

# TABLE OF CONTENTS

|                                                           | PAGE |
|-----------------------------------------------------------|------|
| <i>Preface</i> .....                                      | v    |
| <i>Abbreviations: Books Referred to in the Text</i> ..... | ix   |
| <i>Table of Cases</i> .....                               | xxi  |
| <i>Table of Statutes</i> .....                            | xcì  |
| <i>Table of Statutory Instruments</i> .....               | xcix |
| <i>Table of European Legislation</i> .....                | ciii |
| <i>Table of Foreign Statutes</i> .....                    | cv   |

|                                                                                   | PARA |
|-----------------------------------------------------------------------------------|------|
| 1. GENERAL INTRODUCTION                                                           |      |
| I. Scope of this Book .....                                                       | 1–01 |
| II. Distinguishing between Misrepresentation, Mistake<br>and Non-Disclosure ..... | 1–03 |

## Part 1 MISREPRESENTATION

|                                                                        |      |
|------------------------------------------------------------------------|------|
| 2. INTRODUCTION: THE CLAIM FOR MISREPRESENTATION                       |      |
| I. Scope of this Part .....                                            | 2–01 |
| II. The Focus on Individual Remedies for<br>Misrepresentation .....    | 2–02 |
| III. An Overview of the Remedies for<br>Misrepresentation .....        | 2–04 |
| 3. ELEMENTS COMMON TO A CLAIM FOR MISREPRESENTATION                    |      |
| I. The Core Problem: Defining Actionable<br>Statements .....           | 3–01 |
| II. The Statement .....                                                | 3–03 |
| III. Statement of Fact?                                                |      |
| (1) A Statement on which the Representee was<br>Entitled to Rely ..... | 3–12 |

|      |                                                                                                                   |      |
|------|-------------------------------------------------------------------------------------------------------------------|------|
| (2)  | Statements of Fact Contrasted with “Sales Talk”, Uncertain Statements and Statements of Opinion .....             | 3–14 |
| (3)  | Fact Contrasted with Law                                                                                          |      |
| (a)  | The “misrepresentation of law” rule .....                                                                         | 3–20 |
| (b)  | The law/fact distinction .....                                                                                    | 3–22 |
| (c)  | The origins and rationale of the distinction.....                                                                 | 3–28 |
| (d)  | Rejection of the “mistake of law” rule in restitution, and the law/fact distinction in other jurisdictions .....  | 3–34 |
| (e)  | The future: assimilation with the rules for misrepresentations of opinion? Applying the underlying principle..... | 3–39 |
| (4)  | (Present) Fact Contrasted with Future Fact or Intention .....                                                     | 3–42 |
| (5)  | Other Tests for Other Remedies .....                                                                              | 3–45 |
| IV.  | The Representor’s State of Mind .....                                                                             | 3–48 |
| V.   | Reliance; Causation .....                                                                                         | 3–50 |
|      |                                                                                                                   |      |
| 4.   | RESCISSION OF THE CONTRACT FOR MISREPRESENTATION                                                                  |      |
| I.   | The Nature of the Remedy                                                                                          |      |
| (1)  | Rescission at Common Law and in Equity .....                                                                      | 4–01 |
| (2)  | The Effect of Rescission .....                                                                                    | 4–05 |
| (3)  | The Mechanics of Rescission.....                                                                                  | 4–18 |
| II.  | Elements of the Claim .....                                                                                       | 4–21 |
| (1)  | The Representation .....                                                                                          | 4–23 |
| (2)  | The Representor’s State of Mind .....                                                                             | 4–29 |
| (3)  | Reliance by the Representee .....                                                                                 | 4–32 |
| III. | Limits to the Remedy .....                                                                                        | 4–38 |
| (1)  | Affirmation of the Contract.....                                                                                  | 4–39 |
| (2)  | Lapse of Time .....                                                                                               | 4–48 |
| (3)  | Impossibility of Restitution .....                                                                                | 4–52 |
| (4)  | Intervening Third-Party Rights.....                                                                               | 4–59 |
| (5)  | Misrepresentation Act 1967, Section 2(2).....                                                                     | 4–61 |
| (6)  | Exclusion and Limitation Clauses                                                                                  |      |
| IV.  | Misrepresentations by Third Parties.....                                                                          | 4–72 |

