(4) The claimant was in fact induced by the representation to act or refrain from acting.
(5) The claimant thereby suffered loss.[7]

Each of the first four elements of the cause of action is considered separately in detail below; damages are considered in Ch.22.

1–004 The tort of deceit is only complete once the representee has acted to his detriment by reason of the representation: as in the tort of negligence, damage is the "gist" of the tort.[8]

1–005 A claim in deceit is to be distinguished from other claims arising out of misrepresentations or misstatements:

(1) A claim for negligent misstatement, as developed in the case law since the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[9] requires the circumstances to warrant the imposition of a duty of care on the representor. Whether there is a duty of care owed by the representor to the representee is irrelevant in a claim for deceit; the ambit of the tort is instead circumscribed by the requirements to demonstrate knowledge of (or recklessness as to) falsity and intended reliance by the representee.
(2) A claim under s.2(1) of the Misrepresentation Act 1967 presupposes that the representation has induced entry into a contract between representor and representee; but once this is established, a claim in damages will lie without having to establish fraud, if the representation would have given rise to a claim in damages had it been made fraudulently (unless the representor can prove that he had reasonable grounds to believe and did believe the representation to be true).[10] A claim in deceit, in contrast, will lie whether or not a contract has resulted from the misrepresentation, and, if a contract has resulted, whether or not the representor is a party to it.
(3) There are also statutory provisions governing liability for statements published in connection with listed securities, including (but not limited to) ones made dishonestly. These provide an important overlay upon the common law claim in deceit in connection with such statements and are considered separately in this book, in Ch.17.

[7] The statement of the elements of the tort in *Eco 3 Capital Ltd v Ludsin Overseas Ltd* [2013] EWCA Civ 413, per Jackson LJ at [77], has recently proved popular with first instance judges: see e.g. *Khakshouri v Jimenez* [2017] EWHC 3392 (QB), per Green J at [17]; and *London Executive Aviation Ltd v The Royal Bank of Scotland Plc* [2018] EWHC 74 (Ch), per Rose J at [255].
[8] *Smith v Chadwick* (1884) 9 App Cas 187, per Lord Blackburn at 195, citing *Pasley v Freeman* (1789) 2 Sm L C 66, at 73, 86 (8th ed); *Briess v Woolley* [1954] A.C. 333; *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48; [2017] A.C. 142, at [62], per Lord Clarke ("The vice of the defendant's conduct consists in dishonestly making a false representation with the intention of influencing the representee to act on it to its detriment. If it does not cause the representee to do so, the mischief against which the tort provides protection will not have occurred").
[9] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465.
[10] Though of course it is perfectly possible for a fraudulent misrepresentation to have induced entry into a contract, in which case the claimant may have claims both under the Misrepresentation Act 1967 and in the tort of deceit.

1–006 In short, in deceit the law provides an avenue for redress when the five elements of the cause of action summarised above are made out, not because of any existing or resulting factual or legal nexus between the parties, but on the essentially moral basis that people cannot be allowed to tell lies with impunity.

1–007 The tort of deceit should also be distinguished from the "right" which the victim of a misrepresentation has to rescind any contract which he has thereby been induced to enter. Rescission is in principle (and subject to certain conditions) available whenever a contract has been induced by a misrepresentation, whether the representation was made fraudulently, negligently or innocently. Rescission, and the restitutionary and proprietary rights to recover money or property transferred under a contract which can flow from it, are important weapons in the fraud litigator's armoury, and they are considered elsewhere in this work.[11] Insofar as different principles may apply when establishing deceit for the purposes of rescission from those which apply when establishing it for the purposes of a claim in damages, that is addressed in this chapter, at para.1–119.

(2) The Decision to Allege Fraud

1–008 An allegation of fraud is a serious and potentially very harmful one, most obviously in reputational terms. Allegations of fraud, once made, and whether or not they have been adjudicated upon, can irreversibly damage a defendant. The potential for such harm is even more acute in the internet age. Such allegations can also impose substantial strain on a defendant seeking to defend himself. The law of defamation is unlikely to provide any redress for unfounded allegations which form part of the judicial process, which is protected by absolute privilege for these purposes. Conscious of these matters, the law erects various safeguards against the improper pleading of claims in deceit, and in fraud-based claims generally, as well as other protections for a defendant to a claim in fraud.

1–009 **Professional Obligations.** First, stringent professional obligations govern lawyers who advance such allegations. There are two aspects to this: the first is that a claim in deceit can only properly be advanced if there is reasonably credible material to support the allegation.[12] This can mean that a lawyer is obliged to refuse to plead or allege fraud even when so instructed by his client. The decision to plead or allege fraud in the absence of proper instructions and

[11] See also Chs 23 (Personal Equitable Remedies) and 15 (Unjust Enrichment).
[12] In relation to solicitors, Ch.5 of the SRA Code of Conduct 2011 relates to a solicitor's duties to the court. One of the "indicative behaviours" which may tend to show a failure to comply with such duties is IB(5.8) which refers to "suggesting that any person is guilty of a crime, fraud, or misconduct unless such allegations: (a) go to a matter in issue which is material to your own client's case; and (b) appear to be supported by reasonable grounds". In relation to barristers, r.C9.2.c of the Code of Conduct provides: "you must not draft any statement of case, witness statement, affidavit or other document containing … any allegation of fraud, unless you have clear instructions to allege fraud and you have reasonably credible material which establishes an arguable case of fraud." Note that the material on which reliance is placed for these purposes need not be admissible in court proceedings: *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 A.C. 120 (where the material in question was privileged).

reasonable grounds for so doing can lead to regulatory action against the lawyer. It can also expose him to the possibility of a wasted costs order.[13]

1–010 Needless to say, as against this a legal representative has a countervailing obligation to promote and protect his client's interests to the best of his ability. These potential conflicting duties may engage difficult questions of judgment. As Lord Steyn commented in *Medcalf v Mardell*[14]:

> "This particular professional duty sometimes poses difficult problems for practitioners. Making allegations of dishonesty without adequate grounds for doing so may be improper conduct. Not making an allegation of dishonesty where it is proper to make such allegations may amount to dereliction of duty. The barrister must promote and protect fearlessly and by all proper and lawful means his lay client's interests ... Often the decision will depend on circumstantial evidence. It may sometimes be finely balanced. What the decision should be may be a difficult matter of judgment on which reasonable minds may differ."[15]

1–011 The second aspect is that any allegation of fraud must be made clearly, unequivocally and with sufficient particularity so that the defendant understands the case he is required to meet.[16] As we note below, the representation which is said to have been made fraudulently will need to be identified with precision (something that is particularly important where the representation is said to be implicit or derived from conduct). As to the mental element of the tort, these requirements do not necessarily mean that the word "fraud" or "dishonesty" has to be used, since the facts alleged may be consistent only with an allegation of fraud; but if those facts are also consistent with innocence, then the pleader must make it plain that fraud is alleged. It bears note that the common formula "the Defendant knew or ought to have known" is not sufficient for these purposes, since it is treated as being a composite allegation of constructive knowledge rather than an allegation of actual knowledge with an allegation of constructive knowledge in the alternative.[17]

[13] Pursuant to s.51 of the Senior Courts Act 1981 and CPR r.46.8.

[14] *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 A.C. 120, at [35], per Lord Steyn.

[15] Hence it will be a comparatively rare event that a lawyer is exposed to a wasted costs order for improperly pleading or alleging fraud.

[16] The courts have long emphasised these requirements: see, e.g., *Smith v Kay* (1859) 7 HLC 750 (HL); 11 E.R. 299; *Davy v Garrett* (1878) 7 Ch. D. 473, at 489, per Thesiger LJ; *Bradford Third Equitable Building Society v Borders* [1941] 2 All E.R. 205, at 207; *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch. 250, at 268, per Buckley LJ; *Armitage v Nurse* [1998] Ch. 241, at 256–257, per Millett LJ; *Three Rivers DC v Bank of England (No.3)* [2001] UKHL 16; [2001] 3 All E.R. 513, at [184]–[185], per Lord Steyn; *First Subsea Ltd v Baltec Ltd* [2017] EWCA Civ 186; [2018] Ch. 25, at [65]–[67], per Patten LJ. See also CPR PD 16, para.8.2(1) and the Admiralty and Commercial Courts Guide at C1.2, which provides that "full and specific details should be given of any allegation of fraud, dishonesty, malice or illegality" and that "where an inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged must be fully set out"; and the Chancery Guide at 2.8(1) to like effect.

[17] *Armitage v Nurse* [1998] Ch. 241, at 257B, per Millett LJ. See the recent decision of HH Judge Keyser QC in *Autogas (Europe) Ltd v Ochocki* [2018] EWHC 2345 (Ch), at [15], a case concerning dishonest assistance, which confirms that unless fraud is expressly pleaded, the primary facts must be consistent only with dishonesty for a finding of fraud.

Standard of Proof. Secondly, although an allegation of deceit only needs to be proven to the normal civil standard, that is the balance of probabilities,[18] it has often been suggested that the evidential burden on the claimant is in practice heightened, on the basis that "the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."[19] However, this observation needs to be treated with caution: the standard of proof does not vary with the gravity of the misconduct alleged, nor is it correct as a proposition of law that a more serious allegation requires more cogent evidence to prove it.[20] Rather, the court should have regard to the inherent probabilities. As a matter of common sense, and as a very broad generalisation, it is inherently less likely that a defendant will be dishonest than that he will be incompetent; but all depends on the particular circumstances, and the question is always, ultimately, whether on the evidence before the court the allegation of deceit has been established to the usual civil standard.[21] **1–012**

Summary Judgment and Appeals. Thirdly, it is rare (though not unprecedented) for summary judgment to be granted in fraud cases. In one such case, where the evidence passed the very high threshold test for summary judgment to be granted in a case of fraud, the then President of the Queen's Bench Division[22] remarked as follows[23]: **1–013**

> "I do not underestimate the importance of a finding adverse to the integrity to one of the parties. In itself, the risk of such a finding may provide a compelling reason for allowing a case to proceed to full oral hearing, notwithstanding the apparent strength of the claim on

[18] *Hornal v Neuberger Products* [1957] 1 Q.B. 247.

[19] *Re H (Minors)* [1996] A.C. 563, at 586–587, per Lord Nicholls; *AIC Ltd v ITS Trading Services (UK) Ltd* [2006] EWCA Civ 1601; [2007] 1 All E.R. (Comm) 667, per Rix LJ at [259]; *In Re B* [2005] UKHL 35; [2009] 1 A.C. 11, per Lady Hale at [70]; *Dadourian Group International Inc v Simms* [2009] 1 Lloyd's Rep. 601, per Arden LJ at [32]; *Foodco UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), per Lewison J at [3]; *JSC BTA Bank v Mukhtar Ablyazov* [2013] EWHC 510, per Teare J at [76].

[20] *Re B* [2008] UKHL 35; [2009] 1 A.C. 11, per Lord Hoffmann at [13]–[15]; *Re S-B* [2005] UKSC 17; [2010] 1 A.C. 678, per Lady Hale at [11]–[13]; *Re J* [2013] UKSC 9; [2013] 1 A.C. 680, per Lady Hale at [35].

[21] See *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 191 (Comm), per Eder J at [85]–[89]; *Kazakhstan Kagazy Plc v Zhunus* [2017] EWHC 3374 (Comm), per Picken J, at [155]–[159].

[22] Sir Igor Judge.

[23] *Wrexham Association Football Club Ltd (In Administration) v Crucialmove Ltd* [2006] EWCA Civ 237; [2007] B.C.C. 139, at [57]–[58]. Another example is *Cheshire BS v Dunlop Hayward* [2008] EWHC 51 where summary judgment was entered against a surveying company in respect of the deceit of one of its employees for dishonestly overvaluing properties being offered for security for lending purposes. That was a case where the defendant made "no admission" in relation to the allegation of fraudulent misrepresentation. See also *Allied Fort Insurance Services Ltd v Creation Consumer Finance Ltd* [2015] EWCA Civ 841, per Etherton LJ, where the Court of Appeal declined to grant summary judgment, commenting, at [82], that "the length of the written evidence deployed by the parties both on the application for, and the discharge of, the freezing order and relied upon by both sides on the hearing of the summary judgment application, as well as the length of the hearing challenging the freezing order, should immediately have sent a warning signal to the deputy Judge." The court went on, at [94], to refer to "the dangers of evaluating disputed evidence in a complex case on a summary judgment application."

paper, and the confident expectation, based on the papers, that the defendant lacks any real prospect of success. Experience teaches us that on occasion apparently overwhelming cases of fraud and dishonesty somehow inexplicably disintegrate. In short, oral testimony may show that some such cases are only tissue paper strong. As Lord Steyn observed in *Medcalf v Weatherill*,[24] when considering wasted costs orders:

> 'The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried.'

And that is why I commented in *Fashion Gossip Ltd v Esprit Telecoms UK Ltd*,[25] that I was:

> 'troubled about entering summary judgment in a case in which the success of the claimant's case involves, as this one does, establishing allegations of dishonesty and fraud, which are strongly denied, and which cannot be conclusively proved by, for example, a conviction before a criminal court. This collective judicial experience does not always, or inevitably, provide a compelling reason for requiring a seemingly unanswerable case to proceed to trial, nor for that matter require the judge considering the summary judgment application to reject the conclusion that there is no real prospect of a successful defence of the claim if he is satisfied that there is none on the evidence before him. That is not what the Rules provide,[26] and if that had been intended,[27] express provision would have been made. It is however a factor constantly to be borne in mind, if and when, as here, the reason for concluding summary judgment is appropriate is consequent on a disputed finding, adverse to the integrity of the unsuccessful party.'"

1–014 For essentially similar reasons, once a claim in deceit has proceeded to trial and been rejected on the evidence, an appellate court will be very slow to intervene and upset the first instance judge's conclusions. Doubts, even grave ones, as to the correctness of the judge's findings will not suffice; the appellate court must be "convinced that he is wrong".[28]

1–015 **Jury Trial.** Fourthly, this is one of the few remaining areas of civil litigation in which the defendant may on principle demand trial by jury, at least if the matter is proceeding in either the County Court[29] or the Queen's Bench Division of the High Court.[30]

1–016 **Costs Sanctions.** Fifthly, if serious allegations of deceit are unsuccessfully pursued and are shown to have been unfounded, then the claimant will find himself in danger of being met with judicial disapproval, which may find

[24] Otherwise known as *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 A.C. 120, at [42], per Lord Steyn.
[25] Unreported 27 July 2000.
[26] See generally CPR r.24.2.
[27] The CPR expressly provides that admiralty claims in rem and possession claims cannot be disposed of by way of summary judgment: CPR r.24.3(2).
[28] *Gross v Lewis Hillman Ltd* [1970] Ch. 445.
[29] County Courts Act 1984 s.66(3)(a).
[30] Senior Courts Act 1981 s.69(1): "Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue—(a) a charge of fraud against that party … the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury." See *Stafford Winfield Cook & Partners v Winfield* [1981] 1 W.L.R. 458 for the position which arises when the proceedings have been issued in the Chancery Division.

expression in costs being awarded on the indemnity basis.[31] This will also be the case where a deceit case is discontinued.[32] Such orders are in part reflective of the fact that a defendant has no choice but to come to court to defend such allegations, and the unpleasant and distressing experience which the defendant will have endured as the target of the allegations over the inevitably lengthy period over which a case runs its course.[33] As noted earlier, in serious cases, it may be that the claimant's lawyers will find themselves held liable for some or all of the costs of the defendant, pursuant to the wasted costs jurisdiction.

1–017 **Avoidance of Insurance Policies.** Sixthly, when suing an insured defendant it should be borne in mind that policies of indemnity insurance will usually exclude cover for claims arising from the insured's own dishonesty or fraud. Framing a claim in deceit may therefore leave a claimant reliant on the defendant's own resources for recovery.

(3) Advantages of Pleading Fraud

1–018 On the other hand, if a fraud is proved, the claimant enjoys various special advantages, which distinguish his position from that of the claimant who founds his claim on causes of action which do not involve proof of intentional dishonesty.

1–019 **No Defence of Contributory Negligence.** However careless or negligent the claimant himself may have been, for instance in entering into the transaction said to have been induced by the relevant deceit, no defence of contributory negligence will avail the wrongdoer so as to reduce his damages liability.[34] By contrast, if the relevant misrepresentation was only negligently made then the defendant is entitled to set up a defence of contributory negligence if the facts warrant it.

[31] See for instance the well-known judgment of Tomlinson J in *Three Rivers District Council v Bank of England* [2006] EWHC 816 (Comm); [2006] 5 Costs L.R. 714.
[32] *Clutterbuck v HSBC Plc* [2015] EWHC 3233 (Ch).
[33] See for instance the last paragraph of Popplewell J's Judgment in *Madoff Securities International Ltd v Raven* [2013] EWHC 3147.
[34] See for instance *Alliance & Leicester Building Society v Edgestop Ltd* [1993] 1 W.L.R. 1462; *Corporación Nacional del Cobre de Chile v Sogemin Metals Ltd* [1997] 1 W.L.R. 1396; *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)* [2003] 1 A.C. 959. The law on the non-availability of the defence of contributory negligence in intentional torts was comprehensively reviewed in the Court of Appeal decision of *Co-operative Group (CWS) Ltd v Pritchard* [2011] EWCA 329; [2012] Q.B. 320. Note, however, that where the party claiming in deceit was itself under specific duty to detect that very deceit (such as an auditor), the proper analysis may be that the cause of its loss is not the deceit but its own failure to detect it: *Barings Plc v Coopers & Lybrand* [2003] EWHC 1319 (Ch); [2003] P.N.L.R. 34, at [727]–[729], per Evans-Lombe J. This reasoning was adopted in *Singularis* where a bank liable in negligence under the *Quincecare* doctrine (see *Barclays Bank Plc v Quincecare Ltd* [1992] 4 All E.R. 363) for permitting a transfer of funds by a company was unable to set up the deceit of its director, even if that deceit could be attributed to the company, as a defence: see, at [73]–[80], per Steyn J. We discuss this further in Ch.22.

