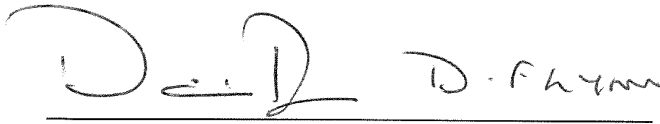


Exhibit 1

This is exhibit "1" referred to in the Affidavit of Ben Matthew Valentin, sworn before me
this 12 day of October 2010.

A handwritten signature in dark ink, appearing to read 'D. Flynn', is written above a horizontal line.

Solicitor of the Senior Courts of England and Wales

PORTRAIT
1 CHANCERY LANE
LONDON WC2A 1LF
Tel: 020 7320 3888 - DX69

BEN VALENTIN

3-4 South Square, Gray's Inn, London, WC1R 5HP

E: benvalentin@southsquare.com

T: +44 (0)20 7696 9900

F: +44 (0)20 7696 9911

DX: LDE 338 Chancery Lane

Dates of Call to the Bar

1995 (England and Wales); 1998 (New York); 2007 (British Virgin Islands)

Practice Areas

Ben has a broad commercial practice with extensive experience of substantial and complex litigation. His principal practice areas are:

- ❖ General Commercial Litigation
- ❖ Banking and Finance
- ❖ Corporate law
- ❖ Civil Fraud
- ❖ Commercial Arbitration
- ❖ Corporate restructuring and insolvency
- ❖ Civil Procedure (especially all aspects of disclosure and legal professional privilege)

Recommendations

Ben is highly rated in the main practitioner's guides. Recent examples include:

"undoubtedly a rising star" (Legal 500 – Leading Commercial Chancery Sets, 2009)

"has made a good impression at the Commercial Bar acting as junior on a number of landmark cases. Commentators say he has "razor-sharp intellect and is very practical, commercial and easy to deal with." (Chambers & Partners – Commercial Dispute Resolution, 2009)

"acted for RBS on the Raiffeisen case, and also appeared for CIMB in a promissory note dispute. His razor-sharp intellect, collaborative approach and ability to charm clients are cited as reasons to engage him." (Chambers & Partners – Banking and Finance, 2009)

"a very safe pair of hands" (Legal 500 – Civil Fraud, 2009)

"noted for his role as senior junior for NatWest in the recently settled case against Rabobank involving allegations of deceit and misrepresentation" (Chambers & Partners – Civil Fraud, 2009)

"undoubtedly a young star at the Bar." He is a popular pick amongst clients as he is a 'real team player.'" (Chambers & Partners, 2008)

"Ben Valentin is 'really superb' and has big-case experience" (The Legal 500 – Commercial Litigation, 2008)

"the popular Ben Valentin is seen as 'extremely bright and hardworking'" (The Legal 500 – Banking, 2008)

Education

Worcester College, Oxford, 1989-1993

- ❖ BA (Jurisprudence), 1992
- ❖ BCL, 1993

Cornell Law School, New York, 1993-1994

- ❖ LLM, 1994

Professional Experience

Ben has a broad practice as a junior in commercial and banking litigation. He was the senior junior in the long-running *Three Rivers* litigation (for the Bank of England) and more recently in the *Rabobank* litigation (for NatWest) and (in 2010) the *RZB* litigation (for RBS). In all three cases, his clients were successful in defeating serious allegations of dishonesty after lengthy Commercial Court trials. In *Three Rivers* and *Rabobank*, his clients recovered their costs on an indemnity basis (and these are now leading cases on the circumstances in which indemnity costs are awarded).

In addition to large-scale litigation, Ben is regularly involved in a wide range of commercial disputes both in an advisory capacity and before the English courts.

Ben has a substantial arbitration practice and, throughout his career, has been involved in a number of commercial arbitrations in London conducted under each of the major arbitral rules. Most recently, these arbitrations have involved commercial contractual disputes in the following areas: insurance; mergers and acquisitions; aviation; energy and carbon emissions trading.

Ben also has experience of commercial and corporate litigation before the courts of the British Virgin Islands.

Current or recent clients include the Bank of England, CIMB Bank, CSFB, Goldman Sachs, NatWest, Northern Rock, PWC, RBS, TeliaSonera, Computershare, ACP Capital, MF Global and the Bar Council.

Notable and representative recent cases

Prudential PLC v Special Commissioner of Income Tax (Court of Appeal; Junior Counsel for Bar Council, intervening: 2010)

The appeal is concerned with whether legal advice privilege applies to communications between a client and his accountants giving legal advice on tax issues, or whether it is confined to client communications with members of the legal profession.

Raiffeisen Zentralbank Österreich AG (“RZB”) v The Royal Bank of Scotland PLC (Commercial Court; Junior Counsel for RBS: 2007-2010)

Commercial banking dispute involving a claim in deceit and misrepresentation arising out of £140 million syndicated loan in connection with Enron Teesside Operations Ltd.

Action tried over 20 days (January and February 2010). Judgment given for RBS [2010] EWHC 1392 (Comm).

HHR Pascal B.V. v W2005 Puppet II B.V. (Commercial Court; Junior Counsel for Puppet: 2009) [2009] EWHC 2771 (Comm).

Commercial dispute relating to the sale of a portfolio of substantial hotels; action to recover deposit on termination of Sale Purchase Agreement; applications for summary judgment on issues of contractual construction.

TeliaSonera Finland OYJ v Alfa Telecom Turkey Limited (BVI High Court, Eastern Caribbean Court of Appeal; Junior Counsel for TeliaSonera: 2007-2010)

Shareholder dispute involving ownership of Turkcell Holding (the Turkish mobile telephone network) and allegations of inducing breach of contract and conspiracy. Claim worth in excess of \$1 billion.

National Westminster Bank v Rabobank Nederland (Commercial Court, Court of Appeal; Junior Counsel for NatWest: 2006-2009)

Major commercial banking dispute involving \$200 million counterclaim and allegations of deceit, misrepresentation and inducing breach of contract. Action tried over 52 days (October 2006-February 2007). Judgment given for NatWest [2007] EWHC 1056 (Comm); indemnity costs awarded against Rabobank [2007] EWHC 1742 (Comm). Appeal heard by Court of Appeal: October 2008. Case settled before judgment handed down.

The litigation generated a number of significant interlocutory decisions: [2006] EWHC 1744 (Comm) (striking out; estoppel; res judicata); [2006] EWHC 2108 (Comm) (evidence; hearsay); [2006] EWHC 2332 (Comm); (disclosure; privilege); [2006] EWHC 2959 (Comm) (striking out; submission of no case to answer); [2006] EWCA Civ 1578 (case management appeal; permission to amend to add new cause of action during trial).

CIMB Bank Behad v Bon Pour Aval Limited (Commercial Court; Counsel for CIMB: 2008-2009)

The case involved claims in deceit and conspiracy arising out of a fraudulent promissory note transaction in Malaysia.

Three Rivers DC v Bank of England (Commercial Court, Court of Appeal, House of Lords; Junior Counsel for the Bank of England: 1997-2006)

Instructed on behalf of the Bank of England in relation to all aspects of the long-running *Three Rivers* litigation pursued by the Liquidators of BCCI SA over 13 years, including numerous appearances as Junior Counsel during the various phases of the litigation.

Ben was the senior Junior during the 255 day trial of the action (between January 2004 - November 2005). The Claimants discontinued the action on Day 256. In light of the seriousness of the allegations made, the Bank was awarded its costs of the entire action between 1993 and 2005 on an indemnity basis: [2006] EWHC 816 (Comm).

Ben also appeared in many of the interlocutory applications and appeals generated by the *Three Rivers* litigation, a number of which gave rise to leading decisions in the law of tort and civil procedure.

- ❖ *Three Rivers (No.6)*: the Claimants' application for the disclosure of lawyer-client communications at all levels up to House of Lords. In July 2004, the House of Lords allowed the Bank of England's appeal against the decision of the Court of Appeal ([2004] EWCA Civ. 218; [2004] QB 916; dismissing an appeal against an order of Tomlinson J: [2003] EWHC 2565) and ruled that such communications were immune from disclosure because they were covered by legal advice privilege: [2004] UKHL 48; [2005] 1 AC 610.
- ❖ *Three Rivers (No.7)*: the Bank of England's application to restrict the length of cross-examination of one of its witnesses. The Judge's order restricting the cross-examination was upheld on appeal in July 2005: [2005] EWCA Civ. 889. At the same time, the Court of Appeal also gave an important separate ruling on the privacy of its judgments: [2005] EWCA Civ. 933.
- ❖ Approximately 20 Commercial Court CMCs and other disclosure applications between 2001 and 2003, including *Three Rivers (No.4)* [2002] EWHC 1118; the Claimants' application against HM Treasury for third party disclosure of the Bingham Inquiry archive pursuant to CPR 31.17. This application also went to the Court of Appeal: [2002] EWCA 1182; [2003] 1 WLR 210.

- ❖ *Three Rivers (No.3)*: Ben appeared in the 13-day appeal to Court of Appeal in July 1998 and on two 4-day appeals to the House of Lords in January 2000 and 2001 and all consequential hearings arising of the original dismissal of action in 1997. The first decision of the House of Lords is the leading authority on the requirements of the tort of misfeasance in public office and the second decision was the first time the House of Lords had had to consider an application for summary judgment under CPR Part 24. The decision of the Court of Appeal and the two decisions of the House of Lords are reported together at [2003] 2 AC 1 ([2001] UKHL16).

Professional memberships

Commercial Bar Association, Chancery Bar Association, New York State Bar Association; London Court of International Arbitration, CEDR Accredited Mediator.

Exhibit 2

This is exhibit "2" referred to in the Affidavit of Ben Matthew Valentin, sworn before me
this 13 day of October 2010.



A handwritten signature in dark ink, appearing to read 'D. Flynn', is written over a horizontal line.

Solicitor of the Senior Courts of England and Wales

PORTRAIT
1 CHANCERY LANE
LONDON WC2A 1LF
Tel: 020 7320 3888 - DX69

ANNOTATED GUIDE TO THE INSOLVENCY LEGISLATION

Insolvency Acts 1986 and 2000
Insolvency Rules 1986 with 2010 Amendments
Enterprise Act 2002

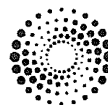
Thirteenth Edition

Volume 1

Len Sealy MA LLM PhD, Barrister and Solicitor (NZ)
*SJ Berwin Professor Emeritus of Corporate Law,
University of Cambridge*

David Milman LLB PhD
*Professor of Law
Law School
Lancaster University*

SWEET & MAXWELL



THOMSON REUTERS

involving fraud or dishonesty, and in particular extends the scope of the fraudulent trading offence (CA 2006 s.993) so as to include being a party to the fraudulent carrying on of a business by a sole trader or other person who is outside the reach of s.993 (s.9).

S.213(1)

The section, unlike the equivalent criminal provision (see above), applies only in a winding up.

The words “or for any fraudulent purpose” could not be wider, and should not be construed in any limiting way. The wording is certainly wide enough to include frauds committed against potential creditors: see *R. v Kemp* [1988] Q.B. 645; (1988) 4 B.C.C. 203. See also *Re L Todd (Swanscombe) Ltd* [1990] B.C.C. 125 (fraudulent evasion of value added tax). However, in *Morphitis v Bernasconi* [2002] EWCA Civ 289; [2003] Ch. 552; [2003] B.C.C. 540 the Court of Appeal ruled that, although a business may be found to have been carried on with intent to defraud creditors even where only one creditor is shown to have been defrauded, it does not necessarily follow that this is the case whenever a fraud on a creditor has been perpetrated. In such a situation the appropriate remedy may be for the creditor to pursue his own remedy under the general law, and not for the liquidator to seek a contribution to the general assets of the company in the winding up.

In *Bank of India v Morris* [2005] EWCA Civ 693; [2005] B.C.C. 739, the Bank of India was held liable under s.213 on the ground that it had knowingly been a party to frauds committed by officers of BCCI. The Court of Appeal held that it was not necessary to show that any members of the board of the Bank of India had knowledge of the fraud: the appropriate rule of attribution for the purposes of s.213 and its policy was to fix the bank with the knowledge of the employee who had authority to conclude the transactions in question; and it was immaterial that he had acted dishonestly and in breach of his duty to his employer.

A company cannot be treated as “carrying on business” after the date on which a winding-up petition was presented if a winding-up order is subsequently made, and so any transactions made after that date are incapable of constituting fraudulent trading: *Carman v Cronos Group SA* [2005] EWHC 2403 (Ch); [2006] B.C.C. 451. This case is also authority for the following: (a) that the period of fraudulent trading is not interrupted during the time when the company concerned has been struck off but later reinstated, and (b) that where money has been taken from the defendant and wrongfully paid to third parties without resulting in any loss to the company concerned, this does not come within s.213.

S.213(2)

Two changes are made from the former law.

First, it is only the liquidator who has standing to apply for relief under this section. Previously, an individual creditor or contributory could also apply, but this was thought undesirable because it might encourage a creditor to put improper pressure upon directors to settle his claim personally.

Secondly, the order which the court may make declares the wrongdoers “liable to make such contributions (if any) to the company’s assets as the court thinks proper”. This makes it clear that any sums ordered to be paid must go into the general funds in the hands of the liquidator and be held for the benefit of the whole body of creditors. Under the previous wording, the court had power to order that a defendant should directly reimburse a particular creditor (*Re Cyona Distributors Ltd* [1967] Ch. 889; *Re Gerald Cooper Chemicals Ltd (in liq.)* [1978] Ch. 262). However, a creditor may have a claim for damages directly against a director (e.g. for fraud), independently of s.213: *Contex Drouzhba Ltd v Wiseman* [2007] EWCA Civ 1201; [2008] B.C.C. 301.

In other respects, the law remains the same. Thus, those who may be made liable are “any persons who were knowingly parties” to the fraudulent trading (who need not have any connection with the company itself: *Re BCCI, Banque Arabe Internationale d’Investissement SA v Morris* (above)). This may be contrasted with the wrongful trading provision (s.214) which is limited in its scope to directors and former directors, but pointedly avoids the words “parties to” (and, indeed, “business” or “trading”).

In certain cases under the former law it was held appropriate to include a punitive as well as a compensatory element in the court’s order, but in *Morphitis v Bernasconi* (above) the Court of Appeal has denied that there is any such power: to make such an award would be foreign to the principle underlying s.213.

Further provisions relating to proceedings for fraudulent trading are contained in s.215, below.

In addition to the civil liability to pay compensation under this section and the criminal sanctions of CA 2006 s.993, a person who is guilty of fraudulent trading may be made the subject of a disqualification order: see CDDA 1986 ss.4, 10.

214 Wrongful trading

214(1) [Declaration by court, on application] Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who

is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.

214(2) [Application] This subsection applies in relation to a person if—

- (a) the company has gone into insolvent liquidation,
- (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and
- (c) that person was a director of the company at that time;

but the court shall not make a declaration under this section in any case where the time mentioned in paragraph (b) above was before 28th April 1986.

214(3) [Limit on declaration] The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) he ought to have taken.

214(4) [Interpretation of s.214(2), (3)] For the purposes of subsections (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both—

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and
- (b) the general knowledge, skill and experience that that director has.

214(5) [Interpretation of s.214(4)] The reference in subsection (4) to the functions carried out in relation to a company by a director of the company includes any functions which he does not carry out but which have been entrusted to him.

214(6) [Interpretation re insolvent liquidation] For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

214(7) ["Director"] In this section "director" includes a shadow director.

214(8) [Section 213] This section is without prejudice to section 213.

GENERAL NOTE

For the background to this provision, see the note to s.213 above.

The section, according to the marginal note, is concerned with "wrongful trading"; but it is notable that the word "trading" is not used in the text of the Act. (The marginal note may not be used as an aid for the construction of the text: *Chandler v Director of Public Prosecutions* [1964] A.C. 763.) The section itself is singularly imprecise in defining just what conduct on the part of a director will bring him within its scope.

The Cork Committee (*Report*, para.1806) did put forward its own draft definition of "wrongful trading", the essential part of which read: "... at any time when the company is insolvent or unable to pay its debts as they fall due it incurs further debts or other liabilities to other persons without a reasonable prospect of meeting them in full". However, this definition was explicitly rejected by Parliament when an attempt was made to introduce it as an amendment to the Insolvency Bill 1985, and so it would be wrong to refer to it for guidance on the meaning of the present section. In particular, there may be wrongful trading under s.214 even though the company does not incur further debts: one example mentioned during the parliamentary debate was the case where a company allows its assets to be depleted, e.g. by the payment of excessive directors' fees. It was, presumably, a concern to ensure that this kind of conduct was caught that led the draftsman to omit the word "trading" from his formulation.

The amount of contribution to be ordered is left entirely to the court's discretion, and is not related by the terms of the Act either to any particular period of trading or to the loss suffered by the company or creditors. However, in *Re Produce Marketing Consortium Ltd* (1989) 5 B.C.C. 569 at 597, Knox J. said:

"In my judgment the jurisdiction under sec. 214 is primarily compensatory rather than penal. Prime facie the appropriate amount that a director is declared to be liable to contribute is the amount by which the company's assets can be discerned to have been depleted by the director's conduct which caused the discretion under sec. 214(1) to arise. However Parliament has indeed chosen very wide words of discretion and it would be undesirable to seek to spell out limits on that discretion... The fact that there was no fraudulent intent is not of itself a reason for fixing the amount at a nominal or low figure, for that would amount to frustrating what I discern as Parliament's intention in adding sec. 214 to sec. 213 in the *Insolvency Act* 1986, but I am not persuaded that it is right to ignore that fact totally".

Although the section is silent on the question of causation, it must be shown that if the defendant had complied with his duties to the requisite standard the loss in question would not have resulted (as a matter of probability): *Lexi Holdings plc v Lugman* [2008] EWHC 1639 (Ch); [2008] 2 B.C.L.C. 725 at [40]. In that case the company's managing director, S, had defrauded it of some £60 million. The defendant non-executive directors had remained inactive and (inter alia) had not disclosed to the other directors their knowledge that S had a criminal record. They were held not liable for the loss because the likely result of disclosing this would have been nothing more than the resignation of the other directors.

In *Re Marini Ltd* [2003] EWHC 334 (Ch); [2004] B.C.C. 172, H.H.J. Seymour thought that the powers of the court under s.214 could not arise unless it was demonstrated that the company was, at the date of the actual liquidation, worse off than it would have been if it had ceased trading at the date when the director(s) ought to have realised that insolvent liquidation was inevitable. With respect, this view ignores the relevance of the causation factor. If this can be brought into account in order to reduce the director's liability (see *Re Brian D Pierson (Contractors) Ltd* [1999] B.C.C. 26), it must be just as relevant if the company receives an unexpected windfall which leaves it better off despite the continued wrongful trading.

In the light of the ruling of the Court of Appeal in *Morphitis v Bernasconi* [2002] EWCA Civ 289; [2003] Ch. 552; [2003] B.C.C. 540, it will not be appropriate to include a punitive element in the amount of contribution awarded: see the note to s.213(2), above.

Summary judgment on a s.214 claim was awarded in *Re Bangla Television Ltd* [2009] EWHC 1632 (Ch); [2010] B.C.C. 143.

Where a claim under s.214 is brought against a number of directors, liability is several and not joint and several, that is to say that the position of each individual has to be separately assessed, and payment by one does not discharge the liability of any other: *Re Continental Assurance Co of London plc* [2001] B.P.I.R. 733 at 846–848. However, it was also said in this case that the court may, in its discretion, order that the liability of any two or more directors should be joint and several for the whole or part of the sum which the court has assessed for contribution to the company's assets.

In an appropriate case, an application may be made under s.214 against the foreign directors of a foreign company which is being wound up in this jurisdiction as an unregistered company: *Re Howard Holdings Ltd* [1998] B.C.C. 549.

There will plainly be cases in which claims will be made against the former director of a company both under this section and under some other provisions of the Act, e.g. s.212 (misfeasance) or s.239 (preference). In such a case there may be no injustice in making orders which impose cumulative liability on the defendant: *Re Purpoint Ltd* [1991] B.C.C. 121. However, in *Re DKG Contractors Ltd* [1990] B.C.C. 903 the court ruled that payments made under ss.212 and 239 should go to satisfy the liability under s.214, and that enforcement should be limited to what was necessary to pay the company's creditors and the costs and expenses of the liquidation. On this and related questions, see the note to s.212(1).

It has been ruled that, as a matter of law, CA 2006 s.1157 [formerly CA 1985 s.727] (which empowers the court to relieve a director from liability for breach of duty where he has acted honestly and reasonably and ought fairly to be excused) is not available to a director in s.214 proceedings: *Re Produce Marketing Consortium Ltd (Halls v David)* [1989] 1 W.L.R. 745; (1989) 5 B.C.C. 399.

A claim under s.214 (and, similarly, a claim under s.213) is a "claim for the recovery of a sum recoverable under any enactment" within s.9(1) of the Limitation Act 1980, and the appropriate limitation period is six years, reckoned from the date when the company went into insolvent liquidation: *Re Farmizer (Products) Ltd, Moore v Gadd* [1997] B.C.C. 655. However even if proceedings are commenced within the limitation period, unreasonable delay in prosecuting the claim may justify a striking-out order (*ibid.*).

The provisions of ss.214–217 apply to the directors of building societies: see the note to CDDA 1986 s.7.

S.214(1)

Four points may be noted:

- (1) The section applies only to present and past directors (including shadow directors: s.214(7)). In *Re a Company (No.005009 of 1987)* (1988) 4 B.C.C. 424 (interlocutory proceedings in the saga of *Re M C Bacon Ltd*: see [1990] B.C.C. 78 at 79G) Knox J. ruled that a company's bank which, on becoming apprised of the fact that its client company is in financial difficulties, makes recommendations to its directors as to the future conduct of its business could, in principle, incur liability under the section as a "shadow director"—or, at least, that on the evidence before him the case was not so obviously unsustainable that an allegation to that effect should be struck out without proceeding to trial. A bank would not, however (it is submitted), risk liability as a shadow director if its requirements were expressed as conditions of extending loan facilities to the company rather than as instructions. (Compare the views expressed in *Re PFTZM Ltd (in liq.)* [1995] B.C.C. 280.) In *Re Hydorad (Corby) Ltd* [1994] B.C.C. 161, Millett J. accepted as correct a concession by counsel that s.214 applies also to de facto directors. (See further on this point the notes to s.251, below.) Proceedings may be brought against the estate of a deceased director: *Re Sherborne Associates Ltd* [1995] B.C.C. 40.
- (2) Section 214 applies only in a winding up.
- (3) Only the liquidator has standing to bring proceedings.
- (4) Any sum paid by a defendant goes into the general assets in the hands of the liquidator. Accordingly, it will not be caught by a charge over the assets of the company (despite the assumption to the contrary made by Knox J. in *Re Produce Marketing Consortium Ltd* (1989) 5 B.C.C. 569 at 598); and it is incapable of assignment (*Re Oasis Merchandising Services Ltd* [1998] Ch. 170; [1997] B.C.C. 282). See the note to Sch.4 paras 6, 13.

The comments to s.213 on these points are also relevant for this subsection.

A person held liable under this section may also have a disqualification order made against him: see CDDA 1986 s.10, although the power appears to be used sparingly (see *Re Brian D Pierson (Contractors) Ltd* [1999] B.C.C. 26). Alternatively, an application under this section may be consolidated with proceedings for a disqualification order, as was done in *Official Receiver v Doshi* [2001] 2 B.C.L.C. 235.

S.214(2)

On the meaning of "has gone into insolvent liquidation" see s.214(6); and for "the commencement of the winding up" see ss.86 and 129.

April 28, 1986 was the date when this provision (as IA 1985 s.15) was first brought into force (SI 1986/463).

The words "knew or ought to have concluded" are to be read in conjunction with s.214(4). See the note to that provision, below.

Note that a director does not contravene the section simply by allowing the company to continue to trade when it is insolvent, or when he knows or ought to know that it is insolvent (on either a balance-sheet or cash-flow test): the question is whether he knows or ought to have concluded that there is no reasonable prospect of avoiding insolvent liquidation: *Re Hawkes Hill Publishing Co Ltd* [2007] B.C.C. 937. Where the liquidator alleges that a respondent knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation by reference to specific dates, but fails to make out his case as to the dates pleaded, he is not entitled to substitute later dates: *Re Sherborne Associates Ltd* [1995] B.C.C. 40.

S.214(3)

The section, as has been noted, pointedly avoids giving any concrete meaning to the concept of "wrongful trading" or any positive guidance as to the types of conduct which will lead to liability. There is thus a major gap in the law, as framed, which is having to be filled by decisions of the courts in test cases. The only objective facts that need to be established are those relating to the winding up of the company, its insolvency, and that the director held office at the material time (s.214(2)); beyond that, liability turns on his knowledge or imputed knowledge (s.214(2)(b)) and his failure to take "every step with a view to minimising the potential loss to the company's creditors as ... he ought to have taken". What a director knows, or must be taken to know, for these purposes is assessed by a mixture of subjective and objective tests (see the note to s.214(4) below).

The phrases "took every step" and "minimising the potential loss to creditors" seem, at first sight, rather overstated. However, there is no doubt that the use of "every step" was deliberate: a proposed amendment to "every reasonable step" was expressly rejected in Parliament; and on similar reasoning, we must assume that "minimise" was fully intended, rather than, say, "reduce" or "avert".

The bracketed words in the subsection credit a director, for the purpose of determining what he “ought” to have done, with an awareness of the company’s financial position and (by virtue of s.214(4)) with a degree of general knowledge, skill and experience which in reality he may not have had. These fictitious assumptions as to the directors’ state of mind were invoked against the defendants in *Re Produce Marketing Consortium Ltd* (1989) 5 B.C.C. 569. The company had kept inadequate accounting records, and in consequence the directors were in breach of their statutory duty to prepare accounts for the financial year ending September 30, 1985, which should have been laid before the shareholders and delivered to the registrar of companies by the end of July 1986. Knox J. held that he should assume, for the purposes of s.214, that these financial results were known to the directors at the latter date, at least to the extent of the size of the deficiency of assets over liabilities.

The Act gives no affirmative guidance as to the steps which a director “ought” to take when insolvency is threatening. It was plainly assumed in the Government’s White Paper (Cmnd.9175, para.12) that a conscientious director would seek to have the company put into receivership, administration, or voluntary liquidation as soon as possible. There is a clear risk that this may seem the safest course for directors, faced as they are with the threat of personal liability and possible disqualification, even when in their own business judgment there is a good case for carrying on. It is clear that any decision to do so ought to be fully reasoned and documented and, where necessary, made with the benefit of outside professional advice, in order that the requirements of the present subsection can be met if a charge of wrongful trading is brought. It is significant that in *Re Continental Assurance Co of London plc* [2001] B.P.I.R. 733, in which all of the directors concerned were held not to be liable for wrongful trading, management accounts had been prepared (albeit that they may not have been wholly accurate) and two licensed insolvency practitioners were advising the company at the material time. See also *Re Hawkes Hill Publishing Co Ltd* (above).

On principle and, it is submitted, on the language of the section, the onus of proof to show that a director has failed to take every step that he ought to have taken should be on the liquidator. In *Re Sherborne Associates Ltd* (above) it was emphasised that the court should be aware of the danger of making assumptions with the benefit of hindsight, and in the case of a claim against the estate of a deceased director should be particularly astute to recognise the possibility of explanations for his conduct which he might have been able to give had he lived.

S.214(4)

The tests to be applied under this subsection combine both subjective and objective criteria. The director is thus to be judged by the standards of the “reasonable” director, even though he himself is lacking or below average in knowledge, skill or experience, but by his own higher standards if these are above average. In *Re DKG Contractors Ltd* [1990] B.C.C. 903 it was observed: “Patently, [the directors’] own knowledge, skill and experience were hopelessly inadequate for the task they undertook. That is not sufficient to protect them”. However, it should be noted that in the *Produce Marketing* case (above), Knox J. accepted a submission that the objective standards fixed by the section do require the court to have regard to the particular company and its business, so that the general knowledge, skill and experience postulated will be much less extensive in a small company in a modest way of business, with simple accounting procedures and equipment, than it will be in a large company with sophisticated procedures. This approach could also give scope for the courts to make some allowances in the case of non-executive and part-time directors. (*Re Continental Assurance Co of London plc* (above) contains an important analysis of the position of non-executive directors in this context.) For a detailed examination of the standards prescribed by s.214(4), see *Rubin v Gunner* [2004] EWHC 316 (Ch); [2004] B.C.C. 684.

In applying objective standards to the conduct of company directors in this way, the Act broke new ground, for the case law had traditionally emphasised the need for honesty and conscientiousness but had not demanded that directors should exercise any particular degree of competence or diligence or skill. However, in *Re D’Jan of London Ltd* [1993] B.C.C. 646, Hoffmann L.J. expressed the view that “the duty of care owed by a director at common law is accurately stated in s.214 of the Insolvency Act 1986”, and this view has not only been accepted in later cases but adopted in the statutory statement of directors’ duties in the Companies Act 2006.

S.214(5)

The remarks made in the preceding paragraph are underlined by the present subsection, which puts sins of omission into the same category as sins of commission. This, too, is a departure from the common law, which has never had effective sanctions to penalise passive defaults such as non-attendance at board meetings.

S.214(6)

Section 214 applies only in a liquidation; but it is immaterial whether this is a compulsory or voluntary liquidation. The phrase “goes into liquidation” is defined in s.247(2). The test of insolvency applied by s.214(6) is on a “balance sheet” rather than a “liquidity” or “commercial” basis. (The recommendation of the Cork Committee was that *either* should be sufficient.) The definition of “inability to pay debts” in s.123(1)(e) and (2) may be contrasted.

The Act gives no indication whether the company's assets are to be valued for the purpose of s.214 on a "going concern" rather than a "break-up" basis, or whether contingent and future liabilities are to be brought into the reckoning. It is submitted that it would be wrong to judge these matters with the wisdom of hindsight, if it does happen that, e.g. the assets have had to be sold up piecemeal in the winding up which has resulted. The reference to "going into insolvent liquidation" in relation to the making of business judgments in s.214(2)(b) surely indicates that the question of solvency is to be assessed on the basis of going-concern assumptions for all the purposes of the present section.

On the problems of valuation for the purposes of determining "insolvency" under the present section, see the comments of Professor Roy Goode, *Principles of Corporate Insolvency Law*, 3rd edn (2005), at 4.24–4.41.

S.214(7)

For the definition of these terms, see the note to s.206.

S.214(8)

In view of the heavier onus of proof required by s.213, it is unlikely that that section will be invoked in future where a liquidator has a choice of proceeding under either section. The one respect in which the two sections do not overlap, however, is that s.213 applies to persons other than directors and shadow directors, provided that they are knowingly parties to the fraudulent trading.

215 Proceedings under ss.213, 214

215(1) [Evidence by liquidator] On the hearing of an application under section 213 or 214, the liquidator may himself give evidence or call witnesses.

215(2) [Further court directions] Where under either section the court makes a declaration, it may give such further directions as it thinks proper for giving effect to the declaration; and in particular, the court may—

- (a) provide for the liability of any person under the declaration to be a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf, and
- (b) from time to time make such further order as may be necessary for enforcing any charge imposed under this subsection.

215(3) ["Assignee"] For the purposes of subsection (2), "assignee"—

- (a) includes a person to whom or in whose favour, by the directions of the person made liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but
- (b) does not include an assignee for valuable consideration (not including consideration by way of marriage or the formation of a civil partnership) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

215(4) [Directions re priority of debts] Where the court makes a declaration under either section in relation to a person who is a creditor of the company, it may direct that the whole or any part of any debt owed by the company to that person and any interest thereon shall rank in priority after all other debts owed by the company and after any interest on those debts.

215(5) [Sections 213, 214] Sections 213 and 214 have effect notwithstanding that the person concerned may be criminally liable in respect of matters on the ground of which the declaration under the section is to be made.

S.215(4)

The court is empowered to make a declaration, ancillary to an order for contribution, subordinating any debt owed by the company to a respondent so that it ranks after the company's other debts. Such a declaration was made in *Re Purpoint Ltd* [1991] B.C.C. 121.

216

216(

has ;
of tl
liqui

216(

(ε

(t

216
pers
on ,

(;

(

(

216
or l

216
cor
rec
rel

216
a c
con

21
ins
of

21
Pa

Gi

Th

"p

m

w

Fr

w

cc

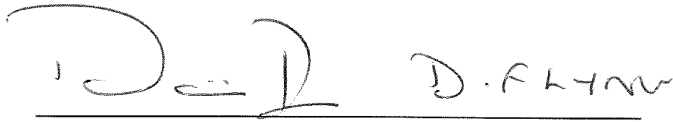
cc

bi

in

Exhibit 3

This is exhibit "3" referred to in the Affidavit of Ben Matthew Valentin, sworn before me
this 13 day of October 2010.



A handwritten signature in dark ink, appearing to read 'D. Flynn', is written over a horizontal line.

Solicitor of the Senior Courts of England and Wales

PORTRAIT
1 CHANCERY LANE
LONDON WC2A 1LF
Tel: 020 7320 3888

PORTRAIT
1 CHANCERY LANE
LONDON WC2A 1LF
Tel: 020 7320 3888 - DX69

ANNOTATED GUIDE TO THE INSOLVENCY LEGISLATION

Company Directors Disqualification Act 1986
EC Regulation on Insolvency Proceedings 2000
UNCITRAL Model Law on Cross-Border Insolvency
Cross-Border Insolvency Regulations 2006
Selected Statutes and Statutory Instruments

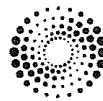
Thirteenth Edition

Volume 2

Len Sealy MA LLM PhD, Barrister and Solicitor (NZ)
*SJ Berwin Professor Emeritus of Corporate Law,
University of Cambridge*

David Milman LLB PhD
*Professor of Law
Law School
Lancaster University*

SWEET & MAXWELL



THOMSON REUTERS

9E Interpretation

9E(1) [Application of s.9E] This section applies for the purposes of sections 9A to 9D.

9E(2) [The specified regulators] Each of the following is a specified regulator for the purposes of a breach of competition law in relation to a matter in respect of which he or it has a function—

- (a) the Office of Communications;
- (b) the Gas and Electricity Markets Authority;
- (c) the Director General of Water Services;
- (d) the Rail Regulator;
- (e) the Civil Aviation Authority.

9E(3) [The court] The court is the High Court or (in Scotland) the Court of Session.

9E(4) [Conduct] Conduct includes omission.

9E(5) [Shadow director] Director includes shadow director.

GENERAL NOTE

The regulators specified for the purposes of ss.9A–9D are listed in s.9E(2).

Section 9E(2)(a) was amended by the Communications Act 2003 s.406(1) and Sch.17 para.83 as from December 29, 2003 (see the Office of Communications Act 2002 (Commencement No.3 and Communications Act 2003 (Commencement No.2) Order 2003 (SI 2003/3142) art.3(1) and Sch.1). The reference was formerly to the Director General of Telecommunications.

S.9E(3)

The county court has no jurisdiction in relation to competition orders and undertakings.

Other cases of disqualification

10 Participation in wrongful trading

10(1) [Court's power] Where the court makes a declaration under section 213 or 214 of the Insolvency Act 1986 that a person is liable to make a contribution to a company's assets, then, whether or not an application for such an order is made by any person, the court may, if it thinks fit, also make a disqualification order against the person to whom the declaration relates.

10(2) [Maximum period] The maximum period of disqualification under this section is 15 years.

GENERAL NOTE

The sections referred to relate to fraudulent trading as well as wrongful trading. The court is empowered to make a disqualification order in addition to imposing personal liability on the person concerned (who, in the case of fraudulent trading, will not necessarily have been a director or shadow director). This it may do of its own motion, or on the application of any person. The section appears to assume that the disqualification order will be made in the same proceedings as the declaration of liability, but conceivably it could be the subject of a separate, later application.

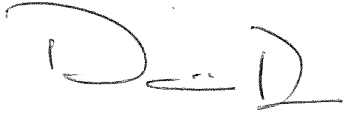
According to a note in [1990] I.L. & P. 72 at 73, the respondent in *Re Purpoint Ltd* [1991] B.C.C. 121 was disqualified under this section for two years, as well as being ordered to pay compensation under s.214. See also *Re Brian D Pierson (Contractors) Ltd* [1999] B.C.C. 26 in which in an addendum to the judgment the respondents were disqualified under s.10 for five and two years respectively.

11 Undischarged bankrupts

11(1) [Offences] It is an offence for a person to act as director of a company or directly or indirectly to take part in or be concerned in the promotion, formation or management of a company, without the leave of the court, at a time when—

Exhibit 4

This is exhibit "4" referred to in the Affidavit of Ben Matthew Valentin, sworn before me
this 13 day of October 2010.

 D. Farnham

Solicitor of the Senior Courts of England and Wales

PORTRAIT
1 CHANCERY LANE
LONDON WC2A 1LF
Tel: 020 7320 3888 - DX69

Tolley's Insolvency Law Service/Division O/The Official Receiver -- Corporate/Proceedings available to the OR/Fraudulent and wrongful trading

Fraudulent and wrongful trading

[O3033]

Fraudulent trading. If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the court may, on the application of the liquidator, declare any persons who were knowingly parties to that conduct as liable to make such contributions (if any) to the company's assets as the court thinks proper (IA 1986, s 213) (*Bernasconi v Nicholas Bennett & Co [2000] BCC 921*).

Wrongful trading. A liquidator can make a similar application against a director or former director of a company when there appears to have been wrongful trading. The requirements for wrongful trading are that the company has gone into insolvent liquidation; at some time before the commencement of the winding up of the company, the person in question knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation; and that person was a director at the time (section 214). Subsection (3) provides a defence where the court is satisfied that the person took every step with a view to minimising the potential loss to the company's creditors as he ought to have taken on concluding (or when he should have concluded) that the company had no reasonable prospect of avoiding insolvent liquidation.

