provincial Marine Insurance Co*, above, n.2 at 474.

[4] Mistake assumes a positive state of mind about the facts or law: above, para.12–03; a claim for non-disclosure may, however, be based on a less precise state of mind—it can be sufficient to show *forgetfulness* or *ignorance* of the circumstances that would have been relevant if they had been known. However, the gist of the claim in non-disclosure is not the claimant's state of mind but the defendant's failure to provide relevant information to the claimant.

[5] Above, para.1–04.

parties during the pre-contractual phase. There is no general heading of "pre-contractual liability" in the English contract law textbooks,[6] whereas continental European jurisdictions generally find a home for such a principle.[7] Although the scope of "pre-contractual liability" can extend to other, very different matters[8] it can also encompass the duty of disclosure during the negotiations, because the legal systems which accept a generalised form of pre-contractual liability do so on the basis of a duty of good faith between negotiating parties; and the duty to disclose can be linked to the duty to negotiate in good faith. This is not to say that commercial parties in continental European jurisdictions have onerous altruistic duties from the moment that their negotiations begin, nor that each party has to lay all his (commercially sensitive) cards on the table during the negotiations. All legal systems recognise the independence of the parties negotiating a contract and start from the same position: that each is entitled to look after his own interests during the negotiations. However, although this is not the place to explore the topic in detail,[9] it can be said that European civil law jurisdictions are generally more prepared to recognise that the relationship between negotiating parties—even commercial parties—can change during the negotiations so that each is no longer acting completely at arm's length; and the principle—or, at least, the language—of "good faith" is called upon to explain this. By contrast, the English courts have not admitted a general principle of good faith during the negotiations;

[6] Chitty, paras 1–159 to 1–164 is an exception; but that passage is written by way of explanation that the English approach is very different from civil law jurisdictions: see esp. para.1–164. See also Cartwright (Formation), Ch.2.

[7] The place for the principle varies; some legal systems (e.g. France) impose liability in tort for "pre-contractual fault"; others (e.g. Germany) have an autonomous principle of *culpa in contrahendo*; Chitty, para.1–164. For a survey of many common law and civil law jurisdictions, see J. Cartwright and M. Hesselink (eds), *Precontractual Liability in European Private Law* (Cambridge University Press, 2009); E.H. Hondius (ed.), *Precontractual Liability* (Kluwer, Deventer, 1990); and for source materials (in English) on several European jurisdictions, see H. Beale, B. Fauvarque-Cosson, J. Rutgers, D. Tallon and S. Vogenauer, *Cases, Materials and Text on Contract Law*, 2nd edn (Oxford: Hart Publishing, 2010), Ch.9. See also P. Giliker, "A Role for Tort in Pre-Contractual Negotiations? An Examination of English, French and Canadian Law" (2003) 52 I.C.L.Q. 969.

[8] e.g. whether liability can be imposed on a party who negotiated in bad faith and with an ulterior motive, never really intending to conclude the final contract with the claimant; or failed to warn the claimant sufficiently promptly of his decision not to proceed with the final contract and thereby allowed the claimant to continue to run up expenses preparing for the contract; or broke off the negotiations wrongfully in such a way as to inflict loss on the claimant—for example, at the very last moment at the end of detailed and lengthy negotiations, when the contract was about to be signed.

[9] See J. Cartwright and M. Hesselink, *Precontractual Liability in European Contract Law* (Cambridge University Press, 2009); R. Sefton-Green, *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge University Press, 2005); R. Zimmermann and S. Whittaker, *Good Faith in European Contract Law* (Cambridge University Press, 2000); Lando and Beale, arts 1.102(1), 1.201, 2.301 and corresponding Comment and Notes; C. von Bar and E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition* (Munich: Sellier, 2009), art.II.-3:301, and corresponding Comments and Notes which outline the relationship between the rules presented in the DCFR and national laws.

indeed, they have gone further and have rejected the notion of duties between negotiating parties that arise other than from contractually binding promises, or from making misrepresentations[10]:

> "the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations."

Secondly, legal systems, such as those in continental Europe,[11] which in their theory of contract focus on the consent of the contracting party, and which therefore have relatively wide doctrines of mistake, might be expected also to develop quite readily duties of disclosure; or, at least, there is less likely to be resistance to such development.[12] But English law is reluctant to allow a claimant to rely on his mistake to render a contract void,[13] and places more emphasis on the defendant's responsibility in having caused the mistake: misrepresentation. Consistently with this restrictive approach to mistake, English law starts from the strong assumption that there is no general duty of disclosure[14]:

> "whatever be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor."

16–05 **Silence as misrepresentation.** Sometimes what appears to be silence may in fact amount to a misrepresentation. To establish a claim based on misrepresentation the claimant must show that the defendant communicated a falsehood to him: this can be through the defendant's actions, as well as his words; and by the falsehood which is hidden in a true statement. Misrepresentations by conduct and by "half-truth" (statements which are literally true but misleading) have been discussed earlier.[15] The fundamental distinction is between silence which has the effect of misleading the claimant, and silence which simply fails to illuminate the facts or the circumstances surrounding the contract as the claimant already (wrongly) believes them to be. In this Part, we are concerned only with the latter

[10] *Walford v Miles* [1992] 2 A.C. 128 at 138 (Lord Ackner). This statement was not made in the context of a claim for non-disclosure, and is a particularly strong statement; some commentators would say, too strong; cf. *Petromec Inc v Petroleo Brasileiro SA* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep.121 at [121]. But it illustrates the general starting-point of English law, and its contrast with the general approach of the civil law.