1–020 **Limitation.** Further, the claimant is able to take advantage of s.32(1)(a) of the Limitation Act 1980, which provides that, in claims based upon the "fraud of the defendant" (which of course includes claims in deceit)[35] time does not start running for limitation purposes until he knew of the fraud or could with reasonable diligence have discovered it.[36]

1–021 **Damages.** Moreover, in cases where an intentional wrong has been established, such as deceit, the courts are prepared to show a degree of flexibility as regards causation and damages which favour the claimant.[37] The general rule in a claim for deceit is that any actual damage which flows directly from the fraudulent inducement can be the subject of recovery, meaning: (a) that the claimant is not necessarily required to give credit for the value of an asset acquired as a result of the deceit as at the date of its acquisition (it may be appropriate only to bring into account the actual proceeds realised on a later sale); (b) the claimant can recover consequential losses (such as expenses incurred by reason of having acquired an asset or entered into a transaction, or profits foregone on an alternative acquisition or transaction); and (c) the claimant can recover losses which would be too remote in a contractual or negligence based case (that is, not reasonably foreseeable or within the reasonable contemplation of the parties).[38] Damages are also not capped with reference to what the position would have been had the deceitful representation been true.[39] Further, a claimant in a deceit claim can, in an appropriate case, recover aggravated and exemplary damages.[40] We consider the question of damages below at Ch.21.

1–022 **Exclusion Clauses.** The law, on public policy grounds, will not permit a party to a contract to exclude or limit liability for his own fraud and a provision that

[35] This might be thought obvious, but the contrary was argued—and rejected—in *Regent Leisure Ltd v NatWest Finance Ltd* [2003] EWCA Civ 391, at [100], per Jonathan Parker LJ.

[36] *Paragon Finance Plc v Thakerar & Co* [1999] 1 All E.R. 400, at 418, per Millett LJ; *Biggs v Sotnicks (A Firm)* [2002] Lloyd's Rep. P.N. 331. We discuss this further in Ch.26.

[37] Allowing more generous recovery for torts involving dishonesty or intentional wrongdoing serves the legitimate purpose of deterrence, and as between the fraudster and the innocent party moral considerations militate in favour of requiring the former to bear the risk of unforeseen events: *Smith New Court Securities Ltd v Citibank N.A.* [1997] A.C. 254, at 280A–280C, per Lord Steyn.

[38] *Doyle v Olby* [1969] 2 Q.B. 158, at 167–168, per Winn LJ (approving the dictum of Lord Adkin in *Clark v Urquhart* [1930] A.C. 28, at 67–68, per Lord Atkin); *Smith New Court Securities Ltd v Citibank N.A.* [1997] A.C. 254, at 264–265, per Lord Browne-Wilkinson. A claimant in a deceit claim will, however, be unable to recover losses attributable to his own failure to take steps reasonably available to him to extricate himself from a transaction which he has been deceived into entering, once the fraud has been discovered (i.e. he is still subject to the "duty" to mitigate his losses): *Downs v Chappell* [1997] 1 W.L.R. 426; *Smith New Court Securities Ltd v Citibank N.A.* [1997] A.C. 254, at 266G, per Lord Browne-Wilkinson. He also will not be able to recover for losses which, whilst connected to the deceit in a "but for" sense, nevertheless in substance flow from a separate intervening cause.

[39] In which respect *Downs v Chappell* [1997] 1 W.L.R. 426, at 443, per Hobhouse LJ, was wrongly decided: *Smith New Court Securities Ltd v Citibank N.A.* [1997] A.C. 254, at 283, per Lord Steyn.

[40] *Archer v Brown* [1985] Q.B. 401 (aggravated damages to compensate for injured feelings resulting from deceit); *Rookes v Barnard* [1964] A.C. 1129, at 1223, per Lord Devlin, and *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29; [2002] 2 A.C. 122 (exemplary damages available in principle where defendant's conduct calculated to make a profit which exceeds the amount of compensation).

purports to do so (which could include a clause that stipulates that no representations are being made or that no reliance is being placed on any representations made) will not be enforced.[41] It is therefore now standard for exclusion clauses to have express carve-outs for fraud; and even absent an express carve-out, an exclusion clause in general terms would probably be construed as not being intended to cover fraud.[42] A claim in deceit, if established, will thus enable a claimant to avoid any contractual limitations on the defendant's liability.[43]

1–023 It would, however, appear that the public policy bar to the enforcement of contracts excluding liability for fraud does not extend to provisions excluding liability for the fraud of a third party (such as an agent or employee) for which the defendant might otherwise be liable, at least where the third party is not an alter ego of the defendant and the defendant is not itself aware of or complicit in the fraud.[44] Very clear wording would, however, generally be required for the Court to conclude as a matter of construction that this is what was intended.[45]

1–024 **Illegality Defence.** In cases where the fraud alleged against the defendant might also be attributed to the claimant (for example, where the claimant is a company and the defendant is a former director of it), issues can arise as to whether the claim should be barred by application of the ex turpi causa principle. Recent authority on how attribution works for these purposes has considerably reduced the scope for difficulty for a claimant on this front; but the point nevertheless merits mention. It is considered in detail in Chs 19 and 24.

1–025 **Interim Remedies.** Prior to trial, if the claimant is able to advance a reasonably cogent case of fraud, this may well permit him to obtain powerful forms of interim relief, most notably freezing and/or search orders, together with disclosure orders, which are intended to ensure that enforcement of any eventual

[41] *S Pearson & Son Ltd v Dublin Corp* [1907] A.C. 351, at 356, per Lord Halsbury; *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; [2003] 2 Lloyd's Rep. 61, at [16] and [76], per Lords Bingham and Hoffman; *Bonhams 1973 Ltd v Cavazzoni* [2014] EWHC 682 (QB), at [10]–[12], per Cooke J; *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch), at [226] and [231], per Asplin J.

[42] See *Government of Zanzibar v British Aerospace Ltd* [2000] 1 W.L.R. 2333, at 2346, per Raymond Jack QC, and *Six Continents Hotels Inc v Event Hotels GmbH* [2006] EWHC 2317 (QB), at [53], per Gloster J; but note the different view of Jacob J in *Thomas Witter Ltd v T.B.P. Industries Ltd* [1996] 2 All E.R. 573, at 598, per Jacob J.

[43] Public policy considerations do not always point in favour of the claimant in a fraud claim and there are circumstances in which liability for fraud is precluded on policy grounds. One noteworthy example is witness immunity: there can be no liability in deceit for statements made in the course of giving evidence in court proceedings, however dishonestly; see *Sprecher Grier Halberstam LLP v Walsh* [2008] EWCA Civ 1324. As the case makes clear, the immunity extends to statements made outside Court in the course of preparing evidence, and statements made by solicitors in correspondence on instructions from the witness (on which the witness could have been cross-examined): at [50]–[52], per Ward LJ.

[44] *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; [2003] 2 Lloyd's Rep. 61, at [122], per Lord Scott.

[45] *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] 2 Lloyd's Rep. 61, at [16], per Lord Bingham. Other controls on the enforcement of exclusion clauses, such as s.3 of the Misrepresentation Act 1967, would also have to be considered.

judgment will not be thwarted by assets being dissipated or otherwise diminished whilst proceedings remain at the interim stage.[46] Cogent allegations of fraud, particularly when coupled with the use of a network of offshore companies in connection with the alleged fraud, may of themselves provide powerful support for a case of a real risk of dissipation such as to justify a freezing order.[47] That said, it is always necessary for the Court to scrutinise any allegation of fraud carefully to see whether the dishonesty in question does indeed justify a conclusion that assets are likely to be dissipated.[48]

1–026 **Rescission and Proprietary Remedies.** As is considered further below, one remedy for a claim in deceit which may be available is rescission of the contract, gift or other transaction induced by the fraud. When property is transferred or money paid pursuant to such a transaction, beneficial title passes to the recipient unless and until the transaction is rescinded; but if it is rescinded, beneficial title is revested in the transferor/payer by means of a constructive (or possibly resulting) trust, apparently with retrospective effect—at least to the extent that the transferor/payer can use the equitable rules of tracing to trace his revested beneficial ownership and then assert a proprietary claim to the property, money or proceeds in the hands of the original recipient or a further recipient who is not a bona fide purchaser for value without notice of the fraud.[49]

1–027 **Execution.** Post-trial, the fact that the defendant has been proven to be a fraudster is likely to facilitate considerably the claimant's task of investigating, securing and executing the judgment which has been obtained against assets held by the defendant. It may also give rise to allegations of contempt of court and the associated threat of committal to prison.[50]

(4) Conclusion

1–028 Proceedings in which allegations of fraud are advanced can therefore properly be described as "high stakes" litigation. If the relevant evidential thresholds are crossed then the claimant may, depending on the relevant stage of the proceedings, be given access to a wide range of procedural tools and substantive rights which will assist in pursing the wrongdoer. On the other hand, if allegations are advanced without a proper foundation then the consequences for the claimant (and possibly his legal representatives) may be serious.

1–029 It is all too easy to state these principles in the abstract. Experience shows, however, that in real life the fraud claimant (or putative claimant) and his legal advisers are often placed in a difficult position because of the paucity of information available to them. Those who tell lies in order to gain an advantage

[46] For a discussion of such interim remedies, see Chs 26–33.
[47] *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808; [2012] 2 Lloyd's Rep. 313, at [174] and [178], per Lloyd LJ.
[48] See *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [70], per Males J.
[49] *Lonrho v Fayed (No.2)* [1992] 1 W.L.R. 1, at 12, per Millett J; see further Ch.10, para.10–007, and Ch.23, paras 23–047—23–048, and the cases referred to there.
[50] See Chs 35 (Contempt) and 37 (Enforcement of Judgments).

or cause harm to others do not tend to be forthcoming about the true nature of their intentions and activities. A person who considers that he has suffered harm as a result of being misled is therefore in danger of reaching incorrect conclusions or drawing false inferences on the basis of a limited understanding of the factual position. In some cases, a claimant may conclude that there has been a fraud when in fact there is an entirely innocent explanation for what has happened. In other instances, the claimant is correct that a fraud has been perpetrated against him, but may then proceed by making allegations against a party who turns out not to have been involved, or to have played only an innocent part in the events which unfolded. As further information and documentary disclosure emerges during the course of proceedings it is incumbent on the claimant and his advisers carefully to reassess the merits of the allegations which have been advanced, and to test them against the evolving evidential backdrop, which often looks very different from the one which appeared at the pre-action stage.

B. The Misrepresentation

(1) Introduction

1–030 At the core of any claim in deceit is the representation in question. Its falsity, and the honesty of the person who made the representation, cannot begin to be considered until the representation on which the claim in deceit is to be founded has been identified. In the case of a written document, the task of identification of the representation is usually a simple one, although it may be said that, given the context, an implied representation can be construed out of the written words. In the case of an oral representation, the identification may be a more difficult process, involving disputed testimony from representee and representor.[51] Difficult questions can also arise where, as the law recognises is in certain circumstances possible, a representation is alleged to arise out of the conduct of the representor or indeed his silence.

1–031 Accordingly, when formulating and pleading a case in fraud it is vital accurately and clearly to identify the representation which it is said has caused the claimant loss. It is not every case that will permit this to be done simply by reference to a document that is clear in its terms. Even an express representation (especially one made orally)[52] will require interpretation against the context in which it was made; and where the representation is said to be implicit or to have arisen from conduct, care will be needed to identify with precision what the content of the

[51] This paragraph is drawn from the judgment of Rix LJ in *AIC Ltd v ITS Testing Services (UK) Ltd* [2016] EWCA Civ 1601; [2007] 1 All E.R. (Comm) 607, at [252]. The judgment is perhaps the leading modern analysis of the law of deceit.
[52] *AIC Ltd v ITS Testing Services (UK) Ltd* [2016] EWCA Civ 1601; [2007] 1 All E.R. (Comm) 607, at [252], per Rix LJ: "although it is of course possible to be more or less deliberate about one's speech, nevertheless the natural ebb and flow of conversation as part of an essentially interactive process means that it differs significantly from a written document. It does not necessarily have a single writer's logic, it is not composed, and it cannot be read as a whole before its communication … evidence of contemporary views of what the parties to the relevant conversation understood themselves to be saying or hearing may be of special importance."

representation was and how it is said to have arisen. As was stated in *Cassa di Risparmio della Reppublica di San Marino SpA v Barclays Bank Ltd*[53]:

> "In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee."

1–032 Moreover, the task can be yet more complex and delicate when formulating a claim in deceit, because, as will be seen below (and in contradistinction to other forms of misrepresentation), the claimant must show that he understood the representation in the way that the defendant intended it to be understood.

(2) Falsity and Half-truth

1–033 In order to be actionable the representation must of course be false. But the necessary element of falsity may be established even if the representation is not on its face false. The task is to identify what the representor intended the representee to understand by the representation. So if a representation is made which is literally true, but the representor intended the representee to understand the representation in the opposite, or some different, sense, for instance by the adoption of an ironical tone, or a raised eyebrow (or some similar device), and the representee in fact interpreted the representation in that opposite or different sense, then the representor may be liable in deceit if the representation is false in that different sense.[54] (Of course if the representee fails to appreciate the representor's irony and interprets the representation in its literal meaning then, notwithstanding the attempt to deceive, the claim will not be made out.)

1–034 Similarly, if a true fact is represented, but the representor intentionally omits other information which is material to, and substantially alters the intended import of, the facts represented, then he may equally be liable in deceit. As it was observed in a leading case:

> "It is a trite observation that every document as against its author must be read in the sense which it was intended to convey. And everybody knows that sometimes half a truth is no better than a downright falsehood."[55]

[53] *Cassa di Risparmio della Reppublica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm); [2011] 1 C.L.C. 701, at [215], per Hamblen J. See also *Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland Pic* [2010] EWHC 1392 (Comm); [2011] 1 Lloyd's Rep. 123, at [81], per Christopher Clarke J; *Kyle Bay Ltd v Underwriters Subscribing under Policy No. 01957/08/01* [2007] EWCA Civ 57; [2007] 1 C.L.C. 164, at [30]–[33], per Neuberger LJ.

[54] "If a person makes a representation of that which is true, if he intends that the party to whom the representation is made should not believe it to be true, that is a false representation": *Moens v Heyworth* (1842) 10 M&W 147, at 158, per Parke B.

[55] *Gluckstein v Barnes* [1900] A.C. 240, at 250–251, per Lord Macnaghten. Quoted with approval by the House of Lords in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; [2003] 1 All E.R. (Comm) 349, at [71], per Lord Hoffman, referring to "that form of nondisclosure which makes a positive statement misleading—the half truth which, without disclosure of the other half, is, as Lord Macnaghten said…. 'no better than a downright falsehood'." In *Smith*

Thus, in that case, a statement in a company prospectus that a property to be sold to the company for £180,000 had been purchased for £140,000, whilst being true "in the letter", was, when taken together with the undisclosed fact that the vendors had made a profit of £20,000 on certain charges on the property, misleading and fraudulently so: the statement was intended to convey that the vendors' profit on the resale to the company would be only £40,000, when in reality it would be £60,000.[56]

1–035 To establish a misrepresentation it is necessary to show that what was said (expressly or by implication) was *materially* false. A representation that is substantially correct, even if not entirely correct, is not a misrepresentation. The question is whether the difference between what was represented and the truth would have been likely to induce a reasonable person in the position of the claimant to act in the way that has given rise to the claim.[57]

1–036 The question of the falsity (in this sense) or otherwise of the representation must be determined at the date when it is acted upon.[58]

(3) Representation of Fact

1–037 It is a cardinal principle of the law of deceit that to found liability the representation must be one of existing fact.[59] However, as we shall see below, the limitations on the action in deceit suggested by this pre-requisite are in the main illusory and representations which on the face of it are not of existing fact can often nonetheless be actionable. The law has over time shown an increasing flexibility in its interpretation of representations; and its general tendency has been to expand the ambit of actionability.

New Court Securities Ltd v Citibank N.A. [1997] A.C. 254, at 274, Lord Steyn said that it has "rightly been said that a cocktail of truth, falsity and evasion is a more powerful instrument of deception than undiluted falsehood. It is also difficult to detect."

[56] But see *Thorp v Abbotts* [2015] EWHC 2142 (Ch), in which a claim for fraudulent misrepresentation against vendors of a property failed: although the vendors had failed to disclose the fact that they were aware of and had had communications about planning applications for nearby developments, they had nevertheless answered the questions in their property information form about communications affecting the property, and discussions with neighbours affecting the property, accurately in the negative. On their proper construction, those questions did not encompass the planning applications or the communications about them, so this was not a case where something withheld falsified the intended import of something explicitly said.

[57] *Avon Insurance v Swire Fraser* [2000] 1 All E.R. (Comm) 573, at [17], per Rix J; *Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland Plc*, above, at [149].

[58] *Briess v Woolley* [1954] A.C. 333. See generally below at para.1–067 "Continuing Representations".

[59] It has been suggested by J. Cartwright in *Misrepresentation, Mistake and Non-Disclosure*, 3rd edn (London: Sweet & Maxwell, 2012), para.5.08, that this delimitation on the action in deceit should be abandoned. But it would require the Supreme Court to over-rule the many authorities which insist upon this element of the cause of action.