Both sections 213 and 214 specify that the application is to be made by the liquidator. This is in contrast to section 235 (duty to co-operate with office-holder) where application can be made by any administrator, administrative receiver, liquidator or provisional liquidator (each as 'office-holder' within the meaning of section 234(1)) and the OR whether or not he is the liquidator. It is clear that the OR can apply under sections 213 and 214 when he is liquidator.

(See also **F6013** *et seq.* **FRAUD AND MISFEASANCE**.)

Exhibit 5

This is exhibit "5" referred to in the Affidavit of Ben Matthew Valentin, sworn before me this 13 day of October 2010.

A handwritten signature in black ink, appearing to read 'D. Flynn', written over a horizontal line.

Solicitor of the Senior Courts of England and Wales

PORTRAIT
1 CHANCERY LANE
LONDON WC2A 1LF
Tel: 020 7320 3888 - DX69

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(1) INTRODUCTION/701. Misrepresentation as a ground for the rescission of a contract or the award of damages.

MISREPRESENTATION AND FRAUD (

1. ACTIONABLE MISREPRESENTATION

(1) INTRODUCTION

701. Misrepresentation as a ground for the rescission of a contract or the award of damages.

A misrepresentation is a positive statement of fact, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently. Where one person ('the representor')¹ makes a misrepresentation² to another ('the representee')³ which has the object and result of inducing the representee to enter into a contract or binding transaction with him, the representee may generally⁴ elect to regard the contract as rescinded⁵.

In these circumstances he may invoke the aid of the court, which may confirm by declaration his entitlement so to regard the contract, and grant him such other relief as may flow directly from the fact of rescission, for example, the return of money paid or chattels delivered by him pursuant to the terms of the contract⁶. Alternatively, he may set up his entitlement to regard the contract as rescinded by way of defence in any proceedings brought against him in order to enforce its terms⁷.

At common law, the relief afforded by the court to a representee as such does not extend to the award of damages for loss suffered by him in consequence of entering into a contract or binding transaction unless he can further show that the false representation was made fraudulently or negligently⁸. By statute, however, if a person enters into a contract after a misrepresentation has been made to him and as a result suffers loss, he may be awarded damages despite the absence of fraud on the part of the representor⁹.

Where fraud can be shown by a representee who has in any way altered his position for the worse, whether by entering into a contract or binding transaction or otherwise, as a consequence of it, such damage as he has suffered may, in accordance with the general principles governing the award of damages, be recovered from the representor in a claim for deceit¹⁰. Generally, relief is by way of rescission or damages, but not both. However, where the representee has not only entered into a contract or binding transaction with the representor, but has also further altered his position and suffered damage, relief by way of damages for fraud may be claimed in addition to the relief afforded by way of rescission¹¹.

It seems that where the misrepresentations are not fraudulent (or deemed to be fraudulent under the Misrepresentation Act 1967¹²), the representee may recover an indemnity appropriate to relieve him from consequences and obligations of the contract that is set aside¹³.

Misrepresentation in these contexts must be distinguished from mistake (in its legal sense)¹⁴, from mere non-disclosure¹⁵ and from breach of warranty or any other representation assuming the form of a promise or contractual engagement¹⁶.

- 1 As to who is a representor see PARAS 726-734 post.
 - 2 I.e. a misrepresentation. As to what constitutes a representation see PARA 703 et seq post. As to falsity see PARA 742 et seq post.
 - 3 As to who is a representee see PARAS 735-741 post.
 - 4 As to the conditions of the right to rescind see PARA 814 et seq post. As to the defences available in claims based upon misrepresentation, and the circumstances which may preclude the representee from treating the contract as rescinded, see PARAS 802-804, 826-835 post.
 - 5 See PARA 781 et seq post.
 - 6 As to claims for rescission see PARA 812 et seq post.
 - 7 As to the circumstances in which misrepresentation may be set up as a defence see PARAS 785, 788 post.
 - 8 As to claims for damages see PARA 789 et seq post. As to fraudulent misrepresentation see PARA 755 et seq post. As to negligent misrepresentation see PARA 798 et seq post; and NEGLIGENCE vol 78 (2010) PARA 14.
 - 9 See the Misrepresentation Act 1967 s 2(1); and PARAS 801, 811 post.
 - 10 See PARA 781 post. As to claims for deceit see PARA 789 et seq post. As to the general principles governing the award of damages see DAMAGES.
 - 11 *Attwood v Small* (1838) 6 Cl & Fin 232 at 444, HL, per Lord Brougham; *Newbigging v Adam* (1886) 34 ChD 582 at 592, CA, per Bowen LJ. See also PARA 781 post.
 - 12 See PARA 801 post.
 - 13 See *Newbigging v Adam* (1886) 34 ChD 582 at 589, 594, 596, CA. In this case, in upholding an order to indemnify the plaintiff against debts, claims and demands to which he might be liable by virtue of having entered into the partnership agreement which was set aside, it was said: 'it is not giving damages in consequence of deceit, it is working out the proper result of setting aside a contract in consequence of misrepresentation': *Newbigging v Adam* supra at 589 per Cotton LJ.
 - 14 I.e. the misapprehension or misconception of some fact material to a transaction, by both parties or by one party only, where the misapprehension or misconception has not been induced by any misrepresentation by either party: see MISTAKE. As to errors for which it is possible to say that the misrepresentor has assumed responsibility see *Aneco Reinsurance Underwriting Ltd (in liq) v Johnson & Higgins Ltd* [2001] UKHL 51, [2002] 1 Lloyd's Rep 157.
 - 15 For the classes of contract in which a duty of disclosure arises and the effect of non-disclosure in rendering the contract voidable see generally CONTRACT. For examples of the duty of disclosure in particular cases see eg AGENCY vol 1 (2008) PARAS 89-90 (duty owed by agent to principal); INSURANCE vol 25 (2003 Reissue) PARA 36 et seq (disclosure to insurers). As to the extent of the duty owed by one partner to another see eg *Cassels v Stewart* (1881) 6 App Cas 64, HL; and PARTNERSHIP vol 79 (2008) PARA 106. For the duty of disclosure owed by a solicitor to his client see eg *Nocton v Lord Ashburton* [1914] AC 932 at 964-965, HL, per Lord Dunedin; and LEGAL PROFESSIONS vol 66 (2009) PARA 798 et seq. For the duty owed by a trustee in dealings with beneficiaries see EQUITY; TRUSTS.
- Although mere silence or inaction does not in general amount to a misrepresentation, silence or inaction may contribute to establish a misrepresentation: see PARAS 748-751 post. Damages may well be recoverable in the case of fraudulent non-disclosure: as regards non-disclosure see *HiH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483. As to the circumstances in which silence or inaction may create an estoppel see ESTOPPEL.
- 16 For the distinction between mere representations and statements which are intended to have contractual force see PARA 704 post. As to promises see PARA 707 post. See also CONTRACT.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(1) INTRODUCTION/702. Postponement of limitation period in case of fraud.

702. Postponement of limitation period in case of fraud.

Where, in the case of any claim for which a period of limitation is prescribed¹, the claim is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or any fact relevant to the claimant's right of action has been deliberately concealed from him by any such person, the period of limitation does not begin to run until the claimant has discovered the fraud or concealment or could with reasonable diligence have discovered it².

This extended period of limitation probably does not apply to statements merely deemed fraudulent under the Misrepresentation Act 1967³, but the point is unsettled.

¹ See by the Limitation Act 1980: see LIMITATION PERIODS. As to limitation periods see also PARA 826 note 4 post.

² See *ibid* s 32(1) (as amended); and LIMITATION PERIODS vol 68 (2008) PARA 1220 et seq. This extension of the limitation period applies even if the deliberate concealment of facts relevant to a cause of action does not take place until after the accrual of the cause of action: *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102, [1995] 2 All ER 558, HL. There is statutory protection for an innocent third party who has purchased property for valuable consideration since the fraud or concealment took place: see the Limitation Act 1980 s 32(3); and LIMITATION PERIODS vol 68 (2008) PARA 1222.

³ See PARA 801 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(i) What constitutes a Representation/703. Constituent elements.

(2) THE REPRESENTATION

(i) What constitutes a Representation

703. Constituent elements.

A representation is a statement made by a representor¹ to a representee² and relating by way of affirmation, denial, description or otherwise to a matter of fact. The statement may be oral or in writing or arise by implication from words or conduct³. The representor and the representee must be distinct from one another in substance as well as in name; where the persons claiming to have been deceived by a statement are in effect the same as those who are alleged to have made it, there is no representation which the law can recognise⁴.

The matter of fact to which the statement relates must be a matter of present or past fact⁵, but there are difficulties in applying this principle to certain classes of statements. Thus, if a person makes a statement relating to his own or some other person's intention⁶, or containing a promise or forecast as to the future with possible implications as to the present⁷, or relating to his own or some other person's opinion, belief or other condition of mind⁸, or to a matter of law⁹, or to a document¹⁰, or containing laudatory generalities or exaggeration¹¹, questions may arise whether, and in what sense, and to what extent a representation is contained in or to be implied from the statement.

¹ As to who is a representor see PARAS 726-734 post.

² As to who is a representee see PARAS 735-741 post.

³ See PARAS 717-724 post. See also PARAS 709, 748-751 post.

⁴ *Re Ambrose Lake Tin and Copper Mining Co, ex p Taylor, ex p Moss* (1880) 14 ChD 390 at 396-397, CA.

⁵ See eg *Yorkshire Insurance Co Ltd v Craine* [1922] 2 AC 541 at 553, PC.

- 6 See PARAS 705-706 post.
- 7 See PARAS 707-708 post.
- 8 See PARAS 709-710 post.
- 9 See PARAS 711-712 post.
- 10 See PARAS 713-714 post.
- 11 See PARAS 715-716 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(i) What constitutes a Representation/704. Distinction between representation and contractual term.

704. Distinction between representation and contractual term.

A representation must be distinguished from a statement which, while relating to a matter of fact, is intended by the parties to have contractual force and is a contractual term¹. However, where a person has entered into a contract after a misrepresentation has been made to him, then, if otherwise he would be entitled to rescind the contract without alleging fraud², he is entitled to rescind notwithstanding that the misrepresentation has become a term of the contract or the contract has been performed³. Furthermore, in appropriate circumstances the same statement may form the basis of claims for damages for breach of contract and for damages in tort for negligently making the statement⁴.

1 *Pawson v Watson* (1778) 2 Cowp 785 at 788, 790; *Langridge v Levy* (1837) 2 M & W 519 (affd (1838) 4 M & W 337, Ex Ch); *Behn v Burness* (1863) 3 B & S 751, Ex Ch; *Thomson v Weems* (1884) 9 App Cas 671, HL; *Schawel v Reade* [1913] 2 IR 81, HL; *Heilbut Symons & Co v Buckleton* [1913] AC 30, HL; *Harrison v Knowles and Foster* [1918] 1 KB 608 at 610, CA, per Scrutton LJ; *Pennsylvania Shipping Co v Compagnia Nazionale de Navigation* [1936] 2 All ER 1167 at 1171 per Branson J; *Leaf v International Galleries* [1950] 2 KB 86, [1950] 1 All ER 693, CA; *Routledge v McKay* [1954] 1 All ER 855, [1954] 1 WLR 615, CA; *Homal v Neuberger Products Ltd* [1957] 1 QB 247, [1956] 3 All ER 970, CA; *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, CA; *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65, [1965] 1 WLR 623, CA; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA.

The circumstance that the party making the statement assumes to assert a fact of which the other party is ignorant is not conclusive of the question whether a statement amounts to a warranty: *Heilbut Symons & Co v Buckleton* supra at 50-51 per Lord Moulton, disapproving a dictum in *De Lassalle v Guildford* [1901] 2 KB 215 at 221, CA, per AL Smith MR.

As to the warranty of authority implied where any person purports to do any act or make any contract on behalf of a principal see PARA 727 note 2 post; and AGENCY vol 1 (2008) PARA 160. As to conditions and warranties generally see CONTRACT. See also eg ANIMALS vol 2 (2008) PARA 725 et seq (warranties on sale of animals); AUCTION vol 2(3) (Reissue) PARAS 210, 243 (authority of auctioneer to warrant; oral statements by auctioneers); INSURANCE vol 25 (2003 Reissue) PARAS 94, 215 et seq (special meaning of 'warranty' in insurance law; warranties; marine insurance); para 94 (special meaning of warranty in insurance law); LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 422-423 (warranty of fitness). As to conditions and warranties on the sale of goods see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 62 et seq.

2 As to rescission for misrepresentation see PARA 812 et seq post. In the case of innocent misrepresentation the court may in certain circumstances award damages in lieu of ordering rescission: see the Misrepresentation Act 1967 s 2(2); and PARA 834 post.

3 See *ibid* s 1; and PARA 817 post.

4 See *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(ii) Statements of Intention/705.

Effect of statement of representor's intention.

(ii) Statements of Intention

705. Effect of statement of representor's intention.

A statement of intention is not a representation as to the matter said to be intended, because that belongs to the future and is not a matter of present or past fact. On the other hand, a statement of intention involves a representation as to the existence of the intention which is itself a present fact¹. However, the difficulty of proving the non-existence of the intention diminishes the value of such representations². The mere circumstance that the expressed intention is not fulfilled does not by itself establish the non-existence of the intention at the time when it was expressed³, although the non-fulfilment of the intention may be some evidence, strong or weak according to the circumstances of the individual case, that the intention never existed at all⁴.

Many examples can be given of a person's statement of his own intention being treated as a representation that he has the intention⁵.

¹ *Edgington v Fitzmaurice* (1885) 29 ChD 459 at 483, CA, per Bowen LJ; *Angus v Clifford* [1891] 2 Ch 449 at 470, CA, per Bowen LJ.

The purchasing of goods has been said to be an implied representation of a then present intention of paying for them: *Re Shackleton, ex p Whittaker* (1875) 10 Ch App 446 at 449-450 per Mellish LJ. See also *Re Eastgate, ex p Ward* [1905] 1 KB 465.

² Cf *Edgington v Fitzmaurice* (1885) 29 ChD 459 at 483, CA.

³ *Benham v United Guarantee and Life Assurance Co* (1852) 7 Exch 744 at 752-753; *Jorden v Money* (1854) 5 HL Cas 185; *Bold v Hutchinson* (1855) 5 De GM & G 558 at 565 ('if a person merely says 'I will leave my daughter £10,000', it does not amount to a misrepresentation if he does not leave her that sum'); *Beattie v Lord Ebury* (1872) 7 Ch App 777 at 804.

⁴ *Clydesdale Bank Ltd v Paton* [1896] AC 381 at 386-388, 395, HL.

⁵ Eg statements that the representor was prepared to lend, or pay, or hand over money (*Ramshire v Bolton* (1869) LR 8 Eq 294; *Blake v Albion Life Assurance Society* (1878) 4 CPD 94 at 106; *Babcock v Lawson* (1880) 5 QBD 284, CA); statements as to the objects to which the subscriptions to an issue of shares or debentures of a company were intended to be applied (*Re Deposit and General Life Assurance Co, Ayre's Case* (1858) 25 Beav 513 at 524; *Edgington v Fitzmaurice* (1885) 29 ChD 459 at 479-480, 482-483, CA; *Aaron's Reefs v Twiss* [1896] AC 273 at 283-285, 286, HL); a statement of an intention to relinquish business in favour of the representor's son (*Biddle and Loyd v Levy* (1815) 1 Stark 20); an expression of intention to make a lane giving access to property sold and a new street (*Beaumont v Dukes* (1822) Jac 422 at 424); a statement as to an intended mode of keeping accounts (*Benham v United Guarantee and Life Assurance Co* (1852) 7 Exch 744); a statement of the use which the representor intended to make of demised premises (*Feret v Hill* (1854) 15 CB 207); a statement that the representor had power to stop the sale of certain goods under an execution, and would stop it (*Cooper v Joel* (1859) 1 De GF & J 240); a statement that a company intended to commence operations with a certain number of steamships of a certain type (*Hallows v Fernie* (1868) 3 Ch App 467); a statement that a company was minded to take a third of a certain insurance risk (*Trail v Baring* (1864) 4 De GJ & Sm 318); a statement that the representor was minded to extricate the representee from difficulties and losses, and to act as his friend and benefactor (*Curtis v Bottomley* (1911) Times, 1 August, CA); a brochure stating the intention to develop a time-share resort (*Buxton v Birches Time Share Resort Ltd* [1991] 2 NZLR 641, NZ CA); a statement by the vendor's solicitor that the transaction would be called off if the purchaser did not exchange contracts at once (*Goff v Gauthier* (1991) 62 P & CR 388). See also *Kingscroft Insurance Co Ltd v Nissan Fire & Marine Insurance Co Ltd* [1999] Lloyd's Rep IR 603, [2000] 1 All ER 272 (when a person proposes terms of contract to another he normally makes a representation about his intention and ability to perform).

As to who is a representor see PARAS 726-734 post. As to who is a representee see PARAS 735-741 post.

UPDATE

705 Effect of statement of representor's intention

NOTE 1--A statement of intention is generally not longstanding; a change in economic circumstances or the nature of the relationship between a parties will usually cause it to cease to be operative: *Limit No 2 Ltd v Axa Versicherung AG* [2008] EWCA Civ 1231, [2009] Lloyd's Rep IR 396, [2008] All ER (D) 115 (Nov).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(ii) Statements of Intention/706. Statements of other persons' intentions.

706. Statements of other persons' intentions.

A statement of another person's intention is a representation of the existence of the intention¹. It may be construed as such a representation, and not as a guarantee, even when accompanied or fortified by such expressions as 'we do not hesitate to guarantee'², if they can fairly be regarded as mere figurative forms of vernacular speech.

¹ *Hamar v Alexander* (1806) 2 Bos & PNR 241; *Barley v Walford* (1846) 9 QB 197 (statement that persons, entitled to registered design, intended to proceed against the plaintiff for infringement); *Re Hull and London Life Assurance Co and Hull and London Fire Insurance Co, Gibson's Case, Kemp's Case, Hudson's Case* (1858) 2 De G & J 275 (statement that two named persons would execute a deed of settlement); *Hallows v Fernie* (1868) 3 Ch App 467 (statement that certain persons had consented to become directors of company treated as a statement of fact). See also *R v Gordon* (1889) 23 QBD 354 at 360; *Smelter Corp'n of Ireland Ltd v O'Driscoll* [1977] IR 305.

For statutory restrictions on the bringing of claims upon representations as to credit see PARA 804 post.

² *Gerhard v Bates* (1853) 2 E & B 476 at 482 per Coleridge J. See also *Hamar v Alexander* (1806) 2 Bos & PNR 241 ('I durst be bound for him').

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(iii) Promises and Forecasts/707. Promises.

(iii) Promises and Forecasts

707. Promises.

A promise that something will or will not be done or occur in the future is in itself not a statement of a matter of present or past fact and therefore not a representation¹. However, it may happen that language which contains promissory expressions can be shown, nevertheless, to have been intended as a statement of an existing intention². Conversely, although a party used words expressive of intention, it may be apparent from other expressions or the surrounding circumstances that what he really meant, and the other party understood to be conveyed, was a promise or offer and nothing else³.

¹ *Re Robinson, ex p Burrell* (1876) 1 ChD 537 at 552, CA (it is always necessary to distinguish, when an alleged ground of false representation is set up, between a representation of an existing fact and a promise to do something in the future). A promise, even though it does not amount to a representation, may have legal effect in other ways, for instance if it forms part of a contract or is embodied in a deed: see CONTRACT; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 59.

² *Clydesdale Bank Ltd v Paton* [1896] AC 381 at 394, HL (what is in form a promise may be in another aspect a representation). Cf *Denton v Great Northern Rly Co* (1856) 5 E & B 860. See also *Convent Hospital Ltd v Eberlin & Partners* (1989) 23 ConLR 112, CA (statement in a bill of quantities against the entry for a bond was not a representation that a bond

could be obtained for that price but a statement of the price which would be charged for the provision of the bond).

3 *Hammersley v Baron De Biel* (1845) 12 Cl & Fin 45.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(iii) Promises and Forecasts/708. Forecasts.

708. Forecasts.

Mere general and indefinite anticipations of the future success or prosperity of any business or undertaking are not representations in any sense¹, but a statement of expectation is a statement that the party does actually expect as stated², and is therefore a representation. Moreover, a statement of expectation or a statement in the future tense may impliedly say something as to the existing position and so import an implied representation³.

Where a person who has special knowledge or skill makes representations to another by way of advice, information or opinion, with the intention of inducing the other to enter into a contract with him, he is under a duty to use reasonable care to see that the advice, information or opinion is reliable; and if he fails in that duty he will be liable for damages for negligence⁴.

1 *Bellairs v Tucker* (1884) 13 QBD 562, DC. See also *Beaumont v Dukes* (1822) Jac 422 at 424.

2 *Re Metropolitan Coal Consumers' Association Ltd, Karberg's Case* [1892] 3 Ch 1 at 11, CA.

3 *Willes v Glover* (1804) 1 Bos & PNR 14 at 16 (statement by a shipper that he 'thinks the captain will sail to-morrow' imports that he knows the ship to be in such a condition as to give a just expectation of her sailing at that time); *Gerhard v Bates* (1853) 2 E & B 476 at 490 (defendant, knowing a company to be a bubble company, and that no dividend would ever be paid upon the shares, fraudulently pretended to guarantee to the bearer of shares a minimum annual dividend of 33%); *Mathias v Yelts* (1882) 46 LT 497 at 503, CA. See also *Re Pacaya Rubber and Produce Co Ltd, Burn's Application* [1914] 1 Ch 542 at 549 per Astbury J, where a statement which was in itself merely an estimate of future profit was held to amount to a confirmation of an intended picture of an equipped and immediately workable property.

4 See *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA, where the plaintiffs had let a filling station to the defendant after a careless forecast of its potential throughput and were held liable on a counterclaim both in tort for negligent representation and in contract on a warranty that the forecast was reliable. They were not held to have warranted that the forecast would prove correct; that would have imposed liability for loss of expected profits. As to negligent statements see NEGLIGENCE vol 78 (2010) PARA 14.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(iv) Statements of Opinion, Belief or Information/709. Statements as representations of existence of opinion, belief or information.

(iv) Statements of Opinion, Belief or Information

709. Statements as representations of existence of opinion, belief or information.

If a person makes a statement of his opinion, belief or information, there is a representation that he has that opinion, belief or information¹. What has been previously said as to statements of intention² and statements of expectation³ is mutatis mutandis applicable in this connection. There may be difficulty in proving such a statement false because it is necessary to prove the non-existence of the opinion, belief or information rather than merely its incorrectness⁴. Similarly, where the facts were equally well known to both parties, there may

be difficulty in proving that one party was induced to enter into a transaction by the other party's expression of opinion⁵. A statement of some other person's opinion or belief is a representation that he has that opinion or belief⁶.

1 *Edgington v Fitzmaurice* (1885) 29 ChD 459 at 483, CA; *Angus v Clifford* [1891] 2 Ch 449 at 470, CA; *Smith v Land and House Property Corp* (1884) 28 ChD 7 at 15, CA; *Bisset v Wilkinson* [1927] AC 177 at 182, PC; *Brown v Raphael* [1958] Ch 636, [1958] 2 All ER 79, CA. As to reasonable reliance on any (untrue) statement see *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568; *Aneco Reinsurance Underwriting Ltd (in liq) v Johnson & Higgins Ltd* [2001] UKHL 51, [2002] 1 Lloyd's Rep 157. See also *BFG Bank AG v Brown & Mumford Ltd* [1996] EGCS 169, CA (high possibility of obtaining planning permission). Cf *Hummingbird Motors Ltd v Hobbs* [1986] RTR 276, CA.

2 See PARA 705 ante.

3 See PARA 708 ante.

4 *New Brunswick and Canada Rly and Land Co v Coneybeare* (1862) 9 HL Cas 711 at 729 (statement of opinion of directors in prospectus that there was no probability of a rival railway line being constructed, not falsified by subsequent construction of such a line); *Melbourne Banking Corp v Brougham* (1882) 7 App Cas 307 at 319-320, PC (bank's valuation of a security held not to be a misrepresentation merely because it turned out to be incorrect, there being no proof that the valuation was made otherwise than in good faith); *Bisset v Wilkinson* [1927] AC 177, PC (similar decision as to a statement of the carrying capacity of a sheep farm); *H & JM Bennett (Potatoes) Ltd v Secretary of State for Scotland* 1990 SLT 189, HL.

5 See *Smith v Land and House Property Corp* (1884) 28 ChD 7 at 15-16, CA, per Bowen LJ.

6 *Re Roberts, Roberts v Roberts* [1905] 1 Ch 704, CA (opinion of counsel); *Re Mount Morgan (West) Gold Mine Ltd, ex p West* (1887) 56 LT 622 at 624 (report of expert cited in company prospectus). As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

UPDATE

709 Statements as representations of existence of opinion, belief or information

NOTES 4, 5--See *MCI WorldCom International Inc v Primus Telecommunications Inc* [2003] EWHC 2182 (Comm), [2004] 1 All ER (Comm) 138 (comments by agent of subsidiary that parent company financially viable were statements of opinion derived from matters of public knowledge; no entitlement to rescind when parent became bankrupt).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(iv) Statements of Opinion, Belief or Information/710. Statements as representations of facts other than existence of opinion.

710. Statements as representations of facts other than existence of opinion.

If a person who has only an opinion or information as to a matter chooses to state it as a fact, the statement is a representation of the matter stated and the falsity of the representation is established by proof that the matter is not as stated, even though the representor may have genuinely held the opinion or believed the information¹. Sometimes a statement which is apparently in the form of an opinion, or uses words tending to suggest that it is only an opinion, may be held to contain or imply a statement of fact, and even from an expression of opinion there may be an implication that the speaker knows facts which justify the opinion or at least knows no facts showing it to be unjustified².

1 *A-G v Ray* (1874) 9 Ch App 397 at 405; *Hart v Swaine* (1877) 7 ChD 42; *Brownlie v Campbell* (1880) 5 App Cas 925 at 936, 945, 953, HL; *Pritty v Child* (1902) 71 LKJ 512, DC. As to who is a representor see PARAS 726-734 post.

2 *Willes v Glover* (1804) 1 Bos & PNR 14 (see PARA 708 note 3 ante); *Jones v Keene* (1841) 2 Mood & R 348; *Smith v Land*

and *House Property Corpn* (1884) 28 ChD 7 at 15, CA, per Bowen LJ, and at 17 per Fry LJ (statement that a person was a most desirable tenant); *Ferguson v Wilson* (1904) 6 F 779 at 783, Ct of Sess; *Bisset v Wilkinson* [1927] AC 177 at 182, PC (where the actual statement in question was held to be merely of an opinion honestly held); *Brown v Raphael* [1958] Ch 636, [1958] 2 All ER 79, CA (reversion in trust fund set aside to pay annuity sold subject to death duties which might become payable; statement in particulars of sale that annuitant was believed to have no aggregable estate; representation of reasonable grounds for belief). As to reasonable reliance on any (untrue) statement see *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568; *Aneco Reinsurance Underwriting Ltd (in liq) v Johnson & Higgins Ltd* [2001] UKHL 51, [2002] 1 Lloyd's Rep 157.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(v) Statements of Law/711.
Representation may include a statement of law.

(v) Statements of Law

711. Representation may include a statement of law.

A mere statement of law (for example, an abstract proposition of law or a legal inference from facts separately stated or known to both parties) is not a representation of what is stated¹. On the other hand, a statement of mixed fact and law (for example, a statement as to private rights such as the nature of rights under a will² or a lease³, the ownership of a fishery⁴, the priority of stock⁵, the borrowing powers of a company⁶ or the existence of incumbrances in shares⁷) is a representation of what is stated⁸. This is the principle of division between those statements involving law which constitute representations and those which do not, but the line is not clearly drawn in all the decided cases⁹. It is not clear on which side of the line statements as to the applicability of an enactment to given facts should be placed: one view is that the applicability of an enactment to given facts is a matter of law¹⁰, and the other view is that the conclusion on which the applicability of the enactment depends is a conclusion on a matter of fact¹¹.

1 *Directors etc of Midland Great Western Rly Co of Ireland v Johnson* (1858) 6 HL Cas 798 at 811; *Eaglesfield v Marquis of Londonderry* (1876) 4 ChD 693 at 709, CA; *Harse v Pearl Life Assurance Co* [1904] 1 KB 558, CA; *London County Territorial and Auxiliary Forces Association v Nichols* [1949] 1 KB 35 at 50, [1948] 2 All ER 432 at 435, CA, per Scott LJ; *Kai Nam v Ma Kam Chan* [1956] AC 358 at 367, [1956] 1 All ER 783n at 784, PC.

2 *Reynell v Sprye* (1852) 1 De GM & G 660 at 707.

3 *Jones v Edney* (1812) 3 Camp 285.

4 *Cooper v Phibbs* (1867) LR 2 HL 149 at 170.

5 *Eaglesfield v Marquis of Londonderry* (1876) 4 ChD 693 at 714, CA.

6 *West London Commercial Bank v Kitson* (1884) 13 QBD 360 at 363, CA (distinguishing *Rashdall v Ford* (1866) LR 2 Eq 750; and dicta in *Beattie v Lord Ebury* (1872) 7 Ch App 777 at 800 (see note 9 infra)).

7 *MacKenzie v Royal Bank of Canada* [1934] AC 468 at 475-476, PC.

8 See ESTOPPEL. Cf *Mandeville v GLC* (1982) Times, 28 January (statement by council relating to the right of tenants to buy council houses, made against a background of prospective legislation which was still the subject of debate, was held not to be a representation).

9 For decisions which appear to be anomalous, in so far as statements as to private rights were held to be mere statements of law and not to constitute representations, see *Rashdall v Ford* (1866) LR 2 Eq 750 (statement that company would shortly have power to issue debentures); *Beattie v Lord Ebury* (1872) 7 Ch App 777 at 800 (assertion by implication that company directors had power to overdraw company's account would be merely a misstatement of law; cf the text and note 6 supra); *Siveyer v Allison* [1935] 2 KB 403 at 406 per Greaves-Lord J (statement by married man that he could obtain decree of nullity). As to representations as to the effect of a document see PARA 714 post.

10 See *London County Territorial and Auxiliary Forces Association v Nichols* [1949] 1 KB 35 at 50, [1948] 2 All ER 432 at 435, CA, per Scott LJ; *Kai Nam v Ma Kam Chan* [1956] AC 358 at 367, [1956] 1 All ER 783 at 784, PC; *Solle v Butcher* [1950] 1

KB 671 at 703, [1949] 2 All ER 1107 at 1126, CA, per Jenkins LJ (a dissenting judgment). All these cases were concerned with the rent restrictions legislation. See also ESTOPPEL.

11 See *Solfe v Butcher* [1950] 1 KB 671 at 686-687, [1949] 2 All ER 1107 at 1115-1116, CA, per Bucknill LJ, and at 695 and 1121 per Denning LJ.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(v) Statements of Law/712. Effect of fraudulent statement of law.

712. Effect of fraudulent statement of law.

A fraudulent misstatement of law has the effect of a misrepresentation¹. This may be explained on the basis that a statement of law implies a representation that the maker of the statement has a belief or opinion that it is correct, and, if he does not have such belief or opinion, the implied representation is false and fraudulent.

¹ *British Workman's and General Assurance Co Ltd v Cunliffe* (1902) 18 TLR 502, CA; *Harse v Pearl Life Assurance Co* [1904] 1 KB 558, CA; *Kettlewell v Refuge Assurance Co* [1908] 1 KB 545, CA (affd sub nom *Refuge Assurance Co Ltd v Kettlewell* [1909] AC 243, HL); *Tofts v Pearl Life Assurance Co Ltd* [1915] 1 KB 189, CA; *Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 KB 482, CA; *Byrne v Rudd* [1920] 2 IR 12, Ir CA.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(vi) Statements as to Documents/713. Statements as to the existence of a document.

(vi) Statements as to Documents

713. Statements as to the existence of a document.

Statements as to the existence or non-existence of a document are representations, and it seems that a statement that a person derives power from a document (for example, that a company derives power from its special Act) is a statement that such a document exists¹.

¹ *West London Commercial Bank v Kitson* (1884) 13 QBD 360 at 363, CA, per Bowen LJ; *Cemp Properties (UK) Ltd v Dentsply Research and Development Corp* [1989] 2 EGLR 192, [1989] 35 EG 99 (statement that certain documents were not available for inspection).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(vi) Statements as to Documents/714. Statements as to the wording or effect of a document.

714. Statements as to the wording or effect of a document.

Statements as to the actual wording or tenor of a document¹, as to the object or effect of a document², or as to the class, character or description of a document³, are all statements of fact and as such are

representations⁴.

¹ *Thoroughgood's Case* (1584) 2 Co Rep 9a; *Anon* (1684) Skin 159; *Beadles v Burch* (1839) 10 Sim 332 at 333; *Clapham v Shillito* (1844) 7 Beav 146; *Billage v Southee* (1852) 9 Hare 534; *Mahomed Kala Mea v Harperink* (1908) 25 TLR 180, PC.

² *Hirschfeld v London, Brighton and South Coast Rly Co* (1876) 2 QBD 1; *Arkwright v Newbold* (1881) 17 ChD 301 at 318, CA; *Re Mount Morgan (West) Gold Mine Ltd, ex p West* (1887) 56 LT 622 at 624; *Stewart v Kennedy (No 2)* (1890) 15 App Cas 108, HL; *Components' Tube Co v Naylor* [1900] 2 IR 1; *Re Roberts, Roberts v Roberts* [1905] 1 Ch 704, CA; *Mahomed Kala Mea v Harperink* (1908) 25 TLR 180, PC; *Moss & Co Ltd v Swansea Corp* (1910) 74 JP 351; *Atlantic Lines and Navigation Co Inc v Hallam Ltd, The Lucy* [1983] 1 Lloyd's Rep 188 (delivery of head charter to sub-charterer involved representation as to its effect).

³ *Thoroughgood's Case* (1584) 2 Co Rep 9a; *Edwards v Brown* (1831) 1 Cr & J 307; *Kennedy v Green* (1834) 3 My & K 699; *Hoghton v Hoghton* (1852) 15 Beav 278; *Curson v Belworthy* (1852) 3 HL Cas 742 at 753; *Lewellin v Cobbold* (1853) 1 Sm & G 376; *Lee v Angus* (1866) 15 LT 380 (affd (1868) 7 Ch App 80n); *Foster v Mackinnon* (1869) LR 4 CP 704; *Hunter v Walters* (1871) 7 Ch App 75; *National Provincial Bank of England v Jackson* (1886) 33 ChD 1, CA; *King v Smith* [1900] 2 Ch 425; *Bagot v Chapman* [1907] 2 Ch 222; *Howatson v Webb* [1908] 1 Ch 1, CA; *Carlisle and Cumberland Banking Co v Bragg* [1911] 1 KB 489, CA (overruled on other grounds by *Saunders (Executrix of the Estate of Rose Maud Gallie) v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL); *Paul and Vincent Ltd v O'Reilly* (1913) 49 ILT 89; *Re Leighton's Conveyance* [1936] 1 All ER 667.

⁴ For the effect of misrepresentation as to the character, class or nature of an instrument where the execution of that instrument has been thereby induced see PARAS 781-783 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(vii) Exaggeration, Puff etc/715.
When exaggeration is not representation.

(vii) Exaggeration, Puff etc

715. When exaggeration is not representation.

Mere praise by a person of his own goods, inventions, projects, undertakings, or other marketable commodities or rights, if confined to indiscriminate puffing and pushing, and not related to particulars, is not representation¹.

¹ See *Fenton v Browne* (1807) 14 Ves 144 (leasehold property described as 'nearly equal to freehold'); *Scott v Hanson* (1829) 1 Russ & M 128 (14 acres of land described as 'uncommonly rich water meadowland'; as to 12 of the acres, which were not 'uncommonly rich', there was no misrepresentation, but as to the other two, which were not water meadowland at all, there was); *Neeley v Lock* (1838) 8 C & P 527 ('warm protestations' of a person's influence and power); *Jennings v Broughton* (1854) 5 De GM & G 126 (prospectus painted in 'glowing and exaggerated colours'); *R v Watson* (1857) 4 Jur NS 14, CCR (mere 'exaggeration of the prisoner's prosperity' held not to be a false pretence); *Dimmock v Hallett* (1866) 2 Ch App 21 (description of farms as 'fertile and improvable at a moderate cost' held mere laudatory phraseology; but statements as to their tenancy and occupation treated as statements of fact); *Cargill v Bower* (1878) 10 ChD 502 (sanguine anticipations in a prospectus); *McKeown v Boudard-Peveril Gear Co* (1896) 65 LJ Ch 735, CA (puff in a prospectus). The principle embodied in these cases is that the mere recommendation of goods by the seller imposes no liability upon him.

As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq. As to false or misleading statements made in the course of an estate agency business or a property development business see the Property Misdescriptions Act 1991 s 1; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 791 et seq.

UPDATE

715 When exaggeration is not representation

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(2) THE REPRESENTATION/(vii) Exaggeration, Puff etc/716. When exaggeration is a representation.

716. When exaggeration is a representation.

Where instead of basing the exaggeration or puffing upon facts separately stated (in which case each of the two things stands on its own footing, and whereas the one is not a representation at all, the other is wholly so), the representor¹ intermingles it with facts, punctuates it by details or quantifies it by figures, the whole of the compound statement is deemed a representation. Thus, if the statement gives rise to a claim where the facts are proved to have been misstated, it is no defence to allege that the facts were buried under a mass of indefinite and flattering generalities².

¹ As to who is a representor see PARAS 726-734 post.