[11] Above, para.1–05.

[12] In French law the general pre-contractual duty of disclosure is now explicit in the Civil Code, which was reformed with effect from 1 October 2016: see art.1112–1; and there are numerous specific duties of disclosure in the regimes governing particular types of contract (including consumer contracts). This had already been developed by the courts before the 2016 reform; for a detailed discussion, see J. Ghestin, G. Loiseau and Y.-M. Serinet, *La Formation du Contrat*, 4th edn (Paris: L.G.D.J., 2013), paras 1512–1830. See also, more generally, J. Ghestin (French Report), "The Pre-contractual Obligation to Disclose Information" in *Contract Law Today: Anglo-French Comparisons* (D. Harris and D. Tallon, eds, 1989), Ch.4; M. Fabre-Magnan, *De l'Obligation d'Information dans les Contrats: Essai d'une Théorie* (Paris: L.G.D.J., 1992).

[13] Above, para.12–13.

[14] *Smith v Hughes*, above, n.2 at 607 (Blackburn J); *Walters v Morgan* (1861) 3 De G. F. & J. 718 at 724, 45 E.R. 1056 at 1059 (Lord Campbell LC: "simple reticence does not amount to legal fraud, however it may be viewed by moralists").

[15] Above, paras 3–04, 3–08.

form of silence, that which has not actively misled the claimant. Only if the claimant cannot find a misrepresentation should he seek to establish that the defendant was in breach of a duty to disclose information, because that is generally a more difficult claim and the remedies are less extensive than the remedies for misrepresentation.[16]

Non-disclosure as the omission to speak. Liability for non-disclosure is liability for omission. It is therefore not surprising that the courts have been cautious in imposing liability. We saw earlier[17] that for a long time the courts had difficulty in accepting that there should be liability for non-fraudulent statements where a party had given no contractual warranty about the truth of his statement. In this context words were seen as posing more of a problem than acts; non-fraudulent statements more than fraudulent; claims for economic loss more than claims for physical damage. But at least in such cases the defendant is to be made liable for having actively caused the undesirable state of affairs against which the claimant seeks a remedy. Given, however, that liability for non-disclosure involves a claim that there was not even a positive misrepresentation but only a failure to make a statement which would have avoided the claimant's undesirable state of affairs, one can understand why the courts have required the claimant to show not simply that, had the defendant provided the information in question, the undesirable consequence could have been avoided, but also *why* the defendant *should* have provided it. **16–06**

Could English law develop more generalised duties of disclosure? One might ask whether there is scope for reform of the law so as to impose more generalised duties of disclosure. In the eighteenth century Lord Mansfield saw the possibility; but also saw it in terms of a generalised principle of good faith between contracting parties[18]: **16–07**

> "The governing principle is applicable to all contracts and dealings.
>
> Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.
>
> But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon. *Aliud est celare; aliud, tacere; neque enim, id est celare quicquid reticeas; sed cum quod tu scias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire.*[19]
>
> This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of

[16] Below, Ch.17.

[17] The arguments have varied in relation to different remedies. The courts found particular difficulties in relation to claims for damages for negligent misrepresentation: above, paras 6–01 to 6–05. Rescission was allowed more easily for non-fraudulent misrepresentation, although there was some initial hesitation in moving beyond fraud: above, paras 4–02 to 4–04. We shall see later that the arguments in favour of imposing duties of disclosure also vary according to the remedy sought, and the courts are more reluctant to impose a remedy in damages for non-disclosure than to allow rescission of the contract: below, paras 17–43, 17–44, 17–45.

[18] *Carter v Boehm* (1766) 3 Burr. 1905 at 1909–1910, 97 E.R. 1162 at 1164–1165. For discussion of the case, with a historical perspective, see S. Watterson, "*Carter v Boehm* (1766)" in C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Contract* (Oxford: Hart Publishing, 2008), p.59.

[19] Cicero, *De Officiis*, Book 3, paras 52, 57: "Concealment is one thing, silence is another … Concealment is not just holding something back in silence, but when, for your own benefit, you intend that those who have an interest in knowing what you know should remain in ignorance of it."

the thing concealed.

There are many matters, as to which the insured may be innocently silent …

Men argue differently, from natural phenomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other.

The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason, to suspect.

The question therefore must always be 'whether there was, under all the circumstances at the time the policy[20] was under-written, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risque understood to be run.'"

In substance, Lord Mansfield argued that there is a general principle of good faith between contracting parties; this does not impose a general duty of disclosure, because it is entirely in accordance with the principle of good faith that one should remain silent and leave it to the other party to discover information for himself. But, depending on the nature of the contract, and the nature of the relationship between the parties and their relative positions of skill and knowledge, the general principle of good faith can lead to a duty on one party to provide certain types of information to the other. And this was applied to the particular relationship between insured and insurer[21]:

> "Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist."