(4) Representations of Opinion and States of Mind

1–038 It follows that, technically, a representation of opinion is not in itself actionable. However this proposition is now so narrowly interpreted as to be almost meaningless as a curtailment on the claim in deceit. As stated in *Clerk & Lindsell on Torts*:

> "A statement of opinion is invariably regarded as incorporating an assertion that the maker does actually hold that opinion; hence the expression of an opinion not honestly entertained and intended to be acted upon amounts to fraud."[60]

For instance, where a valuer puts forward his professional opinion as to the true value of property in circumstances where he does not actually hold the opinion that the property is worth the amount ascribed, then he will be potentially liable in deceit.[61]

1–039 Similarly, a statement of belief is a representation of fact as to the representor's state of mind.[62] If a vendor of a horse represents that he does not believe that the horse is suffering from any diseases when, to his knowledge, the horse is indeed suffering disease, then the mere fact that the representation is couched in terms of belief will not avail the representor. Indeed, a statement of belief must connote at least some basis for the belief, in the sense that one could not honestly believe to be true that which one in fact has not the least idea about; but that is not (without more) the same as representing that one's belief is objectively justified.

1–040 That said, an express representation of opinion or belief may also be interpreted as carrying with it implied representations[63] as to the grounds for holding that opinion or belief. So, for example, in *William Sindall Plc v Cambridgeshire CC*[64] it was held that a representation made in answer to pre-contract enquiries by a vendor that there were no defects in title "so far as the vendor is aware" was not merely a representation that the vendor had no actual knowledge of any defects, but also an implied representation that it had made such investigations as could reasonably be expected of it to ascertain whether any existed. If to its knowledge it had not made such investigations, it could in principle have been liable in deceit (even if the express representation as to its lack of actual awareness of defects was true).[65]

1–041 The basis for this further implication seems to be the fact that the representor is better equipped with information or the means of getting it than the representee, and is in a position where his belief could reasonably be expected to be justified (being, for example, a professional, or having retained professionals, in the

[60] M.A. Jones, A.M. Dugdale and M. Simpson (eds), *Clerk & Lindsell on Torts*, 21st edn (London: Sweet & Maxwell, 2014), para.18–13. The classic authority for this proposition is *Brown v Raphael* [1958] Ch. 636. "[T]he existence of an opinion in the person stating it is a question of fact": *Bisset v Wilkinson* [1927] A.C. 177, at 182, per Lord Merrivale.

[61] See for instance *Nationwide BS v Dunlop Haywards* [2007] EWHC 1374 (Comm).

[62] See the words of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459, at 483, quoted in fn.71 below.

[63] In relation to implied representations, see para.1–059 below.

[64] *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016.

[65] *Economides v Commercial Assurance* [1998] Q.B. 587, at 598, per Simon Brown LJ.

relevant field). So, in the case of a statement of opinion, where the facts which inform the relevant opinion are not equally well known to both sides, such a statement by the one who knows the facts best may carry with it an implication that he is aware of facts which reasonably justify it, or bona fide believes himself to have reasonable grounds for holding it. The authorities which support this proposition (*Smith v Land and House Property Corp*[66] and *Brown v Raphael*)[67] both relate to non-fraudulent misrepresentations and care must be taken in applying them to deceit cases. This is because the task of identifying the representation in such cases, and imposing liability in respect of it, is an objective one, whereas, in deceit, if the maker of the representation is not aware (however unreasonably) that he is making the implied representation alleged to be false, then he cannot be liable.[68]

1–042 It is also (and conversely) the case that what at first blush appears to be a statement of fact may in fact amount to no more than a statement of opinion or a contention. For example, lawyers advancing their client's cause will often make unqualified positive averments about aspects of the case to the other side; but these are not usually actionable representations. Similarly, a statement by a loss adjuster to the insured's loss assessor as to the effect of the policy, in the context of the negotiation of the settlement of a claim under an insurance policy, was held just to be a contention, when the representee was a professional who had (or was reasonably believed to have) independent access to the terms of the policy.[69] So too, a statement which in isolation appears to be an outright statement of fact may be qualified by other statements which accompany it and which would indicate to

[66] *Smith v Land and House Property Corp* (1884) 28 Ch. D. 7, at 15, per Bowen LJ: "But if the facts are not equally well known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

[67] *Brown v Raphael* [1958] Ch. 636 (statement by solicitors for vendor of a reversion that annuitant was believed to have no estate for duty purposes). See particularly at 643, at per Lord Evershed MR: "What would be the effect of this language upon the mind of a possible purchaser? Clearly, I should have thought, it would flow from the language used and would be intended to be understood by a reader of the particulars that persons who knew the significance of this matter and who were experienced and competent to look into it were expressing a belief founded upon substantial and reasonable grounds.". Modern examples of the application of this principle are *Barings Plc v Coopers & Lybrand* [2002] EWHC 461 (Ch); [2002] P.N.L.R. 823, at [48]–[52], per Evans-Lombe J; and *AIC Ltd v ITS Testing Services Ltd* [2006] EWCA Civ 1601, at [255], per Rix LJ; but cf. *Economides v Commercial Assurance*, above, at 606, per Gibson LJ (further implied representation not found where assured layperson stated belief as to value of contents for insurance purposes).

[68] 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 [221], per Hamblen J: "In a deceit case it is also necessary that a representor should understand that he is making the implied representation and that it had the misleading sense alleged. A person cannot make a fraudulent statement unless he is aware that he is making that statement." See further para.1-085 below.

[69] *Kyle Bay Ltd v Underwriters Subscribing under Policy No.019057/08/01* [2007] EWCA Civ 57, at [33]–[35]. Another reason why such statements are often not actionable is that they are not intended to be relied upon as such: see further para.1–061 below.

a reasonable person that what was being said was only a statement of belief whose factual accuracy and completeness had not been verified and could not be relied upon.[70]

(5) Representations of Intention/as to the Future

(i) Introduction

1–043 Because of the law's insistence on the requirement of a representation of present fact as a precondition to any liability in deceit, statements of intention or as to the future will only be potentially actionable as (false) representations concerning the representor's current state of mind or knowledge.[71] The mere fact that the intended event does not in fact occur will not in itself create liability, unless the representation has contractual effect.[72]

(ii) Statements of intention

1–044 Yet the law does not shrink from inferring from a statement of intention a representation of present fact.[73] So, if a person represents to another that, in the

[70] See *Raiffeisen Zentralbank Osterreich AG*, above, at [86], per Christopher Clarke J, cited by Hamblen J in *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd*, above, at [222]. The question will arise as to whether a provision to that effect is in substance an exclusion clause (in which case it would not be effective to exclude liability for fraud) or whether it goes to the logically prior question of whether a representation is made at all. That is a question of substance and not form, and will depend on all the facts: *Raiffeisen*, at [310]–[312], per Christopher Clarke J.

[71] In the time-honoured, and often-cited, words of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459, at 483: "There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact." The facts in *Edgington* provide a paradigm example of liability in deceit being imposed in respect of representations of intention.

[72] See *Hagen v ICI Chemicals & Polymers Ltd* [2001] EWHC 548 (QB); [2002] Lloyd's Rep. PN 288, at [131], per Elias J: "By definition the claimant is always complaining in circumstances where the intention has not been carried into effect. It is only because of that fact that the claimant can allege that the representation made was false. The difficulty facing many, if not most, claimants, is that their real complaint is that the intention was not carried out. But absent some contractual undertaking to do so, there never was a representation that it would be." The point is succinctly made in K.R. Handley, *Spencer Bower, Turner and Handley: Actionable Misrepresentation*, 4th edn (London: LNUK, 2000), para.17: "What the representee is generally found to complain of is the failure to carry out the intention, which shows that what really induced him to alter his position was his belief that the intention would be carried out. In other words, he relied upon the statement as if it were a promise, not as a representation. His belief that the representor had a present intention to act according to his statement would not have influenced him unless he had also believed that the intention would be carried out." See also *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch. 53, at 67 where Browne-Wilkinson V-C said: "A representation as to future conduct has no effect unless it constitutes a contract."

[73] So it was said in *Wales v Wadham* [1977] 2 All E.R. 125, per Tudor Price J at 136, that a statement of intention is only false if the person making the statement does not honestly hold the intention being expressed at the time. Of course the fact that the intention is not fulfilled is not, in itself, proof that it did not exist when the representation was made: *Beattie v Lord Ebury* (1872) 7 Ch. App. 777, at 804, per Mellish LJ. Moreover there is a distinction between a statement of present intention to act in a

event of receipt of a sum of money from the representee, he will use that money for a particular purpose, this constitutes a representation of present intention and so a statement of fact.[74] Hence if the representor does not actually harbour that intention at the time of making the representation, or if he knows that he will not be able to put the stated intention into effect, then the representor may be liable in deceit because he has made a false representation as to his present state of mind.[75] (Moreover, such a misrepresentation will almost always be fraudulent, since it is the representor's own true intentions or knowledge that falsifies the representation.)[76]

1–045 By extension of this reasoning it has been held that a director, who executes a contract on behalf of a company by which the company promises payment at some future date, knowing that the company will in fact not be able to make the payment, can be personally liable in deceit: by so doing the director impliedly represents that the company has the capacity to meet its obligations under the contract, knowing that representation to be false.[77] This may be particularly significant where the company is insolvent, such that any claim in breach of contract is of limited value. At first blush this seems surprising. That by entering the contract the company impliedly represents that it has the present intention, and capacity, to perform its obligations can be understood; but that the director who does no more than sign the contract on the company's behalf makes a similar representation, personally, as to what the company intends and is able to do would seem to make a significant inroad into the principles of separate corporate personality and limited liability.[78] It may be wondered why, if this is correct, there is not in every case of a contract entered into by a company also, in principle at least, a potential personal liability on the part of the director or other

certain manner, and a promise to do so: *British Airways Board v Taylor* [1976] 1 W.L.R. 13, at 17 where Lord Wilberforce said: "the distinction in law between a promise as to future action, which may be broken or kept, and a statement as to existing fact, which may be true or false, is clear enough. There may be inherent in a promise an implied statement as to a fact, and where this is really the case, the court can attach appropriate consequences to any falsity in, or recklessness in the making of, that statement. Everyone is familiar with the proposition that a statement of intention may itself be a statement of fact and so capable of being true or false."

[74] "That which is in form a promise may be in another aspect a representation": Jones, Dugdale and Simpson, *Clerk & Lindsell on Torts* (2014), para.18-12, quoting Lord Herschell in *Clydesdale Bank Ltd v Paton* [1896] A.C. 381, at 394, per Lord Herschell.

[75] In *East v Maurer* [1991] 1 W.L.R. 461 where a hairdresser was found liable in deceit where he had represented to the purchaser of a salon that he would not be working in the vicinity of the salon after the sale; whereas in fact he intended so to do. Recent examples are *Al Khudairi v Abbey Brokers Ltd* [2010] EWHC 1486 (Ch); [2010] P.N.L.R. 32 (a case involving the claimant establishing liability in deceit where a claim in contract was of limited value because of the contracting party's insolvency); and *Watts v Watts* [2014] W.T.L.R. 1781.

[76] *Abbar v Saudi Economic & Development Co (SEDCO) Real Estate Ltd* [2013] EWHC 1414 (Ch), at [197], per David Richards J.

[77] *Contex Drouzbha Ltd v Wiseman* [2007] EWCA Civ 1201.

[78] It is acknowledged that *Standard Chartered Bank v Pakistan National Shipping Corp* [2002] UKHL 43; [2003] 1 A.C. 959 makes it clear that an agent of a company who makes a dishonest representation cannot escape liability on the basis that he was only doing so on behalf of the company; but there the agent (a director) had plainly made a representation. The question under consideration here is whether a director who does no more than sign his company's contract on its behalf can be said to be making a representation at all.

> "a liability in equity to make good resulting loss [which] attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation".

This encapsulates the elements of the cause of action, which are:

(1) A breach of trust or fiduciary duty;
(2) Procurement of or assistance in that breach by the defendant;
(3) Dishonesty on the part of the defendant.

13–004 Each of these elements is considered in turn in this chapter. The liability of a dishonest assister has been said to be "secondary", in that it only arises where there has been a breach of trust or fiduciary duty by another.[9]

13–005 The claim is fault-based, rather than receipt-based or restitutionary: the claimant is seeking redress for a wrong.[10] It follows that, as we will see, the mental state that must be established is different from that of the knowing recipient, whose liability we consider in Ch.12. Moreover, the dishonest assister's liability does not arise out of any pre-existing trust or fiduciary relationship between him and the claimant (even if his liability is sometimes, unhelpfully, described as involving an accountability to the claimant as a constructive trustee).[11] He is more accurately described as being "accountable in equity"; he never claims to assume the position of trustee—nor need the claimant assert as much—and his liability can arise without ever having received or handled trust property.[12]

13–006 It follows that the remedies available for dishonest assistance are personal[13]: principally, equitable compensation for loss caused by the breach which has been assisted; but also, it is now established, an account of any profits obtained by reason of the assistance.[14] These remedies are considered in Ch.22. As explained there and as mentioned further below, whilst in principle the compensatory remedy against the dishonest assister ought to be coextensive with that against the defaulting trustee or fiduciary (to whose breach he is an accessory), where one is concerned with requiring the assister to disgorge a profit, it would appear that common law principles of causation will be applied by analogy, and there is a discretion to refuse relief, whereas the fiduciary's accountability is stricter.[15]

[9] *Royal Brunei Airlines Sdn Bhd v Tan*, above, per Lord Nicholls at 382E.
[10] *Twinsectra v Yardley* [2002] 2 A.C. 164, per Lord Millett at 194.
[11] E.g. see Lord Browne-Wilkinson's speech in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, at 705. In *Bank of Scotland Plc v A Ltd* [2001] 1 W.L.R. Lord Woolf said of liability in dishonest assistance, at [26]: "This potential accountability in equity is sometimes referred to as a liability as a constructive trustee, but that expression is ambiguous and may be misleading." Similar views were expressed by Lord Millett in *Dubai Aluminium Co Ltd v Salaam* [2003] 2 A.C. 366, at [141].
[12] *Paragon Finance Plc v D B Thakerar & Co* [1999] 1 All E.R. 400, at 409; *Dubai Aluminium Co Ltd v Salaam* [2003] 2 A.C. 366, per Lord Millett at [141].
[13] *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch); [2007] 2 All E.R. (Comm) 993, per Rimer J at [109]–[135]. It also follows that a dishonest assister can avail himself of limitation defences that a true trustee could not: *Williams v Central Bank of Nigeria* [2014] A.C. 1189. See further para.25–014.
[14] *Novoship (UK) Limted v Mikhaylyuk* [2015] Q.B. 499, at [66]–[93].
[15] *Novoship*, above, at [109]–[115]; and, at [119], applying the discretion to withhold relief identified in non-fiduciary accounting cases in *A-G v Blake* [2001] 1 A.C. 268.

13–007 Liability in dishonest assistance can attach even when the defendant acts as an agent of the trustee whose breach gives rise to the primary liability.[16] Thus dishonest assistance is a means by which a director of a company can (in effect) be rendered personally liable for the default of the company, where the company is a trustee or fiduciary and in breach of its duties as such.[17] Indeed, this mechanism for imposing personal liability on directors for wrongful actions which they have procured via companies is one of the most important practical applications of the dishonest assistance basis of liability. In this way equity, just as the common law in the tort of deceit,[18] has been able to evade the corporate veil without needing to pierce it.

13–008 A dishonest assistance claim can be brought by a beneficiary, principal or company, to whom the relevant underlying trust or fiduciary obligations are owed. In the case of a trust, the trustee himself can sue, even if his breach is the source of the alleged accessory liability[19]; but, more commonly, the claim will be brought by a successor trustee.

(2) Significance in Fraud Litigation

13–009 As we have seen, many fraud claims are founded on a breach of trust or fiduciary duty by a primary wrongdoer, commonly involving the misappropriation of assets belonging beneficially to the claimant. Such wrongdoers are often part of a larger combination of participants in the wrongdoing. A typical example will be the misappropriation of funds belonging to a claimant, which are then channelled far and wide through and with the assistance of a cohort of parties all complicit to a greater or lesser degree in the execution of the fraud and the concealment of its proceeds. Similarly to the tort of conspiracy, the claim in dishonest assistance allows the claimant to cast the net of liability widely, encompassing defendants who have not actually received any of the claimant's assets and who do not stand in a direct trust or fiduciary relationship with the claimant; and, moreover, defendants who are often more likely to have "deeper pockets" for the purposes of recovery than the principal wrongdoer.

13–010 As Lord Nicholls said in *Royal Brunei*[20]:

> "The proper role of equity in commercial transactions is a topical question. Increasingly plaintiffs have recourse to equity for an effective remedy when the person in default, typically a company, is insolvent. Plaintiffs seek to obtain relief from others who were involved in the transaction, such as directors of the company, or its bankers, or its legal or other advisers. They

[16] *Attorney-General v Corp of Leicester* (1844) 7 Beav. 176, per Lord Langdale MR, at [179].
[17] As happened in *Royal Brunei Airlines Sdn Bhd v Tan*, above.
[18] As discussed in Ch.1, a director who makes a deceitful representation in the name of the company cannot avoid personal liability by asserting that the representation was made by him only as agent of the company: see para.1–137.
[19] *Montrose Investments Ltd v Orion Nominees Ltd* [2004] EWCA (Civ) 1032. It is easy to envisage circumstances where a dishonest stranger to the trust has (say) knowingly misled the trustee into committing an innocent breach of trust. In such a case both the beneficiary and the trustee would have a claim against the accessory and the beneficiary will also have a claim against the trustee.
[20] Above, at 381–382.

seek to fasten fiduciary obligations directly onto the company's officers or agents or advisers, or to have them held personally liable for assisting the company in breaches of trust or fiduciary obligations."