² *Directors etc of Central Rly Co of Venezuela v Kisch* (1867) LR 2 HL 99 at 113, where, although it was recognised that some high colouring and even exaggeration is to be expected in a prospectus, the statements went far beyond mere colouring. See also *Bile Beans Manufacturing Co v Davidson* (1906) 8 F 1181, Ct of Sess (although mere puffing and exaggeration, however gross, of the merits and virtues of a remedy do not constitute representations, it is otherwise where statements are made as to imaginary discoveries of imaginary new ingredients in the drug sold). Cf *Scott v Hanson* (1829) 1 Russ & M 128; *Dimmock v Hallett* (1866) 2 Ch App 21 (in these cases, the statement was separated into elements that amounted to representation and those that were mere puff: see PARA 715 note 1 ante). As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(3) HOW REPRESENTATIONS MAY BE MADE/(i) Express Representations/717. Representations in writing, plans etc.

(3) HOW REPRESENTATIONS MAY BE MADE

(i) Express Representations

717. Representations in writing, plans etc.

The usual permanent symbols by which a representation is conveyed are words and figures written or printed or produced by any other equivalent means; but plans and drawings¹, maps², pictures and photographs³, and the like, may effectively serve the same purpose.

¹ *Beaumont v Dukes* (1822) Jac 422; *Denny v Hancock* (1870) 6 Ch App 1 at 11-14; *Re Arnold, Arnold v Arnold* (1880) 14 ChD 270 at 282, 284, CA (all these were cases in which plans of property sold played an important part in the representation). See also *S Pearson & Son Ltd v Dublin Corp* [1907] AC 351, HL (representation contained in, inter alia, plans and drawings prepared by the defendants' engineer). As to the rules of construction to be applied when a plan is attached to or indorsed on a deed see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 229.

² *Re Mount Morgan (West) Gold Mine Ltd, ex p West* (1887) 56 LT 622 (map accompanying a prospectus). As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

³ *Newman v Pinto* (1887) 57 LT 31, CA (deceptive pictures or emblematic designs); *Slingsby v Bradford Patent Truck and Trolley Co* [1906] WN 51, CA ('sketches' of buildings alleged to be 'photographed').

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(3) HOW REPRESENTATIONS MAY BE MADE/(i) Express Representations/718. Representations by speech, gestures or demeanour.

718. Representations by speech, gestures or demeanour.

Speech is the most common method for the communication of a statement not in writing, but gestures and demeanour may be used in addition to or as an alternative to spoken language¹.

¹ See *Walters v Morgan* (1861) 3 De GF & J 718 at 724 per Lord Campbell LC ('a nod or a wink, or a shake of the head, or a smile' may constitute a representation, throwing upon a purchaser a duty of disclosure which otherwise would not arise); *Turner v Green* [1895] 2 Ch 205 at 209 per Chitty J; cf *Webb v Rorke* (1806) 2 Sch & Lef 661 at 668. As to implied representations by acts or conduct see PARAS 720-724 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(3) HOW REPRESENTATIONS MAY BE MADE/(ii) Representations implied from Conduct/719. Representations implied from conduct (including silence).

(ii) Representations implied from Conduct

719. Representations implied from conduct (including silence).

Representations may be implied from such statements as statements of existing intention, opinion or belief¹, or from absolute representations coupled with silence as to matters which it was the duty of the representor not to suppress². Representations may also be implied from acts and conduct³.

¹ See PARA 709 ante.

² Generally, mere non-disclosure is not sufficient, but a partial non-disclosure may amount to a misrepresentation: see PARA 748 et seq post. As to who is a representor see PARAS 726-734 post.

³ The participation of a pop group in an advertising campaign is a representation by conduct of the group's intention not to break up during the term of the contract: *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15, [2002] EMLR 510. See also PARAS 720-724 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(3) HOW REPRESENTATIONS MAY BE MADE/(ii) Representations implied from Conduct/720. Acts and conduct in sales and purchases.

720. Acts and conduct in sales and purchases.

In contracts of sale, or delivery of property pursuant to a contractual or other obligation, the following implications from acts and conduct may be made: (1) the purchaser of goods by the mere act of purchasing them is deemed to represent that he has the present intention of paying for them¹; (2) he who assumes to sell property impliedly represents that it exists and has some value²; (3) he who delivers or hands over or produces documents in certain circumstances may be held impliedly to represent thereby that they are genuine³; and (4) the seller of an article presenting a certain appearance to the purchaser is deemed to represent that the article is in fact what it purports to be, and that there has been no concealment or covering up of defects or other device or manoeuvre whereby the outward appearance of the article is made to deceive⁴.

Conversely, a buyer of property who by acts and conduct conceals the merits, or depreciates the value, of that which is offered to him for sale is as much guilty of implied misrepresentation as the seller who, by the like means, conceals its faults⁵. In the case of sales of a marketable commodity, any person who rigs the market or makes a market in the shares or other commodity by procuring persons to enter into pretended bargains in such market at fictitious prices is making a false representation by acts and conduct that the bargains and prices are real⁶.

1 See PARA 705 note 1 ante.

2 *Colt v Woollaston* (1723) 2 P Wms 154 at 156-157; *Richardson v Silvester* (1873) LR 9 QB 34; *Ajello v Worsley* [1898] 1 Ch 274.

3 *Edinburgh United Breweries v Molleson* [1894] AC 96 at 111, HL, where the handing over of books which the purchaser was entitled to have examined by an accountant as a condition of the sale of a business was held to be an implied representation that they were genuine; *Marnham v Weaver* (1899) 80 LT 412, where the putting forward as security of fictitious leases from the party to himself under an assumed name was held to be an implied misrepresentation of their genuineness. Cf *Gage v Beauchamp* (1920) 36 TLR 253, where supplying for payment a report of a survey of a ship was held to be merely a contract to supply a document and not to raise a warranty of its accuracy. See also *Boyd and Forrest v Glasgow and South Western Rly Co*, as reported in 1912 SC 93 at 96, 100, 104-105, HL; and subsequent proceedings as reported in 1915 SC 20 at 27-28, HL (contractors undertook to construct a railway on the faith of a purported journal of borings made along the proposed line on behalf of a railway company; in compiling the journal the company's engineer had in good faith altered the reports of the persons who made the borings; it was held that the company was not guilty of fraud or misrepresentation). In *Sony KK v Saray Electronics (London) Ltd* [1983] FSR 302, CA, it was held arguable that a dealer who sells well-known branded electrical goods represents that he is in a position to provide a manufacturer's guarantee. In *White v Michael Cullen & Partners* [1993] EGCS 193, CA, there was held to be a triable issue whether a lease with deliberately complex and obscure clauses was a misrepresentation.

4 *Jones v Bowden* (1813) 4 Taunt 847 (sale of sea-damaged pimento by bulk samples, which showed no damage, this being only apparent on unpacking, and sending out advertisements of the sale too late to enable purchasers to inspect; sellers' acts and conduct treated as an implied representation that the pimento was sound); *Lovell v Hicks* (1836) 2 Y & C Ex 46 at 53-55 (sale of an invention for baking bread without the use of spirit or ferment, where the seller gave a demonstration which appeared to satisfy the description, but in the conduct of which spirit and a special ferment had been secretly introduced; acts held to have been one of the means whereby a misrepresentation of the nature and capacity of the invention had been made); *Ormrod v Huth* (1845) 14 M & W 651, Ex Ch (a case of 'false packing', of which, however, the defendant was not proved to have known); *Horsfall v Thomas* (1862) 1 H & C 90 (where it was alleged, but without sufficient proof, that a defect in a cannon had been covered up); *Fitzpatrick v Kelly* (1873) LR 8 QB 337 at 342 per Quain J (when a person asks for butter and the tradesman, without more, sells him an article which seems to be butter, the representation is that the article is butter, that is, unadulterated butter). See FOOD; SALE OF GOODS AND SUPPLY OF SERVICES. See also *Gill v M'Dowell* [1903] 2 IR 463 (hermaphrodite beast sent to a sale of bullocks and heifers; the sending was an implied representation that the animal was either a bullock or a heifer; in this case the animal was described as a sort of living lie); *Patterson v Landsberg & Son* (1905) 7 F 675 at 681, Ct of Sess, per Lord Kyllachy (appearance of age presented by articles sold; silence of seller as to the fact that the articles were modern and equivocal language and conduct of seller amounted in themselves to representation that they were in fact antiques). As to falsity by omission, silence or inaction see PARAS 748-751 post. As to representations by conduct for the purposes of estoppel see ESTOPPEL. As to terms implied into contracts for the sale of goods by description see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 72 et seq.

5 *Walsham v Stainton* (1863) 1 De GJ & Sm 678 at 689-690 (implied misrepresentation of value of shares by manipulating accounts). As to omission, silence or inaction see PARAS 748-751 post.

6 *National Exchange Co of Glasgow v Drew and Dick* (1855) 2 Macq 103, HL; *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724, CA (conspiracy to rig market by misrepresenting value of shares). In the later case, citing *R v De Berenger* (1814) 3 M & S 67 (conspiracy by false rumours), it was said that there was no substantial distinction between false rumours and false and fictitious acts: see *Scott v Brown, Doering, McNab & Co* supra at 730 per Lopes LJ. A purchaser, induced to purchase shares from either of the parties to the proceedings by means of a fictitious premium created by those parties solely for the purpose of

inducing such purchaser to buy, could have successfully sued either or both for a false and fraudulent misrepresentation: *Scott v Brown, Doering, McNab & Co* supra at 734 per AL Smith LJ. As to the criminal offence of conspiracy see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 66-78.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(3) HOW REPRESENTATIONS MAY BE MADE/(ii)
Representations implied from Conduct/721. Implied representation that transaction is legal.

721. Implied representation that transaction is legal.

Some transactions may be carried out in either a lawful or an unlawful manner. Since the law presumes against illegality, the mere fact that a person enters into a transaction may raise an inference that he represents that all the conditions necessary for the legality of the transaction exist.

Thus a shipment of goods may constitute a representation by the shipper to the shipowner that the goods are not being shipped on an illegal voyage¹. It is possible that the sending of an animal to a public market may amount to a representation that it is not suffering from an infectious disease². It seems that, in company matters, the declaration and payment of a dividend may be equivalent to a statement that profits have been earned out of which alone such dividend can lawfully be paid³; and the issue or delivery of fully-paid shares, where there has been no filed contract, raises the inference of a representation that cash has been paid for them, for otherwise such issue or delivery would be unlawful⁴. Similarly, a representation as to a company's profits may involve a representation that the profits have been lawfully earned⁵. On the other hand, if the act in question is such that it infringes no statute, and is not illegal at common law, no such inference arises. Thus the mere act of trading is not an implied representation that the trader is of full age, because it is not generally unlawful for a minor to trade⁶; nor is the mere advertisement of an article, with the descriptive words 'trade mark' added, an implied representation that the party has registered the trade mark, for it is not necessarily illegal to use an unregistered mark⁷.

¹ *Mitchell, Cotts & Co v Steel Bros & Co Ltd* [1916] 2 KB 610 at 614 per Atkin J.

² See ANIMALS vol 2 (2008) PARA 726.

³ This would seem to be so on the principle of the case cited in note 4 infra. The question was referred to, but not decided, in *Jackson v Turquand* (1869) LR 4 HL 305 at 308-309 per Lord Hatherley LC, and at 315 per Lord Westbury. However, in an earlier case, the view was expressed that a payment of dividends is an implied declaration to the world by acts and deeds that the company has made profits which justify such a dividend: see *Burnes v Pennell* (1849) 2 HL Cas 497 at 524-525 per Lord Campbell, and at 531 per Lord Brougham. See also *R v Lord Kylsant* [1932] 1 KB 442 at 448-449, CCA, per Avory J.

⁴ *Bloomenthal v Ford* [1897] AC 156 at 163-164, HL, per Lord Halsbury LC, and at 169 per Lord Herschell. This was an estoppel case, but, since a representation by conduct for the purpose of estoppel in pais is exactly what a representation by conduct is for the purposes of the law of misrepresentation, the authority is in point. As to estoppel in pais see ESTOPPEL. See also COMPANIES vol 14 (2009) PARA 387.

⁵ *Briess v Woolley* [1954] AC 333, [1954] 1 All ER 909, HL (profits earned by contravening terms of government licence).

⁶ *Re Jones, ex p Jones* (1881) 18 ChD 109 at 121, 125, CA. See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 20, 23.

⁷ See *Sen Sen Co v Britten* [1899] 1 Ch 692; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARAS 101, 148.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(3) HOW REPRESENTATIONS MAY BE MADE/(ii)
Representations implied from Conduct/722. Implied representations that representor is acting in a certain character.

722. Implied representations that representor is acting in a certain character.

Where a person, in the course of a transaction, assumes a certain character by conducting himself as if he possessed it, he is deemed to represent by such conduct that he does in fact fill that character. Thus, by the acts of sending bought and sold notes to the other party, and guaranteeing the performance of the contract, a person represents to the other party that he has a principal¹; and the cases of what is usually treated as implied warranty of authority by an agent² may be, and occasionally have been, treated as cases of implied representations³. Similarly, although a distinction normally exists between mere non-disclosure and misrepresentation⁴, non-disclosure is in certain cases capable of being regarded as a representation (inferred from the conduct of the party in entering into and carrying through a particular transaction) that the transaction, so far as he knows, is of the usual and normal type, and that he has withheld nothing which, if revealed, would show it to be otherwise⁵.

1 *Wilson v Short* (1848) 6 Hare 366. See also *Montefiori v Montefiori* (1762) 1 Wm Bl 363.

2 See AGENCY vol 1 (2008) PARA 160. As to the distinction between a representation and a warranty see PARA 704 ante.

3 See eg *Polhill v Walter* (1832) 3 B & Ad 114.

4 See PARA 701 note 14 ante.

5 See PARA 748 et seq post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(3) HOW REPRESENTATIONS MAY BE MADE/(ii) Representations implied from Conduct/723. Personation by acts.

723. Personation by acts.

Personation by acts or conduct is as much representation, even though no word is said, as an assumption of an alias by direct statement¹. By acts and conduct, without language, a person may represent that he is associated as agent or partner with a third person, when he is not², or conversely that he has no connection with a third person, when he is so connected or is in fact that person³.

1 *R v Barnard* (1837) 7 C & P 784 (defendant appearing in cap and gown would in itself have been pregnant evidence from which the court should infer that he pretended he was a member of a university). As to statutory offences of impersonation see eg the Police Act 1996 s 90; and POLICE vol 36(1) (2007 Reissue) PARA 481.

2 *Higgon's v Burton* (1857) 26 LJ Ex 342; *Hardman v Booth* (1863) 1 H & C 803; *Cundy v Lindsay* (1878) 3 App Cas 459, HL.

3 *Moens v Heyworth* (1842) 10 M & W 147 at 156-158; *Blake v Albion Life Assurance Society* (1878) 4 CPD 94; *Marnham v Weaver* (1899) 80 LT 412.

UPDATE

723 Personation by acts

NOTE 3--See also *British Sky Broadcasting Group plc v Sky Home Services Ltd* [2006] EWHC 3165 (Ch), [2007] IP & T 833 (traders realised that customers believed they were connected with a competitor; failure to correct mistaken belief constituted misrepresentation by conduct).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(3) HOW REPRESENTATIONS MAY BE MADE/(ii)
Representations implied from Conduct/724. Maintenance of deception by acts or conduct.

724. Maintenance of deception by acts or conduct.

Acts or conduct may be employed as a means of maintaining, by periodically repeated representations, a deception once initiated. For instance, by regularly transmitting to the supposed mortgagee sums of money exactly equivalent to the interest which would fall due on the mortgage, if it had been effected¹, or by producing (without handing over) the title deeds of the property supposed to be in mortgage², a person who has been entrusted with money to lend on such mortgage is making so many implied representations that the mortgage has been effected and is a subsisting security.

1 *Blair v Bromley* (1847) 2 Ph 354; *Moore v Knight* [1891] 1 Ch 547; *Thorne v Heard and Marsh* [1895] AC 495 at 506, HL.

2 *Re Murray, Dickson v Murray* (1887) 57 LT 223.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(i) In general/725.
Persons liable or entitled to relief.

(4) PARTIES TO A REPRESENTATION

(i) In general

725. Persons liable or entitled to relief.

In any proceeding in which misrepresentation is set up, the only person liable is the representor¹, or a person whom the law deems to be the representor, and the only person entitled to relief is the representee², or a person whom the law deems to be the representee, subject to the rules as to the transmission or devolution of such liability and title respectively, by reason of death, insolvency, assignment and the like³.

1 As to who is a representor see PARAS 726-734 post.

2 As to who is a representee see PARAS 735-741 post.

3 As to misrepresentation as a defence against an assignee from the representor see PARA 788 post; as to the parties to a claim for deceit see PARAS 794-797 post; and as to the parties to a claim for rescission see PARAS 819-822 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(ii) The Representor/726.
The representor.

(ii) The Representor

726. The representor.

The following is a general statement of the rules for determining which persons are deemed to be representors. In the first place, only the person who actually made the representation is liable for its consequences, unless it was made on behalf of a principal or partner, in which case the principal or partner is deemed the representor, or one of the two representors, as the case may be¹. Secondly, an agent who has a co-agent, or who is a sub-agent, does not, merely as such, make the co-agent or the intermediate agent, as the case may be, liable as a principal². Thirdly, where it is necessary to establish fraud, an innocent principal is liable for the fraud of his agent, and for this purpose it makes no difference that the principal is a corporation³. Lastly, all who concur in making any false representation are jointly responsible, and, if it was fraudulent also, are jointly and severally responsible, to the representee for the consequences⁴.

1 See PARA 727 post. In claims in tort based on negligent misrepresentation, the representor's liability depends on whether he owed a duty of care to the representee, which may in turn depend largely on whether he ought to have foreseen that the statement would be acted on by the representee: see eg *Yianni v Edwin Evans & Sons* [1982] QB 438; *Smith v Eric S Bush* [1990] 1 AC 831, [1989] All ER 514, HL. An accountancy firm, engaged by company directors to help in the preparation of a share prospectus, does not owe a duty of care to third party shareholders for negligent misstatements which appear in the prospectus: *Abbott v Strong* [1998] 2 BCLC 420. See also PARA 735 note 2 post. As to negligent misrepresentation see PARAS 762-764, 798-801, 814 post.

2 See PARAS 728-729 post.

3 See PARAS 727, 797 post.

4 See PARAS 732-733 post. As to who is a representee see PARA 735-741 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(ii) The Representor/727. Principal liable for misrepresentation of agent.

727. Principal liable for misrepresentation of agent.

Any person by whose express or implied authority a representation was made is accountable to the representee¹, if it should turn out to be false, and a claim for damages may be brought against the principal or the agent or against both². Where the claim is solely for rescission or analogous relief, the remedy is against the principal only, for the contract is made with him and not with the agent³, although it is possible to proceed against both the principal and the agent for damages and against the principal only for rescission⁴.

1 As to who is a representee see PARA 735-741 post.

2 See *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423, [1986] 1 WLR 119, CA. The finding of agency in this case should now be considered in the light of *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL, but this does not affect the principle that the principal is liable if the representor is in truth an agent. As to responsibility for the fraud of an agent see PARA 797 post.

An agent is not liable under the Misrepresentation Act 1967 s 2(1) (see PARA 801 post) because there is no contract between the agent and the representee: *Resolute Maritime Inc v Nippon Kaiji Kyokai, The Skopas* [1983] 2 All ER 1, [1983] 1 WLR 857.

An agent who innocently misrepresents that he has authority to act for a principal may be liable to the representee for breach of warranty of authority: see AGENCY vol 1 (2008) PARAS 160-161.

As to the various classes of agents see AGENCY vol 1 (2008) PARA 11 et seq. As to partners see PARTNERSHIP. As to estoppel by representation see ESTOPPEL.

As to a claim for damages see PARA 789 et seq post.

3 *Eaglesfield v Marquis of Londonderry* (1878) 26 WR 540 at 541, HL, per Lord Blackburn.

4 *Goldrei, Foucard & Son v Sinclair and Russian Chamber of Commerce in London* [1918] 1 KB 180, CA. As to claims for

rescission see PARA 812 et seq post.

UPDATE

727 Principal liable for misrepresentation of agent

NOTE 2--*Resolute*, cited, applied: *MCI WorldCom International Inc v Primus Telecommunications Inc* [2003] EWHC 2182 (Comm), [2004] 1 All ER (Comm) 138 (statement by agent of subsidiary that parent company financially viable not within express or implied authority).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(ii) The Representor/728. Position of co-agents.

728. Position of co-agents.

One co-agent is not liable to the representee¹ for the misrepresentation of another unless he has expressly authorised or tacitly permitted it², or the co-agents are partners³.

¹ As to who is a representee see PARAS 735-741 post.

² *Cargill v Bower* (1878) 10 ChD 502 at 513-514; *Weir v Bell* (1878) 3 Ex D 238 at 245, 247-248, 250, CA; *Re Denham & Co* (1883) 25 ChD 752 at 764-765.

³ See the Partnership Act 1890 s 6; and AGENCY vol 1 (2008) PARA 28; PARTNERSHIP vol 79 (2008) PARAS 45, 48, 49, 58.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(ii) The Representor/729. Principal and sub-agent.

729. Principal and sub-agent.

A sub-agent may render the ultimate principal liable if the proved circumstances of the case are such that the ultimate principal and the intermediate agent must be deemed to have intended and agreed that the latter should, or might, appoint a substitute for the purpose of discharging in his stead, and on behalf of the former, duties involving the making of representations of the character of that sued upon¹. Otherwise, direct intervention and express authority of the ultimate principal must be shown by evidence².

¹ *De Bussche v Alt* (1878) 8 ChD 286 at 310-311, CA.

² Such intervention and express authority were established in *Powell and Thomas v Evan Jones & Co* [1905] 1 KB 11, CA, where the principal was seeking to recover commission secretly received by the sub-agent from a third person.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(ii) The Representor/730. When authority to make representation is implied.

730. When authority to make representation is implied.

A person is deemed to have the implied authority of another person to make a representation which is made in the course and within the scope of his employment by that other person or, in the case of a partnership, of the partnership business or undertaking¹. In applying this rule, the nature of the service, employment, business or undertaking must first be proved; and the question then is whether making representations at all is within the class of acts incidental to it. If it is, the further inquiry may become necessary whether the particular representation sued upon belongs to the class of representations which the alleged employee, agent or partner is, by virtue of his employment service or the nature of the partnership business or adventure, employed or authorised to make². If the answer to both these questions is in the affirmative, the principal is a representor and liable as such; if the answer to either is in the negative, he is not³. If the misrepresentation is within the scope of the agent's employment, the principal is a representor, even though the misrepresentation is proved by the principal to have been in fact made both with the object and result of serving the agent's private ends only⁴.

¹ See *Barwick v English Stock Joint Bank* (1867) LR 2 Exch 259 at 266, Ex Ch; *Lloyd v Grace Smith & Co* [1912] AC 716, HL. See also AGENCY vol 1 (2008) PARAS 122, 135, 151-152. As to the implied authority of partners see PARTNERSHIP vol 79 (2008) PARA 45 et seq.

² For a useful classification of the kinds of acts which, according to the doctrine of implied authority, will render a company liable for misrepresentation in a prospectus see *Lynde v Anglo-Italian Hemp Spinning Co* [1896] 1 Ch 178 at 182-183 per Romer J. For an explanation of this classification see *Collins v Associated Greyhounds Racecourses Ltd* [1930] 1 Ch 1 at 22 per Luxmoore J (on appeal [1930] 1 Ch 1 at 24, CA); and COMPANIES vol 15 (2009) PARA 1071. As to the various classes of agents see AGENCY vol 1 (2008) PARA 11 et seq. As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

³ Implied authority was not established in the following cases: *Burnes v Pennell* (1849) 2 HL Cas 497 at 519-520; *Wheulton v Hardisty* (1857) 8 E & B 232 at 260, 268-274, 301-302, Ex Ch; *Re Northumberland and Durham District Banking Co, ex p Bigge* (1858) 28 LJ Ch 50; *Re Liverpool Borough Bank, Duranty's Case* (1858) 26 Beav 268; *Re National Patent Steam Fuel Co, ex p Worth* (1859) 28 LJ Ch 589; *Re Royal British Bank, ex p Frowd* (1861) 30 LJ Ch 322; *New Brunswick and Canada Rly and Land Co v Coneybeare* (1862) 9 HL Cas 711; *Newlands v National Employers' Accident Association Ltd* (1885) 54 LJQB 428 at 430-431, CA; *Lynde v Anglo-Italian Hemp Spinning Co* [1896] 1 Ch 178 at 184-185; *Bigger v Rock Life Assurance Co* [1902] 1 KB 516 at 524-525 per Wright J; *Hoole v Speak* [1904] 2 Ch 732; *M'Millan v Accident Insurance Co* 1907 SC 484; *Hindle v Brown* (1908) 98 LT 791, CA; *Terrill v Parker and Thomas* (1915) 32 TLR 48.

However, in *Gordon v Selico Co Ltd* [1986] 1 EGLR 71, 18 HLR 219, CA, where a contractor made a fraudulent misrepresentation by deliberately covering up evidence of dry rot, both the lessors and the management company were implicated in the fraud because the principal shareholder of the management company was aware of the cover up and the lessors had invested the management agents with ostensible, if not actual, authority to make representations to prospective purchasers or lessees as to the condition of the premises.

As to the offence of property misdescription see the Property Misdescriptions Act 1991 s 1; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 791 et seq.

⁴ See AGENCY vol 1 (2008) PARA 135; EMPLOYMENT.

UPDATE

730 When authority to make representation is implied

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(ii) The Representor/731.
Ratification and estoppel.

731. Ratification and estoppel.

Either for the purposes of proceedings to rescind a contract or for the purposes of a claim for damages¹, a person may become liable as principal for the misrepresentation of another by adoption or ratification², and by estoppel³.

1 As to claims for rescission see PARA 812 et seq post; and as to claims for damages see PARA 789 et seq post.

2 See *Hoole v Speak* [1904] 2 Ch 732 at 735-736 per Kekewich J, where the law is correctly stated as to contract, but the statement that a principal cannot ratify his agent's tort is incorrect: see PARA 797 post. See also AGENCY vol 1 (2008) PARA 57 et seq; COMPANIES vol 15 (2009) PARA 1085.

3 *Wright v Crookes* (1840) 1 Scott NR 685 at 698-699. See also AGENCY vol 1 (2008) PARA 25; ESTOPPEL.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(ii) The Representor/732.
Liability of joint representors in proceedings for rescission.

732. Liability of joint representors in proceedings for rescission.

It seems that where two or more persons contract with another person and the contract is induced by misrepresentation made by them or on their behalf, they are jointly and severally liable to repay to the representee¹ any money declared to be repayable to him and to pay any indemnity granted to him by way of ancillary relief, in proceedings brought by him for the rescission of the contract². In such a case, it seems that if one of the representors pays the whole or more than his proportionate share of the money repayable or payable to the representee, he is entitled to contribution against the other representors³.

1 As to who is a representee see PARAS 735-741 post.

2 See eg the order in *Newbigging v Adam* (1886) 34 ChD 582 at 584, CA; varied on appeal sub nom *Adam v Newbigging* (1888) 13 App Cas 308, HL. As to claims for rescission see PARA 812 et seq post.

3 See eg *Re Direct Birmingham, Oxford, Reading and Brighton Rly Co*, *Spottiswoode's Case*, *Amsinck's Case* (1855) 6 De GM & G 345. As to contribution see CONTRACT; EQUITY.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(ii) The Representor/733.
Liability of joint representors in claim for deceit.

733. Liability of joint representors in claim for deceit.

Where a misrepresentation is made by more than one person, and is made fraudulently, then, in a claim for damages, all those who concurred in the fraud are, as in the case of any other tort, both jointly and severally answerable to the representee¹ for the whole amount of the damages². A judgment recovered against one

such representor is not a bar to a claim against any other representor³. Each of the representors may recover contribution from any of the others to an amount which the court considers just and equitable, having regard to the extent of that person's responsibility for the damage in question⁴.

1 As to who is a representee see PARAS 735-741 post.

2 *Cullen v Thomson's Trustees and Kerr* (1862) 4 Macq 424 at 432-433, HL; *Swift v Winterbotham* (1873) LR 8 QB 244 at 254 (reversing sub nom *Swift v Jewsbury* (1874) LR 9 QB 301, Ex Ch, but this statement of the law unimpeached); *Phosphate Sewage Co v Hartmont* (1877) 5 Ch D 394 at 456, CA; *Re Collie, ex p Adamson* (1878) 8 ChD 807 at 819-820, CA. See also *Thomas Saunders Partnership v Harvey* (1989) 30 ConLR 103 (company made a fraudulent representation in the process of obtaining a sub-contract; company went into liquidation; it was held that the managing director who was the author of the letter containing the misrepresentation and who knew it was untrue was personally liable). See generally TORT vol 97 (2010) PARA 401 et seq.

3 See the Civil Liability (Contribution) Act 1978 s 3; and DAMAGES vol 12(1) (Reissue) PARAS 833, 838; TORT vol 45(2) (Reissue) PARAS 648, 655; TORT vol 97 (2010) PARA 449.

4 See *ibid* ss 1, 2; and DAMAGES vol 12(1) (Reissue) PARAS 838 et seq, 1117-1118; TORT vol 97 (2010) PARA 451 et seq. As to the effect of the running of time upon a right to claim for contribution see LIMITATION PERIODS vol 68 (2008) PARAS 1006-1007.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(ii) The Representor/734.
Burden of proof as to representor.

734. Burden of proof as to representor.

The burden is on the representee¹ of establishing that the representation was made by the person alleged to be the representor or, where he is not alleged to have personally made it, with his authority². Where either personal representation or express authority is relied on by the representee, the questions whether the alleged representation was made, and whether express authority was given, are questions of fact³, subject to the question of law whether there is any evidence in support of either allegation. Where implied authority is relied on, it is necessary that the circumstances proved or admitted to exist should be such that the existence of an agency is capable of being inferred from them⁴; subject to this, it is a question of fact what the nature and terms of the employment or business were in the particular case, or what were the duties of the alleged agent⁵, but it is a question of law whether from the proved or admitted facts in relation to these matters the authority is to be implied⁶.

1 As to who is a representee see PARAS 735-741 post.

2 See eg *Lynde v Anglo-Italian Hemp Spinning Co* [1896] 1 Ch 178 at 184-185; *Newlands v National Employers' Accident Association Ltd* (1885) 54 LJQB 428, CA; *Barnett v South London Tramways Co* (1887) 18 QBD 815, CA.

3 See eg *Ludgater v Love* (1881) 44 LT 694, CA, where it was left to the jury to say whether the vendor's son had in fact made the alleged representation and whether the vendor had authorised his son to make the representation.

4 See *Thorne v Heard and Marsh* [1895] AC 495 at 502, HL.

5 In *Newlands v National Employers' Accident Association Ltd* (1885) 54 LJQB 428 at 430-431, CA, it was pointed out that no 'practice or regular course of business' had been established by evidence to support the allegation that the secretary had authority to make a statement of the kind which he had made, and that, in the absence of such evidence, it was a conclusion of law that no such implication of authority could be made. In *British Mutual Banking Co Ltd v Charnwood Forest Rly Co* (1887) 18 QBD 714 at 716-719, CA, the jury found that the company secretary had been held out as a person to answer inquiries, but the Court of Appeal held that, from the whole of the proved and found facts, no authority could be inferred in law. So in *Banbury v Bank of Montreal* [1918] AC 626, HL, it was held that there was no evidence before the members of the jury on which they could, as reasonable men, find that a branch manager of a bank had authority to give, on behalf of the bank, advice to the representee as to his investments.

⁶ *Mackay v Commercial Bank of New Brunswick* (1874) LR 5 PC 394 at 415-416; and see the cases cited in note 5 *supra*.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(iii) The Representee/735.
The representee.

(iii) The Representee

735. The representee.

A representee in law includes: (1) any person to whom the representation was physically and directly made, or any principal or partner of such person; (2) any specific person, not coming within the description in head (1) above, but whom the representor¹, either actually or in contemplation of law, intended the representation to reach and influence; and (3) any individual member of the public, or of a class, who has acted upon a representation addressed to the public or the class².

¹ As to who is a representor see PARAS 726-734 *ante*.

² These three categories of representee are included in the comprehensive proposition laid down in *Swift v Winterbotham* (1873) LR 8 QB 244 at 253 per Lord Cockburn CJ; on appeal *sub nom Swift v Jewsbury* (1874) LR 9 QB 301, Ex Ch. As to representations made to a class see PARA 741 *post*.

In tort cases, a person may be liable to a third person for a statement made to another person and for another purpose if he knows the statement is likely to be relied on by that third person: see *Smith v Eric S Bush* [1990] 1 AC 831, [1989] All ER 514, HL (valuer who valued a house for a building society for the purposes of a mortgage application may be liable to the intending purchaser of the house). See also PARA 726 note 1 *ante*.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(iii) The Representee/736.
Person to whom representation made or his principal or partner.

736. Person to whom representation made or his principal or partner.

If a representation is made individually and exclusively to one particular person, with no other person in contemplation, the person to whom the representation is made is obviously the sole representee. It is equally plain that if the representation is made to one person with knowledge on the part of the representor¹ that the person to whom it is made is merely the agent of a particular principal (or of someone who, although undisclosed at the time, turns out to be that principal) for the purpose of receiving and transmitting the representation to the principal, the only representee is the principal, the person to whom the representation is made being the mere messenger or medium through whom the representation is conveyed².

On the other hand the representation may be made to one person through another but with the intention that the person through whom the representation is conveyed will also be influenced and act on it, as where the representor knows or believes that the two persons in question are partners or joint-contractors or associates in the business which it is to bring about; in such a case either or each of the persons in question, if either or each acts on the faith of the representation, is deemed a representee³.

¹ As to who is a representor see PARAS 726-734 *ante*.

² See eg *Haycraft v Creasy* (1801) 2 East 92; *Gilbert v Endean* (1878) 9 ChD 259, CA.

³ Thus, generally speaking, in cases of marine insurance, a representation to the first underwriter extends to the others: *Barber v Fletcher* (1779) 1 Doug KB 305 at 306 per Lord Mansfield CJ. See also PARA 737 post; and INSURANCE vol 25 (2003 Reissue) PARA 415.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(iii) The Representee/737.
Person to whom representation is intended to be passed on.

737. Person to whom representation is intended to be passed on.

A second class of case arises where one person makes a representation to another person, either with an express direction or authority to repeat it to a third person, or with intent that it should come to the third person's notice and be acted upon by him. Such an intent is presumed in law on proof of the fact that the representor¹ contemplated at the time that the person to whom the representation was made would pass it on to the third person for him to act upon², or subsequently, but before the third person acted upon it, knew that the person to whom it was made had in fact so passed it on to the third person for that purpose³. In any such case the third person is a representee⁴. The person to whom the representation was made may also be a representee, depending on all the circumstances of the individual case⁵.

¹ As to who is a representor see PARAS 726-734 ante.

² See *Langridge v Levy* (1837) 2 M & W 519 at 520-521, 530-532 (affd sub nom *Levy v Langridge* (1838) 4 M & W 337, Ex Ch), where the plaintiff's father, to whom the representation concerning the gun sold to him was personally made, expressly informed the defendant that the gun was intended for use by the plaintiff as well as by the father himself; *Swift v Winterbotham* (1873) LR 8 QB 244 (varied sub nom *Swift v Jewsbury* (1874) LR 9 QB 301, Ex Ch, but not on the ground that the plaintiff was not in law a representee), where it was proved that the nature of banking business was such that it must have been within the contemplation of the defendant when the representation was made that it would or might be communicated to the customer of the bank on whose behalf it was sought, namely the plaintiff. Cf *Hosegood v Bull* (1876) 36 LT 617, where a bank manager's letter was held not to have been intended to be communicated to the plaintiff; *Parsons v Barclay & Co Ltd and Goddard* (1910) 103 LT 196, CA, a similar case of a banker's confidential report, where the misrepresentation was held not to be such as would found an action for deceit; *Robinson v National Bank of Scotland* 1916 SC 154, HL, a case of a bank manager's letter to another bank containing statements meant to influence such persons as should be interested in the subject matter of the letter, applied in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL. See also *Fortune v Young* 1918 SC 1 (letter testifying to financial position of a proposed tenant, not addressed to anyone, but written in order that it should be shown to the landlord and his factor); *Gross v Lewis Hillman Ltd* [1970] Ch 445, [1969] 3 All ER 1476, CA (misrepresentation regarding property sued upon by the assignees of the representee). As to statutory restrictions on claims upon representations as to credit see PARA 804 post.

³ *Pilmore v Hood* (1838) 5 Bing NC 97 at 105-106, 108-109.

⁴ See the cases cited in note 2 supra; and PARA 736 note 3 ante.

⁵ In general, if the representation is made to one person for the sole purpose of his passing it on as a mere distributing agent to another, the person to whom it is made is not a representee (see PARA 736 ante); but, if it is intended that the person to whom the representation is made should act upon it himself as well as pass it on (see eg *Langridge v Levy* (1837) 2 M & W 519; affd sub nom *Levy v Landgridge* (1838) 4 M & W 337, Ex Ch), both that person and the person to whom it is intended that the representation should be passed on are representees.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(iii) The Representee/738.
Members of public or particular section of the community.

738. Members of public or particular section of the community.

If a representation is addressed to the public at large or to some section of the community in order to induce members of it to take a particular course, for example, to apply for or purchase shares in a company¹, to give value for a bill of exchange², to bid at an auction³, to apply for a situation⁴ or to travel by a particular train⁵, and a member of the public or person belonging to the section of the community in question is induced by the representation to take the course in question, that member or person is entitled to all such rights as he would have been entitled to if the representation had been addressed to him individually⁶.