5. LIABILITY IN TORT FOR MISREPRESENTATION:

I — FRAUDULENT MISREPRESENTATION

|      |                                                  |      |
|------|--------------------------------------------------|------|
| I.   | The Tort of Deceit .....                         | 5–01 |
| II.  | Elements of the Claim in the Tort of Deceit..... | 5–05 |
|      | (1) The Representation .....                     | 5–06 |
|      | (2) The Representor’s State of Mind .....        | 5–13 |
|      | (3) Reliance by the Representee .....            | 5–23 |
| III. | Defences.....                                    | 5–29 |
| IV.  | The Damages Recoverable.....                     | 5–35 |
| V.   | Alleging and Proving Fraud .....                 | 5–46 |

6. LIABILITY IN TORT FOR MISREPRESENTATION: II—NEGLIGENT MISREPRESENTATION

|      |                                                                      |      |
|------|----------------------------------------------------------------------|------|
| I.   | The Tort of Negligence                                               |      |
|      | (1) No General Liability for “Careless”<br>Statements.....           | 6–01 |
|      | (2) Development of Liability in Tort for Careless<br>Statements..... | 6–06 |
| II.  | Elements of the Claim in the Tort of<br>Negligence .....             | 6–12 |
|      | (1) Duty of Care                                                     |      |
|      | (a) General principles.....                                          | 6–13 |
|      | (b) Application of general principles to<br>representations .....    | 6–16 |
|      | (c) Duties of care between parties to a<br>contract.....             | 6–27 |
|      | (d) Particular categories of duty in respect of<br>statements.....   | 6–30 |
|      | (2) Breach of Duty .....                                             | 6–43 |
|      | (3) Damage .....                                                     | 6–46 |
| III. | Defences.....                                                        | 6–47 |
| IV.  | The Damages Recoverable.....                                         | 6–52 |
| V.   | Other Remedies in Damages for Negligent<br>Misrepresentation.....    | 6–64 |

## 7. STATUTORY LIABILITY FOR MISREPRESENTATION

|      |                                                                              |      |
|------|------------------------------------------------------------------------------|------|
| I.   | Different Forms of Statutory Liability .....                                 | 7-01 |
| II.  | General Liability: Section 2(1) of the<br>Misrepresentation Act 1967         |      |
| (1)  | Elements of the Claim Under Section<br>2(1) .....                            | 7-03 |
| (a)  | The remedy is limited to contract .....                                      | 7-05 |
| (b)  | The representation .....                                                     | 7-07 |
| (c)  | Loss .....                                                                   | 7-15 |
| (d)  | The “fiction of fraud” .....                                                 | 7-16 |
| (2)  | The Statutory Defence: Honest and Reasonable<br>Belief .....                 | 7-23 |
| (3)  | Other Defences .....                                                         | 7-26 |
| (4)  | The Damages Recoverable .....                                                | 7-31 |
| (5)  | Relationship to Other Remedies for<br>Misrepresentation .....                | 7-44 |
| III. | Specific Liabilities                                                         |      |
| (1)  | Financial Services and Markets Act 2000,<br>Section 90 .....                 | 7-49 |
| (2)  | Package Travel, Package Holidays and<br>Package Tours Regulations 1992 ..... | 7-66 |
| (3)  | Liability Under Other Statutes .....                                         | 7-71 |

## 8. MISREPRESENTATION AS BREACH OF CONTRACT

|      |                                                               |      |
|------|---------------------------------------------------------------|------|
| I.   | Elements of the Claim .....                                   | 8-01 |
| (1)  | The Contractual Promise                                       |      |
| (a)  | Incorporation of the representation .....                     | 8-03 |
| (b)  | Criteria to test incorporation of the<br>representation ..... | 8-07 |
| (c)  | Contractual duties of care .....                              | 8-14 |
| (2)  | Breach of Contract .....                                      | 8-17 |
| II.  | Defences .....                                                | 8-19 |
| III. | Remedies for Breach of Contract .....                         | 8-23 |
| (1)  | Damages .....                                                 | 8-24 |
| (2)  | Termination .....                                             | 8-35 |