13–011 Indeed one often finds claims in unlawful means conspiracy and other economic torts being pleaded alongside claims in dishonest assistance, arising out of the same essential facts.[21] Similarly, dishonest assistance will commonly be available as a basis for liability on the part of a briber of the claimant's agent, in addition to claims for relief on the basis of the bribe.[22] Nevertheless, a claim in dishonest assistance in such situations does not merely frank the liability that would otherwise arise in tort; rather, it is a powerful additional weapon in the fraud litigator's armoury, including because:

(1) It enables a claimant to recover not just loss caused by the underlying wrong, but also profits made by the assister;
(2) It can lie against those whose involvement in the underlying wrong post-dated it (such as those who assist in the laundering of the proceeds of a fraud, even if not complicit in it before that); and it does not require one to establish a combination to which the primary wrongdoer and assister were both party;
(3) It enables recovery of the losses flowing from the underlying wrong, even if the assistance did not itself cause those losses; and
(4) It is available even where the primary wrongdoer cannot be proven himself to have acted dishonestly.

B. BREACH OF TRUST OR FIDUCIARY DUTY

(1) The Underlying Relationship

13–012 The equitable claim in dishonest assistance lies only where there is a trust or fiduciary relationship, the breach of which gives rise to the primary liability. A trust relationship in the formal sense of one whereby property is vested in one person to be held by him on trust for another is the paradigm, but by no means only, example. Quasi-trust relationships, such as those between a director and a company and between certain sorts of agents and their principals, in which a fiduciary has possession and/or control of property which belongs (legally and beneficially) to another, will also suffice.[23] So too, it would now appear, will fiduciary relationships which do not bear that analogy to trust ones[24]; but the duty which is breached, and which gives rise to the primary liability, must in such a

[21] An example in the context of a bank fraud is *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep. Bank 511. In *Brown v Bennett* [1999] BCC 525 it was accepted (and the concession was regarded as being correct by the Court of Appeal) that the equitable claim in dishonest assistance and the tortious claim in conspiracy stood or fell together.

[22] As for example in *Novoship (UK) Ltd v Mikhaylyuk* [2015] Q.B. 499.

[23] *Selangor United Rubber Estates Ltd v Cradock (No.3)* [1968] 1 W.L.R. 1555, at 1574–1577; *Belmont Finance Corp Ltd v Williams Furniture Ltd (No.2)* [1980] 1 All E.R. 393; *Agip (Africa) Ltd v Jackson* [1990] Ch. 265; [1991] Ch. 547 (CA); *Cowan de Groot Properties Ltd v Eagle Trust Plc* [1992] 4 All E.R. 700.

[24] See the following sub-section.

case nevertheless be a fiduciary one, as distinct from a duty (such as an equitable duty of care) which happens to be owed by a fiduciary.[25]

13–013 Conversely, a relationship which does not involve fully-fledged fiduciary obligations, but which does involve informal trusteeship, will also suffice: so, liability in dishonest assistance can arise wherever the primary wrongdoer is in possession or control of property belonging to another, which he can only deal with for the benefit of or as authorised by that other[26]—including a constructive trustee (in the first sense identified in *Paragon Finance*), a resulting trustee or a bare trustee.[27]

(2) Breach Need not Involve Misapplication of Property

13–014 After some uncertainty, it is now established that it is not necessary to found liability in dishonest assistance for the underlying breach of duty to have involved a misapplication of trust (or quasi-trust) property[28]: thus in *Novoship (UK) Ltd v Mikhaylyuk*,[29] a dishonest assistance claim could lie where the primary liability was that of a manager and director of the claimant company whose breach of fiduciary duty involved the negotiation and entry into charters of the claimant's vessels (for which he had received bribes) that did not involve any disposition of the company's property. This is in contrast to liability in knowing receipt, where, by definition, there must have been receipt of trust property or its traceable proceeds.[30]

13–015 It would seem to follow from this that it is not necessary (although it is sufficient) for the underlying relationship to be one that involves the fiduciary having possession or control over his principal's property.

(3) Breach Need not be Dishonest

13–016 It is now established that there is no requirement that the breach of trust or fiduciary duty should itself be dishonest.[31] As we have noted above, this is significant because liability on the part of an accessory will often arise in circumstances where he has misled or otherwise induced a trustee or fiduciary

[25] As to which, see *Bristol and West Building Society v Mothew* [1998] Ch. 1 and paras 11–058—11–061. It seems that liability may arise for dishonest assistance in a breach of confidence: see *Thomas v Pearce* [2000] F.S.R. 718.

[26] *Baden v Societe General pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* (1983) [1993] 1 W.L.R. 509, at 573E–573F.

[27] See the observations of Mance J in *Grupo Torras SA v Al-Sabah* [1999] C.L.C. 1469, at 1664. This seems to have been assumed in *Bank Terjerat v Hong Kong Banking Corp (CI) Ltd* [1995] 1 Lloyd's Rep. 239.

[28] *J D Wetherspoon Plc v Van de Berg & Co Ltd* [2009] EWHC 639 (Ch), cited with approval in *Novoship (UK) Limted v Mikhaylyuk* [2015] Q.B. 499, at [91]–[93]. For the contrary view, which has now been overtaken, see *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All E.R. 652.

[29] Above.

[30] *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All E.R. 652, per Nourse LJ at 671, as considered in *Goose v Wilson Sandford & Co* [2001] Lloyd's Rep. PN 189, per Morritt LJ at [88].

[31] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] A.C. 378.

into a breach for which they may not be morally culpable, or at least culpable to the level required to be shown to make out a case of dishonesty. Previously it had been understood that dishonesty on the part of the trustee or fiduciary was a requirement where the claim was for assistance in the breach, but not where it was for procurement of it. That distinction has now gone and cases which predate the decision in *Royal Brunei* should therefore be treated with caution on this aspect. The focus is now in all cases on the state of mind of the accessory; if he is dishonest in the sense discussed below, the dishonesty or otherwise of the principal wrongdoer is irrelevant. This makes sense: the liability of the dishonest accessory should not depend on the state of mind of the primary wrongdoer and to link the two questions creates anomalies which could allow liability to be avoided based on matters which are likely to be extraneous to the culpability of the accessory.[32]

(4) Where no Liability for the Primary Breach

13–017 There must be a breach of trust or fiduciary duty for liability in dishonest assistance to arise: that follows from the fact that it is a form of accessory liability. However it does not follow that the trustee or fiduciary whose breach is the springboard for the claim should himself be liable: if the trustee or fiduciary has the benefit of an enforceable exemption clause which excuses him from liability (as distinct from a clause that prevents there being a breach in the first place), then, provided that there is a breach, the dishonest assister could be liable even though the trustee or fiduciary is not. The same is probably true where a director has (in principle) the primary liability but is relieved of liability under s.1157 of the Companies Act 2006 or where the trustee's liability is relieved under s.61 of the Trustee Act 1925.

C. ASSISTANCE/PROCUREMENT

(1) What Amounts to Actionable Assistance

13–018 Whether a defendant has assisted in a breach of trust or fiduciary duty is quintessentially a question of fact and the categories of assistance are not closed: what is required, or at least sufficient, for the ingredient of assistance is simply conduct (or an omission) which in fact assists the fiduciary to commit the act which constitutes the breach of trust or fiduciary duty.[33] It is not necessary that the assistance should play any part in the mental state of the trustee or fiduciary, still less that it should assist the mental state in a way which is necessary to render the act a breach of trust or fiduciary duty.[34]

[32] As discussed in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] A.C. 378, at 384–385.
[33] *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm), per Popplewell J at [351].
[34] *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm), per Popplewell J at [351].

13–019 Conduct can amount to assistance even if the breach would possibly still have occurred (or the proceeds of the breach still have been dissipated) without it.[35] Hence it is an irrelevant and illegitimate inquiry to consider what would have happened absent the defendant's acts or omissions which are said to constitute assistance. Nonetheless, to constitute assistance the conduct complained of must have some causative effect.[36] So where directors in (alleged) breach of their fiduciary duties caused a company to enter into administrative receivership, with a view to the sale of its business to another vehicle, the company which acquired the business from the receivers was held not liable: the directors' breaches and the resultant damage were complete before the acquiring company came on the scene, and its acts in acquiring the business could not therefore amount to assistance in them.[37]

13–020 In the well-known case of *Brink's Ltd v Abu-Saleh (No.3)*,[38] the defendant wife accompanied her husband abroad on money laundering trips, thereby giving the trips an air of legitimacy (and so, it could be said, facilitating the fraud); but she was held not liable, because her assistance was not "of a nature sufficient to make her an accessory". It is right to note that this conclusion appears to have been influenced by the fact that her presence on the trips was not *intended* by her to be as cover for her husband, but in her capacity as his wife; had it been otherwise, the result might well have been different. What is "sufficient" for these purposes is inevitably difficult to state in the abstract; but one academic commentator has suggested that all that is required is that the dishonest assister's actions or omissions "have at least made the commission of the breach easier than it would otherwise have been".[39]

13–021 Examples of assistance in the cases include:

(1) Causing (as director of a company) monies held by the company as trustee to be used for the company's own business purposes[40];
(2) Authorising onward payments of monies derived from trust monies to accounts of companies controlled by those involved in the fraud[41];
(3) Drafting (as a solicitor) sham agreements in purported pursuance of which unauthorised payments were made and then divided between the parties to a fraud[42];

[35] C. Mitchell, D.J. Hayton and P. Matthews, *Underhill & Hayton Law of Trusts and Trustees*, 19th edn (London: LNUK, 2016), para.98.53; *Balfron Trustees Ltd v Peterson* [2001] I.R.L.R. 758, per Laddie J at [21].
[36] *Brown v Bennett* [1999] BCC 525, per Morritt LJ at 533.
[37] *Brown v Bennett* [1999] BCC 525, per Morritt LJ at 533.
[38] *Brink's Ltd v Abu-Saleh (No.3)* [1996] C.L.C. 133, at 148–149.
[39] Elliot and Mitchell, *Remedies for Dishonest Assistance* (2004) 67(1) M.L.R. 16–47, which would need to be read subject to the point noted below that it is not just assistance in the original commission of the breach that is actionable.
[40] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] A.C. 378.
[41] *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 W.L.R. 1476.
[42] *Dubai Aluminium Co Ltd v Salaam* [2003] 2 A.C. 366.

(4) Providing research (which was alleged to be valueless), submitting invoices for it and making arrangements to receive payments, all as a false pretext for the making of company payments in (alleged) breach of directors' duties[43];

(5) Negotiating as agent towards the conclusion of contracts with the defaulting fiduciary's principal.[44]

(2) Assistance After the Original Breach

13–022 It is important to note that the assistance need not precede or be directly contemporaneous with the original breach of trust or duty: as Lord Millett observed in *Twinsectra v Yardley*,[45] the liability:

> "extends to everyone who consciously assists in the continuing diversion of the money. Most of the cases have been concerned, not with assisting in the original breach, but in covering it up afterwards by helping to launder the money."

Thus, as has already been noted, the facilitation of the onward payment of monies misapplied in breach of trust or fiduciary duty is a classic example of actionable assistance; so would concealment of the original misapplication be.[46]

13–023 The justification for this approach is that (in a money laundering case) the breach of trust is not regarded as having been completely implemented until the proceeds have been put beyond the reach of the beneficiaries. Where the breach is complete in this sense, subsequent acts of the defendant cannot assist its commission.[47]

(3) Procurement

13–024 Liability will also attach to a defendant who induces or procures, rather than assists in, a breach of trust or fiduciary duty. Thus in one leading case a parent who induced trustees to make a distribution of trust property to his illegitimate children by producing a forged marriage certificate was held liable to make good the resulting loss to the trust fund.[48] Equally, where the director of a company causes that company to act in breach of trust or fiduciary duty, then he can be said to have procured the breach and will be liable accordingly.[49]

[43] *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm).
[44] *Novoship (UK) Limted v Mikhaylyuk* [2015] Q.B. 499, at [55] (the defaulting fiduciary being in breach of duty by conducting such negotiations on behalf of the principal without disclosing that he was sharing secret commissions with the other side's agent).
[45] Above, at 194.
[46] See *Agip (Africa) Ltd v Jackson* [1990] Ch. 265; *Grupo Torras SA v Al-Sabah* [1999] C.L.C. 1469; *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep. Bank 511; and *Independent Trustee Service Ltd v GP Noble Trustees Ltd* [2010] EWHC 1653 (Ch), at [242]–[244].
[47] *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), per Lewison J at [1509]–[1510]. This was one of the bases on which Mr Soler escaped liability in *Grupo Torras*, above, at 1668.
[48] *Eaves v Hickson* (1861) 30 Beav. 136. This case was cited in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] A.C. 378, with approval, at 385.
[49] *Royal Brunei*, above.

(4) Causation

13–025 The liability of a dishonest assister is not limited to losses (or indeed profits) that can be said to result directly from their assistance; instead, the relevant causal connection is between the loss or profit claimed and the breach of trust or fiduciary duty which has been dishonestly assisted.[50] This would appear to be so even if (in line with the principles identified above) the assistance postdates the breach. As in a claim in conspiracy, it is inappropriate to engage in attempts to assess the precise causative significance of the assistance in relation to the breach.[51]

13–026 It follows that (as has been noted above)[52] it is no answer to a claim in dishonest assistance to say that the defaulting trustee or fiduciary would have brought about the loss claimed even without the assistance.

13–027 However, care must be taken to identify the breach or breaches of trust or fiduciary duty in which there has been assistance. What may be characterised as a single dishonest scheme may nevertheless involve a number of distinct breaches, and the loss recoverable from the dishonest assister is only that which may be said to have resulted from the particular breach or breaches in which he assisted.[53] So where payments are abstracted from the claimant and channelled through a number of different routes to different ultimate recipients as part of a single "scheme", it may be open to a defendant who is implicated only in the onward diversion of one of the payments but not others to contend that the relevant breach of trust in which he assisted is only that by which that particular payment was made and concealed, and so the loss which he must bear (even when analysed with reference to the underlying breach of trust and not the assistance in it) is limited to that particular payment.[54]

13–028 It has been observed in a recent case that the liability of the assistant is "for such loss as the party in breach of fiduciary duty would be liable",[55] and that it therefore falls to be assessed (as in a claim for equitable compensation against the

[50] *Grupo Torras SA v Al-Sabah* [2001] C.L.C. 221 (CA), at [119]. See also *Casio Computer Co Ltd v Sayo* [2001] IL Pr 694, at [16] (it is loss "caused by the breach of fiduciary duty [which is] recoverable from the accessory"); and *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm), per Popplewell J at [340] ("It is not necessary to show that the assistance itself is causative of any loss"). Although the Court of Appeal in *Novoship (UK) Limted v Mikhaylyuk* [2015] Q.B. 499, referred (when considering the remedy of an account of profits) to the question of what had happened "as a result of [the] dishonest assistance" (at [114]), it seems clear from the rest of that paragraph and from the fact that *Grupo Torras* and *Casio Computer* were cited (at [103]) that it was not intended to cast doubt upon these propositions.
[51] *Grupo Torras SA v Al-Sabah* [2001] C.L.C. 221 (CA), at [119].
[52] Paragraph 13–019.
[53] See *Grupo Torras SA v Al-Sabah* [1999] C.L.C. 1469, per Mance J at 1666.
[54] But to different effect see the decision of Peter Smith J in *Independent Trustee Service Ltd v GP Noble Trustees Ltd* [2010] EWHC 1653 (Ch), where one of the defendants (Mr Starkey) was implicated in the creation of bonds designed to help put out of reach funds paid away in breach of trust from a pension trust. There were two "waves" of such payments, and Mr Starkey was held liable for the losses arising from both, even though he only became involved after the first wave of payments had been made.
[55] *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm), per Popplewell J at [340].

defaulting trustee or fiduciary himself) taking account of events post-dating the original breach up to the date of trial, with the full benefit of hindsight.[56] Those observations fit with the accessory nature of the liability. However, as we have noted at the start of this chapter, the Court of Appeal has also held that, because the dishonest assister is not in an antecedent fiduciary relationship with the claimant, common law concepts of causation and remoteness should be applied by analogy and not the stricter rules applicable to trustees and fiduciaries.[57] The two approaches may be reconciled on the basis that the latter case was concerned with the assister's accountability for profits, and the former cases with his liability to compensate losses, although the Court of Appeal's reasoning is cast in broader terms.

13–029 In fact, the dishonest assister's liability could end up being larger than that of the defaulting trustee or fiduciary, where the former is dishonest and the latter is not, given the equitable jurisdiction to award compound interest. Of course, if the breach of trust is innocent and the trustee has the benefit of an exemption clause, or obtains relief under the Trustee Act, then the trustee may have no pecuniary liability at all, in contrast to the accessory.

(5) Contributory Negligence

13–030 As in a claim in deceit, it is no answer to a claim in dishonest assistance to say that the claimant had the opportunity to discover the wrongdoing and unreasonably failed to do so.[58]

13–031 However, a claimant's acts or omissions, particularly in circumstances where he is aware of or on notice of the fraud but fails to take reasonable steps to prevent a loss, may be so egregious as to break the chain of causation, making him the "author of his own loss".[59]

D. DISHONESTY

(1) The Legal Test

13–032 The touchstone of liability for dishonest assistance is dishonesty. Although there is a long history of judicial attempts to define this concept, which have yielded over the years a number of decisions at first instance and in the Court of Appeal which are difficult to reconcile, the current position is relatively settled. The law

[56] *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, per Lord Mance at [170], referring to *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2015] A.C. 1503.
[57] *Novoship (UK) Limted v Mikhaylyuk*, above, at [107]; for the principles applicable to trustees and fiduciaries, see paras 22–120—21–123.
[58] *Corporacion Nacional Del Cobre De Chile v Sogemin Metals Ltd* [1997] 1 W.L.R. 1396; and see generally paras 21–088—21–094, which consider the defence of contributory negligence in the context of intentional wrongs generally.
[59] See the analysis of equitable compensation by McLachlin J in the Canadian Supreme Court decision *Canson Enterprises Ltd v Boughton & Co* (1991) 85 D.L.R. (4th) 129, at 161–162. McLachlin J's judgment was cited with approval in both *Target Holdings Ltd v Redferns* [1996] A.C. 421 and *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2015] A.C. 1503.

can, in essence, be found in two Privy Council decisions and one House of Lords decision which are discussed in this section.