1 As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq. It has been held that the fact that a company report is marked with a direction that it is for the use of shareholders only does not necessarily prevent it from constituting a representation to the public: *Re Royal British Bank, ex p Brockwell* (1857) 26 LJ Ch 855 at 859, 862. As to the principle that a contract made for the purpose of committing a fraud on the public cannot be enforced see CONTRACT.

2 *Polhill v Walter* (1832) 3 B & Ad 114; *West London Commercial Bank v Kitson* (1884) 13 QBD 360, CA (bills accepted fraudulently). As to the liability of an agent see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1476.

3 *Robinson v Wall* (1847) 2 Ph 372 at 374-375 (property advertised to be sold at auction without reserve; secret agreement for bidding on behalf of vendor; specific performance against purchaser not granted).

4 See *R v Silverlock* [1894] 2 QB 766, CCR, where, in an indictment for obtaining a cheque by false pretences, a count which averred that a fraudulent newspaper advertisement for a housekeeper was a false pretence to Her Majesty's subjects was held to be good, although it did not allege that the false pretence was made to a particular person. As to the offence of obtaining a pecuniary advantage by deception see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 312.

5 *Denton v Great Northern Rly Co* (1856) 5 E & B 860, where an intending passenger was held to be entitled to recover for damage sustained as a result of the cancellation of a train mentioned in a railway timetable.

6 The principle is the same as that on which it has been held that, although a contract cannot be made with the world, an offer can be made to the public in general, which, when any person accepts the offer by acting upon it, becomes a contract with that person: *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 262, 268-269, CA; and see CONTRACT.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(iii) The Representee/739.
Burden of proof as to representee.

739. Burden of proof as to representee.

It is incumbent on the party who asserts his right to relief in respect of a misrepresentation to allege, and, having so alleged, to prove, that he was the representee, or one of the representees¹. The question whether the party claiming relief in respect of any misrepresentation was or was not a representee is a question of fact, and the subject, therefore, of evidence²; but the question whether there is any evidence of this fact, and also all questions which may arise whether, on the proved and admitted facts of the case, the representation was made to the alleged representee, are questions of law³.

1 In *Behn v Kemble* (1859) 7 CBNS 260, the omission to aver that any representation was made to the plaintiff was one of several omissions which made a count in the declaration bad. As to proof see generally the cases cited in the notes to paras 735-738 ante; the text and notes 2-3 infra; and PARAS 740-741 post.

2 Such evidence was given in *Swift v Winterbotham* (1873) LR 8 QB 244; on appeal sub nom *Swift v Jewsbury* (1874) LR 9 QB 301, Ex Ch (banking practice). See also *Bedford v Bagshaw* (1859) 4 H & N 538; and PARA 741 note 2 post.

3 See *Gerhard v Bates* (1853) 2 E & B 476; *Bedford v Bagshaw* (1859) 4 H & N 538; *Swift v Winterbotham* (1873) LR 8 QB 244 (on appeal sub nom *Swift v Jewsbury* (1874) LR 9 QB 301, Ex Ch); *R v Aspinall* (1876) 2 QBD 48, CA; *R v Silverlock* [1894] 2 QB 766, CCR; *Andrews v Mockford* [1896] 1 QB 372, CA; *Salaman v Warner* (1891) 65 LT 132, CA.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(iii) The Representee/740.
Proof where representation transmitted indirectly to alleged representee.

740. Proof where representation transmitted indirectly to alleged representee.

Where the alleged representee is an individual to whom the representation was not made directly, but passed on through a third person, proof is required of the representor's¹ intention (actual or presumptive) to influence and mislead him by the transmission of the representation through that channel².

¹ As to who is a representor see PARAS 726-734 ante.

² *Longmeid v Holliday* (1851) 6 Exch 761 at 766; *Collins v Cave* (1860) 6 H & N 131 at 134, Ex Ch; *Barry v Croskey* (1861) 2 John & H 1 at 23-24; *Le Lievre v Gould* [1893] 1 QB 491 at 497-499, 502, CA, where it was said that *Cann v Willson* (1888) 39 ChD 39 (in which a contrary view had been expressed) was no longer law; *Edinburgh United Breweries Ltd v Molleson* [1894] AC 96 at 109-112, 114, HL. It has been pointed out, in discussing *Levy v Langridge* (1838) 4 M & W 337, Ex Ch (see PARA 737 note 2 ante), that if a friend of the father or son had used the gun with the permission of either of them, or a stranger, without such permission, had used it, such a person would not have had a cause of action as a representee: see *Blakemore v Bristol and Exeter Rly Co* (1858) 8 E & B 1035 at 1052-1053; *Barry v Croskey* supra at 17-18, 24. It has been held to be an indictable offence to conspire to raise the price of public funds by false rumours: see *R v De Berenger* (1814) 3 M & S 67; *R v Aspinall* (1876) 2 QBD 48, CA. However, doubts have been expressed whether those who purchased funds on the faith of rumours could have been deemed representees in civil proceedings against the defendant: see *Barry v Croskey* supra at 18-19 per Wood V-C; *Andrews v Mockford* [1896] 1 QB 372 at 384-385, CA, per Rigby LJ. As to indictable conspiracy see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 78. As to the circumstances in which a conspiracy gives rise to a civil right of action see generally TORT vol 97 (2010) PARA 401 et seq.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(4) PARTIES TO A REPRESENTATION/(iii) The Representee/741.
Proof where representation made to class.

741. Proof where representation made to class.

Where the representation is made to a class of which the alleged representee claims to be a member, it must be clearly established that he was one of the persons to whom the representor¹ contemplated that the representation should be made². If it is found that, although a certain class of persons was intended to be deceived by the representation, that class was not the particular class to which the representee belongs, but a different or a smaller one, the burden of proof is not discharged; as, for instance, where a person claims to have been induced to purchase shares in the market by a document the primary function of which is to induce, not purchases in the market, but applications for allotment³, or vice versa⁴, or where a company complains of fraudulent statements made by its officers or agents, not to it, but to the public⁵, or where a member of the public, as such, claims to have sustained injury in consequence of a misrepresentation addressed to a more limited class of which he is not a member⁶.

¹ As to who is a representor see PARAS 726-734 ante.

² *Bedford v Bagshaw* (1859) 4 H & N 538 at 548 per Pollock CB and Bramwell B, where the defendants had obtained a quotation of shares by misrepresentation and the plaintiff, having purchased shares in reliance on the quotation, was held entitled to recover. See, however, the criticism of the application of the principles to the facts of this particular case in *Peek v Gurney* (1873) LR 6 HL 377 at 396-397 per Lord Chelmsford.

³ For the principle that the function of an offer document is normally exhausted when the shares are issued see COMPANIES vol 15 (2009) PARA 1084. As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

⁴ *Re National Patent Steam Fuel Co, ex p Worth* (1859) 28 LJ Ch 589.

⁵ *Vigers v Pike* (1842) 8 Cl & Fin 562 at 646-647, HL; *Overend & Gurney Co v Gibb* (1872) LR 5 HL 480 at 501; *Re Ambrose Lake Tin and Copper Mining Co, ex p Taylor, ex p Moss* (1880) 14 ChD 390 at 397, 399, CA.

⁶ *Blakemore v Bristol and Exeter Rly Co* (1858) 8 E & B 1035.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/(i) Falsity/742. What constitutes falsity.

(5) MISREPRESENTATION

(i) Falsity

742. What constitutes falsity.

A representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date¹ false in substance and in fact. For the purpose of determining whether there has or has not been a misrepresentation at all, the representor's² knowledge, belief or other state of mind is immaterial³, save in cases where the representation relates to the representor's state of mind, although his state of mind is of the utmost importance for the purpose of considering whether the misrepresentation was fraudulent⁴.

¹ See PARAS 753-754 post.

² As to who is a representor see PARAS 726-734 ante.

³ Cf *R v Aspinall* (1876) 2 QBD 48 at 57, CA (although the defendant had a criminal intent and believed his statement was false, if in fact by chance the statement was not incorrect, the charge was not supported).

⁴ As to fraudulent misrepresentation see PARA 755 et seq post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/(i) Falsity/743. Standard for determining falsity.

743. Standard for determining falsity.

The standard by which the truth or falsity of a representation is to be judged is that if material circumstances are incorrectly stated, that is to say, if the discrepancy between the facts as represented and the actual facts is such as would be considered material by a reasonable representee¹, the representation is false; if otherwise, it is not. Another way of stating the rule is to say that substantial falsity is, on the one hand, necessary, and, on the other, adequate, to establish a misrepresentation². It results from the foregoing statement that where the entire representation is a faithful picture or transcript of the essential facts, no falsity is established, even though there may have been any number of inaccuracies in unimportant details³. Conversely, if the general impression conveyed is false, the most punctilious and scrupulous accuracy in immaterial minutiae will not render the representation true⁴.

¹ As to who is a representee see PARAS 735-741 ante.

² The two forms of stating the rule are combined, as regards marine insurance, in the Marine Insurance Act 1906 s 20(4),

which provides that a representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer: see *INSURANCE* vol 25 (2003 Reissue) PARAS 408, 411.

3 See *Pawson v Watson* (1778) 2 Cowp 785 at 788-790, where Lord Mansfield CJ insists on the distinction, in this respect, between a representation, where substantial falsity must be proved, and a warranty, where exact correspondence between the word and the fact is the very thing contracted for, and where, therefore, literal deviation constitutes a breach. Cf the observations in *Thomson v Weems* (1884) 9 App Cas 671 at 683-684, 689, HL; *Hambrough v Mutual Life Insurance Co of New York* (1895) 72 LT 140 at 141-142, CA. Illustrations of inaccuracies held or found to be not substantial or material are to be found in *Dobson v Sotheby* (1827) Mood & M 90 at 92; *Adamson v Evitt* (1830) 2 Russ & M 66 at 72; *Bartlett v Salmon* (1855) 6 De GM & G 33 at 42; *Denton v Macneil* (1866) LR 2 Eq 352; *Bear v Stevenson* (1874) 30 LT 177, PC; *McKeown v Boudard-Peveril Gear Co* (1896) 65 LJ Ch 735 at 736-737, CA; *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326 at 335.

4 See *Amison v Smith* (1889) 41 ChD 348 at 370-373, CA; *Aaron's Reefs Ltd v Twiss* [1896] AC 273 at 281, HL.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/(i) Falsity/744. Burden of proof of falsity.

744. Burden of proof of falsity.

Since in every form of proceeding based on misrepresentation a misrepresentation of some kind must be established, it follows that the burden of alleging and proving that degree of falsity which is required for the representation to be a misrepresentation rests, in every case, on the party who sets it up¹.

¹ *Vernon v Keys* (1810) 12 East 632 (affd (1812) 4 Taunt 488, Ex Ch) (judgment arrested because no unequivocal falsehood averred); *Hallows v Fernie* (1868) 3 Ch App 467 at 477 (the precise representation must be distinctly stated); *Bodger v Nicholls* (1873) 28 LT 441 (no proof that the animal was not sound, even assuming an implied representation that it was); *Melbourne Banking Corp v Brougham* (1882) 7 App Cas 307 at 314-315, PC; *Smith v Chadwick* (1884) 9 App Cas 187 at 190-192, HL; *Goldstein v Salvation Army Assurance Society* [1917] 2 KB 291 at 294 per Rowlatt J.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/(i) Falsity/745. Questions of law and fact.

745. Questions of law and fact.

If the representation is contained in a document, or if, when orally made, its terms are admitted or proved, and there are no surrounding circumstances of such a nature as to suggest an artificial or special meaning, or the possibility of several meanings, the question of what sense should be attributed to it is a question of law to this extent, that it is for the court to say whether it is capable of the meaning alleged, or, on the other hand, whether it admits of any interpretation other than that alleged¹. Subject to this principle, every question as to the sense which the representation in fact bore, or would have conveyed in the context in which it was made to the mind of the representee², is an issue of fact, as to which (in the case of a suggested special sense, at all events) evidence is admissible, and may even be necessary³.

¹ *Bellairs v Tucker* (1884) 13 QBD 562 at 575, DC; *Moore v Explosives Co Ltd* (1887) 56 LJQB 235, CA. See PARAS 711 ante, 766 post.

² As to who is a representee see PARAS 735-741 ante.

³ *Woodhouse v Swift* (1836) 7 C & P 310; *Foster v Mentor Life Assurance Co* (1854) 3 E & B 48 at 71-74, 77-81; *Clarke v Dickson* (1859) 6 CBNS 453 at 469-471; *Charlton v Hay* (1875) 32 LT 96; *Smith v Chadwick* (1884) 9 App Cas 187 at 195, HL. As to evidence being admissible and necessary see *Sen Sen Co v Britten* [1899] 1 Ch 692 at 696 per Stirling J; *Re Carvino Trade Mark* [1911] 2 Ch 572 at 581, CA. See further PARA 766 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/(ii) Construction of Representation/746. Unambiguous representations.

(ii) Construction of Representation

746. Unambiguous representations.

If according to the ordinary rules of construction¹ a representation was reasonably and naturally capable of bearing only one meaning, its truth or falsity must normally be determined on the assumption that it bore that meaning². In general a representee³ cannot establish falsity by putting an unnatural or strained interpretation on the words used, although he may prove that in fact he so understood them⁴; nor can a representor⁵ escape liability by showing that he intended his representation to bear some meaning other than the only meaning which it was naturally capable of bearing⁶.

However, there may be exceptional cases in which a representee can prove that the representation, although true in the natural sense of the words used, was both understood, and intended by the representor to be understood, in a sense other than that which it naturally bears⁷, or the representor can show that the representation, although untrue in its natural meaning, was understood in some other meaning by the representee so that the representee was not deceived.

¹ As to these rules in their application to written documents see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq.

² See eg *Smith v Chadwick* (1884) 9 App Cas 187 at 190, HL, per the Earl of Selborne LC, and at 202 per Lord Bramwell.

³ As to who is a representee see PARAS 735-741 ante.

⁴ *Schroeder v Mendl* (1877) 37 LT 452 at 453, CA, per Bramwell LJ. See also *Hallows v Fernie* (1868) 3 Ch App 467 at 476 (ambiguous representation).

⁵ As to who is a representor see PARAS 726-734 ante.

⁶ See *Amison v Smith* (1889) 41 ChD 348 at 368, CA. See also *Greenwood v Leather Shod Wheel Co* [1900] 1 Ch 421 at 434, CA (liability for misstatements in prospectuses); and COMPANIES vol 15 (2009) PARA 1073. As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

⁷ See eg *Moens v Heyworth* (1842) 10 M & W 147 at 158-159 per Alderson B (a true statement which is intended to be disbelieved may be a lie); *Piggott v Stratton* (1859) 1 De GF & J 33 at 50 (representation literally true, but intended to be understood as conveying more than its literal meaning).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/(ii) Construction of Representation/747. Ambiguous representations.

747. Ambiguous representations.

Where the representation genuinely and reasonably can have more than one meaning, the representee¹

must show in which of the possible senses he understood it, and that in that sense it was false². Where he is able so to do, the fact that it might have been understood in a different sense, which was not false, will not avail the representor³. Furthermore, the use of an ambiguous representation may be indicative of fraud on the part of the representor where it can be shown that the ambiguity was employed for the purpose of misleading the representee; so that, where it has in fact misled the representee, the representee may successfully maintain a claim for deceit, notwithstanding the fact that the representation might have been construed in a sense which was not false⁴.

1 As to who is a representee see PARAS 735-741 ante.

2 *Smith v Chadwick* (1884) 9 App Cas 187, HL. See also *Vernon v Keys* (1810) 12 East 632 at 636 per Lord Ellenborough CJ (affd (1812) 4 Taunt 488, Ex Ch); *Hallows v Fernie* (1868) 3 Ch App 467 at 487 per Lord Chelmsford LC; *Arkwright v Newbold* (1881) 17 ChD 301 at 324, CA, per Cotton LJ; *Capel & Co v Sim's Ships Compositions Co Ltd* (1888) 58 LT 807 at 808 per Kekewich J. As to similar rules applicable to the doctrine of estoppel by representation see ESTOPPEL.

3 As to who is a representor see PARAS 726-734 ante.

4 *Smith v Chadwick* (1884) 9 App Cas 187 at 201, HL, per Lord Blackburn ('If, with intent to lead the plaintiff to act upon it, they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff, putting that meaning upon it, is misled, I do not think they could escape by saying he ought to have put the other. If they palter with him, in a double sense, it may be that they lie like truth, but I think they lie, and it is a fraud'); *Low v Bouverie* [1891] 3 Ch 82 at 113, CA, per Kay LJ. See also *Lee v Jones* (1864) 17 CBNS 482 at 496. As to claims for deceit see PARA 789 et seq post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/(iii) Falsity by Omission, Silence or Inaction/748. When silence constitutes falsity.

(iii) Falsity by Omission, Silence or Inaction

748. When silence constitutes falsity.

There are two main classes of case in which reticence may contribute to establish a misrepresentation: (1) where known material qualifications of an absolute statement are omitted¹; and (2) where the circumstances raise a duty on the representor² to state certain matters, if they exist, and where, therefore, the representee³ is entitled as against the representor to infer their non-existence from the representor's silence as to them⁴.

1 See PARA 749 post.

2 As to who is a representor see PARAS 726-734 ante.

3 As to who is a representee see PARAS 735-741 ante.

4 See PARAS 750-751 post. As to the corresponding rules which apply in relation to estoppel by misrepresentation see ESTOPPEL.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/(iii) Falsity by Omission, Silence or Inaction/749. Omission of qualifications.

749. Omission of qualifications.

Any omission from a statement of reference to qualifying or supplementary facts and circumstances, such as to make what is stated so one-sided, or so absolute, a version of the entirety of the facts as to amount to a travesty, and not an accurate summary, is enough to establish a misrepresentation¹. The representor² must not merely abstain from positive falsehood; he must not knowingly or willingly omit anything which is required to render completely true that which without it is not completely true³. A statement which omits such matters is a lie in one of its most dangerous and insidious forms⁴. However, mere incompleteness is not a factor in misrepresentation; it must always be proved clearly that it rendered what was stated fallacious and false⁵.

¹ *Oakes v Turquand and Harding* (1867) LR 2 HL 325 at 342 per Lord Chelmsford; *Peek v Gurney* (1873) LR 6 HL 377 at 403 per Lord Cairns, where the process in question is characterised as 'such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false'; *Arkwright v Newbold* (1881) 17 ChD 301 at 318, CA.

The rules of construction have been applied rigorously to: (1) cases of sales and purchases (*Coverley v Burrell* (1821) 5 B & Ald 257; *Brandling v Plummer* (1854) 2 Drew 427; *Dimmock v Hallett* (1866) 2 Ch App 21; *Denny v Hancock* (1870) 6 Ch App 1; *Jones v Rimmer* (1880) 14 ChD 588 at 591, CA; *Nottingham Patent Brick and Tile Co v Butler* (1886) 16 QBD 778, CA; *Re Davis and Cavey* (1888) 40 ChD 601 at 605; *Hepworth v Pickles* [1900] 1 Ch 108 at 111-112; *Baker v Moss* (1902) 66 JP 360; *Mahomed Kala Mea v Harperink* (1908) 25 TLR 180, PC); (2) offer documents of companies (see COMPANIES vol 15 (2009) PARA 1070 et seq); (3) cases of representation as to the credit and dealings of a third person (*Tapp v Lee* (1803) 3 Bos & P 367; *Ames v Milward* (1818) 8 Taunt 637; *Lee v Jones* (1864) 17 CBNS 482 at 498); and (4) compromises (*Brooke v Lord Mostyn* (1864) 2 De GJ & Sm 373 (revsd, without affecting the law as laid down in the court below, sub nom *Mostyn v Brooke* (1866) LR 4 HL 304); *Gilbert v Endean* (1878) 9 ChD 259 at 268, 270, CA). See also eg *Re Mount Morgan (West) Gold Mine Ltd, ex p West* (1887) 56 LT 622 at 624 (document quoted in prospectus; omission of important qualification upon statement quoted). As to statements as to the effect of documents see PARAS 713-714 ante.

² As to who is a representor see PARAS 726-734 ante.

³ See eg *Brandling v Plummer* (1854) 2 Drew 427 at 430 (particulars of sale); and SALE OF LAND vol 42 (Reissue) PARA 83. As to the offence of property misdescription see the Property Misdescriptions Act 1991 s 1; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 791 et seq. As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

⁴ See *Tapp v Lee* (1803) 3 Bos & P 367 at 371 per Chambre J; *Foster v Charles* (1830) 6 Bing 396 at 403 per Park J.

⁵ *Re Coal Economising Gas Co, Gover's Case* (1875) 1 ChD 182 at 199, CA, per Brett J; *McKeown v Boudard-Peveril Gear Co* (1896) 65 LJ Ch 735 at 736, CA, per Rigby LJ; *Re Christineville Rubber Estates Ltd* (1911) 28 TLR 38.

UPDATE

749 Omission of qualifications

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/(iii) Falsity by Omission, Silence or Inaction/750. When non-disclosure involves misrepresentation.

750. When non-disclosure involves misrepresentation.

There is another type of reticence or inaction which may, in certain circumstances, and where certain relations exist between the parties, amount to a representation of the non-existence of the matters as to which silence has been observed. Where a person has said something to another, a duty may at once arise

to say more, and if he fails to discharge this duty his reticence from that point becomes an implied misrepresentation, although complete silence throughout the transaction would not have amounted to, or have afforded any evidence of, misrepresentation, or even of actionable non-disclosure¹. This duty may arise in the case of a continuing representation². There are other cases where, in the course of the negotiations, the representor lets fall something which, whether he so intended or not, he at once perceives, or ought to perceive, to be exercising a delusive influence on the representee's mind, and where, by not correcting the delusion, he is deemed to confirm and perpetuate it, and so to misrepresent³.

Again, in certain circumstances raising a duty to declare the whole truth, a misrepresentation may be made by silence, if the representor fails to contradict a statement, erroneous to his knowledge, which has been made to him by the representee, or which he knows to have been made by, or to, the representee to, or by, a third person. Standing by, and inaction and reticence, in such circumstances may amount either to a tacit adoption by the person keeping silence of another's misrepresentation as his own, or a tacit confirmation of another's error as truth⁴.

Lastly, there are certain cases which are usually classed as belonging rather to the province of non-disclosure, pure and simple, than to that of misrepresentation proper, which, nevertheless, have been regarded as illustrations of positive, though implied, misrepresentation⁵.

1 *Stikeman v Dawson* (1847) 1 De G & Sm 90 at 104; *Walters v Morgan* (1861) 3 De GF & J 718 at 723-724; *Central Rly Co of Venezuela (Directors etc) v Kisch* (1867) LR 2 HL 99 at 114 (the suppression of a fact will often amount to a misrepresentation); *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469 at 475 per Fry J (in relation to contracts other than contracts requiring good faith as a matter of law, the duty of disclosure may arise from circumstances which occur during the negotiation, eg the subsequent discovery by the representor that what he had originally stated was false at the time, or the supervening of facts rendering false what was originally true); *Arkwright v Newbold* (1880) 17 ChD 301 at 310-311 per Fry J (revsd on appeal on the facts of the case (1881) 17 Ch D 301 at 313, CA); *Coaks v Boswell* (1886) 11 App Cas 232 at 236, HL, per Lord Selborne LC (party impliedly undertakes or professes to communicate facts as to which he has been silent, if he makes some other communication which, without the addition of those facts, would be necessarily, or naturally and probably, misleading); *Seaton v Heath* [1899] 1 QB 782 at 792, CA (revsd sub nom *Seaton v Burnand* [1900] AC 135, HL, but not on any ground affecting the proposition that misrepresentation may undoubtedly be made by concealment). See also *With v O'Flanagan* [1936] Ch 575, [1936] 1 All ER 727, CA (there is a duty to communicate a change of circumstances during negotiations); *Geest plc v Fyffes plc* [1999] 1 All ER (Comm) 672 (the potential beneficiary of an indemnity contract is under a duty not to make implied misrepresentations; a surety is not entitled to assume that the beneficiary informed him of the true state of facts as he had made specific requests for information of the beneficiary). If non-disclosure is fraudulent, that is the tort of deceit and damages can be awarded on that basis: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483 at 163 per Rix LJ, with whom other members of the Court agreed. On this point the decision was affirmed: [2003] UKHL 6, [2003] Lloyd's Rep IR 230.

As to who is a representor see PARAS 726-734 ante.

2 See PARA 754 post. As to the circumstances in which failure to discharge the duty may amount to fraud see PARA 760 post.

3 *Nicholson v Hooper* (1838) 4 My & Cr 179 at 185-186. As to who is a representee see PARAS 735-741 ante.

4 *Pilmore v Hood* (1838) 5 Bing NC 97 at 107; *North British Insurance Co v Lloyd* (1854) 10 Exch 523 at 529 (one who knows that a false statement is being made to the representee by a third person, and allows it in silence, is himself misrepresenting); *Hardman v Booth* (1863) 1 H & C 803; *Cundy v Lindsay* (1878) 3 App Cas 459 at 465 per Lord Cairns LC (mistake in addressing letters left uncorrected by recipient, although it indicated that the persons who sent the letters believed themselves to be dealing with a person other than the recipient).

5 *Hamilton v Watson* (1845) 12 Cl & Fin 109 at 119, HL; *Lee v Jones* (1864) 17 CBNS 482 at 500, 503-504; *Phillips v Foxall* (1872) LR 7 QB 666 at 679 (these were all suretyship cases). See also *Evans v Edmonds* (1853) 13 CB 777 at 784-785 (separation deed); *Cavendish-Bentinck v Fenn* (1887) 12 App Cas 652 at 671 per Lord Macnaghten (concealment by agent for purchaser of his interest in property to be purchased would have amounted to representation that he had no interest). There are similar rules in connection with the law relating to representation by estoppel: see ESTOPPEL.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/(iii) Falsity by Omission, Silence or Inaction/751. When silence is not misrepresentation.

751. When silence is not misrepresentation.

Except as already stated¹, mere silence or inaction, however morally reprehensible it may be², neither constitutes, nor is equivalent or contributory to, misrepresentation.

In a case where a positive duty of disclosure exists by reason of the particular relationship of the parties, or the fact that the transaction is *uberimmae fidei*, the transaction may be voidable on the ground of non-disclosure even though the non-disclosure does not amount to misrepresentation³.

Where the circumstances are such that no such positive duty of disclosure exists, silence which does not make what is stated false⁴, or tacit acquiescence in the self-deception of another, if nothing is said or done either to create or foster the delusion, does not amount to misrepresentation⁵. However, the dropping of a single word or the making of a single gesture in such a case may amount to evidence of a misrepresentation⁶.

¹ See PARAS 748-750 ante.

² As to the distinction between the ethical and the legal standard see *Fox v Mackreth* (1791) 2 Cox Eq Cas 320, HL; *Smith v Hughes* (1871) LR 6 QB 597 at 603-604, 607; *Marnham v Weaver* (1899) 80 LT 412 at 413.

³ As to the cases in which such a duty exists see PARA 701 note 14 ante.

⁴ See PARA 750 text and note 1 ante.

⁵ This principle, that silence as to matters which there is no duty to disclose can never be an implied representation, is expressed, applied or illustrated in a variety of forms: see eg *Fox v Mackreth* (1791) 2 Cox Eq Cas 320 at 321, HL (by way of illustration, the case was cited of a purchase of land, the purchaser knowing of a mine under it; in such a case he is under no obligation to disclose this fact to the vendor); *Turner v Harvey* (1821) Jac 169 at 178 per Lord Eldon LC (the 'mine' illustration figures again here); *Keates v Earl Cadogan* (1851) 10 CB 591; *Horsfall v Thomas* (1862) 1 H & C 90 at 100; *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72 at 86-87 (nature of material to be excavated by contractor); *Phillips v Homfray* (1871) 6 Ch App 770 at 779 (illustration of purchase of picture by expert from one ignorant of its artistic value); *Smith v Hughes* (1871) LR 6 QB 597 at 603-604, 607, 610-611 (non-correction of a self-induced delusion of purchaser is not misrepresentation by vendor); *Coaks v Boswell* (1886) 11 App Cas 232 at 235-236, HL; *Marnham v Weaver* (1899) 80 LT 412 at 412-413 (if a third person knows of, but is not a party to, a deceit and owes no legal duty to the party deceived, he does not render himself liable to that party if he merely preserves silence); *Royal Bank of Scotland v Green Shields* 1914 SC 259; cf *Bell v Lever Bros Ltd* [1932] AC 161 at 227, HL, per Lord Atkin. As to preliminary inquiries and mining searches by a purchaser see SALE OF LAND.

The opinion of Lord Ellenborough CJ in the *nisi prius* case of *Hill v Gray* (1816) 1 Stark 434, if correctly and fully reported, is directly contrary to the principle described above. Although never formally overruled, this case has been disapproved (see *Keates v Earl Cadogan* supra at 600 per Jervis CJ; *Peek v Gurney* (1873) LR 6 HL 377 at 390-391 per Lord Chelmsford LC), and cannot now be accepted as law.

⁶ See *Turner v Harvey* (1821) Jac 169 at 178 per Lord Eldon LC; *Walters v Morgan* (1861) 3 De GF & J 718 at 723-724; *Thompson v Lambert* (1868) 17 WR 111 at 113; *Phillips v Homfray* (1871) 6 Ch App 770 at 777-780; *Marnham v Weaver* (1899) 80 LT 412, where the party charged was not a mere passive spectator of the deceit practised by another, but actively assisted in it.

UPDATE

751 When silence is not misrepresentation

NOTE 5--*Bell*, cited, applied in *Conlon v Simms* [2006] EWCA Civ 1749, [2007] 3 All ER 802.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/ (iv) Representation composed of Several Statements/752. Construction of complex representation.

(iv) Representation composed of Several Statements

752. Construction of complex representation.

Where the representation was compounded of several statements contained in one document (such as a prospectus or particulars of sale), or in a number of documents, or was made at one interview or series of interviews, the general rule of construction is that all the statements or documents must be considered in their entirety and in their bearing on one another, the primary object being to ascertain whether the conjoint effect of the whole complex representation is true or false of the whole of the facts¹.

However, this general rule is subject to the qualification that if one out of the several statements or documents, not inseparably nor necessarily bound up with the others, has a clear and definite meaning by itself, and in that meaning is false or true, the representee² or representor³, as the case may be, is entitled to rely on this falsity or truth respectively, and it is no answer, in the former case, to say that if the representee had examined the other statements and documents he might have discovered something which would have led him to the truth, or, in the latter, to point to the imperfection and incompleteness of some other statement which does not purport to do more than refer to the true statement, such as an index or marginal note⁴.

1 Illustrations of the rule in its application to a number of statements contained in one document, such as a prospectus, are *Cargill v Bower* (1878) 10 ChD 502 at 516; *Re Metropolitan Coal Consumers' Association Ltd, Wainwright's Case* (1890) 63 LT 429, CA; *Aaron's Reefs v Twiss* [1896] AC 273 at 281, HL, per Lord Halsbury LC; *Components' Tube Co v Naylor* [1900] 2 IR 1, where one of the questions held to have been properly left to the jury was whether the prospectus as a whole was substantially misleading and calculated to deceive; *Mair v Rio Grande Rubber Estates Ltd* [1913] AC 853, HL (prospectus and report set out in it); *Re Pacaya Rubber and Produce Co Ltd, Burns' Application* [1914] 1 Ch 542 (similar case); *R v Lord Kylsant* [1932] 1 KB 442, CCA; *R v Bishirgian* [1936] 1 All ER 586, CCA; *Atlantic Estates plc v Ezekiel* [1991] 2 EGLR 202 CA (particulars in auction catalogue). As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

In the following cases the rule was applied to the interpretation of the conjoint effect of a number of documents: *Denny v Hancock* (1870) 6 Ch App 1 (particulars of sale and plan); *Cargill v Bower* supra (prospectus and relative documents); *Re Arnold, Arnold v Arnold* (1880) 14 ChD 270, CA (particulars of sale and plan); *Drincqhier v Wood* [1899] 1 Ch 393 (prospectus and covering letter); *Andrews v Mockford* [1896] 1 QB 372, CA (prospectus and a following telegram published in the financial papers to strengthen the effect of the prospectus); *Oelkers v Ellis* [1914] 2 KB 139 at 147-148 (bundle of correspondence). As to a number of statements in particulars of sale see *Brandling v Plummer* (1854) 2 Drew 427 at 430-431. In all these cases, except *Cargill v Bower* supra, the result of the examination of the entirety of the representations or documents was to show either that the whole was as false as each part, and each part as false as the whole, or that statements which, severally and separatim, were true, produced nevertheless, when taken together, a totally false impression. In *Cargill v Bower* supra, on the other hand, statements and documents, inaccurate or incomplete when construed singly, were held, in their conjoint effect, to be a substantially true transcript of the facts. So also in *Bartlett v Salmon* (1855) 6 De GM & G 33 at 42. As to the offence of property misdescription see the Property Misdescriptions Act 1991 s 1; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 791 et seq.

2 As to who is a representee see PARAS 735-741 ante.

3 As to who is a representor see PARAS 726-734 ante.

4 *Re Arnold, Arnold v Arnold* (1880) 14 ChD 270 at 282, 284, CA, is an example of the former type of case; and *Moore v Explosives Co* (1887) 56 LJQB 235, CA, illustrates the latter. As to the former see further PARA 802 post.

UPDATE

752 Construction of complex representation

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/ (v) Relevant Date of Falsity/753.
When falsity must have existed.

(v) Relevant Date of Falsity

753. When falsity must have existed.

The representation must be shown to have been false at the date when the representee¹ altered his position because of it².

1 As to who is a representee see PARAS 735-741 ante.

2 *Briess v Woolley* [1954] AC 333 at 354, [1954] 1 All ER 909 at 918, HL, per Lord Tucker.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(5) MISREPRESENTATION/ (v) Relevant Date of Falsity/754.
Continuing representations.

754. Continuing representations.

Where there is an appreciable interval between the date when the representation is made and the date when the representee¹ alters his position on the faith of the representation, and the representation relates to an existing state of things, the representor² is deemed to be repeating his representation at every successive moment during the interval unless he withdraws or modifies it by timely notice to the representee in the meantime³. It follows that if, during the intervening period, events happen by reason of which the representation is not substantially in accordance with the facts existing at the time when the representee acts upon it, though it was in accordance with the facts existing when it was made, a misrepresentation is established⁴. The circumstances in which such a misrepresentation will amount to a fraudulent misrepresentation are considered elsewhere⁵. Conversely, where a representation which was false when made becomes, in virtue of supervening facts, true when acted upon, there is no falsity at the only material date, and therefore no misrepresentation⁶.

1 As to who is a representee see PARAS 735-741 ante.

2 As to who is a representor see PARAS 726-734 ante.

3 *Briess v Woolley* [1954] AC 333 at 354, [1954] 1 All ER 909 at 918, HL, per Lord Tucker. See also *Smith v Kay* (1859) 7 HL Cas 750 at 769 (allegation of misrepresentation at time when representee executed a bond held to be supported by evidence of misrepresentation made before that time, the misrepresentation being a continuing misrepresentation). As to the representor's right to revoke or modify his representation at any time during the period before the representee acts on it see *Holland v Manchester and Liverpool District Banking Co Ltd* (1909) 25 TLR 386 (erroneous entry in pass-book can be set right by banker at any time before customer draws upon supposed balance, but unless and until so corrected, is a continuing representation). As to marine insurance see the Marine Insurance Act 1906 s 20(6); and INSURANCE vol 25 (2003 Reissue) PARA 408 et seq. Similar principles are applicable to representations for the purpose of estoppel (see ESTOPPEL); and, in cases of contract, to a continuing offer (see *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 262, CA, per Lindley LJ; and CONTRACT). As to the duty to communicate a change of circumstances during negotiations see PARAS 750 ante, 760 post.

4 *Turner v Harvey* (1821) Jac 169; *Re Scottish Petroleum Co, Anderson's Case* (1881) 17 ChD 373 at 377, distinguishing *Hallows v Fernie* (1868) 3 Ch App 467; *Re Scottish Petroleum Co* (1883) 23 ChD 413 at 432, 435, 438, CA; *Whurr v Devenish* (1904) 20 TLR 385, where a horse was offered for sale by auction, and described as the representor's property, but during the progress of the auction was sold privately, notwithstanding which the representor authorised the auction sale to go on; *With v O'Flanagan* [1936] Ch 575, [1936] 1 All ER 727, CA; *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15, [2002]

EMLR 510. See also *HB Nickerson & Sons Ltd v Woodbridge* (1980) 115 DLR (3d) 97, NS CA (Canadian employer failing to advise potential employee of change in Canadian regulations requiring substantial Canadian experience for professional qualifications); *Jones v Dumbrell* [1981] VR 199. Cf the insurance cases where there is a material alteration in the health of the assured before completion of the contract: see INSURANCE.

On the other hand, the representation, even though it continues during the whole of the interval between the making of the representation and the alteration of the representee's position, does not last beyond it. The retirement of directors (described as such in a prospectus) after allotment could not make the prospectus false even as a continuing representation: see *Hallows v Fernie* supra at 472. As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

5 See PARA 760 post.

6 *Ship v Crosskill* (1870) LR 10 Eq 73 at 85-86; cf *Tofts v Pearl Life Assurance Co Ltd* [1915] 1 KB 189 at 194, CA.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(6) FRAUDULENT MISREPRESENTATION/755. Circumstances in which fraud as well as falsity must be proved.

(6) FRAUDULENT MISREPRESENTATION

755. Circumstances in which fraud as well as falsity must be proved.

Although innocent misrepresentation¹ constitutes a ground for the rescission² of a contract or binding transaction into which the representee³ has been induced to enter by the misrepresentation, and a defence in any proceedings brought against him to enforce the contract or transaction, a person complaining of having been misled by a misrepresentation to his injury cannot recover damages⁴ from the representor⁵ in respect of the injury suffered unless he can show that: (1) the representation was not only false but fraudulent⁶; or (2) it was negligent⁷; or (3) it was made by another party to the contract who is unable to prove that he believed that the facts represented were true⁸.