From the general principle, a concrete rule was deduced for insurance contracts as a class. The decision in this case was the foundation of the common law duties of disclosure in insurance contracts.[22] The reasoning, however, has not survived,[23] and the general duty of disclosure which was recognised by the common law in relation to insurance contracts was seen as a very particular situation, an exception to the general reluctance of English law to find such duties. Even in the limited context of insurance contracts, the common law duties of disclosure have now been redefined by statute—and, in the case of the consumer's duty to make disclosure to the insurer before a consumer insurance contract, abolished and replaced with a duty on the consumer to take reasonable care not to make a misrepresentation to the insurer.[24] However, Lord Mansfield's general reasoning remains of interest, and it would be open to the courts to revisit it. Lord Mansfield's approach—that the relationship between the parties, and their relative positions of skill and knowledge can justify the imposition of duties on one (the "stronger") in favour of the other—is not alien to the topics discussed

[20] The case concerned a contract of insurance.

[21] *Carter v Boehm*, above, n.18 at 1909, at 1164.

[22] Below, paras 17–06 et seq.

[23] *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 A.C. 501, HL, at 543 (Lord Mustill).

[24] Consumer Insurance (Disclosure and Representations) Act 2012 s.2; above, para.7–71; below, paras 17–06, 17–21.

in this book. It is used in the context of various remedies for misrepresentation.[25] And in recent years there has been an increase in the information which parties—in particular, consumers—can by law expect to be given before concluding a contract.[26] However—as discussed earlier in this chapter—the fundamental difference between misrepresentation, on the one hand, and duties of disclosure, on the other, taken in the context of the general approach to the relationship between the parties during the negotiations for a contract, is likely to lead the English courts to be very cautious in any such development in domestic law.[27]

General approach to finding duties of disclosure and remedies for non-disclosure. 16–08 As the law stands today, there is certainly no general duty of disclosure and no single, general test for whether a party owes a duty to disclose information. This does not, however, mean that one cannot categorise the kinds of circumstance in which the courts will impose liability for non-disclosure. Sometimes they will hold that the particular type of contract carries with it a duty on one or both parties to disclose information; and sometimes they will say that, regardless of the type of contract, the type of relationship between the particular parties carries with it the duty on one of them to disclose information to the other. In addition, a party will sometimes be required by statute to disclose information. Moreover, where there is a duty to disclose information, the consequences of non-disclosure—the remedies available to the party to whom disclosure should have been made—will vary. In Part 1 of this book we saw that the courts do not take a unitary view of liability for misrepresentation: although there are some general characteristics of a "misrepresentation"[28] the detail varies from one

[25] e.g. to determine whether the claimant is entitled to rely on a statement (for the remedy of rescission); whether the defendant owed a duty of care in tort to the claimant; whether a pre-contractual representation was warranted in the contract: above, paras 3–12, 3–46, 3–47.

[26] Below, paras 17–59 to 17–61.

[27] Anson notes at pp.372–373 the increase in regulatory requirements of disclosure and speculates whether legislative intervention might be indicative of the underlying rationale and principle of a duty of disclosure, and therefore lead reform in this area. This is very much the approach that was taken in French law to justify an extension of the duties of disclosure: J. Ghestin, above, n.12. See also M. Fabre-Magnan, above, n.12 and "Duties of Disclosure and French Contract Law" in *Good Faith and Fault in Contract Law* (J. Beatson and D. Friedmann, eds, Oxford: Clarendon Press, 1995), p.99; P. Legrand, "Pre-contractual Disclosure and Information: English and French Law Compared" (1986) 6 O.J.L.S. 322; P. Giliker, "Regulating Contracting Behaviour: The Duty to Disclose in English and French Law" (2005) 13 *European Review of Private Law* 621. The underlying principles of contract in civil systems lend themselves more readily to such development: above, para.16–04. For general and comparative discussion see H. Kötz and A. Flessner, *European Contract Law*, Vol.1 (trans. T. Weir, Oxford: Clarendon Press), pp.198–205; H. Beale, B. Fauvarque-Cosson, J. Rutgers, D. Tallon and S. Vogenauer, *Cases, Materials and Text on Contract Law*, 2nd edn (Oxford: Hart Publishing, 2010), section 10.4; R. Sefton-Green, *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge University Press, 2005), esp. pp.24–30; and for economic arguments see A.T. Kronman, "Mistake, Disclosure, Information, and the Law of Contracts" (1978) 7 J.L.S. 1; R.A. Posner, *Economic Analysis of Law*, 9th edn (New York: Wolters Kluwer, 2014), para.4.7; M. Fabre-Magnan, above, n.12; B. Rudden, "Le juste et l'inefficace, pour un non-devoir de renseignement" (1985) R.T.D.Civ. 91. In recent years there have been significant influences from European Union law, particularly in relation to consumer contracts, although the present and future position is now uncertain: see above, para.1–05; below, para.17–59.

[28] Above, Ch.3.