13–033 For these purposes, dishonesty means simply not acting as an honest person would in the circumstances.[60] Dishonesty may consist in knowledge that a transaction is one in which one cannot honestly participate (such as the misappropriation of money belonging to others), or, importantly, in suspicion to that effect coupled with a conscious decision not to make inquiries which might result in knowledge.[61] An honest person does not "deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless".[62]

13–034 Dishonesty is concerned with subjective states of mind, in the sense that it falls to be assessed with reference to what the defendant actually knew (rather than what he ought to have known) and it requires advertent rather than inadvertent conduct.[63] Imprudence is not dishonesty. Since the state of a person's mind can never directly be known, dishonesty can only be established by drawing inferences from other facts[64]; but that is not to say that the *standard* of what constitutes dishonesty, given the defendant's subjective knowledge and intentions, is itself subjective. It is not: in judging whether the defendant's conduct in light of his subjective mental state is dishonest, the Court applies an objective standard—that is, what by "ordinary standards" is dishonest.[65] The fact that the defendant has an idiosyncratic personal moral code cannot absolve him of liability if his conduct is by normal standards dishonest: hence in *Barlow Clowes International Ltd v Eurotrust International Ltd*[66] the judge at first instance held that one of the defendants had:

> "an exaggerated notion of dutiful service to clients, which produced a warped moral approach that it was not improper to treat carrying out clients' instructions as being all important. Mr Henwood may well have thought this to be an honest attitude, but, if so, he was wrong."

The Privy Council upheld this finding.

13–035 In *Twinsectra Ltd v Yardley*, Lord Hutton (which whom the majority agreed) appeared to suggest that there is an additional subjective component to the test of dishonesty—that:

[60] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] A.C. 378, per Lord Nicholls at 389C.
[61] *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 A.C. 469.
[62] *Royal Brunei Airlines Sdn Bhd v Tan*, above, per Lord Nicholls at 389F–389G.
[63] *Royal Brunei Airlines Sdn Bhd v Tan*, above, per Lord Nicholls at 389D.
[64] *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 W.L.R. 1476, at [26]: "Since there is no window into another mind, the only way to form a view on these matters is to draw inferences from what [the Defendant] knew, said and did, both then and later, including what he said in evidence."
[65] *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 W.L.R. 1476, at [10]. "Ordinary standards" means just that; the fact that there may be a body of opinion which takes a different view is irrelevant: *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, per Morritt C at [32].
[66] Above, at [12].

> "for liability as an accessory to arise the defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men".[67]

On the face of it, that requirement would involve an impossibly refined inquiry into the mental processes of the defendant. It would also absolve the psychopath of liability. But Lord Hutton's observations have subsequently been "explained" by Lord Hoffmann (giving the advice of the Privy Council in *Barlow Clowes Ltd v Eurotrust Ltd*) as meaning only that the defendant's knowledge of the transaction has to be such as to render his participation contrary to normally acceptable standards of honest conduct, and not to require that the defendant should have reflected upon what those normally acceptable standards are.[68] The law therefore remains as stated in *Royal Brunei*: in essence, the court assesses the defendant's conduct by reference: (a) first to the facts he actually knew (rather than the facts he ought to have been aware of); and then (b) to the ordinary standards of honesty (rather than by reference to his own private value system). This is not to say that the well-advised claimant will not seek to establish at trial that the defendant was subjectively dishonest in the sense identified by Lord Hutton. Liability will clearly be made out if the defendant is shown to have been conscious of his own wrongdoing.

13–036 Whilst the doctrine of precedent might arguably require that the unvarnished *Twinsectra* test be favoured until it is reconsidered by the Supreme Court, the better view is almost certainly that Lord Hoffmann's subsequent gloss on it in *Barlow Clowes* is to be preferred[69]; and this can probably be reconciled with the doctrine of precedent on the footing that the point was not necessary to the decision in *Twinsectra*,[70] and the Privy Council in *Barlow Clowes* expressed itself to be explaining, rather than departing from, what the House of Lords had previously said.[71] Recently the Supreme Court in *Ivey v Genting Casinos (UK)*

[67] *Twinsectra Ltd v Yardley* [2002] 2 A.C. 164, at [35]–[36]; see also per Lord Hoffmann at [20].

[68] *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 W.L.R. 1476, at [15]–[16].

[69] As it has been in a number of subsequent cases, including: *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, per Arden LJ at [68]–[69] (although note the reservations of the other members of the Court of Appeal on the issue); *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch), per Morgan J at [183]–[184]; *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2011] 1 Lloyd's Rep. F.C. 102; *Vivendi SA v Richards* [2013] EWHC 3006 (Ch), per Newey J at [182]–[183]; *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm), per Popplewell J at [353]; *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2017] EWHC 257 (Ch), per Rose J at [143]–[145]. In *Group Seven Ltd v Nasir* [2017] EWHC 2466 (Ch) Morgan J held that he was bound by the Court of Appeal decision in *Starglade* to proceed on the basis that *Barlow Clowes* correctly stated the law.

[70] The solicitor, Mr Leach, was not dishonest because, although he knew the terms of the third party undertaking to which the relevant monies were subject, and so knew the facts which (as it was found) made it a breach of trust to pay the money away to the client, he genuinely thought that the money, once in his client account, was held for the client's account only. That was misguided, but not (even objectively) dishonest, and the Judge was able to make that finding without explicitly making any finding about the solicitor's subjective appreciation of the honesty or otherwise of what he was doing. There is no need to resort to Lord Hutton's surmise (at [42]) that the judge had implicitly applied a combined objective/subjective test.

[71] See for example *Singluaris Holdings Ltd v Daiwa Capital Markets Europe Ltd*, above, where Rose J directed herself that the test for dishonesty was that set out in *Twinsectra*, but as explained in *Barlow Clowes*: [143]–[145] (not challenged on appeal: [2018] EWCA Civ 84; [2018] 1 W.L.R. 2777). Arden LJ took the same approach in *Abou-ramah v Abacha*, above, at [68].

Ltd (t/a Crockfords)[72] expressed the view, albeit obiter, that the test established in *Barlow Clowes* represents the English law.

(2) Knowledge of the Underlying Trust or Fiduciary Relationship

13–037 A question which often comes up is what knowledge about, or suspicion as to, the underlying trust or fiduciary relationship is required for the assistance to be dishonest. In *Brinks Ltd v Abu-Saleh (No.3)*,[73] Rimer J expressed the view that a person cannot be liable for dishonest assistance in a breach of trust unless he knows of the existence of the trust or at least the facts giving rise to it. This view was rejected by the Privy Council in *Barlow Clowes*, where it was held that (in the case of assistance in the misappropriation of monies held on trust for investors) knowledge or a suspicion that the person with primary liability was not entitled to use the funds in question as their own (coupled, in the case of a suspicion, with a conscious decision not to inquire further) sufficed: it is not necessary to show that the particular nature of the inhibition on dealing, or the facts giving rise to it, was known.[74] Put more generally, it is sufficient if the assister knows or suspects (without further enquiry) that the transaction is not one in which he can honestly participate.[75] As observed by Millett J in *Agip (Africa) Ltd v Jackson*[76]:

> "it is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that it was 'only' a breach of exchange control or 'only' a case of tax evasion. It is not necessary that he should have been aware of the precise nature of the fraud or even of the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from a third party, takes the risk that they are part of a fraud practised on that party."

13–038 In *Twinsectra*, the same judge (then Lord Millett) expressed the view that:

> "It is sufficient that [the Defendant] knows that the money is not at the free disposal of the principal. In some circumstances it may not even be necessary that his knowledge should extend this far. It may be sufficient that he knows that he is assisting in a dishonest scheme".[77]

13–039 Similarly, ignorance as to the unlawfulness of a transaction will not be a defence: thus a director of an insolvent company, who, knowing it to be insolvent, caused the company to pay away its funds to certain creditors in order to frustrate the

[72] *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67; [2018] A.C. 391, at [62].

[73] In *Brinks Ltd v Abu-Saleh (No.3)* [1996] C.L.C. 133, at 151. Mance J expressed support for this view in *Grupo Torras SA v Al Sabah* [1999] C.L.C. 1469.

[74] At [28]. Similarly in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), Lewison J held that the assistant must know that the person he is assisting is not entitled to do what he is doing and, although he need not know all the details of the whole design, he must in broad terms know what the design is (see, at [1504]–[1506]).

[75] *Abou-Rahmah v Abacha* [2007] 1 All E.R. Com 827, per Rix LJ at [39]; *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm), per Popplewell J at [351].

[76] *Agip (Africa) Ltd v Jackson* [1990] Ch. 265, at 295, cited with approval by Rix LJ in *Abou-Rahmah v Abacha*, above, at [38].

[77] *Twinsectra Ltd v Yardley* [2002] 2 A.C. 164, at [135], which, although it was in a dissenting speech, was referred to with approval by Lord Hoffmann in *Barlow Clowes*, above, at [28].

claim of a person for whom the company had agreed to hold funds on trust, acted dishonestly, even if he did not know that doing so contravened the rules against preferences.[78]

13–040 It is also not necessary, in order to establish the requisite mental state, to show that the defendant intended that the victim should be defrauded. It is (usually) dishonest, by ordinary standards, to assist in a transaction whereby money belonging to another is applied in a way that one knows is not authorised, even if ones hopes that in due course the money will be repaid.[79] Fraud includes taking a risk to the prejudice of another's rights, when that risk is known to be one which there is no right to take, even if one hopes the risk will pay off.[80] Hence a finding of dishonesty does not require a finding that the defendant has been actuated by selfish motives or a desire to further his interests (or those of the defaulting trustee or fiduciary) to the detriment of the claimant. In this sense it is not necessarily oxymoronic to speak of dishonest assistance which is well-intentioned. But nonetheless the dishonesty must have been directed "towards the [claimant]" in relation to property held or potentially held on trust; findings of generic dishonesty are not enough.[81]

(3) Doubts, Suspicions and Recklessness

13–041 When something short of actual knowledge on the defendant's part that a dealing is unauthorised is shown, the question will be whether the defendant entertained doubts or a suspicion such that it was dishonest, by ordinary standards, consciously to refrain from further inquiry before proceeding. There may be more than one course that an honest person would take when faced with such doubts (such as refusing to proceed, making further inquiries, giving advice, etc.) and in assessing the defendant's response the court will take account of all of the relevant circumstances as known to them (including the nature and importance of the transaction, the practicability of proceeding otherwise, the degree of doubt entertained and the seriousness of the consequences for the potential victims). The Court will also take account of the defendant's own attributes, such as his

[78] *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2011] 1 Lloyd's Rep. F.C. 102.

[79] *Royal Brunei Airlines Sdn Bhd v Tan*, above, per Lord Nicholls at 393A–393D. But note the concept of a "judicious" breach of trust, which, although deliberate (i.e. done knowing it is not authorised), is not dishonest when done in good faith and in the honest belief that it is for the benefit of the beneficiaries: see *Armitage v Nurse* [1998] Ch. 241, per Millett LJ at 250–251; and *Walker v Stones* [2001] Q.B. 902, particularly the qualification to this at 939C and 941D (solicitor-trustee's honest perception of interests of beneficiaries could nevertheless be so unreasonable as to amount to dishonesty for the purposes of the exception to an exemption clause).

[80] *Baden v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France S.A. (Note)* [1993] 1 W.L.R. 509, per Peter Gibson J at 574.

[81] *Grupo Torras SA v Al-Sabah* [1999] C.L.C. 1469, at 1665–1666, per Mance J; although the reference to property held on trust should probably now be understood more broadly, in light of the developments noted in paras 13–012—13–015 above.

experience, intelligence and reasons for acting.[82] This is a preferable approach to trying to fit the defendant's degree of suspicion into some preconceived category of culpable knowledge.[83]

Two important points should be made about suspicions in this context: first, a **13–042** suspicion for these purposes must be "firmly grounded and targeted on specific facts"; a vague feeling of unease (which might also be called a suspicion) would not suffice.[84] Secondly, what makes the state of mind dishonest is the deliberate decision, having a suspicion in that sense, to avoid confirming that the facts in whose existence the defendant has good reason to believe.[85]

In a commercial context, dishonesty has for these purposes been equated with, or **13–043** closely allied to, what is commercially unacceptable. Thus in *Abou-Ramah v Abacha*[86] the Court of Appeal upheld the conclusion of the judge that it was not dishonest for a bank to receive and pay on proceeds of a fraud, despite the relevant bank officer having a general suspicion that the persons directing the payments "might be, in the course of their business, from time to time assisting corrupt politicians to launder money". The officer was found not to have any knowledge or suspicion concerning the particular transactions in issue which was such as to render it commercially unacceptable to implement the instructions the bank had received, particularly given the commercial setting in which banks are required to act on proper instructions, the fact that local regulatory requirements were observed and the fact that cash transactions were commonplace in the relevant jurisdiction.[87]

It should also be noted that dishonesty in this area of the law is not to be equated **13–044** with recklessness: acting in reckless disregard of another's possible rights is certainly strong evidence of dishonesty; but it is not the same thing, particularly

[82] Establishing a motive is not a legal requirement, but if a motive cannot plausibly be suggested, then a wrongful intention is less likely: per Mann J in *Mortgage Agency Services Number One Ltd v Cripps Harries LLP* [2016] EWHC 2483 (Ch), at [88], cited by Rose J in *Singularis Holdings Ltd* [2017] EWHC 257 (Ch), at [158].

[83] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] A.C. 378, per Lord Nicholls at 390F–391B and 392G.

[84] See *Manifest Shipping Co v Uni-Polaris Insurance Co* [2003] 1 A.C. 469, per Lord Scott at [116], which was relied on in the context of a dishonest assistance claim by Morgan J in *Group Seven Ltd v Nasir* [2017] EWHC 2466 (Ch), at [445]–[447].

[85] *Manifest Shipping Co v Uni-Polaris Insurance Co* [2003] 1 A.C. 469, per Lord Scott at [116]. So in *Barlow Clowes* Lord Hoffmann endorsed the view that Mr Henwood would be dishonest if he "had solid grounds for suspicion which he consciously ignored that the disposal in which [he] participated involved dealings with misappropriated trust funds": [2006] 1 W.L.R. 1476, at [19]–[20]; and in *Att. Gen. of Zambia v Meer Care & Desai* [2008] EWCA Civ 1007 Lloyd LJ held that "…if Mr Meer had a clear suspicion that this was the case and he deliberately decided not to enquire in order to avoid having confirmation that it was so, that is properly characterised as dishonesty, of the kind often called blind-eye, or Nelsonian". It is not enough to show that a reasonable person would draw the inference that there was a probability that the funds were misappropriated, if the defendant did not in fact draw that inference or consciously shut his eyes to grounds for suspicion: *Heinl v Jyske Bank* [1999] Lloyd's LR Banking 511.

[86] *Abou-Ramah v Abacha* [2006] EWCA Civ 1492.

[87] See particularly per Arden LJ at [72]; but note the serious doubts expressed by Rix LJ (without dissenting).

because (as noted above) an evaluation of circumstances such as the experience and intelligence of the defendant, and his reasons for acting, may point to a different conclusion.[88]

(4) Standard of Proof

13–045 As in other areas of the law, a finding of dishonesty is to be made on the balance of probabilities. Previous suggestions in the cases that the serious nature of the allegation will require stronger evidence before the Court reaches that conclusion applying that standard, dishonesty being inherently less likely than negligence,[89] are to be treated with caution: whilst the Court must of course take into account inherent probabilities and improbabilities, there is no necessary connection between seriousness and probability.[90]

E. VICARIOUS LIABILITY

(1) Dubai Aluminium

13–046 The leading case on vicarious liability for dishonest assistance is *Dubai Aluminium Co Ltd v Salaam*.[91] Whilst the case was concerned with the vicarious liability of partners for acts of their fellow partners under s.10 of the Partnership Act 1890, it was observed that this provision assimilated the vicarious liability of partners with that of employers and was drafted deliberately widely, so that the law applicable to partners could keep step with the general law.[92]

13–047 The following propositions were confirmed in or can be derived from the case:

(1) There can be vicarious liability for dishonest assistance: nothing in s.10 of the 1890 Act or the general law limits vicarious liability to tortious wrongdoing.[93]

(2) It is not necessarily an answer to the imposition of vicarious liability (and is unlikely on its own to be an answer) that the partner or employee acted dishonestly and for his own benefit[94]; nor that the particular act constituting the assistance was not authorised (e.g. a solicitor drafting a sham agreement to conceal an unauthorised payment), it being sufficient that he is

[88] *Clydesdale Bank Plc v Workman* [2016] EWCA Civ 73, per Lewison LJ at [48]–[52].

[89] See e.g. *Chang v Mischon de Reya* [2015] EWHC 164 (Ch), at [8], citing *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] A.C. 563, per Lord Nicholls at 586D–586F.

[90] See *Otkritie International Investments Management Ltd v Urumov* [2014] EWHC 191 (Comm), at [84]–[91]; *Group Seven Ltd v Nasir* [2017] EWHC 2466 (Ch), at [49]–[50]; and *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm), at [46]–[66].

[91] *Dubai Aluminium Co Ltd v Salaam* [2003] 2 A.C. 366.