Untruth in fact does not of itself necessarily import a dishonest mind⁹. Something more must be shown in order to render a misrepresentation fraudulent¹⁰.

1 As to when a misrepresentation is innocent see PARA 763 post.

2 As to claims for rescission see PARA 812 et seq post.

3 As to who is a representee see PARAS 735-741 ante.

4 As to a claim for damages see PARA 789 et seq post.

5 As to who is a representor see PARAS 726-734 ante.

6 See PARAS 701 ante, 756-761 post. As to claims for deceit see PARA 789 et seq post.

7 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; paras 762, 798-800 post; and NEGLIGENCE vol 78 (2010) PARA 14. As to the liability of a director for company's negligent misstatement or misrepresentation see *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL; COMPANIES vol 14 (2009) PARA 588; and NEGLIGENCE vol 78 (2010) PARA 16.

8 See the Misrepresentation Act 1967 s 2(1); and PARAS 762, 801 post.

9 Every deceit comprehends a lie, but deceit is more than a lie: *Pasley v Freeman* (1789) 3 Term Rep 51 at 56 per Buller J. Conversely, an intention to deceive does not necessarily involve that the statement made was untrue in fact: see PARAS 742-746 ante.

10 *Derry v Peek* (1889) 14 App Cas 337 at 359, HL, per Lord Herschell. As to the elements in a representation which will render it fraudulent see PARA 757 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(6) FRAUDULENT MISREPRESENTATION/756. Meaning of 'fraud'.

756. Meaning of 'fraud'.

'Fraud', in connection with representations upon which it is sought to base a claim for deceit, has the same meaning in all the courts whose province it is to consider it¹. In this connection there is no distinction between legal and equitable fraud², or between legal fraud and moral fraud³, and no such thing as imputed or constructive fraud, if and so far as these expressions serve to suggest that any statement may be construed as fraudulent for the purposes of founding a claim for deceit, although the statement is not characterised by actual fraud, as the law has defined it⁴ for this purpose⁵.

¹ See *Nocton v Lord Ashburton* [1914] AC 932 at 953-954, HL, per Viscount Haldane LC. As to claims for deceit see PARA 789 et seq post.

² *Le Lievre v Gould* [1893] 1 QB 491 at 498, CA; cf *Derry v Peek* (1889) 14 App Cas 337, HL; *Tharp v Tharp* [1916] 1 Ch 142 at 151 per Neville J. The term 'legal fraud' appears to have been first used in *Haycraft v Creasy* (1801) 2 East 92 at 103.

³ *Weir v Bell* (1878) 3 Ex D 238 at 243, CA; *Derry v Peek* (1889) 14 App Cas 337 at 346, 359-380, HL; *Nocton v Lord Ashburton* [1914] AC 932 at 954, HL, per Viscount Haldane LC. However, there are certain cases in which equity affords a remedy other than a claim for deceit and which, although classified in equity as cases of fraud, do not necessarily import the element of *dolus malus*, such as cases arising out of breach of special duty: see *Nocton v Lord Ashburton* supra at 952-956 per Viscount Haldane LC; *Robinson v National Bank of Scotland* 1916 SC 154, HL. See also EQUITY. As to liability for careless statements see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; paras 762-764, 798-800 post; and NEGLIGENCE vol 78 (2010) PARA 14. As to the liability of a director for company's negligent misstatement or misrepresentation see *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL; COMPANIES vol 14 (2009) PARA 588; and NEGLIGENCE vol 78 (2010) PARA 16.

⁴ See PARA 757 post.

⁵ In another context, however, the term 'fraud' has been extended in equity by the concept of 'constructive fraud', which includes transactions so opposed to fair dealing between the parties that they ought not to be held binding: see PARAS 836, 838 et seq post; and EQUITY.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(6) FRAUDULENT MISREPRESENTATION/757. What constitutes fraud.

757. What constitutes fraud.

Not only is a misrepresentation fraudulent if it was known or believed by the representor¹ to be false when made, but mere non-belief in the truth is also indicative of fraud². Thus whenever a person makes a false statement which he does not actually and honestly believe to be true, for purposes of civil liability that statement is as fraudulent as if he had stated that which he did not know to be true, or knew or believed to be false³. Proof of absence of actual and honest belief is all that is necessary to satisfy the requirements of the law, whether the representation has been made recklessly or deliberately; indifference or recklessness on the part of the representor as to the truth or falsity of the representation⁴ affords merely an instance of absence of such a belief⁵.

A representor will not, however, be fraudulent if he believed the statement to be true in the sense in which he understood it, provided that was a meaning which might reasonably be attached to it, even though the court later holds that the statement objectively bears another meaning, which the representor did not believe⁶.

1 As to who is a representor see PARAS 726-734 ante.

2 *Taylor v Ashton* (1843) 11 M & W 401 at 415 per Parke B ('it is not necessary to show that the defendants knew the fact to be untrue, if they stated a fact which was untrue for a fraudulent purpose, they at the same time not believing that fact to be true, in that case it would be both a legal and moral fraud'. For the second 'untrue', the report has 'true'; but this seems to be a clerical error and was so treated in *Derry v Peek* (1889) 14 App Cas 337 at 367, HL, per Lord Herschell).

This proposition has been reasserted in a variety of forms and in a variety of circumstances: see eg *Evans v Edmonds* (1853) 13 CB 777 at 786; *Rawlins v Wickham* (1858) 3 De G & J 304 at 316-317; *Behn v Burness* (1863) 3 B & S 751 at 753, Ex Ch; *Reese River Silver Mining Co v Smith* (1869) LR 4 HL 64 at 79-80 per Lord Cairns (explained in *Derry v Peek* supra at 370-371 per Lord Herschell); *Hart v Swaine* (1877) 7 ChD 42 at 46-47; *Arkwright v Newbold* (1881) 17 ChD 301 at 320, CA; *Leddell v McDougal* (1881) 29 WR 403, CA; *Edgington v Fitzmaurice* (1885) 29 ChD 459 at 465-466, 480-482, CA; *Derry v Peek* supra at 374; *Angus v Clifford* [1891] 2 Ch 449 at 471, CA; *Pritty v Child* (1902) 71 LJB 512 at 514 per Channell J.

3 See *Derry v Peek* (1889) 14 App Cas 337 at 374, HL, per Lord Herschell (fraud is proved when it is shown that a false representation has been made: (1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false; the third case being but an instance of the second).

4 See eg *Behn v Burness* (1863) 3 B & S 751 at 753, Ex Ch; *Arkwright v Newbold* (1881) 17 ChD 301 at 320, CA; *Edgington v Fitzmaurice* (1885) 29 ChD 459 at 465-466, 480-482, CA; *Angus v Clifford* [1891] 2 Ch 449 at 471, CA; *Heilbut, Symons & Co v Buckleton* [1913] AC 30 at 49, HL, per Moulton LJ.

5 See note 3 supra.

6 *Akerhielm v De Mare* [1959] AC 789, [1959] 3 All ER 485, PC; *Gross v Lewis Hillman Ltd* [1970] Ch 445, [1969] 3 All ER 1476, CA.

UPDATE

757 What constitutes fraud

NOTE 3--See also *Cheltenham BC v Laird* [2009] EWHC 1253 (QB), [2009] IRLR 621 (truth of responses to medical questionnaire).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(6) FRAUDULENT MISREPRESENTATION/758. Standard of proof and questions of law and fact.

758. Standard of proof and questions of law and fact.

In determining whether a representation was made fraudulently, the standard of proof applicable is the civil standard of balance of probability and not the criminal standard of proof beyond reasonable doubt, but the degree of probability required to establish proof may vary according to the gravity of the allegation to be proved¹. The question whether there is any evidence to support an allegation that a representation made was fraudulent is a question of law². Subject to this, the question whether a false representation was actually fraudulent is, in every case, a question of fact³.

¹ *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, [1956] 3 All ER 970, CA. See also CIVIL PROCEDURE vol 11 (2009) PARA 775.

² See eg *Ludgater v Love* (1881) 44 LT 694, CA; *Smith v Chadwick* (1884) 9 App Cas 187 at 193, HL.

³ See eg *Barwick v English Joint Stock Bank* (1867) LR 2 Exch 259 at 264, Ex Ch; *Ludgater v Love* (1881) 44 LT 694 at 695, CA, per Brett LJ (in the course of counsel's argument); *Smith v Chadwick* (1884) 9 App Cas 187 at 193, HL.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.

ACTIONABLE MISREPRESENTATION/(6) FRAUDULENT MISREPRESENTATION/759. Irrelevancy of representor's motive.

759. Irrelevancy of representor's motive.

It follows from the meaning of fraudulent misrepresentation¹ that, given absence of actual and honest belief by the representor² in the truth of the misrepresentation, his motive in making the misrepresentation is wholly irrelevant³. It may be that he intended to injure the representee⁴ without benefiting himself, or to benefit himself without injuring the representee⁵; it may be that he did not intend to do either, but solely to benefit a third person⁶, or even the representee himself⁷, or otherwise to do right⁸. Lastly, he may have acted with no intelligible or rational motive whatsoever and told a lie from mere caprice, mischievousness or stupidity⁹. In all these cases, provided that there was an absence of actual and honest belief in the truth of his assertion, the misrepresentation is accounted fraudulent, and no proof of any wicked or other intention (other than an intention to induce) on the part of the representor is required by the law; or if it is necessary to establish an intention to deceive or injure, that intention is immediately and irrebuttably presumed in law from the mere act of making the misrepresentation without such belief¹⁰.

¹ See PARAS 756-757 ante.

² As to who is a representor see PARAS 726-734 ante.

³ *Stone v Compton* (1838) 5 Bing NC 142 at 155-156; *Crawshay v Thompson* (1842) 4 Man & G 357 at 382; *Milne v Marwood* (1855) 15 CB 778 at 783; *Denton v Great Northern Rly Co* (1856) 5 E & B 860; *Peek v Gurney* (1873) LR 6 HL 377 at 409-410; *Amison v Smith* (1889) 41 ChD 348 at 368, 372-373, CA; *Derry v Peek* (1889) 14 App Cas 337 at 374, HL; *United Motor Finance Co v Addison & Co Ltd* [1937] 1 All ER 425, PC. There must, of course, be an intention to induce: see PARA 768 et seq post.

⁴ As to who is a representee see PARAS 735-741 ante.

⁵ *Evans v Edmonds* (1853) 13 CB 777 at 786; *Armstrong v Jackson* [1917] 2 KB 822 at 827 per McCordie J; *Janvier v Sweeney* [1919] 2 KB 316, CA.

⁶ *Pasley v Freeman* (1789) 3 Term Rep 51 at 58 per Buller J (if A by fraud and deceit cheats B out of £1,000, it makes no difference to B whether A, or any other person, pockets that £1,000). See also *Foster v Charles* (1830) 7 Bing 105 at 106-107; *Polhill v Walter* (1832) 3 B & Ad 114 at 123-124; *Leddell v McDougal* (1881) 29 WR 403, CA.

⁷ *Leddell v McDougal* (1881) 29 WR 403, CA; *Smith v Chadwick* (1884) 9 App Cas 187 at 201, HL.

⁸ *Foster v Charles* (1830) 7 Bing 105 at 107; *Re McCallum, McCallum v McCallum* [1901] 1 Ch 143 at 163-164, CA, per Vaughan Williams LJ.

⁹ See eg *Wilkinson v Downton* [1897] 2 QB 57 (so-called 'practical joke' giving rise to tortious liability). See also *Richardson v Silvester* (1873) LR 9 QB 34, where particulars of claim alleging that the defendant advertised for letting a farm which he knew he had no power to let and which he knew was not to be let, and that on the faith of the advertisement the plaintiff incurred expense, were held sufficient to disclose a cause of action for deceit, even though they did not allege that the defendant's act was done with an intention to injure the plaintiff. As to claims for deceit see PARA 789 et seq post.

¹⁰ *Foster v Charles* (1830) 6 Bing 396 at 403; *Corbett v Brown* (1831) 8 Bing 33 at 37; *Crawshay v Thompson* (1842) 4 Man & G 357; *Smith v Chadwick* (1884) 9 App Cas 187 at 190, HL; *Coaks v Boswell* (1886) 11 App Cas 232 at 236, HL; *Amison v Smith* (1889) 41 ChD 348 at 372, CA; *Wilkinson v Downton* [1897] 2 QB 57 at 59.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(6) FRAUDULENT MISREPRESENTATION/760. Representation subsequently discovered by representor to be false.

760. Representation subsequently discovered by representor to be false.

Where a representation is a continuing one¹, and between the time when it was made and the time when the representee² altered his position on the faith of it, either: (1) the representor³ discovers that his original statement which, when he made it, he honestly believed to be true, was false; or (2) supervening events render, to the knowledge of the representor, his statement no longer true, a duty to disclose the changed situation to the representee may arise⁴. In such cases the mere fact that the statement may have been innocently made, though false, or true when made, will not, it seems, prevent the representee from establishing fraud where he can show that the representor dishonestly⁵ failed to discharge the duty of disclosing the change in the situation⁶.

1 See PARA 754 ante.

2 As to who is a representee see PARAS 735-741 ante.

3 As to who is a representor see PARAS 726-734 ante.

4 See *Adamson v Jarvis* (1827) 4 Bing 66 at 74; *Jarrett v Kennedy* (1848) 6 CB 319 at 323; *Reynell v Sprye* (1852) 1 De GM & G 660 at 709; *Denton v Great Northern Rly Co* (1856) 5 E & B 860 at 866-867; *Trill v Baring* (1864) 4 De GJ & Sm 318 at 329; *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469 at 475; *Brownlie v Campbell* (1880) 5 App Cas 925 at 950, HL; *With v O'Flanagan* [1936] Ch 575 at 580-585, [1936] 1 All ER 727 at 732-736, CA, per Lord Wright MR. It seems that the duty to disclose must be discharged in unambiguous language: see *Arnison v Smith* (1889) 41 ChD 348 at 370-373, CA (error in prospectus not covered by subsequent ambiguous circular). As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

5 It is not through mere inadvertence or through failure to realise the duty resting upon him: see *With v O'Flanagan* [1936] Ch 575 at 584, [1936] 1 All ER 727 at 735, CA, per Lord Wright MR, criticising dicta in *Brownlie v Campbell* (1880) 5 App Cas 925 at 950, HL, per Lord Blackburn.

6 See eg *Adamson v Jarvis* (1827) 4 Bing 66 at 74; *Denton v Great Northern Rly Co* (1856) 5 E & B 860 at 866-867; *With v O'Flanagan* [1936] Ch 575 at 584-585, [1936] 1 All ER 727 at 735, CA, per Lord Wright MR; *Bradford Third Equitable Benefit Building Society v Bowers* [1941] 2 All ER 205 at 220, HL, per Wright LJ; but cf *Arkwright v Newbold* (1881) 17 ChD 301, CA, where Cotton LJ at 325 doubted, and James LJ at 329 dissented from, the view that the persons issuing a prospectus were liable to a claim for deceit because they did not mention a fact coming to their knowledge before an allotment of shares which falsified a statement in the prospectus. See also *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd and La Réunion Européenne, The Star Sea* [1997] 1 Lloyd's Rep 360, CA; affd [2001] UKHL 1, [2003] 1 AC 469. As to claims for deceit see PARA 789 et seq post; and COMPANIES vol 15 (2009) PARA 1081-1086.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(6) FRAUDULENT MISREPRESENTATION/761. Possible defence to claim for fraudulent misrepresentation.

761. Possible defence to claim for fraudulent misrepresentation.

Contributory negligence is not a defence to claims for fraudulent misrepresentation¹. However, where it is alleged that a representee² who is the victim of fraud is disabled from suing because he is himself involved in illegality, the court may take into account the relative moral culpability of the parties³.

1 *Alliance and Leicester Building Society v Edgestop Ltd* [1994] 2 All ER 38, [1993] 1 WLR 1462. See also *Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd* [1997] 2 All ER 917, [1997] 1 WLR 1396 (bribery). It is not a defence to a claim for fraud that the misrepresentation was made on behalf of another, nor does it matter that the representee was negligent or held an irrational belief: *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* [2002] UKHL 43, [2003] 1 AC 959; [2003] 1 All ER 173.

However, damages for misrepresentation under the Misrepresentation Act 1967 s 2(1) (see PARA 801 post) may be reduced for contributory negligence: see PARA 811 note 1 post. As to contributory negligence generally see NEGLIGENCE vol 78 (2010) PARA 75 et seq. As to the liability of a director for company's negligent misstatement or misrepresentation see *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL; COMPANIES vol 14 (2009) PARA 588; and NEGLIGENCE vol 78 (2010) PARA 16.

2 As to who is a representee see PARAS 735-741 ante.

3 *Saunders v Edwards* [1987] 2 All ER 651, [1987] 1 WLR 1116, CA (defendant sold the lease of a flat to the plaintiffs and fraudulently represented that it included a roof garden; defendant argued unsuccessfully that the plaintiffs were disabled from suing because they had agreed to an apportionment of the price between the flat and chattels which exaggerated the value of the latter so as to minimise liability to stamp duty).

UPDATE

761 Possible defence to claim for fraudulent misrepresentation

NOTE 1--*Standard Chartered Bank*, cited, applied in *GE Commercial Finance Ltd v Gee* [2005] EWHC 2056 (Comm), [2006] 1 Lloyd's Rep 337.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/ (7) INNOCENT MISREPRESENTATION/762. Effect of negligence in establishing liability.

(7) INNOCENT MISREPRESENTATION

762. Effect of negligence in establishing liability.

It used to be thought that negligent misrepresentation, as distinct from fraudulent misrepresentation, did not give rise to a cause of action at common law or in equity in the absence of breach of fiduciary or contractual duty towards the claimant¹. However, it is now clear that such a cause of action may arise both at common law² and under the Misrepresentation Act 1967³.

Thus there are now two classes of 'innocent misrepresentation'⁴: (1) those made without fault, which give rise to the remedy of rescission⁵; and (2) those made through negligence, which give rise to the remedies both of rescission and of damages⁶.

1 See *Le Lievre v Gould* [1893] 1 QB 491, CA; *Candler v Crane, Christmas & Co* [1951] 2 KB 164, [1951] 1 All ER 426, CA.

2 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL. See also PARAS 798-800 post; and for a discussion of this and later authorities see NEGLIGENCE vol 78 (2010) PARA 14. As to the liability of a director for company's negligent misstatement or misrepresentation see *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL; COMPANIES vol 14 (2009) PARA 588; and NEGLIGENCE vol 78 (2010) PARA 16.

3 Ie under the Misrepresentation Act 1967 s 2(1); see PARA 801 post.

4 'Innocent' in this context means 'not fraudulent'.

5 As to rescission see PARA 812 et seq post. As to the availability of damages in lieu of rescission see the Misrepresentation Act 1967 s 2(2); and PARA 834 post.

6 As to claims for damages see PARA 789 et seq post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/ (7) INNOCENT MISREPRESENTATION/763. Misrepresentation innocent if made with honest belief in its truth.

763. Misrepresentation innocent if made with honest belief in its truth.

A misrepresentation must be either fraudulent or innocent¹. It cannot be both. Fraud and innocence, like falsity and truth, are mutually exclusive categories. It follows from the definition of a fraudulent misrepresentation as a misrepresentation made in the absence of actual honest belief in its truth², that: (1) the essential characteristic of an innocent misrepresentation is the presence of such actual honest belief³; and (2) nothing more than this absence, or presence, is required to constitute fraud or innocence respectively.

¹ Innocent misrepresentations include those made through negligence: see PARAS 762 ante, 764 post.

² See PARAS 756-757 ante.

³ *Collins v Evans* (1844) 5 QB 820 at 827, 830, Ex Ch; *Derry v Peek* (1889) 14 App Cas 337 at 374-376, HL, per Lord Herschell; *Angus v Clifford* [1891] 2 Ch 449 at 463-464, CA, per Bowen LJ; *Low v Bouverie* [1891] 3 Ch 82 at 105, CA; *Le Lievre v Gould* [1893] 1 QB 491 at 503, CA; *Glasgow and South Western Rly Co v Boyd and Forrest* as reported in 1912 SC 93, HL. See also *Economides v Commercial Union Assurance Co plc* [1998] QB 587, [1997] 3 All ER 636, CA as to the duty of good faith in insurance contracts where insured's misstatement based on honest belief.

UPDATE

763 Misrepresentation innocent if made with honest belief in its truth

NOTE 3--See *Sykes v Taylor-Rose* [2004] All ER (D) 468 (Feb), CA.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/ (7) INNOCENT MISREPRESENTATION/764. Effect of negligence or incompetence in forming belief.

764. Effect of negligence or incompetence in forming belief.

A misrepresentation which is founded on a belief in its truth, if that belief really existed, and was genuinely and honestly entertained, is not deprived of its character of innocence by reason of the mere fact that the belief resulted from want of care, skill or competence, or lapse of memory¹, even though such conduct, in other aspects, may have been of a most culpable character². Negligence is not dishonesty³; it is its direct antithesis⁴. It has been said that although negligence does not amount to fraud, it may constitute evidence of it⁵; and there may be cases in which the want of care is such that the tribunal appointed to determine the question of fact would be justified in preferring the alternative hypothesis of want of honesty⁶. Nevertheless, carelessness or stupidity in arriving at a genuine conviction must be distinguished from that moral recklessness or callousness which prompts the putting forward of a misrepresentation as to which the representor has no belief at all⁷. Similarly, absence of reasonable grounds for the representor's belief, if in fact it was a real and genuine belief, does not of itself constitute or indicate fraud⁸, although there may be cases where the alleged belief must have been based on grounds so utterly preposterous as to compel the inference that in fact it never did exist⁹. On the same principle, actual failure to recollect a fact, where omission would render the representation false, does not of itself render it fraudulent¹⁰.

¹ See *Bell v Lever Bros Ltd* [1932] AC 161, HL.

² This was the case in *Arkwright v Newbold* (1881) 17 ChD 301, CA (the successful defendant being on that account deprived of his costs); and, to some extent, in *Derry v Peek* (1889) 14 App Cas 337 at 376, HL, per Lord Herschell.

³ *Evans v Bicknell* (1801) 6 Ves 174 at 188, 191-192 per Lord Eldon LC; *Taylor v Ashton* (1843) 11 M & W 401 at 415; *Dickson v Reuter's Telegram Co* (1877) 3 CPD 1 at 6, CA; *Derry v Peek* (1889) 14 App Cas 337 at 361, HL; *Angus v Clifford* [1891] 2 Ch 449 at 462-468, CA; *Thiodon v Tindall* (1891) 65 LT 343, DC; *Le Lievre v Gould* [1893] 1 QB 491 at 501, CA; *Robinson v National Bank of Scotland* 1916 SC 154, HL. As to liability for careless statements see *Hedley Byrne & Co Ltd v*

Heller & Partners Ltd [1964] AC 465, [1963] 2 All ER 575, HL; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA; and NEGLIGENCE vol 78 (2010) PARA 14. As to the liability of a director for company's negligent misstatement or misrepresentation see *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL; COMPANIES vol 14 (2009) PARA 588; and NEGLIGENCE vol 78 (2010) PARA 16.

4 *Kettlewell v Watson* (1882) 21 ChD 685 at 706 per Fry J (a case of 'constructive notice' by wilful abstention from inquiry).

5 See eg *Evans v Bicknell* (1801) 6 Ves 174 at 190-191 per Lord Eldon LC; *Derry v Peek* (1889) 14 App Cas 337 at 369, HL, per Lord Herschell.

6 *Western Bank of Scotland v Addie* (1867) LR 1 Sc & Div 145 at 168, HL, per Lord Cranworth; *Le Lievre v Gould* [1893] 1 QB 491 at 500, CA, per Bowen LJ.

7 See *Derry v Peek* (1889) 14 App Cas 337 at 361, HL, per Lord Herschell; *Le Lievre v Gould* [1893] 1 QB 491 at 501, CA, per Bowen LJ. See also PARA 757 ante. As to who is a representor see PARAS 726-734 ante.

8 *Derry v Peek* (1889) 14 App Cas 337, HL. The decision in this case was acted upon and applied in *Glazier v Rolls* (1889) 42 ChD 436, CA, and has been acted upon in numerous subsequent cases. As regards prospectuses of companies, the law as laid down in *Derry v Peek* supra has been modified by statutory provisions rendering directors and others liable to pay compensation for misstatements in offer documents even though they are not fraudulent: see COMPANIES vol 15 (2009) PARA 1070 et seq.

9 *Derry v Peek* (1889) 14 App Cas 337 at 369, HL, per Lord Herschell (a consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained). See also *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573 at 586-587 per Jacob J.

10 *Bain v Fothergill* (1874) LR 7 HL 158 at 212; *Mathias v Yetts* (1882) 46 LT 497 at 506, CA; *Low v Bouverie* [1891] 3 Ch 82 at 101, 106, CA.

The opinions expressed in *Burrowes v Lock* (1805) 10 Ves 470 and in *Slim v Croucher* (1860) 1 De GF & J 518 are inconsistent with *Derry v Peek* (1889) 14 App Cas 337, HL (see notes 7-9 supra). However, *Burrowes v Lock* supra can be supported on the ground of estoppel: *Low v Bouverie* supra at 102; *Nocton v Lord Ashburton* [1914] AC 932 at 952, HL, per Viscount Haldane LC. The view has been expressed that *Slim v Croucher* supra, in which the assertion was that a valid lease would be granted in the future, cannot any longer be regarded as having been rightly decided (see *Low v Bouverie* supra); but the circumstances were unusual, and it may be that the decision can be supported on the ground that the defendant warranted by implication that he had power to grant a valid lease (see *Nocton v Lord Ashburton* supra at 951 per Viscount Haldane LC).

Where the misrepresentation is only the subject of rescission proceedings, in circumstances where fraud is irrelevant and honesty no answer (see PARA 814 post), the fact that the omitted matter had escaped the representor's memory is no answer: *Mathias v Yetts* supra at 502, 504. So also if a person chooses to state a thing as an absolute fact within his own knowledge when he has no clear recollection on the point, he makes a false representation: *Brownlie v Campbell* (1880) 5 App Cas 925 at 936, 945, 953, HL; and see PARA 710 ante.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1.
ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(i) In general/765.
Distinction between inducement and materiality.

(8) INDUCEMENT AND MATERIALITY

(i) In general

765. Distinction between inducement and materiality.

No misrepresentation, however gross or fraudulent, draws with it any civil consequences unless it was material and was intended to, and did, influence the mind of the representee¹ so as to affect his conduct. Inducement in fact and materiality² are distinct and separate matters, and in any form of proceedings it is necessary to establish both³.

Actual inducement must be shown, irrespective of materiality. In other words, however antecedently probable it may have been in any case that the misrepresentation alleged would influence a normal person to take just the steps which the representee did, yet, if in fact he was not so influenced, he has no cause of action⁴.

1 As to who is a representee see PARAS 735-741 ante.

2 Is a tendency to induce: see PARA 774 et seq post.

3 *Smith v Chadwick* (1884) 9 App Cas 187 at 190, HL, per Lord Selborne LC. See also *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, [1994] 3 All ER 581, HL (in which the requirement for both inducement and materiality in misrepresentation cases was extended to non-disclosure cases).

There may be rare cases in which actual inducement may be inferred as a fact from obvious materiality (see PARA 766 post), but the issues are separate.

An express warranty or condition eliminates all questions both of inducement and materiality: see *Pawson v Watson* (1778) 2 Cowp 785 at 788-790; *Attwood v Small* (1838) 6 Cl & Fin 232 at 444, HL; *Thomson v Weems* (1884) 9 App Cas 671 at 683-684, 689, HL; *Hambrough v Mutual Life Insurance Co of New York* (1895) 72 LT 140, CA; *Paxman v Union Assurance Society Ltd* (1923) 39 TLR 424 at 426 per McCardie J. See also INSURANCE.

4 See eg *Shrewsbury v Blount* (1841) 2 Man & G 475 (where, the jury having found that the plaintiff did not purchase shares in consequence of certain representations, the court declined to interfere); *Smith v Chadwick* (1884) 9 App Cas 187 at 194, HL (in this case, the statement that a particular person was a director of the company might have influenced persons to take shares, but the plaintiff admitted that in fact it had not influenced him).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(i) In general/766. Questions of law and fact.

766. Questions of law and fact.

It is a question of law whether any representation is capable of being construed as material¹, and also whether there is any evidence of actual inducement². Subject to these questions being answered in the affirmative, both inducement and materiality are prima facie issues of fact³, and neither can be presumed as a matter of law⁴. Inducement cannot be inferred in law from proved materiality, although there may be cases where the materiality is so obvious as to justify an inference of fact that the representee⁵ was actually induced⁶; but, even in such exceptional cases, the inference is only a prima facie one, and may be rebutted by counter-evidence⁷.

1 See also PARA 745 ante. In *Beachey v Brown* (1860) EB & E 796, it was held on demurrer that a certain fact, the concealment of which was complained of, was not material. Cf *Smith v Chadwick* (1882) 20 ChD 27 at 45, CA, per Jessel MR (the misstatement may be so trivial that a court will be of opinion that it could not have affected the plaintiff's mind at all); *Bloomenthal v Ford* [1897] AC 156 at 162, HL, per Lord Halsbury LC ('a statement may be made so preposterous in its nature that nobody could believe that anyone was misled'). In *Gordon v Street* [1899] 2 QB 641, CA, the question whether the misrepresentation of the plaintiff's identity under cover of an alias was capable of being considered material by a jury was debated as a question of law. See also *Aneco Reinsurance Underwriting Ltd (in liq) v Johnson & Higgins Ltd* [2001] UKHL 51, [2002] 1 Lloyd's Rep 157.

2 For the general principle in claims tried with a jury that it is for the judge to decide, as a question of law, whether there is any issue of fact to go to the jury see CIVIL PROCEDURE vol 11 (2009) PARA 798.

3 As to inducement see in particular *Andrews v Mockford* [1896] 1 QB 372, CA, where two of the questions left to the jury on the trial related to the issue of inducement, the issue of materiality being separately left to it. See also *Clapham v Shillito* (1844) 7 Beav 146; and PARA 765 ante. As to materiality being an issue of fact see eg *Flinn v Headlam* (1829) 9 B & C 693, where the question was left to the jury. In the following cases a judge, sitting without a jury, determined the issue of materiality as a fact: *Re Universal Non-Tariff Fire Insurance Co. Forbes & Co's Claim* (1875) LR 19 Eq 485 at 493-494, 496; *Capel & Co v Sim's Ships Compositions Co Ltd* (1888) 58 LT 807 at 809-810; *Whurr v Devenish* (1904) 20 TLR 385. See also the Marine Insurance Act 1906 s 20(7); and INSURANCE vol 25 (2003 Reissue) PARA 417.

4 As to inducement see *Amison v Smith* (1889) 41 ChD 348 at 374, CA, per Lord Halsbury LC. As to inducement for the purposes of estoppel by representation see similar observations in *Bloomenthal v Ford* [1897] AC 156 at 162, HL, per Lord Halsbury LC. As to materiality see *Bevan v Adams* (1870) 22 LT 795, where, the judge having taken upon himself to withdraw

the question from the jury and to hold that the representation could not be material, the court ordered a new trial.

5 As to who is a representee see PARAS 735-741 ante.

6 See *Clapham v Shillito* (1844) 7 Beav 146 at 150-152 per Lord Langdale MR; *Smith v Chadwick* (1882) 20 ChD 27 at 44, CA, per Jessel MR (on appeal (1884) 9 App Cas 187 at 196, HL, per Lord Blackburn); *Mathias v Yetts* (1882) 46 LT 497, CA; *Smith v Land and House Property Corp*n (1884) 28 ChD 7 at 16, CA, per Bowen LJ; *Hughes v Twisden* (1886) 55 LJ Ch 481 at 484; *Armison v Smith* (1889) 41 ChD 348 at 369, CA, per Lord Halsbury LC. In *Moss & Co Ltd v Swansea Corp*n (1910) 74 JP 351, Channell J seems to have inferred inducement as a fact from the obvious materiality of an admitted misrepresentation. See also *Museprime Properties Ltd v Adhill Properties Ltd* [1990] 2 EGLR 196, 61 P & CR 111; *St Paul Fire and Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96, [1995] 2 Lloyd's Rep 116, CA (three representees gave evidence of their inducement; the court accepted this evidence and held that there was a clear inference that a fourth representee had also been induced).

7 See *Smith v Chadwick* (1882) 20 Ch D 27 at 44, CA (on appeal (1884) 9 App Cas 187 at 196, HL); *Hughes v Twisden* (1886) 55 LJ Ch 481 at 484; *Armison v Smith* (1889) 41 ChD 348 at 369, CA. The fact that the representee does not choose to pledge his oath to the fact of inducement is of itself some evidence, fit to be considered by the court, tending to weaken the strength of the inference which might otherwise be so drawn: *Smith v Chadwick* (1884) 9 App Cas 187 at 196, HL, per Lord Blackburn.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(i) In general/767. Matters relevant in determining questions of fact.

767. Matters relevant in determining questions of fact.

In determining, as a fact, whether any representation was of a nature to induce, or did induce, the representee¹ to alter his position, all the circumstances must be considered², including, among others, the character of the document in which the representation is contained³, the nature of the transaction or business into which it is alleged that the representee was induced to enter, and the representee's general or particular experience, whether arising from his profession or trade or otherwise⁴.

1 As to who is a representee see PARAS 735-741 ante.

2 *Bloomenthal v Ford* [1897] AC 156 at 162, HL, per Lord Halsbury LC.

3 As to prospectuses, advertisements, etc see the cases cited in PARAS 715 note 1, 716 note 2 ante.

4 Thus in company prospectus cases it has been considered of importance that the representee was a lawyer, whose knowledge of the world and experience must have taught him how little reliance was to be placed upon representations such as those in question (*Shrewsbury v Blount* (1841) 2 Man & G 475 at 504 per Tindal CJ); or a person well acquainted with dealings of shares in companies, with prospectuses, and with stock exchange transactions (*Bellairs v Tucker* (1884) 13 QBD 562 at 577, DC, per Denman J); or a man of business, who had himself turned his own business into a company, and taken shares in other companies, and was quite competent to form an opinion for himself (*Smith v Chadwick* (1884) 9 App Cas 187 at 197, HL, per Lord Blackburn); or a broker with experience of company promotions and undertakings (*Capel & Co v Sim's Ships Compositions Co Ltd* (1888) 58 LT 807 at 809); or an underwriter, as distinct from an investor, to which two classes of applicants for allotment totally different considerations apply (*Baty v Keswick* (1901) 85 LT 18). As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

If a fraudulent misrepresentation was likely to play a part in the decision of a reasonable person, it will be presumed that it had played such a part unless the court can be satisfied to the contrary: *County NatWest Bank Ltd v Barton* [2002] 4 All ER 494n, [1999] 33 LS Gaz R 31, CA.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(ii) Inducement/768. What constitutes inducement.

(ii) Inducement

768. What constitutes inducement.

The inducement which the representee¹ is required to establish is an inducement which was both the result and the object of the representation². Neither element suffices without the other³.

1 As to who is a representee see PARAS 735-741 ante.

2 This proposition is frequently expressed in the formula of the Roman jurists that the misrepresentation must be one *in locum contractui*: see eg *Attwood v Small* (1838) 6 Cl & Fin 232 at 444, HL, per Lord Brougham.

3 See PARAS 769-773 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(ii) Inducement/769. Intention to induce without result.

769. Intention to induce without result.

There is nothing actionable in a proved intention to induce which fails of its effect altogether. A naked lie¹, or a lie in gross as it has otherwise been expressed², or an attempt to overreach, which misses its mark³, comes to nothing⁴.

1 See *Pasley v Freeman* (1789) 3 Term Rep 51 at 56; *Langridge v Levy* (1837) 2 M & W 519 at 531.

2 See *Archer v Stone* (1898) 78 LT 34.

3 *Attwood v Small* (1838) 6 Cl & Fin 232 at 447-448, HL, per Lord Brougham.

4 *Coaks v Boswell* (1886) 11 App Cas 232 at 236, HL (if the vendor was not in fact misled, the contract could not be set aside). For instances of failure to prove inducement in fact, and consequent failure to obtain relief, see *Flinn v Headlam* (1829) 9 B & C 693; *Attwood v Small* (1836) 6 Cl & Fin 232; *Shrewsbury v Blount* (1841) 2 Man & G 475; *Vigers v Pike* (1842) 8 Cl & Fin 562, HL; *Hill v Balls* (1857) 2 H & N 299; *Re Northumberland and Durham District Banking Co. ex p Bigge* (1858) 28 LJ Ch 50; *Horsfall v Thomas* (1862) 1 H & C 90; *Way v Hearn* (1862) 13 CBNS 292 at 305, 307; *Mathias v Yellets* (1882) 46 LT 497 at 502, 504, CA; *Bellairs v Tucker* (1884) 13 QBD 562 at 578, 582, DC; *Salaman v Warner* (1891) 65 LT 132, CA; *Wasteneys v Wasteneys* [1900] AC 446 at 451, PC; *Baty v Keswick* (1901) 85 LT 18; *Stevens v Hoare* (1904) 20 TLR 407; *Sleigh v Glasgow and Transvaal Options Ltd* (1904) 6 F 420, Ct of Sess; *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326 at 335 per Joyce J; *Garage Ltd v Charlesworth's Trustee* 1910 SC 257. See also *Kelly v Enderton* [1913] AC 191 at 194, PC (alleged statement to vendor by agent of purchaser of an option on property that no other property transactions were proceeding in neighbourhood; statement, if made, fell far short of specific misrepresentation inducing contract); *H & JM Bennett (Potatoes) Ltd v Secretary of State for Scotland* 1990 SLT 189, HL. As to the offence of property misdescription see the Property Misdescriptions Act 1991 s 1; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 791 et seq.