[92] Per Lord Millett at [106]–[108].

[93] *Dubai Aluminium*, above, per Lord Nicholls at [10]–[12]; per Lord Millett at [103]–[111].

[94] *Lloyd v Grace Smith & Co* [1912] A.C. 716, cited in *Dubai Aluminium*, above, by Lord Millett at [121].

authorised to do acts of the kind in question (e.g. drafting agreements).[95] That said, the Court could conclude that, on an overall evaluation of the facts, in acting dishonestly, for his own benefit or the benefit of a co-conspirator rather than his employer or firm, the person primarily liable departed so far from the ordinary course of business that he was acting on a frolic of his own (such that no vicarious liability would arise).[96]

(3) Where one is concerned with dishonest, and not merely negligent, conduct, there must be intense focus on the connection between what the employee or partner is employed or authorised to do and the relevant wrongdoing.[97] The question is ultimately whether the dishonest assistance is so closely connected with acts which the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the dishonest assistance may fairly and properly be regarded as done while acting in the ordinary course of the firm's business or the employee's employment.[98]

(4) For there to be vicarious liability for dishonest assistance, all of the features of the wrong which are *necessary* to make the employee (or partner) liable must have occurred in the course of employment; but it does not matter that there may be other acts which could also give rise to a liability in dishonest assistance which were carried out outside the scope of employment.[99]

13–048 The "close connection" test was further considered by the Supreme Court in *Mohamud v Wm Morrison Supermarkets Plc*.[100] Lord Toulson summarised the correct approach in the following terms:

> "In the simplest terms, the court has to consider two matters. The first question is what functions or 'field of activities' have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly …
>
> Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt CJ's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party."

[95] *Navarro v Moregrand Ltd* [1951] 2 T.L.R. 674, cited in *Dubai Aluminium*, above, by Lord Millett at [122].

[96] *Dubai Aluminium*, above, per Lord Nicholls at [33] (citing *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] A.C. 462); and per Lord Millett at [128]–[130].

[97] *Dubai Aluminium*, above, per Lord Millett at [129], drawing upon (inter alia) the observations of Lord Steyn about vicarious liability for intentional wrongdoing in *Lister v Hesley Hall Ltd* [2002] 1 A.C. 215, at 224.

[98] *Dubai Aluminium*, above, per Lord Nicholls at [23].

[99] *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [2000] 1 A.C. 486, as interpreted and applied in the context of the vicarious liability of partners for dishonest assistance in *Dubai Aluminium*, above, per Lord Nicholls at [39] and Lord Millett at [114]–[115].

[100] *Mohamud v Wm Morrison Supermarkets Plc* [2016] A.C. 677, at [44]–[45]. This was not a dishonest assistance case; but its principles were said to be applicable to dishonest assistance in *Group Seven Ltd v Nasir* [2017] EWHC 2466 (Ch).

27–004 In *National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)*[2] the same judge, now as Lord Hoffmann sitting in the Privy Council, returned to these questions, in the context of a consideration of provisions of the Jamaica Civil Procedure Rules which are equivalent to those contained in PD 23A and PD 25A of the CPR. He stated:

> "Although the matter is in the end one for the discretion of the judge, *audi alterem partem* is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."

27–005 It will be evident from these passages that there are only two factual scenarios which justify a litigant proceeding without notice:

(1) First, where giving notice would potentially defeat or prejudice the purpose of the application. It is usually this first scenario which justifies proceeding without notice to obtain a freezing order (because giving notice might hasten the very events the order is designed to prevent), although the particular facts may involve a combination of this and the second scenario described below.

(2) Secondly, where the delay involved in giving notice to the potential respondent will defeat the purpose of the application. Such a scenario will usually involve an attempt to prevent a step which is to be taken imminently and which the applicant wishes to prevent by injunction. However, even in such a situation the Court will generally expect *some* form of notice to be given, even if it is short notice, unless it is satisfied that there was as a matter of practical reality no opportunity at all to give notice.

27–006 These principles, which we consider in further detail below, are reflected in the relevant provisions of the CPR, which we also consider below.

(ii) Secrecy

27–007 It will be evident that the essential requirement of an application made without any notice at all (where the giving of at least some notice is otherwise practicable) is that of secrecy—in the sense of avoiding the respondent being forewarned of the application in a way that might cause him to take steps which might well pre-empt and prejudice the efficacy of the proposed relief. As we have seen, it is an elementary tenet of English law that save in an emergency a court should hear both sides before giving a ruling and (apart from those instances

[2] *National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16; [2009] 1 W.L.R. 1405, at [13].

where a without notice procedure is specifically authorised by statute), if that is to be departed from, it must be on the basis of a well-founded belief that the giving of notice would lead to irretrievable prejudice being caused to the applicant.[3]

(iii) Urgency

27–008 By itself the need for urgency is unlikely to justify a without notice application, because there is almost always the option of giving short notice, even if informally, to the respondent; and some notice is better than none at all.[4]

27–009 As explained below, exceptional urgency (as opposed to secrecy) is identified by the CPR as one of the circumstances which may justify the application being made without notice to the respondent.[5] Doing so is of course a derogation from the principle of *audi alteram partem* and the expectation of the court where urgency alone (in the absence of the other circumstances identified in those provisions) justifies applying without notice is that there is, as we have seen from the quotation above, "literally no time to give notice before the injunction is required to prevent the threatened wrongful act."[6]

(iv) Applying before commencement of proceedings

27–010 Most applications for interim relief, even when made without notice, will be made after the commencement of proceedings. This will almost always be the case for any application which is on notice to the respondent (it will be a rare case where the circumstances are such that the applicant is able to give the respondent notice but has not had sufficient time to issue proceedings before he applies). Nonetheless, the existence of an issued claim form is not an absolute precondition to seeking interim relief, and in urgent without notice applications for freezing orders or search orders the court will not expect the claim form to have been issued, although it will generally insist upon an undertaking from the applicant to issue a claim form as soon as reasonably practicable.[7]

[3] *FZ v SZ* [2011] 1 F.L.R. 64, at [32], per Mostyn J.

[4] Paragraph 16.2 of the Chancery Guide states that "generally it is wrong to make an application without giving prior notice to the respondent" and, even in an urgent case (unless the giving of notice might frustrate the order), "the applicant should give the respondent informally as much notice of the application as is possible". The Guide also makes provision (at para.16.28) in relation to the conduct of hearings of applications of which proper notice has not been given but at which the respondent appears and states that "the judge may, in an appropriate case, make an order which will have effect until trial or further order as if proper notice had been given."

[5] See CPR Pt 23.4(2) and CPR PD 23A, para.3.

[6] *National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16; [2009] 1 W.L.R. 1405, at [13]. As noted there, in most cases there will be other factors aside from simple urgency (most notably the need for secrecy and furthering the overriding objective through the efficacy of the requested relief) which justify proceeding without notice.

[7] Because of the principle, considered in Ch.26, that interim relief should not be granted in a vacuum, but in support of a claim for substantive relief.

(v) The additional burden

27–011 An applicant considering making an application without notice will further want to give considerattion not only to whether he can demonstrate that such circumstances obtain; but also to the fact that, if he is to apply without notice (or even on short notice), there will be a heavy burden on him to ensure that full and frank disclosure is made to the Court. We consider this burden in Section D below.

(2) An Exceptional Remedy

27–012 To grant an interim remedy in the form of an injunction without notice to the person affected by the injunction (and who would thus ordinarily be the respondent to the application) is therefore "to grant an exceptional remedy."[8] In *FZ v SZ*[9] Mostyn J, referring to his experience as a judge in the Family Division, said that that principle was often turned on its head by

> "a sort of lazy, laissez-faire practice or syndrome [having] grown up which says that provided the return date is soon, and provided that the court is satisfied that no material prejudice will be caused to the respondent, then there is no harm in making the order *ex parte*."

In *O'Farrell v O'Farrell*[10] Tugendhat J referred to this observation and commented:

> "I too have been shocked at the volume of spurious ex-parte applications that are made in the Queen's Bench Division. The number of occasions on which CPR Part 25.2 and CPR 15.3(1) and (3) and PD25A para 4(3) are flouted is a matter of real concern. In these days of mobile phones and emails it is almost always possible to give at least informal notice of an application. And it is equally almost always possible for the Judge hearing such an application to communicate with the intended defendant or respondent, either in a three way telephone call, or by a series of calls, or exchanges of e-mail. Judges do this routinely, including when on out of hours duty. Cases where no notice is required for reasons given in PD 25A para 4.3(3) are very rare indeed."

27–013 The applicant should therefore test rigorously his own case for proceeding without notice, and if the conclusion is that he can properly apply for the relief sought without notice then he should set out his reasoning in full in the affidavit drafted in support. Moreover the mere fact that an applicant is applying for a freezing order does not ipso facto provide a justification for applying without notice.[11] If the freezing order is directed at a particular asset (whether or not the

[8] *Moat Housing Group-South Ltd v Harris* [2006] Q.B. 606, at [71] (CA); and *ND v KP* [2011] EWHC 457 (Fam), at [10], per Mostyn J.

[9] *FZ v SZ* [2011] 1 F.L.R. 64, at [32], referred to again by the same judge in *ND v KP*, above.

[10] *O'Farrell v O'Farrell* [2012] EWHC 123 (QB), at [66].

[11] See for instance *Thane v Tomlinson* [2003] EWCA Civ 1272. It is fair to say that in the majority of cases applying without notice will be justified if the application is for freezing relief (because, usually, the apprehended risk of dissipation that justifies the freezing order is also a basis for believing that the giving of notice will cause irretrievable prejudice): see *Legal Services Commission v Lonsdales Solicitors* [2012] EWHC 3311 (QB); and *Gorbunova v Berezovsky (aka Platon Elenin)* [2013] EWHC 76 (Ch).

applicant makes a proprietary claim to that asset) then the character of that asset may mean that there is no real need to apply without notice, either because of its non-liquidity (e.g. a piece of real property) or because, as in *O'Farrell v O'Farrell*, the relevant asset is only to come into the respondent's hands at a date in the future.

27–014 For instance, in *Ian Franses (Liquidator of Arab News Network Ltd) v Al Assad*[12] the applicant had made a without notice application for a freezing injunction over the proceeds of a recent sale of a property, by telephone on a Friday evening (the judge having been provided only with draft orders and a chronology by email during the course of that hearing). The applicant's evidence served later in purported compliance with an undertaking contained within the without notice order had not explained why the application had been made without notice. Henderson J said that proceeding in this way reflected "a serious error of judgment" in circumstances where the applicant's solicitors had been put on notice of the property's sale at the beginning of that week and the proceeds of sale were held by a well-known firm of solicitors (who might have been contacted with a view to providing an undertaking against their disposal until the application had been heard). The judge said that the application ought to have been made on notice (if necessary on short notice) during the following week. When it became apparent from the respondent's evidence that there was no proper basis for maintaining the freezing injunction over the sale proceeds the applicant had to pay the respondent's costs on the indemnity basis.[13]

27–015 In *CEF Holdings Ltd v Mundey*[14] the court emphasised that without notice applications should only be granted in very limited circumstances (observing that the more intrusive the relief sought the more compelling the reasons must be for departing from the general requirement to give notice) and further stated that, in every without notice application for an injunction sought without any (or any proper) notice, it is prudent to include a statement supported by facts explaining fully and honestly why proper notice could not have been given: a "bland statement that the defendant might do something if warned is unlikely to satisfy this requirement without some particulars in support."

27–016 A potential question arises as to whether an applicant who proceeds to make a without notice application, without proper regard to these judicial observations, is likely to suffer the discharge of the order obtained in such circumstances by reason of having proceeded on that basis. We suggest that the answer will very probably turn upon whether or not there has, as a consequence, been a breach of

[12] *Ian Franses (Liquidator of Arab News Network Ltd) v Al Assad* [2007] EWHC 2442 (Ch); [2007] B.P.I.R. 1233, at [70]–[74], [85].

[13] See also *Wood v Gorbunova* [2013] EWHC 1935 (Ch) where receivers appointed by the court were ordered to pay the costs of certain respondents, and were also disallowed some of their own costs in respect of which they would ordinarily have been indemnified, for acting unreasonably in applying (on short notice only to other named respondents) for relief that included mandatory provisions against third parties who had not yet been joined to the proceedings. The judge had directed that notice of the application should be given to them (see para.27–027 in relation to the provisions of CPR 23 on this point) and found that those respondents had since behaved properly by indicating a willingness to cooperate with the receivers subject to appropriate constraints.

[14] *CEF Holdings Ltd v Mundey* [2012] EWHC 1524 (QB), at [248]–[251], per Silber J.

the duty of full and frank disclosure (addressed in Section D below) in that the lack of proper care over the decision as to how the application was to be made may well be symptomatic of (and have contributed to or precipitated) a situation in which the court makes an order without knowing of all matters that are relevant to the application. It should be noted that the CPR require the applicant to justify the decision to proceed without notice so that, on application to discharge the resulting order, the focus is likely to be upon material misstatements or omissions in the evidence containing that purported justification. As already noted, in *Ian Franses v Al Assad* there was, exceptionally, no evidence before the judge at the time of the without notice telephone hearing and the question of notice was not raised as a separate point during the course of that hearing. In those circumstances the "serious error of judgment" in proceeding without notice was regarded as being symptomatic of the wider point that, as a result, the court proceeded in ignorance of latent deficiencies in the merits of the application.[15]

B. PRACTICALITIES OF APPLYING WITHOUT NOTICE

(1) The Civil Procedure Rules

27–017 The relevant provisions of the CPR reflect the law as stated above. They anticipate the need for justification in seeking an interim remedy without giving notice to the respondent by stating that any applicant doing so "must state the reasons why notice has not been given".[16] CPR PD 25A, governing applications for interim injunctions (including search orders and freezing injunctions), also recognises that an application for injunctive relief may be made without notice by providing likewise.[17] As with interim applications generally, an essential need for secrecy is identified as a proper reason (amongst others) for not even notifying the respondent of the application informally.[18]

27–018 In relation to the procedure governing any without notice application, para.4.3 of CPR PD 25A provides as follows, in respect of applications made after issue of the claim form:

> "(1) the application notice, evidence in support and a draft order (as in 2.4 above) should be filed with the court two hours before the hearing wherever possible,
> (2) if an application is made before the application notice has been issued, a draft order (as in 2.4 above) should be provided at the hearing, and the application notice and evidence in support must be filed with the court on the same or next working day or as ordered by the court, and
> (3) except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application."[19]

[15] *Ian Franses (Liquidator of Arab News Network Ltd) v Al Assad* [2007] EWHC 2442 (Ch); [2007] B.P.I.R. 1233, at [70]–[74]. For another illustration of an unjustified decision to apply for a freezing injunction without notice being linked to material non-disclosure (justifying its discharge) see *Frenkel v Lyampert* [2017] EWHC 3121 (Ch), at [116].
[16] CPR r.25.3(3).
[17] CPR PD 25A, para.3.4.
[18] PD 25A, para.4.3(3).
[19] To similar effect see CPR PD 23A, para.4.2.

27–019 Paragraph 4.4 contains further provisions where the application is made before the issue of a claim form:

> "(1) In addition to the provisions set out at 4.3 above, unless the court orders otherwise, either the applicant must undertake to the court to issue a claim form immediately or the court will give directions for the commencement of the claim,
> (2) where possible the claim form should be served with the order for the injunction,
> (3) an order made before the issue of a claim form should state in the title after the names of the applicant and respondent 'the Claimant and Defendant in an Intended Action'."

27–020 Any application made without notice must be accompanied by evidence explaining the circumstances which justify applying without notice.[20] This specific requirement is often overlooked. Evidence in support of most applications for a freezing injunction or a search order, where relief is to be granted before the respondent has an opportunity to be heard on the return date, must make out a case for saying that any prior notification of the application to the respondent would be self-defeating and jeopardise the overriding objective of dealing with cases "justly."[21] For those two particular forms of relief, the justification will inevitably be bound up with the evidence as to the risk which the respondent is said to present to the preservation of assets or evidence (see, respectively, Chs 30 and 32), but it should be separately addressed. As noted in para.27–013, there will be cases where the initial application for a freezing injunction ought properly to be made on notice to the respondent. There are a number of examples in the reported cases of freezing orders being obtained on notice.

27–021 In a case of extreme urgency an application may be dealt with by telephone.[22] Such a procedure is only really likely to be necessary where the application has unavoidably to be made outside court hours.[23]

(2) Private Hearings

27–022 The general rule is that any hearing is to be in public.[24] Any hearing held in private by its very nature derogates from the principle of open justice. For that reason CPR 39.2 specifies the particular circumstances in which a hearing may be held in private; though even if such a ground applies it does not follow that the court will direct a private hearing (or that any part of the hearing should be held

[20] CPR 25.3(3).
[21] CPR Pts 1.1 and 1.2 and, specifically, Pt 23.4(2) anticipating the provisions of CPR 25.3 and CPR PD 25A referred to above. See further *CEF Holdings Ltd v Mundey* [2012] EWHC 1524 (QB) referred to in para.27–013 below.
[22] CPR PD 25A para.4.2.
[23] See generally CPR PD 25A, para.4.5 about the procedure for telephone hearings. Duty Judges are available to hear applications after court hours and during weekends in both the Chancery and Queen's Bench Divisions.
[24] CPR 39.2(1).

in private). The court must also be persuaded that the derogation from the open justice principle is strictly necessary to secure the proper administration of justice.[25]

27–023 Practice Direction 39A provides that the decision whether to hold a hearing in public or in private must be made by judge conducting the hearing having regard to any representations which may have been made on the point. In *Global Torch Ltd v Apex Global Management Ltd*[26] Morgan J referred to the relevant Practice Guidance in emphasising that any derogation from the principle of open justice should, where justified, be no more than strictly necessary in the interests of the proper administration of justice. In that case the judge refused to direct that a hearing for interim relief should be held in private in order to avoid the public airing of allegations which were said, amongst other things, to be likely to have an adverse effect upon the reputation of the ruling family of Saudi Arabia and affect the health of an elder prince of that family.

27–024 In a civil fraud case, the more obvious grounds for seeking a private hearing, as specified in CPR 39.2(3), are the following:

(1) Publicity would defeat the object of the hearing (ground (a)). This ground might apply where the object of the hearing is to obtain relief from the court without tipping off the respondent who, if informed of what was happening, could defeat the object of the hearing by taking action to render the court's order ineffective. Hence, as discussed below, many without notice applications for a freezing or search order will be heard in private.

(2) It involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality (ground (c)).

(3) It is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing (ground (e)).

(4) The court considers this to be necessary, in the interests of justice (ground (g)). Although the court has no power to create further exceptions to the open justice principle by a process of analogy "save possibly in the most compelling circumstances", this paragraph is

> "deliberately in general terms to allow a court to take account of what might potentially be a wide range of material considerations in the many different types of case which might arise".[27]

27–025 A without notice application for a freezing injunction or search order will generally begin with an application for the hearing to proceed in private (on the basis that one or more of the above-mentioned grounds is engaged); but it should always be remembered that the need for secrecy, which (sometimes along with a

[25] *Scott v Scott* [1913] A.C. 417, at 437. Lord Haldane's reference to the need for the administration of justice being public yielding to the "yet more fundamental principle of securing that justice is done is reflected in ground (g) of 39.2 and the qualifications to the right to a 'public hearing' (and public pronouncement of the judgment) in provisions of article 6 of the Convention on Human Rights."

[26] *Global Torch Ltd v Apex Global Management Ltd* [2013] EWHC 223 (Ch), at [44]–[62], referring to Practice Guidance (Interim Non-Disclosure Orders) [2012] 1 W.L.R. 1003, paras 9–15.

[27] *Global Torch*, at [66].

degree of urgency) is usually said to justify the application being made without notice, is not exactly the same thing as a suggested requirement for privacy. However, even if there is no obvious risk of attendance at court of someone who might "tip off" the respondent before he is notified of any order made, it must be remembered that the listing by names in the Court List of any application which is not to be heard in private, when such listing is available on-line, itself creates a risk that the intended purpose of the relief might be thwarted.

27–026 Any applicant seeking a private hearing should have well in mind the following observations by Morgan J in *Global Torch*:

> "Derogations from open justice can be justified in exceptional circumstances where the derogation is strictly necessary to secure the proper administration of justice. The burden lies on the party seeking the derogation to satisfy the court that it is necessary. This requires there to be clear and cogent evidence of the alleged necessity. The question for the court whether to allow a derogation from the open justice principle is not a matter of discretion. It is a matter of principle which requires it to be shown that the derogation is indeed necessary.
>
> There is no general exception to the open justice principle simply because privacy or confidentiality is in issue. A hearing should only be in private where the court is satisfied that nothing short of the exclusion of the public would suffice to allow justice to be done, that is, exclusions must be no more than the minimum strictly necessary to ensure justice is done. The holding of a hearing in private is a particularly serious derogation from open justice. It involves a more significant interference with the open justice principle than does an order conferring anonymity on a party or imposing reporting restrictions.
>
> The fact that a hearing in open court may be painful, humiliating and a deterrent either to a party or to a witness is not normally a proper basis for departing from the open justice principle. The interest protected by the open justice principle is the public interest in the administration of justice rather than the private welfare of those involved in court proceedings."[28]

(3) Documents

27–027 When making an application without notice ideally (and if time permits) the applicant should have prepared the following documents and lodged them with the court, where possible two hours before the hearing[29]:

(1) The application notice, identifying the relief sought, whether issued or not issued.[30]

(2) The claim form, even if not issued, identifying the brief details of the claim and the substantive relief sought in the proceedings.[31]

(3) The Particulars of Claim, if the applicant's legal team has had time to prepare them. If possible it is wise to have the Particulars prepared, because they will provide the court with a clear statement of the nature of the claim.

[28] *Global Torch* [2013] EWHC 223 (Ch) at [49]–[52].

[29] CPR PD 25A, para.4.3(1).

[30] As regards the procedural requirements relating to application notices see further CPR 23.3, 23.6; CPR PD 23A para.2; and CPR Pt 22 (need for verification by statement of truth). Often there will be insufficient time to issue the application notice and the applicant will have to give an undertaking to do so.

[31] Again, it may be that there is insufficient time to issue the claim form; that will have to be subject of an undertaking.

Further, a properly prepared Particulars of Claim may also go some way to persuading the court that there is a good arguable case.[32]

(4) The draft order. This is obviously a vital document and care must be taken over the terms of the order sought.[33] The standard forms of freezing injunction and search order are explained in detail in Chs 28 and 30 respectively. As explained below, it is the duty of the applicant's counsel at the without notice stage (finding its basis in the duty of full and frank disclosure) to bring to the attention of the court any departure from the standard form in the terms of the particular relief sought.

(5) The evidence in support of the application. This must be by way of affidavit if a freezing order or search order is sought.[34] The evidence must address, amongst other things:

(i) the reason why the application is being made without notice;
(ii) the reason for any delay in making the application;
(iii) if applicable, why the applicant requests that the hearing be in private;
(iv) all points which should be brought to the court's attention in discharge of the duty of fair presentation;
(v) the elements required to be established for the grant of the interim relief sought and why they are made out;
(vi) the cross-undertaking in damages and, if the facts permit this, why the cross-undertaking should be limited in amount or why applicant should not be obliged to fortify that cross-undertaking (see below).

(6) A skeleton argument setting out the background facts; identifying the relief sought; the reasons why that relief should be granted; and any matters to be brought to the court's attention pursuant to the duty of fair presentation.

(4) The Hearing

27–028 At the hearing the first step will often be an application for the hearing to be in private (as to which see above). It will sometimes be the case that the Court, having read the documents lodged with it in advance, indicates that it is prepared to make the order sought. The applicant's advocate should nonetheless be astute to ensure that he has discharged the duty of fair presentation, which we discuss below. That may require detaining the court. The advocate should not be

[32] Hence it has been said that on an application for a freezing order: "When assessing whether there is a good arguable case the Court should be especially mindful of the particular scrutiny applied by the courts to serious allegations of fraud and the courts' approach generally to considering serious allegations including those of fraud: see *Owens Bank v Etoile Commercial* [1995] 1 W.L.R. 44, at 51B–51C; and *Re H* [1996] A.C. 563, at 586D–586H. *Ludsin Overseas Ltd v Eco3 Capital Ltd* [2012] EWHC 1980 (Ch), at [51]." *Elektromotive Group v Pan* [2012] EWHC 2742 (QB), at [33(b)], per Eder J.

[33] CPR PD 25A, para.2.4 provides that: "Whenever possible a draft of the order sought should be filed with the application notice and a disk containing the draft should also be available to the court in a format compatible with the word processing software used by the court. This will enable the court officer to arrange for any amendments to be incorporated and for the speedy preparation and sealing of the order." This provision is obviously now somewhat out of date; and an email now suffices.

[34] CPR PD 25A, para.3.1. If there is insufficient time to swear an affidavit an undertaking will have to be given.

distracted from discharging this duty by any judicial willingness to proceed straight to a consideration of the terms of the order.

A very full note of the hearing should be made. This is because it will be incumbent upon the applicant to serve, with all the other documentation, a note of the hearing, so that the respondent can see clearly what submissions were made and what material the judge was directed to, and what interjections and judgment have been made by the judge.[35] The standard form of freezing order contains an undertaking given on the part of the applicant to provide an affidavit confirming what was said by counsel. **27–029**

(5) After the Hearing

The order once made must be served as soon as practicable unless the court orders otherwise.[36] In the case of a search order, the order (accompanied by the evidence in support and any documents capable of being copied) must be served personally by the supervising solicitor, during working hours, unless the court otherwise orders.[37] The elementary requirement for service of the order reflects the respondent's entitlement to know at the earliest opportunity (particularly in relation to any forthcoming return date) what the order prohibits him from doing and requires of him. Service of the order (within the time for complying with any positive act such as giving disclosure of assets) is also normally a key step from the applicant's perspective in ensuring that any disobedience of it may potentially be enforced by a subsequent committal application.[38] **27–030**

In some cases, where more than one party is to be served with or notified of the order, it may be appropriate to consider whether service should be effected in a particular sequence. Such a decision will be motivated not only by concerns about the efficacy of the sanction of committal (against a party who is likely to breach the order if tipped off about its terms before he has been personally served **27–031**

[35] See *Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd* [2002] EWHC 2972 (Ch), Times, 10 November 1999; and *Thane Investments Ltd v Tomlinson* [2002] EWHC 2972 (Ch), at [18]–[19]. In the latter case Neuberger J said "I think a respondent is entitled to know as of right, without having to ask, what happened at the hearing in his absence" (but refused to discharge the injunction in circumstances where no such note had been provided). See also the Admiralty and Commercial Courts Guide (para.F2.5).

[36] CPR PD 25A, 5.1 provides that: "Any order for an injunction, unless the court orders otherwise, must contain:….(2) if made without notice to any other party, an undertaking by the applicant to the court to serve on the respondent the application notice, evidence in support and any order made as soon as practicable."

[37] CPR PD 25A, 7.4(1). The Practice Direction further provides that confidential exhibits need not be served but they must be made available for inspection by the respondent in the presence of the applicant's solicitors while the order is carried out (with provision for their retention thereafter by the respondent's solicitors on certain undertakings aimed at avoiding unrestricted access to them by the respondent).

[38] CPR 81.5. The requirement of personal service may be dispensed with in accordance with CPR 81.8 where the court is satisfied that the respondent has had notice of the order by being present when it was made or by being notified of its terms by email, telephone or otherwise. See *Bunge S.A. v Huaya Maritime Corp* [2017] EWHC 90 (Comm), at [26]–[27], where the court dispensed with the requirement of personal service in the light of the respondent's knowledge of the terms of the asset disclosure order made against the company of which he had actual control.

with it) but also the reality of the position, in that the applicant will want the order to be effective despite what may well be the worst intentions of some of those who are intended to be bound by it (whether or not personally served). Thus, for example, an applicant may wish to seek the court's approval of an order which expressly contemplates that the terms of the freezing injunction are notified to the respondent's bank before it is personally served upon the respondent. As a matter of drafting, such a proposal would be reflected by the use of "and no later than" wording as a qualification to the "as soon as practicable" language of the Practice Direction. However, a more principled approach might involve the inclusion within the terms of the order itself a so-called "gagging" (or non-disclosure) provision to the effect that no person served with the order shall notify any other party to the proceedings of its terms, or of the existence of the proceedings, until a specified date (perhaps most obviously the return date).[39] We discuss gagging provisions in Ch.31.

(6) Undertakings Given to the Court

27–032 Whenever an order is obtained on a without notice the applicant will be required (as the price of the order) to give a suite of undertakings, the precise ambit of which will depend on the factual circumstances then pertaining. So, any order sought on a without notice basis will almost certainly be made on terms which require the applicant to give an undertaking to issue and serve the claim form upon the respondent as soon as reasonably practicable (if either of those steps has not already been taken) and, at the same time, to serve the respondent with copies of the affidavits and exhibits containing the evidence relied upon in support of the application, any other documents provided to the court at the hearing, and an application notice for continuation of the order. If the evidence was presented to the court only in the form of a draft (because of time constraints), then the applicant will be required to cause the witness statement or affidavit (as it must be in support of any freezing injunction or search order) to be made, filed and served.

27–033 In addition (and reflecting the duty of full and frank disclosure addressed below), the court will also require the applicant to undertake to cause an affidavit to be sworn and filed which confirms the substance of any evidential matters relied upon by the Applicant's counsel or advocate which were not set out in evidence. This will be a separate requirement from the obligation to produce a note of the without notice hearing (which is not something the respondent needs to request first), which we have considered above. The purpose of such a note is to inform the respondent of the manner in which the hearing proceeded, including the identification (as opposed to encapsulation) of any evidence relied upon.

27–034 The various undertakings discussed above are included within the standard form of freezing injunction. We consider below, in a separate section, perhaps the most significant undertaking which any without notice (or indeed with notice) applicant must give: the cross-undertaking in damages.

[39] Compare the "gagging" provision in para.20 of the standard form of search order which contains an exception for the purposes of obtaining legal advice.

27–035 More generally, the provisions of CPR Pt 23.9 (addressing without notice applications generally) provide that, subject to any order to the contrary, the application notice and evidence in support must be served, together with the order made, both upon any person against whom the order was made and any person against whom the order was sought. Further, r.23.9(3) provides that any order made without notice must contain a statement of the right to make an application to set aside or vary the order under r.23.10.

C. THE CROSS-UNDERTAKING IN DAMAGES

(1) The Nature of and Basis for the Cross-Undertaking

27–036 An applicant for relief of an injunctive nature—including freezing and search orders—must generally be prepared to provide what is described as "a cross-undertaking in damages" to cover the risk to the respondent (or indeed third parties, as we discuss below) that the order is later shown to have been wrongly made, or made in support of a claim that fails, and to have caused loss.[40] This undertaking is given by the applicant to the court, rather than to the respondent (or any third party).[41] It is a serious step and, as recent cases have demonstrated, can lead to very substantial liabilities being subsequently imposed upon the applicant in circumstances where the undertaking has been enforced.[42] The requirement to give such an undertaking should be considered carefully before applying for any form of injunction, including a freezing order; it may lead to the applicant taking the view that the risks of liability accruing under it are too great. Given that the without notice applicant will almost invariably be required to provide such a cross-undertaking as the price of the without notice order sought, we discuss the cross-undertaking here; although the principles considered apply equally where interim relief is sought on an inter partes basis.

27–037 A cross-undertaking in damages must be given voluntarily; it cannot be ordered.[43] But if an applicant declines to give one, the Court will generally decline to grant the relief he seeks[44]: the cross-undertaking is "the price for interfering with the

[40] Requiring such an undertaking is the long-established practice of the Court when granting injunctive relief: see *Graham v Campbell* (1878) 7 Ch. D. 490, at 484 and *Tucker v New Brunswick Trading Company of London* (1890) 44 Ch. D. 249, at 253. The legal background to the requirement that an applicant for interim injunctive relief provided a cross-undertaking in damages was set out in the leading decision of *SmithKline Beecham Plc v Apotex Europe Ltd* [2006] 1 W.L.R. 872; [2007] Ch. 71, at [23]–[25]: "The practice of requiring a cross-undertaking from a plaintiff who sought an interlocutory (now called 'interim') injunction developed in the 19th century. The reason was that the court at the interlocutory stage did not know who the ultimate winner would be. So if an injunction was granted but the case ultimately failed, the person enjoined would have a remedy."

[41] *F. Hoffmann La Roche & Co A.G. v Sec. of State for Trade and Industry* [1975] A.C. 295, at 361, per Lord Diplock.

[42] For a striking recent example, see *SFC Tankers Ltd (formerly known as Fiona Trust & Holding Corp) v Privalov* [2017] EWCA Civ 1877, where compensation under the cross-undertaking of more than $70 million was awarded.

[43] See *A-G v Albany Hotel Co* [1896] 2 Ch. 696, at 699: "Of course such an undertaking must be voluntary: the Court cannot compel a person to give an undertaking."

[44] See *SmithKline Beecham Plc v Apotex Europe Ltd* [2005] EWHC 1655 (Ch); [2006] 1 W.L.R. 872, at [38]; and on appeal [2006] 1 W.L.R. 872; [2007] Ch. 71, at [24]: "The court in effect says to the

defendant's freedom before he has been found liable for anything."[45] However, it follows from the fact that the grant or refusal of relief is a discretionary matter that, in an appropriate case, it is within the discretion of the court either to dispense entirely with, or to cap the potential liability under, the cross-undertaking which ordinarily forms part of the "package" of any such relief: see the discussion below.

27–038 Where an order for an interim injunction is silent one way or the other, it will generally be implicit that the applicant has undertaken to compensate the respondent for any loss resulting if the Court so determines (the cross-undertaking is, as has been said in a number of cases, "taken for granted").[46] That said, it is obviously far preferable that the fact and terms of the undertaking are recorded on the face of the order.

27–039 In *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* an unlimited cross-undertaking in damages for his protection was described as the "default position".[47] Consistently with this, para.5.1 of CPR PD 25A provides that

> "Any order for an injunction, unless the court orders otherwise, must contain: (1) subject to paragraph 5.3 [which is of no relevance in fraud-related claims], an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay."

The standard form of cross-undertaking (as it is addressed to the respondent to the order) reads as follows:

plaintiff (now 'claimant') seeking an interim injunction: 'I will not grant you an interim injunction unless you give the cross-undertaking…It follows that the court cannot impose a cross-undertaking on a claimant against his will—it is the 'price' he must 'pay' for the grant of the injunction.' One reason is that, without a cross-undertaking to compensate the respondent, the risk that the respondent will suffer irremediable harm from the grant of relief will almost always outweigh the risk that the applicant will suffer such harm without it. See *SmithKline Beecham Plc v Apotex Europe Ltd* [2006] 1 W.L.R. 872; [2007] Ch. 71, at [26]: "The fact that an ultimately unsuccessful claimant will have to compensate the defendant for having 'wrongly' stopped his proposed activity is a major factor in assessing the balance of risk."