UPDATE

769 Intention to induce without result

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6

(meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(ii) Inducement/770. Necessity for existence of intention to induce.

770. Necessity for existence of intention to induce.

It is not every false statement by which a person is in fact induced to alter his position for the worse which gives a right of action¹, but only such as the representor², either in fact or in contemplation of law, intended to operate as an inducement to the representee³, or a class of which the representee is a member, to act on the representation in a particular manner⁴.

It seems that such an intention may in certain circumstances be presumed on proof of the making of a statement which the representor must have foreseen would necessarily, or probably (in the ordinary course of events, or in the special circumstances of the case), produce the kind of effect on the representee's mind which it in fact produced⁵.

Where such intent cannot be presumed, it must be established by direct evidence⁶. A claim does not lie in respect of a simple lie not intended to be acted upon in a case where the representor was under no duty to tell the truth⁷, or where the representor was not only under no duty to give information correctly, but was under a positive duty to give it falsely⁸.

1 Otherwise a person might sue another for damage suffered through relying on a conspicuous clock which was too slow (*Barley v Walford* (1846) 9 QB 197 at 208), or on the accuracy of a traveller's report as to conditions in a district abroad (*Gerhard v Bates* (1853) 2 E & B 476 at 485), or on the correctness of an address given inaccurately in a public directory (*Thiodon v Tindall* (1891) 65 LT 343 at 348, DC).

2 As to who is a representor see PARAS 726-734 ante.

3 As to who is a representee see PARAS 735-741 ante.

4 *Langridge v Levy* (1837) 2 M & W 519 at 531; *Tallerman v Dowsing Radiant Heat Co* [1900] 1 Ch 1 at 6 per Stirling J (on appeal [1900] 1 Ch 1 at 9, CA) (cited in PARA 780 note 3 post). See also eg *Peek v Gurney* (1873) LR 6 HL 377, where the object of the prospectus was merely to induce persons to apply for allotment of shares from the company, and a person who had not applied for allotment but had merely purchased shares after their allotment from the allottee had no cause of action. Cf *Andrews v Mockford* [1896] 1 QB 372, CA, where the publication of the prospectus was part of a scheme of fraud continued after allotment by other devices, and a purchaser of shares was held entitled to maintain a claim. As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

5 *Polhill v Walter* (1832) 3 B & Ad 114 at 123-124.

6 *Salaman v Warner* (1891) 65 LT 132, CA, where a statement of claim containing no averment of an intention to induce was struck out. On the other hand, there are cases where the statement of claim did contain sufficient allegations of such intention, and the demurrer was overruled: see *Barley v Walford* (1846) 9 QB 197; *Gerhard v Bates* (1853) 2 E & B 476. The following are cases where, on failure to show a purpose to induce, the representee was refused relief: *Way v Hearn* (1862) 13 CBNS 292 at 303, 305, 307; *New Brunswick and Canada Railway and Land Co v Conybeare* (1862) 9 HL Cas 711; *Thiodon v Tindall* (1891) 65 LT 343, DC; *Baty v Keswick* (1901) 85 LT 18; *Sleigh v Glasgow and Transvaal Options Ltd* (1904) 6 F 420, Ct of Sess; *Tackey v McBain* [1912] AC 186 at 191-192, PC. Cf *Andrews v Mockford* [1896] 1 QB 372, CA (see note 4 supra); *Gordon v Streif* [1899] 2 QB 641, CA (fraudulent concealment by moneylender of his identity in order to induce borrower to contract with him; borrower entitled to repudiate contract). As to intent to induce see the cases cited in the notes to paras 735-741 ante. As to the necessity that a representation should be intended to be acted upon in the manner in which it was in fact acted upon in order to found estoppel by representation see ESTOPPEL.

7 *Collins v Cave* (1859) 4 H & N 225 at 232 per Pollock CB.

8 See eg *Cave v Mills* (1862) 7 H & N 913 at 930 per Bramwell B (untruth told to a person seeking to buy poison to murder another).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(ii) Inducement/771. Representation need not be the sole inducement.

771. Representation need not be the sole inducement.

It is sufficient to prove that the misrepresentation was an inducing cause, even if it may not have been the sole inducing cause¹. When once it is established that it had an influence on the mind and conduct of the representee², the law places no burden on him, and confers no right on the representor³, of instituting a conjectural inquiry as to what would have happened if certain things had been said, which in fact were not said, or had been said differently⁴.

Thus it is no answer for the representor to suggest, or prove, that other considerations co-existed and co-operated with the misrepresentation in producing the result. If, as against the representor, the misrepresentation can be shown to have been an effective inducement, it need not have been the sole inducement⁵.

1 See *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583, CA. See also note 5 infra.

2 As to who is a representee see PARAS 735-741 ante.

3 As to who is a representor see PARAS 726-734 ante.

4 *Reynell v Sprye* (1852) 1 De GM & G 660; *Smith v Kay* (1859) 7 HL Cas 750 at 759 per Lord Chelmsford LC; *Re London and Leeds Bank, ex p Carling, Carling v London and Leeds Bank* (1887) 56 LJ Ch 321 at 323-324; *Gordon v Street* [1899] 2 QB 641 at 646, CA; *Drincqbier v Wood* [1899] 1 Ch 393 at 400; *Barton v Armstrong* [1976] AC 104, [1975] 2 All ER 465, PC; *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583, CA; *BFG Bank AG v Brown & Mumford Ltd* [1996] EGCS 169, CA. See also *Bristol and West Building Society v Mothew* [1998] Ch 1, [1996] 4 All ER 698, CA (negligent advice; plaintiff did not need to show that he would not have acted as he did if he had been given the proper information).

5 *Attwood v Small* (1838) 6 Cl & Fin 232 at 448, HL; *Tatton v Wade* (1856) 18 CB 371 at 385, 387, Ex Ch; *Re Royal British Bank, Nicol's Case* (1859) 3 De G & J 387 at 422; *Higgins v Samels* (1862) 2 John & H 460 at 468; *Mathias v Yetts* (1882) 46 LT 497 at 502, CA; *Edgington v Fitzmaurice* (1885) 29 ChD 459 at 480-481, 483-485, CA; *Re London and Leeds Bank, ex p Carling, Carling v London and Leeds Bank* (1887) 56 LJ Ch 321; *Drincqbier v Wood* [1899] 1 Ch 393 at 404-405. A court is at liberty to attach to one of two elements operating upon a person's mind the cause without which the loss would not have arisen: *Paul and Vincent Ltd v O'Reilly* (1913) 49 ILT 89.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(ii) Inducement/772. Entirety of connected statements to be considered.

772. Entirety of connected statements to be considered.

Where the inducing cause is alleged to be a document (such as a prospectus, advertisement or circular), or a batch of documents, containing a number of statements interconnected either by express reference and incorporation or by community of subject matter, it is a general rule that, for the purpose of determining the issue of inducement, the conjoint effect on the representee's¹ mind of the entirety of the statements or documents, in their mutual relation to and qualification of one another, is the question to be considered, rather than the effect of any particular statement or document apart from the others². However, reliance may in certain circumstances be placed upon a representation in one of several associated statements or documents where that statement or document is not inseparably or necessarily bound up with the others³.

1 As to who is a representee see PARAS 735-741 ante.

² *New Brunswick and Canada Railway and Land Co v Muggeridge* (1860) 1 Drew & Sm 363 at 379-380; *Arnison v Smith* (1889) 41 ChD 348 at 369, CA, per Lord Halsbury; *Aaron's Reefs v Twiss* [1896] AC 273 at 280, 291, HL; *Andrews v Mockford* [1896] 1 QB 372 at 382-383, CA; *Drincqbier v Wood* [1899] 1 Ch 393 at 404; *McConnel v Wright* [1903] 1 Ch 546 at 551, CA, per Collins MR; *R v Lord Kylsant* [1932] 1 KB 442, CCA; *R v Bishirgian* [1936] 1 All ER 586, CCA. As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

³ See PARA 752 ante.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(ii) Inducement/773. Proof of inducement where representation ambiguous.

773. Proof of inducement where representation ambiguous.

Where the representation is fairly capable of two or more constructions, in one of which it would be false and in the other or others true, it is for the representee¹ to allege and prove in which of its possible meanings he understood it, and, so understanding, was induced by it to alter his position².

¹ As to who is a representee see PARAS 735-741 ante.

² See *Smith v Chadwick* (1882) 20 ChD 27 at 45, CA, per Jessel MR; and PARA 747 ante.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(iii) Materiality/774. Meaning of 'materiality'.

(iii) Materiality

774. Meaning of 'materiality'.

A representation is material¹ when its tendency, or its natural and probable result, is to induce the representee² to act on the faith of it in the kind of way in which he is proved to have in fact acted³.

¹ 'Materiality' is a distinct thing from inducement. Each is a question of fact, if there is any evidence at all, and each must be separately proved, although in certain cases inducement may be inferred, as a fact, from manifest materiality: see PARAS 765-766 ante.

² As to who is a representee see PARAS 735-741 ante.

³ See *Smith v Chadwick* (1882) 20 ChD 27 at 44, CA, per Jessel MR; on appeal (1884) 9 App Cas 187 at 196, HL, per Lord Blackburn, who refers to a statement of such a nature as would be likely to induce a person to enter into a contract. As to the definition of a material representation see also *Downs v Chappell* [1996] 3 All ER 344 at 351 per Hobhouse LJ, CA. As to what is a material representation for the purpose of marine insurance see the Marine Insurance Act 1906 s 20(2); and INSURANCE vol 25 (2003 Reissue) PARA 409.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(iii) Materiality/775. Belief of either party irrelevant.

775. Belief of either party irrelevant.

Except in certain circumstances¹, for the purposes of determining the question of materiality no regard is had to the views entertained by either of the parties when the representation was made. If, in any ordinary case, a representation was not material, the mere fact that the representee² thought at the time that it was cannot make it so³. Conversely, if, in any such case, the representation was material, the mere fact that the representor⁴ did not at the time regard it as such cannot make it otherwise⁵.

¹ See PARA 776 post.

² As to who is a representee see PARAS 735-741 ante.

³ See *Beachey v Brown* (1860) EB & E 796 at 803 per Crompton J, where it is said that non-disclosure of a fact which was material in the mind of the party seeking to set up the defence of non-disclosure was not enough. The observation would apply with even greater force in a case of misrepresentation.

⁴ As to who is a representor see PARAS 726-734 ante.

⁵ See *Lindenau v Desborough* (1828) 8 B & C 586 at 592-593; *Dalglisch v Jarvie* (1850) 2 Mac & G 231 at 243; *London Assurance v Mansel* (1879) 11 ChD 363 at 368. These cases were cases of non-disclosure, but the principles enumerated in them are equally applicable to cases of positive misrepresentation.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(iii) Materiality/776. Materiality constituted by special circumstances.

776. Materiality constituted by special circumstances.

'A tendency to induce' means a tendency to induce the particular representee¹ in the proved or admitted circumstances of the case. Where there is nothing special in those circumstances it is sufficient to prove that, in the ordinary course of events, the natural and probable effect of the representation was to influence the mind of a normal representee in the manner alleged². However, there may be, to the knowledge of the representor³, circumstances peculiar to the representee of such a character as to render the particular representation of importance to the particular representee to whom it was addressed, even though it would be utterly inoperative on the mind of a normal person under normal conditions. In all such cases the representation is material as between the parties.

The question frequently arises when the representation relates to the personality or identity of any individual who is alleged to be the owner, or late owner, of property offered to the representee for sale⁴, or of the intended purchaser from the representee of any property⁵, or of the representee's intended creditor in a monetary dealing⁶, or when it relates to any person's independence of or connection with other persons or influences in the contemplated transaction⁷. In many such cases the representation has been held to be material, and the objection that it was immaterial to the contract (although, in one sense, this was true) has been overruled, because the objection presupposed that the contract had already been entered into, whereas the question was whether, but for the statement, the representee would ever have entered into the contract at all, or, in other words, whether the representation was material, not to the contract, but to the inducement⁸. In this type of case, unlike the ordinary type, it is obvious that the representor's knowledge or belief of the likely effect of the misrepresentation on the representee's mind is of the first importance, because it is precisely that knowledge or belief which makes a representation material as against him which would not be material as against anyone else⁹.

¹ As to who is a representee see PARAS 735-741 ante.

- 2 For illustrations of the more obvious types of materiality see generally the cases cited in the notes to paras 789-797 post.
- 3 As to who is a representor see *PARAS 726-734 ante*.
- 4 See eg *Fellowes v Lord Gwydyr* (1829) 1 Russ & M 83 at 89-90 per Lord Lyndhurst LC, who entertained no doubt that the representation would have been material if it had been shown that the representee would not have treated with anyone but Lord Gwydyr, but this was not sufficiently made out. The following are illustrations of the materiality of statements as to present or late ownership of goods offered for sale at auction: *Bexwell v Christie* (1776) 1 Cowp 395 (sale of goods and effects of a gentleman deceased at his house in the country); *Hill v Gray* (1816) 1 Stark 434 (sale of pictures as the property of a named collector); *Arkwright v Newbold* (1881) 17 ChD 301 at 314, CA, per James LJ (sale of picture under similar conditions); *Whurr v Devenish* (1904) 20 TLR 385 (sale of a horse as the property of a private gentleman, whereas at the actual moment of sale it had become the property of a jobmaster). As to auctions generally see *AUCTION*.
- 5 *Smith v Wheatcroft* (1878) 9 ChD 223 at 230, where Fry J recognised the principle that a misrepresentation of the identity of a purchaser may be a material one if the vendor would have been unwilling to enter into a contract in the same terms with anybody else, although he held that in that case the representee had failed to prove this essential fact; *Archer v Stone* (1898) 78 LT 34. See also *Lake v Simmons* [1927] AC 487 at 501, HL, per Lord Haldane. However, unless the contract is one in which some personal consideration forms a material ingredient, mere non-disclosure as to the person actually entitled to the benefit of a contract for the sale of real estate does not amount to misrepresentation, even though the contracting party knows that, if the disclosure were made, the other party would not enter into the contract: *Nash v Dix* (1898) 78 LT 445; *Dyster v Randall & Sons* [1926] Ch 932. As to the effect of mistakes as to the identity of a party to an intended contract see generally *CONTRACT; MISTAKE* vol 77 (2010) *PARA 13*. As to false or misleading statements made in the course of an estate agency business or a property development business see the *Property Misdescriptions Act 1991 s 1*; and *SALE OF GOODS AND SUPPLY OF SERVICES* vol 41 (2005 Reissue) *PARA 791 et seq*.
- 6 *Smith v Kay* (1859) 7 HL Cas 750 at 758-759, 766-767; *Gordon v Street* [1899] 2 QB 641 at 647-649, CA.
- 7 *Fellowes v Lord Gwydyr* (1829) 1 Russ & M 83, where a person represented himself to be the agent of another, when in fact he was independent, being a purchaser from him; *Moens v Heyworth* (1842) 10 M & W 147, where goods were stated to have been invoiced to sellers as of first shipping quality by shippers of a distinct and independent position, whereas they were agents or partners; *Smith v Wheatcroft* (1878) 9 ChD 223. See also *Archer v Stone* (1898) 78 LT 34; *Gordon v Street* [1899] 2 QB 641, CA (both cases of statements by the representor of his independent individuality, when in reality he was identical with, or the instrument of, another person). It is doubtful whether a statement in a company prospectus that an expert's report on property purchased by the company was prepared for the directors, whereas in fact it was prepared on behalf of the vendors, is capable of being deemed a material misrepresentation, if there is no false statement in the report itself: see *Angus v Clifford* [1891] 2 Ch 449 at 456-458, CA, per Romer J, at 468 per Lindley LJ, and at 480 per Kay LJ, where differing views were expressed. As to misrepresentation in offer documents generally see *COMPANIES* vol 15 (2009) *PARA 1070 et seq*.
- 8 *Gordon v Street* [1899] 2 QB 641 at 645-646, CA, per AL Smith LJ.
- 9 *Archer v Stone* (1898) 78 LT 34; *Gordon v Street* [1899] 2 QB 641 at 648, CA, per AL Smith LJ, who laid great stress on the fact that the plaintiff himself was keenly alive to the importance, in his own interests, of suppressing his identity; *Whurr v Devenish* (1904) 20 TLR 385, where it was proved that the defendant was fully aware of the materiality of his representation that the horse was a private person's property (namely his own), and not that of a horse dealer, as tending to establish his good faith and the genuineness of the sale and to fetch better prices.

UPDATE

776 Materiality constituted by special circumstances

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see *LOCAL GOVERNMENT* vol 69 (2009) *PARA 733*. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see *ADMINISTRATIVE LAW* vol 1(1) (2001 Reissue) *PARA 196A*.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(iii) Materiality/777. Burden of proving materiality on representee.

777. Burden of proving materiality on representee.

Materiality, if disputed, must be established by the representee¹ in addition to, and apart from, inducement². This burden is usually discharged by comparison of the terms of the representation with the proved or admitted facts of the case. When once the circumstances are established, the question is, as a rule, the subject of argument only, but, in certain cases (for example where the representation is only an implied one from the external appearance of an object) it may be necessary to adduce some evidence of its tendency to deceive³.

1 See generally the cases cited in notes 2-3 infra; and PARAS 766, 774-776 ante. As to who is a representee see PARAS 735-741 ante.

2 *Mathias v Yetts* (1882) 46 LT 497 at 502, CA, per Jessel MR, and at 504 per Hannen L.J.

3 *London General Omnibus Co Ltd v Lavell* [1901] 1 Ch 135, CA; *Re Carvino Trade Mark* [1911] 2 Ch 572, CA. On the other hand, in *Gill v McDowell* [1903] 2 IR 463, and in *Patterson v Landsberg & Son* (1905) 7 F 675 at 681, Ct of Sess, per Lord Kyllachy, it was thought that the hermaphrodite animal in the one case, and the curio in the other, bore on its face the evidence of its capacity to induce and mislead.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(iv) Alteration of Position/778. Necessity for showing alteration of position.

(iv) Alteration of Position

778. Necessity for showing alteration of position.

In order to sustain any claim or proceeding for misrepresentation it is necessary for the representee¹ to establish that he was induced by it, not merely to alter his mind, but to alter his position, that is to say, to effect a change in his material or temporal interests or situation².

This change may or may not be accompanied by ascertainable pecuniary loss or physical injury, which is damage³; and where it is necessary to prove damage, such resultant loss or injury must be shown in addition to the alteration of position itself, but not otherwise⁴. In any case, damage is a separate and distinct issue from alteration of position, and to establish the latter it is necessary and sufficient to prove that by reason of his belief in the truth of the representation the representee voluntarily altered his position⁵.

1 As to who is a representee see PARAS 735-741 ante.

2 A mere change of mind, without a change of position, is not enough; nor is a change of position which affects solely the representee's social, moral, political or spiritual condition. As to how the representee's position may be altered see PARA 779 post. As to the burden of proof see PARA 780 post.

3 As to damage see PARAS 791-793 post.

4 See PARAS 780-781, 790, 816 post.

5 There is a class of case in which it is not necessary to show that the representee altered his position at all, in the sense of doing anything on the faith of the representation, namely where he is shown to have suffered involuntary physical damage in consequence of it: see PARA 791 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(iv) Alteration of Position/779. How the representee's position may be altered.

779. How the representee's position may be altered.

There are various ways in which a representee¹ may act on the faith of a representation so as to alter his position. He may enter into a contract either with the representor² himself, or with a third person, or class of persons³, or the alteration of position may take the form of a unilateral transaction of a binding nature, in the sense that it is not revocable except with the consent of the other party to it, such as a gift, licence or consent, a forbearance or a renunciation⁴, or it may consist in an act, of whatever nature, the effect of which is to render the representee responsible in civil law to some third person⁵, or even to render him amenable to criminal process, if such act would not have constituted any offence at all if the statement on the faith of which he committed it had been true⁶. Further, a person may physically alter his position by the act of using property, whether land or a chattel, in reliance on a representation (express, or implied from acts and conduct) that the place or chattel may be used without danger⁷, and, generally, by the doing of or abstention from anything which has a bearing on his material interests, and which he is not legally compellable to do or to abstain from⁸.

1 As to who is a representee see PARAS 735-741 ante.

2 As to who is a representor see PARAS 726-734 ante.

3 See eg *Arnison v Smith* (1889) 41 ChD 348, CA, where the representees were induced to take debenture stock in a company by a misrepresentation by the directors of the company. For the principle that a claim for deceit does not lie in respect of a representation as to the credit of a third person unless the representation was in writing see PARA 804 post.

4 As to gifts see *Haygarth v Wearing* (1871) LR 12 Eq 320 at 329; and GIFTS. As to compromises and consents see CIVIL PROCEDURE vol 12 (2009) PARA 1143. As to renunciations see *M'Carthy v Decaix* (1831) 2 Russ & M 614 at 620-623. Releases by deed and compromises come under the head of contracts proper: see eg *Hirschfeld v London, Brighton and South Coast Rly Co* (1876) 2 QBD 1; *Gilbert v Endean* (1878) 9 ChD 259, CA. See also CONTRACT.

5 *Adamson v Jarvis* (1827) 4 Bing 66.

6 *Burrows v Rhodes* [1899] 1 QB 816.

7 See PARA 791 text and note 6 post.

8 See generally the cases cited in the notes to paras 780, 791-793 post.

UPDATE

779 How the representee's position may be altered

NOTE 3--A representee alters his position by entering into a contract with the representor on material terms different to those he would have agreed to in the absence of the misrepresentation: *Huyton SA v Distribuidora Internacional de Productos Agrícolas SA de CV* [2003] EWCA Civ 1104, [2004] 1 All ER (Comm) 402.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/(8) INDUCEMENT AND MATERIALITY/(iv) Alteration of Position/780. Burden of proof.

780. Burden of proof.

The burden is on the representee¹ to allege and prove that the representor², actually or presumptively, intended him to act on the faith of the representation in the manner in which he did act, and it is not enough to prove damage to the representee unless it is also shown that it resulted from an alteration of position induced by that representation³. Whether there is any sufficient averment⁴, or any evidence⁵, of such

matters are questions of law; but otherwise, and subject to the principle of law that a person is presumed to intend the natural consequences of his acts and statements, all matters connected with alteration of position are issues of fact⁶.

1 As to who is a representee see PARAS 735-741 ante.

2 As to who is a representor see PARAS 726-734 ante.

3 See *Tallerman v Dowsing Radiant Heat Co* [1900] 1 Ch 1 at 5-6 per Stirling J (on appeal [1900] 1 Ch 1 at 9, CA) (action was dismissed because, although damage was caused to the plaintiffs by a misrepresentation alleged to constitute a passing off, the statements complained of were not intended to be acted on by the plaintiffs, and had not been acted upon by them); *Strover v Harrington* [1988] Ch 390, [1988] 1 All ER 769 (misrepresentation by vendor's agents; purchaser's solicitors subsequently informed that the statement was erroneous, but failed to inform purchaser; loss arose from their failure rather than the misrepresentation). As to inducement see PARAS 768-773 ante. For the principle that a party setting up estoppel by representation must have acted on the representation to his prejudice see ESTOPPEL. As to false or misleading statements made in the course of an estate agency business or a property development business see the Property Misdescriptions Act 1991 s 1; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 791 et seq.

4 *Behn v Kemble* (1859) 7 CBNS 260; *Salaman v Warner* (1891) 65 LT 132, CA.

5 See *Smith v Chadwick* (1884) 9 App Cas 187 at 195-196, HL.

6 As to questions of law and fact see PARAS 766-767 ante.

UPDATE

780 Burden of proof

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/ (9) THE EFFECT OF MISREPRESENTATION/781. Remedies for fraudulent misrepresentation.

(9) THE EFFECT OF MISREPRESENTATION

781. Remedies for fraudulent misrepresentation.

Where a representor¹ has, by way of fraudulent misrepresentation², induced a representee³ to alter his position⁴, other than by entering into a contract or binding transaction⁵ with the representor, the representee will be able to bring a claim for damages at common law⁶ or for an account of profits in equity⁷, but he will not be entitled to any other form of relief.

However, where the representee has been induced by fraudulent misrepresentation to enter into a contract or binding transaction with the representor, he may either maintain a claim for damages under the Misrepresentation Act 1967⁸ or at common law, or repudiate the contract or transaction. The representee may institute proceedings for the rescission of the contract or transaction⁹, or set up the fraudulent misrepresentation as a defence to any claim or proceeding instituted for the direct or indirect enforcement of the contract or transaction¹⁰.

Where the representee has only altered his position by entering into a contract or binding transaction, he may obtain relief either by way of rescission of the contract or damages, but not both¹¹. However, these claims may be made alternatively in a single claim form¹², and a claim for relief by way of rescission of a contract will not, it seems, preclude an alternative or additional claim for the recovery of such further damage as may have been suffered by a representee who, as a result of a fraudulent misrepresentation, not only has entered into the contract but also has further altered his position and suffered damage by reason of that further alteration¹³.

If the representee elects to sue for damages, the fact that he might first have avoided the contract or transaction, or taken proceedings to rescind it, or asserted his right to have it treated as void in any proceedings brought to enforce it, will not be a bar to his claim¹⁴.

1 As to who is a representor see PARAS 726-734 ante.

2 As to fraudulent misrepresentation see PARA 755 et seq ante.

3 As to who is a representee see PARAS 735-741 ante.

4 As to inducement, materiality and alteration of position see PARA 765 et seq ante.

5 As to what is a binding transaction see PARA 779 ante.

6 As to claims for damages see PARA 789 et seq post.

7 See EQUITY.

8 Because of the heavy onus of proof of fraud, pleaders may find it preferable to rely on the Act, which has the effect of reversing the onus of proof: see PARA 801 post.

9 As to claims for rescission see PARA 812 et seq post. As to the representee's right to affirm or disaffirm the contract or transaction see PARA 784 post.

10 See PARA 785 et seq post.

11 If the representee must elect between rescinding the contract and affirming it: see PARA 784 post.

12 See *Greenwood v Leather Shod Wheel Co* [1900] 1 Ch 421, CA; *Goldrei, Foucard & Son v Sinclair and Russian Chamber of Commerce in London* [1918] 1 KB 180, CA.

13 See *Attwood v Small* (1838) 6 Cl & Fin 232 at 444, HL, per Lord Brougham; *Newbigging v Adam* (1886) 34 ChD 582 at 592, CA, per Bowen LJ; *Goldrei, Foucard & Son v Sinclair and Russian Chamber of Commerce in London* [1918] 1 KB 180 at 186, CA, per Pickford LJ (but cf at 190 per Bankes LJ). A representee who had obtained rescission of a contract to take shares in a new company on grounds not involving fraud, but had not obtained restitution of money paid, might, it seems, in a subsequent claim for fraud recover from the directors or promoters, if the fraud were proved, the amount that had not been restored to him: see *Ship v Crosskill* (1870) LR 10 Eq 73 at 82-83, where the plaintiff's name was removed from the list of contributories for untrue statements in a prospectus, and it was held that in order to succeed in subsequent proceedings against directors or promoters to recover money paid on allotment it was necessary to prove fraud, but, as fraud was not established, the claim in the subsequent proceedings failed. See also *Stewart v Austin* (1866) LR 3 Eq 299; *Henderson v Lacon* (1867) LR 5 Eq 249. Cf *Redgrave v Hurd* (1881) 20 ChD 1 at 12, CA. As to misrepresentation in offer documents generally see COMPANIES vol 15 (2009) PARA 1070 et seq.

14 See *Amison v Smith* (1889) 41 ChD 348 at 371, CA, per Cotton LJ.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/ (9) THE EFFECT OF MISREPRESENTATION/782. Remedies for innocent misrepresentation.

782. Remedies for innocent misrepresentation.

Where a representee¹ entered into a contract or binding transaction² with the representor³ on the strength of

an innocent misrepresentation⁴, the representee is entitled to take proceedings for the purpose of having the contract rescinded⁵ or for consequential relief⁶ or to set up the misrepresentation as a defence in any proceedings by the representor to enforce the contract⁷. The representee may in some circumstances be entitled to damages, either because there is a special relationship between representor and representee which gives rise to a duty of care at common law⁸ or because the representee can rely on the statutory right to damages⁹.

1 As to who is a representee see PARAS 735-741 ante.

2 As to what is a binding transaction see PARA 779 ante.

3 As to who is a representor see PARAS 726-734 ante.

4 See PARAS 762-764 ante.

5 As to claims for rescission see PARA 812 et seq post.

6 See PARA 813 post.

7 See PARA 785 et seq post.

8 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; paras 762-764 ante, 798-800 post; and NEGLIGENCE vol 78 (2010) PARA 14.

9 See the Misrepresentation Act 1967 s 2(1); and PARA 801 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/ (9) THE EFFECT OF MISREPRESENTATION/783. Contracts induced by misrepresentation normally voidable, not void.

783. Contracts induced by misrepresentation normally voidable, not void.

In general a contract induced by misrepresentation is valid until disaffirmed, not invalid until affirmed, that is to say it is voidable, not void¹. The consequences of this rule are of importance in relation both to the conditions of relief², and also to some of the affirmative defences which may be set up by the representor³.

There is one exception, apparent rather than real, to the rule. When the misrepresentation relates to the essential nature of the contract which the representee⁴ is induced by the misrepresentation to execute, for example to the type of transaction intended to be effected or the identity of the person with whom the representee is contracting, the effect of the misrepresentation may be wholly to nullify the apparent consent of the representee to the contract and to render the contract void ab initio on the ground that when the representee executed it his mind did not accompany his outward act⁵.

1 *Stevenson v Newnham* (1853) 13 CB 285 at 302-303, Ex Ch; *Feret v Hill* (1854) 15 CB 207 at 223-227; *Oakes v Turquand and Harding* (1867) LR 2 HL 325 at 346; *Ogilvie v Currie* (1868) 37 LJ Ch 541 at 546; *Reese River Silver Mining Co Ltd v Smith* (1869) LR 4 HL 64 at 69, 73-74; *Clough v London and North Western Rly Co* (1871) LR 7 Exch 26 at 34, Ex Ch; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1227-1228, HL; *Re Scottish Petroleum Co* (1883) 23 ChD 413 at 430-432, CA; *Aaron's Reefs v Twiss* [1896] AC 273 at 290-291, 294, HL; *Re Glubb, Bamfield v Rogers* [1900] 1 Ch 354 at 361-362, CA, per Lindley MR (gift); *United Shoe Machinery Co of Canada v Brunet* [1909] AC 330 at 339, PC; *Abram Steamship Co v Westville Shipping Co* [1923] AC 773 at 782-783, 787, HL, per Atkinson LJ.

2 See PARAS 814-818 post.

3 See PARA 826 et seq post. As to who is a representor see PARAS 726-734 ante.

4 As to who is a representee see PARAS 735-741 ante.

⁵ See generally CONTRACT; DEEDS AND OTHER INSTRUMENTS. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1035, 1046. Where a contract for the sale of goods is merely voidable on the ground of misrepresentation by the purchaser, the purchaser, until it is avoided, can transmit a good title to the goods to a third person taking them for value and without notice: see eg *Whitehorn Bros v Davison* [1911] 1 KB 463, CA; *Phillips v Brooks Ltd* [1919] 2 KB 243; and see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 153-155. As to the power to transmit a good title of a mercantile agent or a person who has agreed to buy goods where the agent or person is in possession of goods or documents of title to them with the apparent consent of the owner see AGENCY vol 1 (2008) PARAS 12, 133; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 157-158. However, where a contract has been induced by a misrepresentation as to the person with whom the representee is contracting such that it nullifies his apparent consent and renders the contract wholly void, the representor cannot in general confer any title on a third person: see *Phillips v Brooks Ltd* [1919] 2 KB 243, HL; and CONTRACT vol 9(1) (Reissue) PARAS 620, 705; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 154-155. For circumstances in which a representee may be estopped from denying the representor's authority to deal with goods see eg *Henderson & Co v Williams* [1895] 1 QB 521, CA. See also ESTOPPEL.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/ (9) THE EFFECT OF MISREPRESENTATION/784. Right of representee to affirm or disaffirm the contract.

784. Right of representee to affirm or disaffirm the contract.

A representee¹ who has been induced² by misrepresentation, whether fraudulent or innocent³, to enter into a contract or binding transaction with the representor⁴, has, on discovery of the real facts, in the first instance, a right of election only. He may either affirm or disaffirm the contract or transaction, and, if he disaffirms it, give notice to the representor of repudiation and demand from him a complete restoration of the status quo. In the event of his demand not being complied with he may, subject to certain conditions⁵ and affirmative defences⁶, institute proceedings for the purpose of having the contract or transaction declared void and rescinded by the court, in which event specific restitution and other relief consequential upon the declaration and rescission may be decreed⁷. The right of election, when exercised, is finally exhausted and a representee may not disaffirm a contract after he has once affirmed it, or treat a contract as subsisting after he has disaffirmed it⁸. The representee is not, however, bound to choose one course rather than the other; nor is he bound to make any choice at all within any particular period of time, although he delays doing so at his peril⁹. Further, should he choose to adhere to the contract, he is still entitled to all such remedies in damages as are available to a representee in such circumstances¹⁰.

¹ As to who is a representee see PARAS 735-741 ante.

² As to inducement see PARA 768 et seq ante.

³ As to fraudulent misrepresentation see PARA 755 et seq ante; and as to innocent misrepresentation see PARAS 762-764 ante. If an innocent misrepresentation is subsequently incorporated as a term of the contract the representee may still rescind if the misrepresentation was made on or after 22 April 1967: see the Misrepresentation Act 1967 ss 1, 5; and PARA 704 ante. Before that date the only action available was one for breach of contract: *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167.

⁴ As to who is a representor see PARAS 726-734 ante.

⁵ See PARAS 831-835 post.

⁶ See PARAS 826-830 post.

⁷ As to claims for rescission see PARA 812 et seq post. As to damages in lieu of rescission see PARA 834 post.

⁸ *Clough v London and North Western Ry Co* (1871) LR 7 Exch 26 at 34, 36, Ex Ch; *Re Thomas Edward Brinsmead & Sons, Tomlin's Case* [1898] 1 Ch 104; *Kwei Tek Chao (Tas Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 1 All ER 779.

⁹ See PARA 835 post.

¹⁰ Thus, having unsuccessfully sued the company in the names of the proper officers for rescission (see *Clarke v Dickson*

(1858) EB & E 148), the representee, on afterwards suing the directors for the same misrepresentations (which were proved to be fraudulent), was held entitled to damages: see *Clarke v Dickson* (1859) 6 CBNS 453. As to the circumstances in which damages are available see PARAS 781-782 ante.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/ (9) THE EFFECT OF MISREPRESENTATION/785. Misrepresentation as a defence to proceedings.

785. Misrepresentation as a defence to proceedings.

Whenever a representee¹ is entitled to rescission of a contract², or other analogous relief, on the ground of misrepresentation, he is also in a position, if the representor³ seeks to enforce the contract against him, to set up the misrepresentation as a defence to the claim⁴, whether the proceedings instituted by the representor are brought to enforce the agreement directly, although not specifically, as in the case of a claim for money due under it⁵, or to enforce it indirectly, as in proceedings to recover damages⁶, or to enforce it specifically⁷, and whether the representor's claim be asserted in the form of a claim or counterclaim⁸, or in accordance with any authorised summary procedure⁹ or otherwise. The representee need not in any such case counterclaim for rescission¹⁰.

The conditions precedent to the validity of the defence are substantially the same as the conditions under which relief by way of rescission is granted¹¹. With two exceptions¹², the evidence which will support the one will support the other, and what is a good answer to rescission constitutes an equally good answer to a defence setting up misrepresentation¹³.

1 As to who is a representee see PARAS 735-741 ante.

2 As to claims for rescission see PARA 812 et seq post.

3 As to who is a representor see PARAS 726-734 ante.

4 As to pleading generally see CIVIL PROCEDURE. See also LIMITATION PERIODS vol 68 (2008) PARA 943 et seq.

5 The following are examples of a plea of misrepresentation made in answer to claims for debt in covenant, or for liquidated sums alleged to be due, or to recover chattels the property in which was alleged to have passed under the contract, or otherwise for the purpose of directly, though not specifically, enforcing the contract: *M'Carthy v Decaix* (1831) 2 Russ & M 614 (agreement of compromise); *Stone v Compton* (1838) 5 Bing NC 142 (promissory note); *Mallalieu v Hodgson* (1851) 16 QB 689 (release, to which the reply of fraudulent misrepresentation was held good as against the defendant setting up the release, although the plaintiff failed because it was shown that both parties were defrauding creditors); *Evans v Edmonds* (1853) 13 CB 777 (money due under covenant in deed); *Bannerman v White* (1861) 10 CBNS 844 (price of goods); *Lee v Jones* (1864) 17 CBNS 482 (guarantee); *Dawes v Harness* (1875) LR 10 CP 166 (cheque); *Hirschfeld v London, Brighton and South Coast Rly Co* (1876) 2 QBD 1 (deed of release); *Eyre v Smith* (1877) 2 CPD 435 at 438, CA (liquidation by arrangement); *Aaron's Reefs v Twiss* [1896] AC 273, HL (call money on forfeited shares); *Gordon v Street* [1899] 2 QB 641, CA (promissory note); *Components' Tube Co v Naylor* [1900] 2 IR 1; *Re General Railway Syndicate, Whiteley's Case* [1900] 1 Ch 365, CA (calls on shares); *Shankland & Co v Robinson & Co* (1920) 57 Sc LR 400, HL (price of goods); *Far Eastern Shipping Co Public Ltd v Scales Trading Ltd* [2000] 1 All ER (Comm) 319, PC (guarantee). As to misrepresentation as an answer to a claim under a policy of insurance see INSURANCE vol 25 (2003 Reissue) PARA 408 et seq.