[45] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139; [2016] 1 W.L.R. 160, at [68]. See *SCF Tankers (formerly known as Fiona Trust Holding Corp) v Privalov* [2017] EWCA Civ 1877, at [49] for the "pragmatic justice" to be applied at this interim stage. In *Financial Services Authority v Sinaloa Gold Plc* [2013] UKSC 11; [2013] 2 W.L.R. 613 Lord Mance said, at [30]: "In private litigation, a claimant acts in its own interests and has a choice whether to commit its assets and energies to doing so. If it seeks interim relief which may, if unjustified, cause loss or expense to the defendant, it is usually fair to require the claimant to be ready to accept responsibility for the loss or expense. Particularly in the commercial context in which freezing orders commonly originate, a claimant should be prepared to back its own interests with its own assets against the event that it obtains unjustifiably an injunction which harms another's interests."

[46] See the cases referred to by Lewison J in the first instance decision in *Smithkline Beecham Plc v Apotex Europe Ltd* [2005] EWHC 1655 (Ch); [2006] 1 W.L.R. 872, at [26]–[32]. In cases where the respondent obviates the need for an injunction (or a continuation of an injunction obtained without notice) by giving an undertaking in response to the applicant's application for an order, there is an implied undertaking in damages by the party applying for the injunction in favour of the other: see para.5.28 of the Chancery Guide. However, most well advised respondents would stipulate for an express cross-undertaking in such circumstances.

[47] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139; [2016] 1 W.L.R. 160, at [68].

> "If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make."

27–040 In *Pugachev* Lewison LJ explained[48] that it is the requirement of fairness rather than likelihood of loss which underpins the need for a cross-undertaking. At the interim injunction stage no firm decisions upon the merits of the claim have been made and the court cannot be seen to prefer the interests of one litigant over another. Further, at the stage of the without notice application for injunctive relief, the respondent will necessarily not have had the opportunity to give any evidence about loss (or indeed anything else) that the injunction might occasion. Even at the inter partes stage, when the court comes to consider whether to extend the injunction, it is not necessary for the defendant to establish a likelihood of the order causing loss, or loss in a given amount, in order to be entitled to a cross-undertaking unlimited in amount.[49]

27–041 Although commonly described for convenience as a cross-undertaking "in damages", the modern form of cross-undertaking rightly describes it as "compensation for loss".[50] This is consistent with the trigger for any claim upon the cross-undertaking not being confined to the situation where the injunction, of which it formed an integral part, is shown to have been "wrongly granted" (in a way that might have supported a successful appeal made soon after the grant of the original injunction). Rather, the cross-undertaking exists for those cases where the court later decides, with the benefit of hindsight and after full investigation of the facts, that the claimant was not deserving of the relief because, for instance, the underlying claim has been dismissed.[51] Hence, where a

[48] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, at [77].

[49] *Sinclair Investment Holdings SA v Cushnie* [2004] EWHC 218 (Ch), at [25], per Mann J. Mann J's approach was endorsed in *Pugachev*, at [75]–[78], Lewison LJ commenting that it was not in his experience usual for defendants to set out the prospective loss that they might suffer as a reason for requiring the cross-undertaking.

[50] *SmithKline Beecham Plc v Apotex Europe Ltd* [2006] 1 W.L.R. 872; [2007] Ch. 71, at [25]: "A party who is granted an interim injunction but who ultimately loses the full trial is not regarded as a wrongdoer because he got an interim injunction. Sometimes, for convenience and want of a better term, the expression 'wrongful injunction' is used, but in truth there is nothing wrongful about it. The decision whether or not to grant it is made on the basis of a necessarily incomplete picture. The decision depends on all the circumstances of the case, generally whether or not damages to an ultimately victorious claimant would be an adequate remedy, whether the claimant can show a serious issue to be tried and so on."

[51] See *Yukong Line Ltd v Rendsberg Investments Corp* [2000] EWCA Civ 358; [2001] Lloyd's Rep. 113, [32]–[33] for the meaning of "wrongly granted" (in preference to "improperly obtained") to cover the situation where there may have been no improper conduct by the applicant but "where the court makes an order which is subsequently demonstrated or conceded to have been too wide in its scope or unjustified or inappropriate on the facts". Potter LJ said that if it is established that the injunction was wrongly granted, with or without fault on the applicant's behalf, the court "will ordinarily order an inquiry as to damages in any case where it appears that loss *may* have been caused as a result." It is on this basis that any third party affected by the order and for whose benefit a cross-undertaking may have been given (as to which see below), but who is not a party to the claim, may seek to enforce it. In *Financial Services Authority v Sinaloa Gold Plc* [2013] UKSC 11; [2013] 2 W.L.R. 678, at [18] the Supreme Court observed that "an inquiry into damages will ordinarily be ordered where a freezing injunction is shown to have been wrongly granted, even though the claimant was not at fault", but went on to say that it may be appropriate to await the final outcome of the trial before deciding whether to enforce the cross-undertaking: "it does not follow from the defendant's

freezing order is discharged at the return date the respondent will usually be entitled to an immediate inquiry into damages; but where the freezing order is not discharged but the claimant later fails at trial the respondent will also be entitled, in general (though not always), to an inquiry, even though the order was properly granted at the time it was made on the evidence then available to the court. A better way of putting it, therefore, is that the cross-undertaking is given to cover the possibility that the grant of relief proves to have been inappropriate.[52] Even in such a case the court retains a discretion not to enforce the cross-undertaking if the circumstances make it inequitable to do so.[53] If, however, it is enforced the measure of damages is not discretionary but to be determined upon an inquiry and assessed on the contractual basis, as if the applicant had promised not to prevent the respondent from doing that which the order did in fact restrain.[54]

(2) Discretion to Waive or Limit the Cross-Undertaking

27–042 As the Court of Appeal in *Pugachev* also observed, the acceptance of a more limited cross-undertaking forms part of the judge's discretion to grant relief and there are certain categories of case where the court may either not require the applicant to provide any cross-undertaking at all or at least not require an unlimited one. A limited undertaking will have a cap on the potential liability of the applicant under it in the event that it is ordered that it be enforced. As Lewison LJ summarised the position:

> "This price is not exacted when the applicant is a law enforcement agency simply enforcing the law in the public interest.[55] But that is not this case. There is also another possible exception

success on liability that he did not in fact remove (or seek to remove) assets from the reach of the claimant, justifying an interim freezing order." However, the protection of innocent third parties under an undertaking given in their favour will usually be unqualified by such considerations: see at [19] and [34].

[52] *Financial Services Authority v Sinaloa Gold Plc*, above, at [29].

[53] See *Société Générale v Sanayi* [2017] EWHC 667 (Comm), at [74]-[76], per Popplewell J. In *Fiona Trust & Holding Corp v Privalov* [2016] EWHC (Comm), at [47], [39] Males J rejected the claimant's argument that relief should be refused on the ground of the defendant's alleged fraud in obtaining an earlier order to enforce the cross-undertaking. The judge said that, even if there had been relevant misconduct amounting to "unclean hands" on the defendant's part, it would have to be considered against the claimant's own misconduct in suppressing material facts when applying for the order.

[54] *Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] A.C. 295, 361; *Cheltenham and Gloucester Building Society v Ricketts* [1993] 1 W.L.R. 1545, at 1551–1552; and *Harley Street Capital Ltd v Tchigirinski* [2005] EWHC 2471 (Ch), at [19]–[22]. In *SmithKline Beecham Plc v Apotex Europe Ltd* [2007] Ch. 71, at [83]–[84], Jacob LJ observed that this brings into play *Hadley v Baxendale* principles of reasonable foreseeability (derived either from general knowledge of the circumstances or knowledge of the particular circumstances of "the injunctee") and that, in some cases, the notional contract basis may be too narrow. For the assessment of the opportunity lost to Apotex, see the later decision at [2008] EWHC 2347 (Ch); [2009] F.S.R. 3. We consider questions relating to the enforcement of the cross-undertaking in Ch.31.

[55] See *Financial Services Authority v Sinaloa Gold Plc* [2013] UKSC 11; [2013] 2 W.L.R. 678, at [33] and [43] where the Supreme Court held that an authority such as the FSA (as was) acting in pursuance of a public duty should not ordinarily be required to give a cross-undertaking in damages in support of a freezing injunction. This is the "starting point" for both the without notice and on notice stages of the application, though any respondent or third party fearing adverse loss might apply for an

> where the applicant has no personal interest in the litigation and is bringing the action on behalf of others. One example is where litigation is being brought by liquidators on behalf of an insolvent company where there are no large creditors who can be expected to indemnify them and where it has proved impossible to obtain insurance against unlimited liability on the cross undertaking: *Re DPR Futures Ltd* [1989] 1 W.L.R. 778. In that case an order froze assets of £2.3 million and the applicants who were liquidators were permitted to cap their liability under the cross-undertaking at £2 million. An order to similar effect was made by Laddie J in *RBG Resources Ltd v Rastogi* [2002] B.P.I.R. 1028. That was a case in which Laddie J considered that there was 'an extremely strong case' against the principal defendants; and that if he did not accept the limited undertaking 'the freezing orders will have to go': [51] and [52]."

27–043 Those observations reveal that where the applicant seeks to avoid personal exposure under an unlimited cross-undertaking by reference to a lack of available resources or assets to meet it in full (and lacks the personal financial interest in the proceedings of the kind ordinarily seen by the court as justification for such exposure) the court will still be anxious to test whether those who stand behind the litigation, and who do stand to benefit indirectly from it, have the resources to back such an undertaking.[56] If, however, the true picture is revealed to be one where the claimant with no personal interest is at risk of being personally exposed then any decision to dispense with, or to cap the cross-undertaking, is a discretionary one to be made within the overall assessment of the balance of convenience. The apparent strength of the underlying claim may prove to be decisive if the only alternative for the court is to refuse relief because an unlimited undertaking cannot be offered. The court will also be concerned to establish whether the particular nature of the cause of action (assuming it is made out at trial) explains the circumstances in which the applicant currently lacks the resources to back an unlimited undertaking.[57]

order that any continuation of the injunction should be conditional upon one being given on terms that the court considered to be "fair". This would require some explanation in evidence of the loss feared. The English court is likely to adopt the same starting point for the benefit of overseas regulators obtaining injunctive relief here: see *United States Securities & Exchange Commission v Manterfield* [2009] EWCA Civ 27; [2010] 1 W.L.R. 27, where the Court of Appeal upheld the judge's decision not to require the SEC to give a cross-undertaking in damages on the grant of a worldwide freezing injunction obtained in support of US proceedings directed at an allegedly fraudulent investment scheme.

[56] See *Wood v Baker* [2015] EWHC 2536 (Ch) where, at the without notice stage, HH Judge Hodge QC accepted a cross-undertaking in damages by a trustee in bankruptcy which was limited to the value of the unpledged assets in the bankrupt's estate (though he was not prepared to exclude the costs, expenses and disbursements of the bankruptcy pending the return date). In *Pugachev* Lewison LJ went on to refer to the decisions in *Hone v Abbey Forwarding Ltd (In Liquidation)* [2014] EWCA Civ 711 and *Abbey Forwarding Ltd (In Liquidation) v HM Revenue & Customs* [2015] EWHC 225 (Ch) as illustrating that the mere fact that litigation is being brought by a liquidator of an insolvent company does not compel the conclusion that the cross-undertaking *must* be capped, as there may be a major creditor who is prepared to provide financial backing for it. In that case the Court of Appeal refused to interfere with the judge's ruling that the cross-undertaking should be unlimited, given the existence of substantial creditors sitting behind the claimant liquidator: contrast the approach in the *DPR Futures* case and *Bloomsbury International Ltd v Holyoake* [2010] EWHC 1150 (Ch), discussed below. It is right to point out that in many cases judges are prepared to accept a limited cross-undertaking from liquidators; but it is not an invariable practice.

[57] In *RBG Resources Ltd v Rastogi* [2002] B.P.I.R. 1028, at [47] Laddie J said "the whole basis upon which the defendants here claim they will be exposed to no compensation under the cross-undertaking in damages is that there has been the massive fraud which the provisional liquidators allege. The circumstances in which a cross-undertaking in damages could not be fulfilled is a circumstance in

(3) Fortifying the Cross-Undertaking

27–044 On the other hand, there may be situations where a cross-undertaking is not only required (whether in a limited or unlimited amount), but the court goes further and insists upon its being reinforced by some form of security.[58] This will often be the case where the respondent can show that the applicant's financial standing and resources are such that, when compared with what the respondent estimates to be the likely loss caused by the grant of the injunction,[59] there is a risk that such loss will remain uncompensated (because the respondent will be unable to effectively enforce the cross-undertaking). In such cases, some reinforcement of the cross-undertaking might be justified in the form of a guarantee, bond, payment into an escrow account held by the applicant's solicitor (or into court) or similar security for the respondent's potential claim under it.[60] Ordinarily, such issues arise at the inter partes stage when the respondent is heard, and can put in evidence on the question, but in some cases the judge will raise the question of fortification of the court's own initiative at the without notice hearing.[61] Hence, as we have mentioned earlier in this chapter, the applicant for a without notice order should address the issue of the cross-undertaking and the possibility that the court may require it to be fortified at that stage.

27–045 The standard form of freezing injunction contemplates that the court may require the applicant to reinforce his cross-undertaking in damages by providing a guarantee issued by an English bank up to a specified sum.[62] The relevant form of undertaking, which is by no means mandatory, reads as follows:

which the fraud has taken place." See also *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch), at [33], where Lewison J took account of the strength of the claimant's proprietary claim and noted that any successful defence of it by the defendant would involve the scenario of the claimant being able (on the language of a cross-undertaking fixed by reference to "the assets from time to time of the underlying pension funds") to set off its liability on the undertaking against a genuine secured loan.

[58] The decision in *Bloomsbury International Ltd v Holyoake* [2010] EWHC 1150 (Ch), at [29]–[30], (where the applicant was a company in administration with limited available assets) shows that where there are parties of financial substance behind the applicant (in that case the creditors were banks) such fortification may be justified in the interest of adopting a course which is "least likely to lead to an injustice". Compare the cases mentioned in fn.56 above. In *Bloomsbury* Floyd J said that it is incumbent upon the applicant to produce evidence in support of any suggestion of difficulty in the way of providing such security.

[59] See below and, further, Ch.31, in relation to the need for the respondent to establish a good arguable case that such loss has been suffered or is likely and the estimation of such loss.

[60] In *Brainbox Digital Ltd v Backboard Media GmbH* [2017] EWHC 2465 (QB); [2018] 1 W.L.R. 1149 the court (John Howell QC) held that the court "may require, as a condition for granting or continuing an injunction, that the cross-undertaking given by the applicant is fortified by the provision by someone other than the applicant of an unlimited, or a limited, undertaking, or by the making of some other form of limited provision, to meet any loss that the injunction may cause.... Any fortification required is not necessarily limited in amount. The court has a wide discretion as to the conditions on which it may grant or continue an injunction. Discretions of that kind should not be fettered by rigid judge-made rules."

[61] A recent example being *Brainbox Digital Ltd v Backboard Media GmbH* [2017] EWHC 2465 (QB); [2018] 1 W.L.R. 1149, at [9].

[62] In principle, other forms of security might be considered appropriate in the circumstances, such as a payment into a joint account of the applicant's and respondent's solicitors to be held in escrow or the grant of a charge over property or a pledge of assets. However, the party applying for fortification

"The Applicant will –

(a) on or before [date] cause a written guarantee in the sum of £ to be issued from a bank with a place of business within England or Wales, in respect of any order the court may make pursuant to paragraph (1) above; and

(b) immediately upon issue of the guarantee, cause a copy of it to be served on the Respondent."

27–046 The Commercial Court Guide[63] addresses the fortification of the undertaking in damages in the following terms:

"(a) Where the applicant for an interim remedy is not able to show sufficient assets within the jurisdiction of the Court to provide substance to the undertakings given, particularly the undertaking in damages, he may be required to reinforce his undertakings by providing security.

(b) Security will be ordered in such form as the judge decides is appropriate but may, for example, take the form of a payment into court, a bond issued by an insurance company or a first demand guarantee or standby credit issued by a first-class bank.

(c) In an appropriate case the judge may order a payment to be made to the applicant's solicitors to be held by them as officers of the court pending further order. Sometimes the undertaking of a parent company may be acceptable."

27–047 The language of the Commercial Court Guide is such as to put the initial onus upon the applicant to establish the sufficiency of assets within the jurisdiction[64] if he is to avoid the risk of being ordered to fortify the cross-undertaking. The standard practice in any court is to require the evidence in support of any interim relief, where a cross-undertaking is required, to explain the true value of that undertaking. This is usually done by reference to the value of the applicant's unencumbered assets and, in the case of a corporate applicant, most conveniently by reference to its latest accounts.[65]

27–048 The Guide is silent in relation to the burden of proof where (usually in advance of the return date) a respondent complains about the absence (or inadequacy) of any fortification on the basis that the applicant's financial resources appear to be inadequate for the purposes of covering the loss which it is feared will be caused by the grant of relief. If the respondent contends that applicant's evidence as to available assets has not adequately covered off the risk of loss, to its true level,

may well argue that any form of security which is likely to result in the process of realisation being less straightforward than a claim upon a bank guarantee (or monies held by solicitors in escrow) is inadequate.

[63] Paragraph F15.4.

[64] It might be wondered why the assets need to be in the jurisdiction, in circumstances where assets available in other jurisdictions (such as in the EU) might be equally readily amendable to execution. As it was put by Dillon LJ in *Tasarov v Nassif*, unreported, 29 June 1994, "The essential question is whether there are assets readily available to satisfy any liability under the cross-undertaking" (although in that case the point did not arise). Compare the position with respect to security for costs, where residence outside the jurisdiction is not sufficient to establish the condition in CPR 25.13(2)(a) unless the claimant is also not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in s.1(3) of the Civil Jurisdiction and Judgments Act 1982.

[65] Although what will concern the Court is whether the assets are readily amenable to execution, which the accounts alone may not reveal.