6 *Wharton v Lewis* (1824) 1 C & P 529 (action for damages for breach of promise of marriage); *Footo v Hayne* (1824) 1 C & P 545 (the same); *Canham v Barry* (1855) 15 CB 597 (action for damages for breach of agreement to deliver possession).

7 As to claims for specific performance see generally SPECIFIC PERFORMANCE. The following are examples of refusal to grant specific performance on the ground of the plaintiff's misrepresentation, set up by the defendant as a defence: *Cadman v Horner* (1810) 18 Ves 10; *Baumont v Dukes* (1822) Jac 422; *Harris v Kemble* (1831) 5 Bli NS 730, HL; *Lord Brooke v Rounthwaite* (1846) 5 Hare 298; *Price v Macaulay* (1852) 2 De GM & G 339, CA in Ch (as to one of the two lots the subject of the sale); *Reynell v Sprye* (1852) 1 De GM & G 660 (as to the cross-action); *Higgins v Samels* (1862) 2 John & H 460; *Caballero v Henty* (1874) 9 Ch App 447; *Redgrave v Hurd* (1881) 20 ChD 1, CA; *Smith v Land and House Property Corp'n* (1884) 28 ChD 7, CA; *Archer v Stone* (1898) 78 LT 34; *Jacobs v Revell* [1900] 2 Ch 858 (as to the defendant's counterclaim); *Lee v Rayson* [1917] 1 Ch 613 (similar case); *Holliday v Lockwood* [1917] 2 Ch 47 (similar case).

8 In the following cases the representee set up misrepresentation as a reply or answer to the representor's counterclaim or cross-bill: *M'Carthy v Decaix* (1831) 2 Russ & M 614; *Mallalieu v Hodgson* (1851) 16 QB 689; *Hirschfeld v London, Brighton and South Coast Rly Co* (1876) 2 QBD 1; *Eyre v Smith* (1877) 2 CPD 435, CA; *Reynell v Sprye* (1852) 1 De GM & G 660; *Jacobs v Revell* [1900] 2 Ch 858.

9 Eg the statutory proceedings for settling the list of contributories in the winding up of a company, which any person named in it as a contributory can resist on the ground of misrepresentation set forth in an affidavit: see COMPANY AND PARTNERSHIP INSOLVENCY.

10 A counterclaim for rescission was added in *Redgrave v Hurd* (1881) 20 ChD 1, CA; *Smith v Land and House Property Corp* (1884) 28 ChD 7, CA; *Components' Tube Co v Naylor* [1900] 2 IR 1; *Shepherd v Croft* [1911] 1 Ch 521; *Hilo Manufacturing Co Ltd v Williamson* (1911) 28 TLR 164, CA. A cross-bill was filed for the like purpose in *Reynell v Sprye* (1852) 1 De GM & G 660.

11 As to conditions of the right to rescind see PARA 814 et seq post.

12 See PARAS 786-787 post.

13 See *United Shoe Machinery Co of Canada v Brunet* [1909] AC 330 at 338, PC, where the constituent elements of a good defence are described, and appear to be substantially the same as the ingredients in a cause of action or proceedings for rescission. See also PARAS 814-818 post. As to the application of the principle (see PARA 784 ante) that a representee cannot seek to avoid a contract which he has affirmed see *Wakefield and Barnsley Banking Co v Normanton Local Board* (1881) 44 LT 697, CA; *Hemmings v Sceptre Life Association Ltd* [1905] 1 Ch 365; *United Shoe Machinery Co of Canada v Brunet* supra. As to the necessity that specific restitution should be possible in order that misrepresentation may constitute a good defence see *Harris v Kemble* (1831) 5 Bli NS 730 at 751-752, HL; *Urquhart v Macpherson* (1878) 3 App Cas 831 at 838, PC (a case where a plea of fraud was raised in a reply); and cf para 831 post. As to the burden of proof see PARA 787 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/ (9) THE EFFECT OF MISREPRESENTATION/786. Position where specific performance is sought.

786. Position where specific performance is sought.

Where the representor¹ is suing for specific performance of the contract, the jurisdiction being discretionary, less strong evidence will induce the court to give effect to the representee's² case than if he were claiming rescission³, or were defending himself against a claim to enforce the contract otherwise than specifically⁴; for in the last two forms of proceeding the relief is such that the contract is avoided, or deemed a nullity, for all purposes; whereas, when specific performance is refused, it is merely a question of denying the party a particular remedy, leaving all others open to him, or of withholding relief except on equitable terms as to abatement of price, compensation or otherwise⁵.

1 As to who is a representor see PARAS 726-734 ante.

2 As to who is a representee see PARAS 735-741 ante.

3 *Cadman v Horner* (1810) 18 Ves 10 at 12; *Re Banister, Broad v Munton* (1879) 12 ChD 131 at 142, CA. However, where the representee is in a position to apply for rescission, it is usually prudent to do so, and in some cases he comes to the court with a better equity if he adopts that course in preference to a waiting attitude: *Fenn v Craig* (1838) 3 Y & C Ex 216 at 222, where an insurance company applied to set aside a policy, instead of taking premiums until the death of the insured, and then disputing liability. On the other hand, where the representor company has forfeited the representee's shares, and there is, therefore, no contract to avoid, it is both prudent and proper to await the attack: *Aaron's Reefs Ltd v Twiss* [1896] AC 273 at 293, HL, per Lord Macnaghten. As to claims for rescission see PARA 812 et seq post.

4 As to misrepresentation as a defence see PARAS 785 ante, 788 post.

5 Thus specific performance was only granted with compensation in the following cases: *Scott v Hanson* (1829) 1 Russ & M 128 at 131 (as to part of the property); *King v Wilson* (1843) 6 Beav 124 at 128-129 (as to part of the property); *Hughes v Jones* (1861) 3 De GF & J 307. However, where it would be unjust to the representee (as in *Beaumont v Dukes* (1822) Jac 422 at 426) or it would be impracticable to make a decree subject to compensation (as in *Lord Brooke v Rounthwaite* (1846) 5 Hare 298 at 305, although there was an express condition of sale here providing for compensation), specific performance will be absolutely, and not conditionally, refused. Abatement or allowance may be forced on the misrepresenter as the condition of

specific performance, but the representee who seeks specific performance has no right to this conditional remedy unless he derives it from some express term in the contract: see *Cordingley v Cheeseborough* (1862) 4 De GF & J 379 at 384-389 (misrepresentation by vendor as to measurement of property; purchaser rejected vendor's offer to vacate the contract; terms of contract applied; no deduction from purchase money); *Re Terry and White's Contract* (1886) 32 ChD 14 at 31, CA, per Lindley LJ (similar case; in this situation the vendor would sue in vain for specific performance without compensation; but that is quite a different thing from saying that the purchaser is entitled to insist upon specific performance without paying the price contracted for). See also *Molphy v Coyne* (1919) 53 ILT 177.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/ (9) THE EFFECT OF MISREPRESENTATION/787. Burden of proof of election to repudiate contract.

787. Burden of proof of election to repudiate contract.

In the case of proceedings to have the contract set aside it is not necessary for the representee¹ to allege or prove that he has exercised his right of election by repudiating the contract, the claim or counterclaim being itself sufficient repudiation², and the burden being on the representor³ to prove affirmation and not on the representee to prove avoidance⁴. In the case of a defence, on the other hand, it appears that the burden is on the representee of proving not merely that the contract was induced by misrepresentation, but also that, having become voidable on that ground, it was in fact avoided by him within a reasonable time after discovery of the truth, and that he has restored, or is in a position to restore, any benefit obtained under it⁵. It seems that the fact that the representee has avoided the contract must be specifically pleaded in the defence⁶.

1 As to who is a representee see PARAS 735-741 ante.

2 *Hyde v Watts* (1843) 12 M & W 254 at 270; *Capel & Co v Sim's Ships Compositions Co* (1888) 58 LT 807 at 811.

3 As to who is a representor see PARAS 726-734 ante.

4 As to affirmation as a defence see PARAS 829-830 post.

5 See *Dawes v Harness* (1875) LR 10 CP 166 at 167-168; *Urquhart v Macpherson* (1878) 3 App Cas 831 at 836-838, PC (where a plea of fraud was raised by a plaintiff in his reply); *United Shoe Machinery Co of Canada v Brunet* [1909] AC 330 at 338, PC; *First National Reinsurance Co v Greenfield* [1921] 2 KB 260 at 266, DC, per Lush J.

6 See *Meldon v Lawless* (1869) 18 WR 261; *Anderson v Costello* (1871) 19 WR 628 (both Irish cases); *Deposit and General Life Assurance Co v Ayscough* (1856) 6 E & B 761 at 762 per Crompton J. Cf *Dawes v Harness* (1875) LR 10 CP 166, where the defendant pleaded that the contract was induced by fraudulent misrepresentation, and the plaintiff was held entitled to rely on the defendant's failure in fact to disaffirm the contract, although he had not specifically raised the matter in his reply, since the defendant's plea of fraud was bad unless it imported an allegation that he had disaffirmed the contract, and the plaintiff's reply impliedly traversed this allegation.

Where proceedings to enforce calls on shares in a company and the shares have not been forfeited, a defendant alleging that the contract to take shares was induced by misrepresentation must not only plead and prove that he has disaffirmed the contract, but must normally also either plead and prove that he has taken proceedings for rectification of the company's register or join a counterclaim for rectification with his defence; it is not sufficient for him to plead merely that he is entitled to rectification, unless he has given an undertaking to begin rectification proceedings: see *Deposit and General Life Assurance Co v Ayscough* supra; *First National Reinsurance Co v Greenfield* [1921] 2 KB 260, DC, explaining *Bwlch-y-Plwm Lead Mining Co v Baynes* (1867) LR 2 Exch 324, and applying observations in *Aaron's Reefs Ltd v Twiss* [1896] AC 273, HL. See COMPANIES vol 15 (2009) PARA 1079.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/1. ACTIONABLE MISREPRESENTATION/ (9) THE EFFECT OF MISREPRESENTATION/788. Misrepresentation as a defence against representor's assignee.

788. Misrepresentation as a defence against representor's assignee.

In certain cases where proof that a contract was induced by misrepresentation would have afforded a good defence to the representee¹ in proceedings by the representor², it may not be a sufficient defence in proceedings by an assignee of the representor, for example in a case where the representee has been induced to execute a negotiable instrument and is sued upon it by a holder in due course³. However, where a debt is not secured by a negotiable instrument, it seems that a representee sued for the debt by an assignee of the representor is entitled to set up the defence that the contract under which the debt arose was induced by misrepresentation⁴, even though he cannot set up against the assignee any claim for damages which he may have against the representor⁵. The rights of a third person to whom goods forming the subject of a voidable contract for sale, or land forming the subject of a voidable conveyance, have been transferred for value and without notice are mentioned elsewhere in this title⁶.

1 As to who is a representee see PARAS 735-741 ante.

2 As to misrepresentation as a defence see PARA 785 ante. As to who is a representor see PARAS 726-734 ante.

3 As to the general principle that a holder in due course holds free from defects in title see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1488. As to the burden of proof in a case of fraud see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1478.

4 See *Stoddart v Union Trust Ltd* [1912] 1 KB 181 at 189, CA, per Vaughan Williams LJ, and at 191 per Buckley LJ; and PARA 822 post. As to the general principle that an assignee of a chose in action takes subject to equities see CHOSSES IN ACTION vol 13 (2009) PARA 83.

5 *Stoddart v Union Trust Ltd* [1912] 1 KB 181, CA.

6 See PARAS 783 note 5 ante, 822 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(1) DAMAGES FOR DECEIT/(i) In general/789. Claim for damages.

2. CLAIMS FOR DAMAGES

(1) DAMAGES FOR DECEIT

(i) In general

789. Claim for damages.

It may be preferable to frame a cause of action under the Misrepresentation Act 1967¹, rather than under the common law. However, where it is thought that a case is suitable for pleading under the common law, the following principles apply. On proof of the several matters subsequently mentioned², a claim³ is maintainable at the suit of the representee⁴ for damages in respect of fraudulent misrepresentation⁵. It is founded in tort⁶, and the same principles of law and rules of evidence are applicable in whatever court the proceedings are instituted⁷.

Since the claim is based on fraud, the period of limitation does not begin to run until the representee has discovered the fraud or could with reasonable diligence have discovered it⁸.

1 See PARA 801 post.

2 See PARA 790 post. The particulars of the claim must be set out in the claim form and the claimant must specifically set out any allegation of fraud and/or details of any misrepresentation where he wishes to rely on them in support of his claim: see *Practice Direction-Statements of Case* PD 16 paras 1.1 et seq, 8.2(1), (3); and CIVIL PROCEDURE. See also *Newton Chemical Ltd v Arsenis* [1989] 1 WLR 1297, CA; *Garden Neptune Shipping v Occidental Worldwide Investment Corp* [1990] 1 Lloyd's Rep 330, CA; *Movemain Ltd v Lewis* [1993] EGCS 130, CA. Where there is a charge of fraud, the claim is 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 the Supreme Court Act 1981 s 69(1); and CIVIL PROCEDURE. 'Fraud' here means the tort of deceit: see *Barclays Bank Ltd v Cole* [1967] 2 QB 738, [1966] 3 All ER 948, CA (decided under earlier legislation); and CIVIL PROCEDURE.

3 This includes a counterclaim: see *Redgrave v Hurd* (1881) 20 ChD 1, CA.

4 As to who is a representee see PARAS 735-741 ante.

5 As to fraudulent misrepresentation see PARA 755 et seq ante.

6 Thus a claim for damages for fraudulent misrepresentation by which the plaintiff was induced to enter into a contract was not a claim upon or in relation to or in connection with the contract within the meaning of an arbitration clause in the contract, so as to enable the action to be stayed and referred to arbitration under the arbitration clause: see *Monro v Bognor UDC* [1915] 3 KB 167, CA. As to the general principles of tort see TORT vol 97 (2010) PARA 401 et seq.

7 The claim when brought at common law is sometimes called by its old name of 'action of deceit', and when brought in the Chancery Division it used to be described as an equitable claim for damages in the nature of, or analogous to, an action of deceit; but whatever distinctive terminology may be used, it has long been settled that the two forms of proceeding are precisely the same, and governed by the same principles: *Peek v Gurney* (1873) LR 6 HL 377 at 384, 390; *Arkwright v Newbold* (1881) 17 ChD 301 at 320, CA; *Smith v Chadwick* (1884) 9 App Cas 187 at 193, HL; *Schroeder v Mendl* (1877) 37 LT 452 at 454, CA; *Derry v Peek* (1889) 14 App Cas 337 at 360, HL. However, the necessity of proving fraud in proceedings for deceit has not narrowed the scope of the equitable remedy, which enables the court to award compensation for breach of a special duty in cases which, although classified in equity as fraud, do not necessarily import the element of *dolus malus*: *Nocton v Lord Ashburton* [1914] AC 932, HL; and see PARA 756 note 3 ante. As to misrepresentation in offer documents and the principles governing proceedings for deceit as a result of fraudulent misrepresentations in offer documents see COMPANIES vol 15 (2009) PARA 1070 et seq.

8 See PARA 702 ante; and LIMITATION PERIODS vol 68 (2008) PARA 986.

UPDATE

789 Claim for damages

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(1) DAMAGES FOR DECEIT/(i) In general/790. Constituent elements of the claim for deceit.

790. Constituent elements of the claim for deceit.

In any proceedings for deceit the burden is on the representee¹ of alleging and (except in so far as any of them are either expressly or impliedly admitted before or at the trial) proving all of the following matters: (1) that the alleged representation consisted of something said, written or done which amounts in law to a representation²; (2) that the defendant was the representor³; (3) that the claimant was the representee; (4) that the representation was false⁴; (5) inducement and materiality⁵; (6) alteration of position⁶; (7) fraud⁷; and (8) damage⁸. Of these matters, the first six are common to all forms of proceeding for misrepresentation⁹. In proceedings for deceit, the concurrence of fraud and damage is essential if damages are to be recovered, and neither is sufficient without the other¹⁰.

¹ As to who is a representee see PARAS 735-741 ante.

- 2 As to what amounts to a representation see PARA 703 et seq ante.
- 3 As to who is a representor see PARAS 726-734 ante.
- 4 As to falsity see PARA 742 et seq ante.
- 5 As to inducement and materiality see PARAS 765-777 ante.
- 6 As to alteration of position see PARAS 778-780 ante.
- 7 As to fraudulent misrepresentation see PARA 755 et seq ante. As to the meaning of 'fraud' see PARAS 756-757 ante.
- 8 As to damage see PARAS 791-793 post.
- 9 le not only claims for damages, but also proceedings for rescission (see PARA 812 et seq post) and defences based upon misrepresentation (see PARAS 785-788 ante).
- 10 This has been recognised from the earliest times: see *Baily v Merrell* (1615) 3 Bulst 94 at 95; *Pasley v Freeman* (1789) 3 Term Rep 51 at 56 per Buller J (fraud without damage, or damage without fraud, gives no cause of action; but when these two concur, an action lies); *Levy v Langridge* (1838) 4 M & W 337, Ex Ch; *Derry v Peek* (1889) 14 App Cas 337 at 343, HL, per Lord Halsbury LC. For illustrations of the principle that fraud must be alleged and proved see *Chandelor v Lopus* (1603) Cro Jac 4; *Homcastle v Moat* (1824) 1 C & P 166; *Childers v Wooler* (1860) 2 E & E 287, Ex Ch.

UPDATE

790 Constituent elements of the claim for deceit

NOTES 2-8--As to the approach of the court when considering the application of the constituent elements of a claim for deceit, see *A v B (damages: paternity)* [2007] EWHC 1246 (QB), [2007] 3 FCR 861.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(1) DAMAGES FOR DECEIT/ (ii) Damage/791. What actionable damage includes.

(ii) Damage

791. What actionable damage includes.

In a claim for fraudulent misrepresentation¹ actionable damage includes actual and temporal injury, that is, some loss of money or money's worth, or some tangible detriment capable of being quantified and assessed². It seems that actionable damage may now also extend to injured feelings, inconvenience and mental suffering³.

It may include loss arising out of a contract entered into on the faith of the representation; loss of money paid to a third person or to the representor himself⁴; in certain circumstances, loss of profits, appointments or earnings⁵; or the equivalent in money of any destruction of, or injury to, property; or any expense, or detriment of any kind, which allows pecuniary computation⁶.

The damage may consist in the personal and physical injury which results from doing some act on the faith of an express representation⁷. Also, where a representee⁸ is induced by fraudulent misrepresentation to believe a certain state of things to exist, or a certain thing to have happened, and the misrepresentation is of such a nature that the mere making of it to a normal person, who believes it, is calculated to, and does, produce not merely mental distress but consequential physical and personal injury, then, even if he does nothing, but only suffers something by reason of his belief in its truth, his bodily suffering is damage of which the law takes notice in a claim founded on such misrepresentation⁹.

1 As to fraudulent misrepresentation see PARA 755 et seq ante.

2 As to the principles on which damages are computed and quantified see PARA 805 et seq post; and DAMAGES. The topic now under discussion concerns only the qualities and legal constituents of damage.

3 See eg *Archer v Brown* [1985] QB 401 (aggravated damages to compensate for injured feelings may be awarded in deceit on the same basis as in contract). It used to be the position that mental distress, unless accompanied by physical effects, or mere loss of social advantages to which no money value could be attached was not included: see *Chamberlain v Boyd* (1883) 11 QBD 407, CA (slander not actionable except on proof of actual damage, and therefore in point); *Mafo v Adams* [1970] 1 QB 548, [1969] 3 All ER 1404, CA (plaintiff was entitled to damages for loss of a regulated tenancy but not to exemplary damages for inconvenience caused by the defendant's deceit). See DAMAGES. As to the principles on which the court will act in cases where the damage suffered consists in the incurring of expenses resulting from criminal proceedings or the making of reparation for the consequences of a criminal act see *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35. As to aggravated and exemplary damages see PARA 805 note 4 post; and DAMAGES.

4 Money paid to the representor himself is usually sued for as money had and received (see CONTRACT); but it may also be treated as damages, even though the amount is liquidated: *Kettlewell v Refuge Assurance Co Ltd* [1908] 1 KB 545 at 550, CA, per Alverstone CJ; on appeal [1909] AC 243, HL. As to who is a representor see PARAS 726-734 ante.

5 *Barley v Walford* (1846) 9 QB 197 (loss of profit on a design for silk handkerchiefs); *Denton v Great Northern Rly Co* (1856) 5 E & B 860 (missing an appointment); *Burrows v Rhodes* [1899] 1 QB 816 (loss of pay and earnings and capacity to earn). As to loss of profits see further PARA 809 post.

6 As to loss of property by reason of fraudulent misrepresentation see *Mullett v Mason* (1866) LR 1 CP 559 (loss of cow from cattle plague, and of other cows with which it was placed and which became infected with the same disease). As to expenses see *Barley v Walford* (1846) 9 QB 197 (in addition to his loss of profits, the plaintiff was put to trouble and expense in making inquiries and communicating with the persons falsely represented to be the registered owners of the design); *Milne v Marwood* (1855) 15 CB 778 (expense of fitting up a vessel); *Richardson v Silvester* (1873) LR 9 QB 34 (time and money spent in going to see the farm advertised); *Wilkinson v Downton* [1897] 2 QB 57 (expense of railway fares, inter alia); *Burrows v Rhodes* [1899] 1 QB 816 (fees paid for surgical operations); *Pritty v Child* (1902) 71 LJKB 512, DC (expense of sinking a well).

7 The following are examples of physical injury resulting from the use of a chattel, or of land, the qualities or condition of which had been misrepresented: *Levy v Langridge* (1838) 4 M & W 337, Ex Ch (gun); *Longmeid v Holliday* (1851) 6 Exch 761 (lamp; plaintiff failed on other grounds); *Burtsal v Bianchi* (1891) 65 LT 678 (illness caused by taking a house with defective drains; plaintiff failed on other grounds).

8 As to who is a representee see PARAS 735-741 ante.

9 *Wilkinson v Downton* [1897] 2 QB 57; *Janvier v Sweeney* [1919] 2 KB 316, CA (both cases of tortious liability). As to the recovery, generally, of damages for illness caused by shock see NEGLIGENCE vol 78 (2010) PARA 12. See also DAMAGES.

UPDATE

791 What actionable damage includes

NOTE 5--See also *4 Eng Ltd v Harper* [2008] EWHC 915 (Ch), [2008] 3 WLR 892, [2008] All ER (D) 400 (Apr) (loss of opportunity to purchase and profit from company).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(1) DAMAGES FOR DECEIT/ (ii) Damage/792. Connection between the damage and the representation.

792. Connection between the damage and the representation.

In every case where it is necessary to prove actionable damage¹ it is also necessary for the representee² to establish a causal connection, as distinct from a relation of mere sequence and succession, between the damage and the misrepresentation. The damage must be shown to have been a natural and direct result of the misrepresentation being believed and acted on or, where the representee is induced by fraudulent misrepresentation to believe a certain state of things to exist³, of the misrepresentation being believed⁴. Where this connection is not made out, then, even if he proves that he did in fact sustain the damage alleged by reason of his belief in the truth of the misrepresentation, the representee will not succeed in the claim⁵;

but, where it is made out, he will succeed⁶. The representee is normally entitled to succeed if he is in a position to allege and prove that the representor⁷ in fact intended the precise kind of damage which resulted⁸. Where a person suffers damage as a result of acting on a fraudulent misrepresentation made to another with the intention that it should, or the knowledge that it will, be so acted upon, damages are recoverable at his instance from the representor⁹.

1 See PARA 791 ante.

2 As to who is a representee see PARAS 735-741 ante.

3 See PARA 791 text and note 9 ante. As to fraudulent misrepresentation see PARA 755 et seq ante. As to inducement see PARAS 768-773 ante.

4 See generally DAMAGES. When the damage alleged or proved in any case of misrepresentation, or other tort, is described as too remote, nothing more is meant than that it is not the natural or probable result of the injury. So also, when it is said that the misrepresentation must be the 'direct' or 'immediate' cause of the loss or injury (see eg *Barry v Croskey* (1861) 2 John & H 1 at 23-24 per Wood V-C), these expressions, although not felicitous, are intended to indicate no more than the existence of this natural connection and causality: *Andrews v Mockford* [1896] 1 QB 372 at 378, CA, per Lord Esher MR.

5 *Collins v Cave* (1860) 6 H & N 131 at 134, Ex Ch; *Barry v Croskey* (1861) 2 John & H 1 (demurrer allowed); *Dashwood v Jermyn* (1879) 12 ChD 776; *Ajello v Worsley* [1898] 1 Ch 274 at 281-283; cf *Australian Steam Shipping Co Ltd v Devitt* (1917) 33 TLR 178.

6 *Polhill v Walter* (1832) 3 B & Ad 114 at 123-124; *Barley v Walford* (1846) 9 QB 197 at 206-209; *Mullett v Mason* (1866) LR 1 CP 559 at 563-564; *Wilkinson v Downton* [1897] 2 QB 57 at 59; *Janvier v Sweeney* [1919] 2 KB 316 at 324-325, CA, per Bankes LJ. A possible exception to this rule is where the damage is irrecoverable on grounds of public policy: see *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35; *Shelley v Paddock* [1979] QB 120, [1978] 3 All ER 129; cf *Saunders v Edwards* [1987] 2 All ER 651, [1987] 1 WLR 1116, CA. See also DAMAGES.

7 As to who is a representor see PARAS 726-734 ante.

8 See *Andrews v Mockford* [1896] 1 QB 372 at 378, CA, per Lord Esher MR, and at 384-385 per Rigby LJ.

9 *Levy v Langridge* (1838) 4 M & W 337, Ex Ch; *Longmeid v Holliday* (1851) 6 Exch 761 at 766; *Barry v Croskey* (1861) 2 John & H 1; *Gerhard v Bates* (1853) 2 E & B 476; *Clarke v Dickson* (1859) 6 CBNS 453; *National Exchange Co of Glasgow v Drew and Dick* (1855) 2 Macq 103, HL; *Peek v Gurney* (1873) LR 6 HL 377 at 410. As to the circumstances in which a person to whom a representation is passed on is a representee see PARA 736 et seq ante. As to the circumstances in which a person other than an original allottee of shares can maintain proceedings for deceit in respect of a misrepresentation in a company offer document see COMPANIES vol 15 (2009) PARAS 1081-1086.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(1) DAMAGES FOR DECEIT/ (ii) Damage/793. Questions of fact and of law in relation to damage.

793. Questions of fact and of law in relation to damage.

All questions of damage are questions of fact, the burden of establishing which lies upon the representee¹, subject to the following, which are questions of law, namely: (1) whether there is any evidence of the alleged damage having been sustained at all; (2) whether, if sustained, it is of the kind which the law recognises; (3) whether there is any evidence that the damage was in fact caused by the representee's belief in the truth of the misrepresentation; and (4) whether the proved damage was the natural and direct consequence of the misrepresentation².

1 *Baily v Merrell* (1615) 3 Bulst 94; *Pasley v Freeman* (1789) 3 Term Rep 51 at 53 per Grose J; *Smith v Chadwick* (1884) 9 App Cas 187 at 195-196, HL. As to who is a representee see PARAS 735-741 ante.

2 *Vernon v Keys* (1810) 12 East 632 at 638 (affd (1812) 4 Taunt 488, Ex Ch); *Eastwood v Bain* (1858) 3 H & N 738; *Bear v Stevenson* (1874) 30 LT 177, PC; *Clydesdale Bank Ltd v Paton* [1896] AC 381 at 397-398, HL; *Tallerman v Dowsing Radiant*

Heat Co [1900] 1 Ch 1 (on appeal [1900] 1 Ch 1 at 9, CA); *Stevens v Hoare* (1904) 20 TLR 407 at 409 per Joyce J.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(1) DAMAGES FOR DECEIT/(iii) Parties/794. Who may sue and be sued.

(iii) Parties

794. Who may sue and be sued.

The possible parties to a claim for damages for deceit are ordinarily the persons who were, or who are deemed to have been, the parties to the representation¹.

¹ Deceit may arise in the context of domestic relations; *P v B (Paternity: Damages for Deceit)* [2001] 1 FLR 1041. As to who are representees and representors see PARAS 725-741 ante. As to claims against companies and other corporations see COMPANIES vol 14 (2009) PARA 301 et seq; CORPORATIONS vol 9(2) (2006 Reissue) PARA 1275. As to the parties to a claim generally see CIVIL PROCEDURE. As to liability in tort generally see TORT vol 97 (2010) PARA 401 et seq.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(1) DAMAGES FOR DECEIT/(iii) Parties/795. Effect of death or disability or assignment of rights.

795. Effect of death or disability or assignment of rights.

The survival of a cause of action in tort in the case of the death of the person entitled to sue or the person liable to be sued¹, the effect of bankruptcy² or winding up proceedings³ upon the right to sue and liability to be sued, the liability in tort of minors⁴ and mentally disordered persons⁵, and the modes by which proceedings may be instituted and carried on by or against minors⁶ and mentally disordered persons⁷, are considered elsewhere in this work.

As regards assignments inter vivos, the bare right to sue for damages for misrepresentation is not transferable⁸.

¹ As to the survival of causes of action for the benefit of or against the estates of deceased persons, and the effect of the death of a party while a claim is proceeding, see CIVIL PROCEDURE; EXECUTORS AND ADMINISTRATORS.

² See BANKRUPTCY AND INDIVIDUAL INSOLVENCY. For the principle that where a misrepresentation results in a pecuniary loss, and personal injury to the representee is only incidental, the right of action passes to the representee's trustee in bankruptcy see *Hodgson v Sidney* (1866) LR 1 Exch 313; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 435. For the principle that the court will not restrain any action against a bankrupt to which his discharge would not be a defence see *Re Blake, ex p Coker* (1875) 10 Ch App 652; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 731.

³ See BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY.

⁴ See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 26-27.

⁵ See eg *Morriss v Marsden* [1952] 1 All ER 925; and MENTAL HEALTH vol 30(2) (Reissue) PARA 611.

⁶ See CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1409 et seq.

⁷ See CPR 21.2; *Practice Direction-Children and Patients* PD 21 para 1.1 et seq; and MENTAL HEALTH vol 30(2) (Reissue) PARA 634.

⁸ *De Hughton v Money* (1866) 2 Ch App 164 at 169, CA, per Turner LJ (the right to complain of fraud is not a marketable commodity). See also CHOSER IN ACTION vol 13 (2009) PARA 98. The rule applies equally to proceedings for rescission, where nothing is assigned but the bare right to sue: see PARA 821 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(1) DAMAGES FOR DECEIT/(iii) Parties/796. Capacity of member to sue company.

796. Capacity of member to sue company.

A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company or any right to apply or subscribe for shares or to be included in the company's register in respect of shares¹.

¹ Companies Act 1985 s 111A (added by the Companies Act 1989 s 131(1)). This provision has the effect of nullifying the rule in *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317, HL, under which a subscriber for shares in a company could not claim damages for misrepresentation unless he severed his connection with the company: see *Soden v British and Commonwealth Holdings plc (in administration)* [1996] 3 All ER 951 at 959, [1996] 2 BCLC 207 at 215, CA, per Peter Gibson LJ; and COMPANIES vol 15 (2009) PARA 1087.

The rule did not affect the right of the shareholder to take any other kind of proceeding against the company in respect of the species of misrepresentation in question (*Western Bank of Scotland v Addie* (1867) LR 1 Sc & Div 145 at 163-164, HL) or to sue for damages in respect of any other species of misrepresentation (*Houldsworth v City of Glasgow Bank* supra at 329 per Lord Selborne).

As to the relief available where a partnership agreement or a purchase of a partnership share is induced by fraud or misrepresentation see PARTNERSHIP vol 79 (2008) PARAS 147, 148.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(1) DAMAGES FOR DECEIT/(iii) Parties/797. Responsibility for the fraud of an agent.

797. Responsibility for the fraud of an agent.

A principal is responsible in tort for a representation made fraudulently by his agent, acting within the scope of his authority¹. He is equally responsible where the representation was first made by the agent before the commencement of the agency but continued after its commencement, finally inducing a third person to enter into a contract which the agent made whilst acting within the scope of his authority². Where an innocent misrepresentation³ is made by an agent, the falsity of the facts of which are known to the principal, the principal will only be liable for deceit if he had expressly authorised the making of the misrepresentation or had deliberately employed the agent in order that the agent's ignorance might result in its being made⁴. A person becomes liable in tort for the fraudulent misrepresentation⁵ of an alleged agent if, subsequent to the making of any such representation, he intervenes and adopts the benefit of it⁶.

An agent is personally liable in tort for his own fraudulent misrepresentation⁷.

¹ *Lloyd v Grace, Smith & Co* [1912] AC 716, HL. See also *S Pearson & Son Ltd v Dublin Corpn* [1907] AC 351 at 357-358, HL, per the Earl of Halsbury; *Gordon v Selico Co Ltd* [1986] 1 EGLR 71, 18 HLR 219, CA; and AGENCY vol 1 (2008) PARAS 135, 152 et seq. As regards the liability of a principal in tort for a criminal act by an agent see AGENCY vol 1 (2008) PARA 155. As to the liability of corporations for the torts of their agents or employees see CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1275-1276. See also COMPANIES vol 14 (2009) PARA 296. A friendly society has been held disentitled to retain money procured

by the fraudulent misrepresentation of its agent: *Byrne v Rudd* [1920] 2 IR 12, Ir CA.

2 *Briess v Woolley* [1954] AC 333, [1954] 1 All ER 909, HL.

3 As to innocent misrepresentation see PARAS 762-764 ante.

4 *Comfoot v Fowke* (1840) 6 M & W 358; *Ludgater v Love* (1881) 44 LT 694, CA; *Gordon Hill Trust Ltd v Segall* [1941] 2 All ER 379, CA; *Armstrong v Strain* [1952] 1 KB 232, [1952] 1 All ER 139, CA; *Garnac Grain Co Inc v HMF Faure and Farclough Ltd* [1968] AC 1130n, [1967] 2 All ER 353, HL. See also AGENCY vol 1 (2008) PARAS 135, 152. As to the responsibility of an innocent member of a firm for the fraud of his partner see *Re Collie, ex p Adamson* (1878) 8 ChD 807 at 820, CA; and PARTNERSHIP vol 79 (2008) PARA 65 et seq.

The statements in the text relate to liability for deceit. It may now be possible in appropriate cases to hold the principal liable for a careless statement by an agent or for so organising his business that although no one person can be said to be negligent, operations as a whole can be said to be negligent: see *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850. As to the liability of an agent for negligent misstatements made to a contractor to induce him to tender for the design and construction of a development see *J Jarvis and Sons Ltd v Castle Wharf Developments Ltd* [2001] EWCA Civ 19, [2001] All ER (D) 108 (Jan); and AGENCY vol 1 (2008) PARA 153. As to liability for careless misstatements see PARAS 762-764 ante, 798-800 post; and NEGLIGENCE vol 78 (2010) PARA 14.

5 As to fraudulent misrepresentation see PARA 755 et seq ante.

6 *Wilson v Tumman* (1843) 6 Man & G 236 at 242; approved in *Keighley Maxted & Co v Durant* [1901] AC 240 at 246-247, HL, per Lord Macnaghten. As to the ratification by a principal of the acts of his agent see AGENCY vol 1 (2008) PARA 57 et seq.

7 *Eaglesfield v Marquis of Londonderry* (1878) 26 WR 540 at 541, HL; *Goldrei Foucard & Son v Sinclair and Russian Chamber of Commerce in London* [1918] 1 KB 180, CA; and see AGENCY vol 1 (2008) PARAS 160, 164. See also *Convent Hospital Ltd v Eberlin and Partners* (1989) 23 ConLR 112, CA.

UPDATE

797 Responsibility for the fraud of an agent

NOTE 1--See also *Barclays Bank plc v Kalamohan* [2010] EWHC 1383 (Ch), [2010] All ER (D) 59 (Jun).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/ (2) DAMAGES FOR NEGLIGENT WORDS/798. Damages for negligent words at common law.

(2) DAMAGES FOR NEGLIGENT WORDS

798. Damages for negligent words at common law.

It was long believed to be a basic principle of English law that there was no liability for damages for financial loss caused by careless words in the absence of a contractual or fiduciary obligation to take care¹. It is now clear that this view is wrong and that there may be a tortious claim for damages based upon a duty to take care, independent of contract or fiduciary obligations². Such a claim may arise where there have been careless statements in the course of performing a contractual duty to take care³ or in precontractual negotiations⁴.

1 See *Le Lievre v Gould* [1893] 1 QB 491, CA; *Candler v Crane, Christmas & Co* [1951] 2 KB 164, [1951] 1 All ER 426, CA.

2 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL. For a discussion of this and later authorities see NEGLIGENCE vol 78 (2010) PARA 14.

3 See PARA 799 post.

4 See PARA 800 post.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/ (2) DAMAGES FOR NEGLIGENT WORDS/799. Careless statements made in the course of performing a contractual duty to take care.

799. Careless statements made in the course of performing a contractual duty to take care.

The practice of a profession, art or calling which demands a special skill or ability carries with it a duty to exercise a reasonable amount of skill or ability. Before 1963¹ it was thought that where a person failed to use such reasonable skill or ability he was liable for breach of contractual duty² only and was not under a general duty in tort unless the failure was likely to cause physical injury to persons or property³. After 1963 it was at first assumed that this continued to be the case⁴, but it is now clear that this is incorrect and that there may be a claim in tort for breach of duty of care in addition to a claim in contract⁵. The claims in contract and tort may coincide but different principles may apply to the assessment of damages, and in particular a different limitation period may be applicable for each cause of action⁶.

¹ See before the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL: see PARA 798 ante.

² See CONTRACT.

³ *Groom v Crocker* [1939] 1 KB 194, [1938] 2 All ER 394, CA; *Bean v Wade* (1885) 2 TLR 157, CA; cf *Nocton v Lord Ashburton* [1914] AC 932 at 952-956, HL, per Lord Haldane.

⁴ *Bagot v Stevens Scanlan & Co* [1966] 1 QB 197, [1964] 3 All ER 577, where a relationship creating a duty on the defendants to exercise reasonable skill and care arose out of the contractual relationship alone; *Clark v Kirby-Smith* [1964] Ch 506, [1964] 2 All ER 835, where the liability of a solicitor to his client for negligence was held to be a liability in contract and not in tort (but see note 5 infra).

⁵ *Eso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA, where a negligent representation was made by a person holding himself out as having special expertise in circumstances which gave rise to the duty to take reasonable care to see that the representation was correct; the duty of care existed during the precontractual negotiations and survived the making of the written contract, and the plaintiffs were held liable in the tort of negligence; *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554, [1978] 2 All ER 445, CA, where the principle that a duty could be owed and a person could be liable both in contract and tort was held not to be confined to cases where a person owed a duty of care in relation to professional skills; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, [1978] 3 All ER 571, where solicitors were held liable to their client in tort for breach of the duty of care, the decision in *Clark v Kirby-Smith* [1964] Ch 506, [1964] 2 All ER 835 (see note 4 supra) being doubted and not followed. See also *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583, CA; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 107, [1985] 2 All ER 947 at 957, PC (in this case, the Privy Council favoured the contractual analysis; but this decision may now be seen as argument against allowing a tortious duty of care more extensive than that provided for by the contract); *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481, Can SC; *Henderson v Merrett Syndicates* [1995] 2 AC 145, [1994] 3 All ER 506, HL; *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL. See generally NEGLIGENCE; TORT vol 97 (2010) PARA 401 et seq.

⁶ See LIMITATION PERIODS vol 68 (2008) PARA 952 et seq. As to the measure of damages in tort and contract see generally DAMAGES.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/ (2) DAMAGES FOR NEGLIGENT WORDS/800. Careless statements made in the course of precontractual negotiations.

800. Careless statements made in the course of precontractual negotiations.

Before 1963¹ careless statements made in the course of precontractual negotiations could only give rise to a

claim to damages if the statements were either held to constitute a contractual term² or were not merely careless but fraudulent³. However, it is now clear that one contracting party may be under a duty of care in regard to statements made in precontractual negotiations, and breach of that duty may lead to liability under either the Misrepresentation Act 1967⁴ or in tort for negligence⁵. This is not to say that such a duty will always arise between negotiating parties; often it will not. However, the fact that the parties were in the course of negotiating a contract will not prevent a duty of care arising where the requirements of the law of tort are satisfied⁶.

1 le before the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL: see PARA 798 ante.

2 See PARA 799 ante; and CONTRACT.

3 See PARA 789 et seq ante. As to fraudulent misrepresentation see PARA 755 et seq ante.

4 See *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574, [1978] 2 All ER 1134, CA, where the owners of barges were held liable for damages under the Misrepresentation Act 1967 s 1(1) (see PARA 704 ante) and at common law for misrepresentation made by their employee during precontractual negotiations as to the capacity of the company's barges which was a material matter on which the representees relied in concluding the contract. As to damages under the Misrepresentation Act 1967 see PARAS 801, 811 post.

5 See *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA; para 799 note 5 ante; and NEGLIGENCE vol 78 (2010) PARA 14; TORT vol 97 (2010) PARA 702 et seq. Thus it is possible that a solicitor acting for one side in the negotiation of the contract may owe a duty of care to the other party to the negotiations: *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865; cf *Hemmens v Wilson Browne* [1995] Ch 223, [1993] 4 All ER 826. All of these cases must now be read in the light of *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL. See also *Dorsch v City of Weyburn* (1985) 23 DLR (4th) 379, Sask CA.

6 The duty of care may arise whether or not the precontractual negotiations result in the conclusion of a contract. Ordinarily, where a careless statement is made in negotiations which do not in fact lead to the completion of a contract, there would be no loss, but this is not necessarily so. For instance, a sub-contractor may make a carelessly low tender for work and a main contractor may rely on it in tendering successfully for the main contract; if the sub-contractor were to withdraw his tender before acceptance he would not be bound in contract but it may perhaps be argued that he is liable in tort. Such an argument has not been tested in the English courts but it has been rejected in New Zealand: see *Holman Construction Ltd v Delta Timber Co Ltd* [1972] NZLR 1081.

UPDATE

800 Careless statements made in the course of precontractual negotiations

NOTE 4--See also *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511 (1967 Act not engaged where representation inconsistent with clear contractual clause).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/ (2) DAMAGES FOR NEGLIGENT WORDS/801. Statutory liability.

801. Statutory liability.

Under the Misrepresentation Act 1967¹, where a person has entered into a contract after a misrepresentation has been made to him by another party to it and as a result he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect of it had the misrepresentation been made fraudulently, that person is so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true². Thus the burden of proof is reversed.

This statutory liability is similar to the common law liability for negligent misstatements³, but there are

important differences. Thus (1) the statutory provision applies to all contracts and there is no need to demonstrate a duty of care between the particular contracting parties⁴; and (2) the burden of proof is reversed, so that the representor⁵ must prove his reasonable grounds for belief rather than the representee⁶ having to prove that the representor failed to take reasonable care⁷.

¹ ie the Misrepresentation Act 1967 s 2(1). Nothing in the Misrepresentation Act 1967 applies in relation to any misrepresentation or contract of sale which was made before the commencement of the Act (ie 22 April 1967): see ss 5, 6 (s 6(3) amended by the Sale of Goods Act 1979 ss 62, 63 and Sch 3).

² Ibid s 2(1). As to the measure of damages under the Misrepresentation Act 1967 see PARA 811 post. Discovery of the misrepresentation between contract and completion does not preclude a claim for damages: see *Production Technology Consultants Ltd v Bartlett* [1988] 1 EGLR 182, CA. As to fraudulent misrepresentation see PARA 755 et seq ante.

³ See *Rust v Abbey Life Assurance Co Ltd* [1978] 2 Lloyd's Rep 386; *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810, [1978] 1 WLR 1128. As to negligent misstatements see PARAS 762-764, 798-800 ante; and NEGLIGENCE vol 78 (2010) PARA 14.

⁴ See *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574, [1978] 2 All ER 1134, CA; and PARA 800 note 4 ante.

⁵ As to who is a representor see PARAS 726-734 ante.

⁶ As to who is a representee see PARAS 735-741 ante.

⁷ See the Misrepresentation Act 1967 s 2(1); and the text to note 2 supra.

UPDATE

801 Statutory liability

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/ (3) DEFENCE TO CLAIM FOR DAMAGES/802. Representee's knowledge of the truth.

(3) DEFENCE TO CLAIM FOR DAMAGES

802. Representee's knowledge of the truth.

A representee¹ who knows the truth is not deceived. Proof, therefore, of such knowledge is a complete answer to any proceeding founded on misrepresentation², and it is sufficient to show that the representee was aware of the real facts at any time before he altered his position on the faith of the false statement³. However, it must be established that the representee's knowledge was exact and complete; it is not enough to show partial and fragmentary information or mere suspicion⁴. Moreover, actual knowledge must be proved⁵. Imputed or constructive notice is not sufficient; thus, if the false statement was made to an agent of the representee, the representor is not allowed to protect himself by proving that the agent knew that the statement was untrue⁶. Nor is it of any use to establish merely that the representee had such means of knowledge and materials within his reach as would have enabled a person of ordinary business habits and normal intelligence to discover the whole truth, even though the representor himself may have supplied those means and materials, or even that the representee availed himself of them, if his investigation, whether perfunctory or diligent, did not in fact result in actual knowledge⁷. A person cannot be heard to complain that another has confided in a misrepresentation made, even if innocently, much less if fraudulently, for the purpose of inspiring that very confidence, or plead as an excuse that the person he has misled was at fault in

not testing the statement by inquiry⁸.

1 As to who is a representee see PARAS 735-741 ante.

2 There are very few reported instances of the success of the plea in claims for damages, but see *Eaglesfield v Marquis of Londonderry* (1878) 26 WR 540 at 541, HL, per Lord Hatherley (action for damages); *Attwood v Small* (1838) 6 Cl & Fin 232 at 390, 448-450, HL; *Vigers v Pike* (1842) 8 Cl & Fin 562 at 648, HL; *Begbie v Phosphate Sewage Co* (1875) LR 10 QB 491 at 498-499 (on appeal (1876) 1 QBD 679, CA); *Re British Burmah Lead Co Ltd, ex p Vickers* (1887) 56 LT 815; *Wasteneys v Wasteneys* [1900] AC 446 at 449, PC; *Howarth v Pioneer Life Assurance Co Ltd* (1912) 107 LT 155, DC (actions for rescission). For cases where the plea has been successfully put forward by way of answer to a defence based on misrepresentation see *Dyer v Hargrave* (1805) 10 Ves 505; *Bawden v London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534, CA (a case which has frequently been distinguished in subsequent cases: see eg *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356 at 367-375, CA, per Scrutton LJ). See INSURANCE vol 25 (2003 Reissue) PARA 64 et seq. See also *Strover v Harrington* [1988] Ch 390, [1988] 1 All ER 769 (particulars of sale stated that a house had mains drainage; estate agent later informed the representee's solicitor that this was untrue; the solicitor did not pass this information to the representee; any loss flowed from the solicitor's failure rather than the misrepresentation, and the representee's claim was barred). As to false or misleading statements made in the course of an estate agency business or a property development business see the Property Misdescriptions Act 1991 s 1; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 791 et seq.

3 For the principle that a representation is deemed to continue until the representee acts upon it see PARA 754 ante. As to alteration of position see PARA 778 et seq ante.

4 *Martin v Cotter* (1846) 3 Jo & Lat 496 at 507-508; *Wilson v Short* (1848) 6 Hare 366 at 376; *Hughes v Jones* (1861) 3 De GF & J 307 at 312; *Redgrave v Hurd* (1881) 20 ChD 1, CA.

5 As to where actual notice is constituted by registration see EQUITY; LAND CHARGES; LAND REGISTRATION.

6 See *Wells v Smith* [1914] 3 KB 722, where the representor made to the representee's agent a statement which the representor and the agent knew to be untrue, in order to induce the representee to act upon it. See also *Supersafe Supermarkets Ltd v Patel* (1970) 216 Estates Gazette 1135 (agent knowing true facts but unaware of misrepresentation; knowledge could not be imputed to principal). As to who is a representor see PARAS 726-734 ante.

In non-marine insurance cases, where an agent employed by the insurers to procure proposals fills in, or assists in filling in, the proposal form for the proposer, the knowledge of the agent is not normally to be imputed to the insurers: see INSURANCE vol 25 (2003 Reissue) PARA 396.

7 *Dyer v Hargrave* (1805) 10 Ves 505 (as to two of the three misrepresentations which were the subject of the plea); *Dobell v Stevens* (1825) 3 B & C 623; *Pearson v Wheeler* (1825) Ry & M 303; *Bowring v Stevens* (1826) 2 C & P 337; *Harris v Kemble* (1831) 5 Bli NS 730 at 745, 750, HL; *King v Wilson* (1843) 6 Beav 124 at 129; *Reynell v Sprye* (1852) 1 De GM & G 660 at 687, 709-710; *Price v Macaulay* (1852) 2 De GM & G 339 at 346-347, CA in Ch; *Branding v Plummer* (1854) 2 Drew 427 at 431-432; *Rawlins v Wickham* (1858) 3 De G & J 304 at 313-314; *Central Rly Co of Venezuela (Directors etc) v Kisch* (1867) LR 2 HL 99 at 118, 120-121, 123-124; *Caballero v Henty* (1874) 9 Ch App 447 at 450; *Redgrave v Hurd* (1881) 20 ChD 1 at 14, CA; *Mathias v Yetts* (1882) 46 LT 497 at 502, 504, CA; *Re London and Staffordshire Fire Insurance Co* (1883) 24 ChD 149 at 154-156; *White v Haymen* (1883) Cab & El 101 at 103; *Amison v Smith* (1889) 41 ChD 348 at 370-373, CA; *Moss & Co Ltd v Swansea Corp* (1910) 74 JP 351; *Nocton v Lord Ashburton* [1914] AC 932 at 962, HL, per Lord Dunedin.

8 *Barley v Walford* (1846) 9 QB 197 at 209; *Wilson v Short* (1848) 6 Hare 366 at 377; *Reynell v Sprye* (1852) 1 De GM & G 660 at 710; *Price v Macaulay* (1852) 2 De GM & G 339 at 346-347, CA in Ch; *Central Rly Co of Venezuela (Directors etc) v Kisch* (1867) LR 2 HL 99 at 120-121; *Hunter v Walters* (1871) 7 Ch App 75 at 86; *Re Arnold, Arnold v Arnold* (1880) 14 ChD 270 at 281, CA (where the misrepresentation was assumed to be innocent); *Bloomenthal v Ford* [1897] AC 156 at 161-162, 168, HL (an estoppel case); *Bejemann v Bejemann* [1895] 2 Ch 474 at 479, 482, CA. Contributory negligence is not a defence to claims for fraud: *Alliance and Leicester Building Society v Edgestop Ltd* [1994] 2 All ER 38, [1993] 1 WLR 1462 (deceit); *Corporacion Nacional Del Cobre De Chile v Sogemin Metals Ltd* [1997] 2 All ER 917, [1997] 1 WLR 1396 (bribery).

The possibility has been recognised, however, in relation to non-fraudulent misrepresentation: see *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865.

UPDATE

802 Representee's knowledge of the truth

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph

are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/ (3) DEFENCE TO CLAIM FOR DAMAGES/803. Attempts to exclude liability for misrepresentation by contractual term.

803. Attempts to exclude liability for misrepresentation by contractual term.

Where the representor¹ and representee² have entered into a contract after the representation, the contract may contain a term purporting to exclude or restrict liability for misrepresentation. At common law such a clause will be ineffective if it seeks to exclude liability for fraudulent misrepresentation for a person cannot escape liability for his own fraudulent statements by inserting in a contract a clause that the other party is not to rely on them³. More generally the effect of such a term is governed by statute. The statutory provision applies to a contractual term which would exclude or restrict either any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made or any remedy available to another party to the contract by reason of such a misrepresentation⁴. If a term falls within the scope of this provision it is of no effect except in so far as it satisfies the requirement of reasonableness as stated in the Unfair Contract Terms Act 1977⁵; and it is for those claiming that the term satisfies that requirement to show that it does⁶.

What is a representation and an exclusion for the purposes of this provision is to be approached in a broad and reasonable way; it will not suffice to make what would ordinarily be a representation accompanied by a statement that it is not to be treated as a representation⁷. On the other hand, it is permissible for a principal to state that an agent has no authority to make representations, and such a statement may ensure that what would otherwise be a representation within the agent's ostensible authority falls outside that authority and does not constitute a representation by the principal⁸.

It should also be noted that a representation can itself become a collateral contract, the consideration for which is entry into the principal contract. Such a collateral contract can override express terms in the principal contract⁹.

1 As to who is a representor see PARAS 726-734 ante.

2 As to who is a representee see PARAS 735-741 ante.

3 *S Pearson & Son Ltd v Dublin Corpn* [1907] AC 351 at 353-354, HL, per Lord Loreburn LC.

4 See the Misrepresentation Act 1967 s 3 (substituted by the Unfair Contract Terms Act 1977 s 8(1)). Set-off can be regarded as a remedy for the purposes of the Misrepresentation Act 1967 s 3 (as substituted): *Skipskreditforeningen v Emperor Navigation* [1997] 2 BCLC 398, [1998] 1 Lloyd's Rep 66.

5 Misrepresentation Act 1967 s 3 (as substituted: see note 4 supra). The effect of s 3 (as substituted) is to invalidate a clause in respect of claims based on misrepresentation; it has been held that, in so far as a claim applies to an alleged breach of contract, the Unfair Contract Terms Act scheme applies: *Skipskreditforeningen v Emperor Navigation* [1997] 2 BCLC 398, [1998] 1 Lloyd's Rep 66. See CONTRACT vol 9(1) (Reissue) PARA 831. In order to satisfy the requirement of reasonableness in the Misrepresentation Act 1967 s 3 (as substituted), the term must have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made: see the Unfair Contract Terms Act 1977 s 11(1); and CONTRACT vol 9(1) (Reissue) PARA 831; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 451, 465.

Neither the fact that the exclusion is contained in a well known standard form nor that the parties have been represented throughout by solicitors will of itself be sufficient evidence of reasonableness: *Walker v Boyle* [1982] 1 All ER 634 at 644-645, [1982] 1 WLR 495 at 507-508 per Dillon J (where a condition in the National Conditions of Sale did not satisfy the requirement of reasonableness). See also *South Western General Property Co Ltd v Marton* [1982] 2 EGLR 19; *Cooper v Tamms* [1988] 1 EGLR 257; *Swingler v Khosla* [1991] 1 EGLR 245; *Goff v Gauthier* (1991) 62 P & CR 388; *Inntrepreneur Estates (CPC) Ltd v Worth* [1996] 1 EGLR 84.

6 Misrepresentation Act 1967 s 3 (as substituted: see note 4 supra). See also the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 452 et seq.

7 *Cremdean Properties Ltd v Nash* (1977) 244 Estates Gazette 547 at 551, CA, per Bridge LJ. See also *Walker v Boyle* [1982] 1 All ER 634 at 640, [1982] 1 WLR 495 at 501 per Dillon J.

8 *Overbrooke Estates Ltd v Glencombe Properties Ltd* [1974] 3 All ER 511, [1974] 1 WLR 1335; *Collins v Howell-Jones* [1981] 2 EGLR 108, CA. Cf *Museprime Properties Ltd v Adhill Properties Ltd* [1990] 2 EGLR 196, 61 P & CR 111. Such statements about the agent's authority are particularly common in sales by auction and house purchase transactions handled by estate agents. As to liability of agents for misrepresentation in such cases, and the effect of disclaimers, see *McCullagh v Lane Fox and Partners Ltd* [1996] 1 EGLR 35, (1995) 49 ConLR 124, CA; and AGENCY vol 1 (2008) PARA 135. As to false or misleading statements made in the course of an estate agency business or a property development business see the Property Misdescriptions Act 1991 s 1; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 791 et seq.

9 See *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129.

UPDATE

803 Attempts to exclude liability for misrepresentation by contractual term

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/ (3) DEFENCE TO CLAIM FOR DAMAGES/804. Statutory requirement as to representations concerning credit.

804. Statutory requirement as to representations concerning credit.

No claim may be brought by which to charge any person upon or by reason of a representation made concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, in order that such other person may obtain credit, money, or goods, unless the representation is made in writing, signed¹ by the party to be charged with it². This applies only to claims for fraudulent misrepresentation³, and not to a claim for damages for breach of duty founded on an innocent misrepresentation⁴; nor is it a defence to a claim based on negligent representations⁵.

Where the representations are partly oral and partly in writing, the claimant will succeed if he establishes that he was substantially induced by the written representations⁶.

1 Personal signature of the principal is necessary: see eg AGENCY vol 1 (2008) PARAS 3, 19; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1054. The signature of a duly authorised officer or employee of a company is the signature of the company for this purpose: *UBAF Ltd v European American Banking Corp* [1984] QB 713, [1984] 2 All ER 226, CA. See also COMPANIES vol 14 (2009) PARA 296.

2 Statute of Frauds Amendment Act 1828 s 6. The Statute of Frauds Amendment Act 1828 is commonly known as Lord Tenterden's Act. For decisions on this provision see *Lyde v Barnard* (1836) 1 M & W 101; *Haslock v Ferguson* (1837) 7 Ad & El 86; *Swann v Phillips* (1838) 8 Ad & El 457; *Devaux v Steinkeller* (1839) 6 Bing NC 84; *Turnley v MacGregor* (1843) 6 Man & G 46; *Craig v Watson* (1845) 8 Beav 427; *Tatton v Wade* (1856) 18 CB 371, Ex Ch; *Williams v Mason* (1873) 28 LT 232; *Swift v Jewsbury* (1874) LR 9 QB 301, Ex Ch; *Hosegood v Bull* (1876) 36 LT 617; *Pearson v Seligman* (1883) 48 LT 842, CA; *Bishop v Balkis Consolidated Co* (1890) 25 QBD 512, CA; *Hirst v West Riding Union Banking Co* [1901] 2 KB 560, CA; *Pearsons v Barclay & Co Ltd and Goddard* (1910) 103 LT 196, CA; *Banbury v Bank of Montreal* [1918] AC 626, HL. See also *UBAF Ltd v European American Banking Corp* [1984] QB 713, [1984] 2 All ER 226, CA. See further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1052 et seq.

The claimant must specifically set out any allegation of fraud and/or details of any misrepresentation where he wishes to rely on them in support of his claim: see *Practice Direction-Statements of Case* PD 16 para 8.2; and *CIVIL PROCEDURE*.

3 As to fraudulent misrepresentation see PARA 755 et seq ante.

4 *Banbury v Bank of Montreal* [1918] AC 626, HL. As to innocent misrepresentation see PARAS 762-764 ante.

5 *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850 at 865 per Cairns J. It appears that the Statute of Frauds Amendment Act 1828 s 6 does apply to claims under the Misrepresentation Act 1967 s 2(1) (see PARA 801 ante): *UBAF Ltd v European American Banking Corpn* [1984] QB 713 at 718-719, [1984] 2 All ER 226 at 229-230, CA, per Ackner LJ. As to negligent representation see PARAS 798-800 ante.

6 *Tatton v Wade* (1856) 18 CB 371 at 385, 387-388, Ex Ch.

UPDATE

804 Statutory requirement as to representations concerning credit

NOTE 2--See also *Contex Drouzhba Ltd v Wiseman* [2007] EWCA Civ 1201, [2008] 1 BCLC 631.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(4) MEASURE OF DAMAGES/805. Claim for deceit.

(4) MEASURE OF DAMAGES

805. Claim for deceit.

Since the claim for deceit, and its equitable equivalent¹, is based on the hypothesis that the representee² has elected or is compelled to adhere to the contract, or put up with the situation into which he has been misled by the fraudulent misrepresentation³, and there can be no question of undoing the past, it follows that the only relief obtainable in such a case is the award of a gross sum in money, payable once and for all as compensation⁴, to represent the present value of the entire net loss sustained by him in the past, or likely to be sustained in the future⁵.

The general rule as to the quantification of the damage is that the claimant should be restored to the position he would have been in if the representation had not been made. In applying this principle to consequential loss a broad approach should be taken, since it has been held that the defendant is bound to make reparation for all the actual damage flowing from the fraudulent inducement and cannot plead that the damage could not reasonably have been foreseen⁶. Although the loss need not have been foreseeable it must have been directly caused by the transaction⁷.

1 See PARA 789 note 7 ante.

2 As to who is a representee see PARAS 735-741 ante.

3 As to fraudulent misrepresentation see PARA 755 et seq ante.

4 See generally DAMAGES. In *Mafo v Adams* [1970] 1 QB 548, [1969] 3 All ER 1404, CA, the question whether exemplary damages might be recovered in deceit was left open; but it was clearly stated that they could not in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1076, [1972] 1 All ER 801 at 826, HL, per Lord Hailsham of St Marylebone LC, and at 1131 and 874 per Lord Diplock. Aggravated damages may be recovered: *Archer v Brown* [1985] QB 401, [1984] 2 All ER 267. As to aggravated and exemplary damages see DAMAGES.

5 As to the meaning in law of damage, and the causal relation which it is necessary to establish between it and the misrepresentation, see PARAS 791-793 ante.

6 See *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 at 167, [1969] 2 All ER 119 at 122, CA, per Lord Denning MR; and

DAMAGES vol 12(1) (Reissue) PARA 1109. See also *Smith Kline & French Laboratories Ltd v Long* [1988] 3 All ER 887, [1989] 1 WLR 1, CA, where in order to place the representees in the position in which they would have been if the deceit had not been perpetrated, the value of the goods in question was ascertained by reference to the market value of the goods rather than the replacement cost.

See further *Siametis v Trojan Horse (Burlington) Inc* (1979) 25 OR (2d) 120; *East v Maurer* [1991] 2 All ER 733, [1991] 1 WLR 461, CA; *Slough Estates plc v Welwyn Hatfield District Council* [1996] 2 EGLR 219, [1996] 2 PLR 50, *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488, CA.

⁷ *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 267, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 at 779, HL, per Lord Browne-Wilkinson.

UPDATE

805 Claim for deceit

NOTE 4--See *BSkyB Ltd v HP Enterprise Services UK Ltd (formerly Electronic Data Systems Ltd)* [2010] EWHC 86 (TCC), [2010] IP & T 597.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(4) MEASURE OF DAMAGES/806. Assessment of damages.

806. Assessment of damages.

Where the representee¹ has received no money or money's worth, and has simply parted with property or paid money which is irrecoverable in law² or in fact³, or is under liability in that behalf which he is unable to dispute⁴, the calculation of damages is simply a matter of addition, or (in the case of liability) an estimate of present values. However, where the representee's alteration of position assumes the form of a contract with the representor⁵ or a third person, under which the representee has paid money and received in return property, rights or interests, for example a contract to take shares in, or debentures of, a company, the damages which the representee is entitled to recover from the representor are normally⁶ the difference, if any, between the amount paid by the representee and the value of the property, rights or interests received by him⁷. If the real value of what the representee has received is nil⁸, the representee is entitled to recover the full amount which he has paid⁹; but the claim to this amount, although it may appear to be by way of a liquidated sum, is still in law a claim for damages¹⁰.

¹ As to who is a representee see PARAS 735-741 ante.

² See eg *Richardson v Silvester* (1873) LR 9 QB 34 (sums paid by the representee to third persons); *Wilkinson v Downton* [1897] 2 QB 57 (railway fares).

³ See eg *Mullett v Mason* (1866) LR 1 CP 559 (cows which perished); and the various misrepresentation of credit cases referred to in PARA 804 note 2 ante (goods delivered on credit, or money advanced, to insolvent persons).

⁴ Cf *Starkey v Bank of England* [1903] AC 114, HL (bank executed transfer of stock in reliance on forged power of attorney; bank liable to make restitution to stockholders; broker who had presented power of attorney liable to indemnify bank). In this case the broker had acted innocently and was liable on the ground of breach of warranty of authority (see AGENCY vol 1 (2008) PARA 161), but the bank's right of indemnity would have been the same if he had been guilty of fraudulent misrepresentation.

⁵ As to who is a representor see PARAS 726-734 ante.

⁶ See *Clark v Urquhart* [1930] AC 28 at 67-68, HL, per Lord Atkin, reserving the right to consider in any future case whether the formula laid down in *McConnel v Wright* [1903] 1 Ch 546, CA (see the text and note 7 infra) was too rigidly expressed, on the ground that in all cases of transactions induced by fraudulent misrepresentation the measure of damages should be based on the actual damage flowing from the fraudulent inducement. See also *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at 259-260, [1956] 3 All ER 970 at 974, CA, per Lord Denning LJ. As to the measure of damages in tort see DAMAGES.

⁷ *McConnel v Wright* [1903] 1 Ch 546 at 554-555, CA, per Collins MR; and see COMPANIES vol 15 (2009) PARA 1086. See

also *Heinemann v Cooper* [1987] 2 EGLR 154, 19 HLR 262, CA; *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426, CA. See, however, the criticism of the latter case in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769, HL, where as the result of fraudulent misrepresentation the representee bought a large parcel of shares the true value of which was greatly reduced by a then undiscovered separate fraud practised on the company, and it was held that the representee could recover the whole of the difference between what it paid for the shares and the amount actually realised on the resale of the shares. Where the fraudulently obtained property consists of shares, their value should be calculated as of their date of purchase: *Great Future International Ltd v Sealand Housing Corpn* [2002] EWHC 2454 (Ch), [2002] All ER (D) 28 (Dec).

8 See *Twycross v Grant* (1877) 2 CPD 469, CA; *Jury v Stoker and Jackson* (1882) 9 LR Ir 385; *Thomson v Lord Clanmorris* [1900] 1 Ch 718, CA; *Goldrei, Foucard & Son v Sinclair and Russian Chamber of Commerce in London* [1918] 1 KB 180, CA; *McConnel v Wright* [1903] 1 Ch 546 at 554-555, CA, per Collins MR.

9 See note 7 supra.

10 Thus a representee by putting his claim in the form of a demand for a liquidated sum, or labelling his cause of action money had and received, cannot alter its intrinsic nature or escape the disabilities attaching to it: see *Ship v Crosskill* (1870) LR 10 Eq 73; *Manners v Whitehead* (1898) 1 F 171, Ct of Sess. For the principle that money paid to the representor may be sued for as money had and received or treated as damages see PARA 791 note 4 ante.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(4) MEASURE OF DAMAGES/807. Computation of benefits received by representee.

807. Computation of benefits received by representee.

For the purpose of calculating damages, the value of the property, rights or interests received by the representee¹ under the contract means their real and actual value, to be determined by reference to the evidence adduced², and, in the case of marketable or saleable securities, without regard to market or current prices, which may be shown to have been manufactured by the same fraudulent means as gave the representee his cause of action³. The date at which the value is to be assessed is the date at which the property or rights were acquired, although subsequent events may be taken into account in determining the value at that date⁴. The representee is not bound to sell on discovery of the fraud, or at any subsequent time, but if he chooses to do so he must give credit for at least the sum received as purchase money⁵, and if he delays selling after the date when he has had a reasonable time to consider his position, and if the price has gone down since that date, he may have to give credit for the higher price which he could have obtained at that date⁶.

1 As to who is a representee see PARAS 735-741 ante.

2 *Pearson v Wheeler* (1825) Ry & M 303 at 304; and see generally the authorities cited in note 3 infra.

3 *Twycross v Grant* (1877) 2 CPD 469 at 489-491, 503-505, 542-546, CA; *Jury v Stoker and Jackson* (1882) 9 LR Ir 385; *Arkwright v Newbold* (1881) 17 ChD 301 at 312-313, CA, per Fry J; *Peek v Derry* (1887) 37 ChD 541 at 591-594, CA (revsd without reference to this point (1889) 14 App Cas 337, HL); *Glasier v Rolls* (1889) 42 ChD 436 at 455, CA, per Kekewich J; *McConnel v Wright* [1903] 1 Ch 546, CA; *Cackett v Keswick* [1902] 2 Ch 456 at 468, CA, per Farwell J; *Broome v Speak* [1903] 1 Ch 586 at 605-606, CA, per Buckley J, and at 623 per Collins MR (affd sub nom *Shepherd v Broome* [1904] AC 342, HL).

4 *Peek v Derry* (1887) 37 ChD 541 at 592-594, CA (revsd without reference to this point sub nom *Derry v Peek* (1889) 14 App Cas 337, HL); *Glasier v Rolls* (1889) 42 ChD 436 at 455, CA, per Kekewich J; *McConnel v Wright* [1903] 1 Ch 546, CA; *Broome v Speak* [1903] 1 Ch 586 at 609, CA, per Buckley J, and at 623 per Collins MR (affd sub nom *Shepherd v Broom* [1904] AC 342, HL).

5 *Peek v Derry* (1887) 37 ChD 541 at 593, CA; revsd without reference to this point sub nom *Derry v Peek* (1889) 14 App Cas 337, HL.

6 *Waddell v Blockey* (1879) 4 QBD 678, CA.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2.
CLAIMS FOR DAMAGES/(4) MEASURE OF DAMAGES/808. Duty to mitigate loss.

808. Duty to mitigate loss.

It is the duty of the representee¹ to take all reasonable steps to mitigate the loss sustained by him in consequence of the fraudulent misrepresentation², the question what is reasonable being one of fact, the burden of proof being on the representor³.

¹ As to who is a representee see PARAS 735-741 ante.

² As to fraudulent misrepresentation see PARA 755 et seq ante.

³ See DAMAGES. As to who is a representor see PARAS 726-734 ante. The burden is on the representor to show both that the representee has failed to act reasonably and that the representee would have been in a more advantageous position if it had acted reasonably: *Standard Chartered Bank v Pakistan National Shipping Corpn* [2002] EWCA Civ 55, [2001] 1 All ER (Comm) 822, CA.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2.
CLAIMS FOR DAMAGES/(4) MEASURE OF DAMAGES/809. Loss of profits.

809. Loss of profits.

It seems that a representee¹ may recover damages for loss of prospective profits if the loss is the natural and direct result of the representee acting upon the fraudulent misrepresentation², but he cannot recover for loss of prospective profits merely on the ground that he would have obtained them if the representation had been true³.

¹ As to who is a representee see PARAS 735-741 ante.

² See eg *Barley v Walford* (1846) 9 QB 197; and PARA 791 ante. As to fraudulent misrepresentation see PARA 755 et seq ante.

³ See *Salvesen & Co v Rederi Aktiebolaget Nordstjernen* [1905] AC 302, HL; *Cassaboglou v Gibb* (1883) 11 QBD 797, CA; *Johnston v Braham and Campbell* [1917] 1 KB 586, CA (actions for breach of duty against agents); and AGENCY vol 1 (2008) PARA 86. Such a claim might lie if the representor had contracted that his statement was true, for then the representee would in principle be entitled to be put in the position he would have been in if the contract had been performed: see DAMAGES.

See also *East v Maurer* [1991] 2 All ER 733, [1991] 1 WLR 461, CA (loss of profits could be recovered in an action for deceit as being actual damage directly flowing from the fraudulent representation; amount to be assessed on the basis of compensating for all the loss suffered rather than on the basis of putting the representee in as good a position as if the statement had been true; thus, where the representee bought a business as a result of the representor's fraud, the representee recovered damages which reflected not the profit which would have been made if the representations had been true but a reasonable return on the money which would otherwise have been invested in another business); *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488, CA (the successful claimant had not made a loss overall but less profit than if the fraudulent misstatement had not been made and the defendant's argument, that the rule of recovery was confined to cases of overall loss, was rejected; the claim was in accord with 'overriding compensatory principle' of comparing the claimant's position before the fraudulent statement was made to him with his position as a result).

As to who is a representor see PARAS 726-734 ante.

UPDATE

809 Loss of profits

NOTE 3--See *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486, [2010] All ER (D) 33 (May) (representee induced to trade on alternative trading system entitled to profits it would have accrued had it continued its previous trading practices).

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(4) MEASURE OF DAMAGES/810. Damages for negligent statements at common law.

810. Damages for negligent statements at common law.

It is clear that where damages are awarded for negligent misstatements¹ the cause of action is tortious and that accordingly damages should aim to restore the claimant to the position he was in before the statement, subject to the limitation that the loss suffered should be foreseeable².

¹ See PARAS 762-764, 798-800 ante.

² Foreseeability being the test of remoteness of damage in negligence, the wider test employed in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, [1969] 2 All ER 119, CA, (see PARA 805 ante) would not apply. As to the difference between the fraud and negligence measures see *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769, HL (see PARA 806 note 7 ante); cf *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, HL (where a valuer who negligently overvalued property was only liable for the foreseeable consequences of the information being wrong, and not for loss attributable to a general collapse of the property market).

See also *Naughton v O'Callaghan* [1990] 3 All ER 191. In this case, a racehorse was bought as a result of misrepresentations as to its pedigree and, although at the date of purchase this would have made no difference to its value, by the time the misrepresentation was discovered it was clear that the horse had little or no value as a racehorse. The purchaser recovered the difference between the purchase price and its present value rather than the difference between the purchase price and its actual value at the time of purchase, together with the costs of training and upkeep up to the date of discovery of the truth. See further *Jacovides v Constantinou* (1986) Times, 27 October; *Heinemann v Cooper* [1987] 2 EGLR 154, 19 HLR 262, CA; *Hussey v Eels* [1990] 2 QB 227, [1990] 1 All ER 449, CA; *First Interstate Bank of California v Cohen Arnold & Co* [1995] EGCS 188, (1995) Times, 11 December, CA.

As to the measure of damages in tort generally see DAMAGES.

Halsbury's Laws of England/MISREPRESENTATION AND FRAUD (VOLUME 31 (2003 REISSUE))/2. CLAIMS FOR DAMAGES/(4) MEASURE OF DAMAGES/811. Damages under the Misrepresentation Act 1967.

811. Damages under the Misrepresentation Act 1967.

Damages may be awarded under the Misrepresentation Act 1967¹, but the Act itself contains no guidance as to the principles upon which damages should be assessed. Some early cases suggested that damages might be recovered on contract principles, for example so as to recover foreseeable loss of profits². But it is now clear that the better view is that this cause of action should be regarded as tortious³; and the same principles should be applied to claims under the statute as to claims for deceit⁴.

¹ ie under the Misrepresentation Act 1967 s 2(1) (see PARA 801 ante). Damages may also be awarded in lieu of rescission under s 2(2) (see PARA 834 post). Damages awarded in lieu of rescission must be taken into account in assessing liability under s 2(1); see s 2(3); and PARA 834 post.

Damages under s 2(1) may be reduced for contributory negligence: see *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865. As to contributory negligence see NEGLIGENCE vol 78 (2010) PARA 75 et seq.

² See *Jarvis v Swans Tours Ltd* [1973] QB 233 at 237, [1973] 1 All ER 71 at 73, CA, per Lord Denning MR; *Davis & Co (Wines) Ltd v Afa-Minerva (EMI) Ltd* [1974] 2 Lloyd's Rep 27; *Watts v Spence* [1976] Ch 165, [1975] 2 All ER 528.

³ *Andre & Cie SA v Ets Michel Blanc & Fils* [1979] 2 Lloyd's Rep 427, CA; *Chesneau v Interhome Ltd* (1983) Times, 9 June, CA. See also *Shameyford Supplies Ltd v Edge* [1987] Ch 305, [1987] 1 All ER 588, CA.

⁴ See *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA. In *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 283, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 at 792, HL, Lord Steyn noted the 'trenchant academic criticism' of the *Royscot* decision, but declined to express a view whether it was correct. See also *Naughton v O'Callaghan* [1990] 3 All ER 191.