## 9. EXCLUSION AND LIMITATION OF LIABILITY FOR MISREPRESENTATION

- I. Different Forms of Clause or Notice Excluding or Limiting Liability .....9-01
- II. Common Law Controls of Exclusion and Limitation Clauses
  - (1) The Scope of the Common Law Controls.....9-08
  - (2) Examples of the Courts' Construction of Clauses .....9-12
- III. Statutory Controls of Exclusion and Limitation Clauses .....9-18
  - (1) Misrepresentation Act 1967, Section 3 .....9-19
  - (2) Unfair Contract Terms Act 1977 .....9-31
  - (3) Unfair Terms in Consumer Contracts Regulations 1999 .....9-37
  - (4) Interrelationship Between the Several Statutory Controls.....9-39

## 10. MISREPRESENTATION AS A DEFENCE

- I. The Defence of Misrepresentation Distinguished from a Counterclaim Based on Misrepresentation.....10-01
- II. Illustrations of the Use of Misrepresentation as a Defence
  - (1) Refusal of Specific Performance.....10-04
  - (2) Defence to Actions for Debt or Damages.....10-10
  - (3) Defence to the Enforcement of Deeds, Written Contracts and Other Documents .....10-12
- III. Misrepresentation and Estoppel .....10-18

## 11. PRACTICE AND PROCEDURE RELATING TO CLAIMS FOR MISREPRESENTATION

- I. Civil Procedure Rules and Practice.....11-01
- II. Particular Rules and Practice Relevant to Misrepresentation Claims and Defences .....11-03

## Part 2 MISTAKE

|                                                                                       |       |
|---------------------------------------------------------------------------------------|-------|
| 12. INTRODUCTION: CATEGORISING MISTAKES                                               |       |
| I. Scope of this Part .....                                                           | 12-01 |
| II. What is a “Mistake”? .....                                                        | 12-02 |
| III. Categorising Mistakes .....                                                      | 12-06 |
| IV. The Reluctance to Remedy a Mistake .....                                          | 12-12 |
| V. An Overview of the Remedies for Mistake .....                                      | 12-16 |
| 13. MISTAKES ABOUT THE TERMS OF THE CONTRACT                                          |       |
| I. Introduction: “Mistake” about the Terms .....                                      | 13-01 |
| II. Formation of the Contract: the “Objective Test”                                   |       |
| (1) Subjectivity and Objectivity .....                                                | 13-04 |
| (2) The General Approach in English Law .....                                         | 13-08 |
| III. Practical Application of the Objective Test                                      |       |
| (1) Misunderstandings Incapable of Resolution .....                                   | 13-20 |
| (2) Mistake of One Party, Known (or Ought to be Known) by the Other .....             | 13-21 |
| (3) Relevant of the Parties’ Fault .....                                              | 13-24 |
| (4) The Consequences at Common Law of a Mistake About the Terms of the Contract ..... | 13-27 |
| (5) Equitable Remedies for a Mistake about the Terms .....                            | 13-30 |
| IV. Written Contracts                                                                 |       |
| (1) The Use of Writing in the Formation of a Contract .....                           | 13-32 |
| (2) Remedying Mistakes by Interpretation .....                                        | 13-35 |
| (3) Remedying Mistakes by Rectification: Common Mistakes .....                        | 13-38 |
| (4) Remedying Mistakes by Rectification: Unilateral Mistakes .....                    | 13-44 |
| (5) Limitations on the Remedy of Rectification .....                                  | 13-50 |
| (6) The Mechanics of Rectification .....                                              | 13-53 |
| (7) Non est Factum .....                                                              | 13-55 |

|                                                                                                                     |       |
|---------------------------------------------------------------------------------------------------------------------|-------|
| 14. MISTAKES ABOUT THE IDENTITY OF THE OTHER PARTY                                                                  |       |
| I. Introduction: “Identity” and its Relevance in Forming a Contract.....                                            | 14–01 |
| II. The Practical Significance of a Mistake of Identity: Void and Voidable Contracts and Transfers of Property..... | 14–08 |
| III. The Law Before <i>Shogun Finance Ltd v Hudson</i> .....                                                        | 14–12 |
| (1) The Claimant Must Have Made a Mistake of Identity Which Caused Him to Contract.....                             | 14–13 |
| (2) A Subjective Mistake is Not Sufficient.....                                                                     | 14–15 |
| (3) The Cases: Mistakes of “Identity” Made in Different Circumstances .....                                         | 14–18 |
| (a) The parties communicate at a distance .....                                                                     | 14–19 |
| (b) The parties deal face to face .....                                                                             | 14–23 |
| (c) The contract is concluded in a single, written document .....                                                   | 14–30 |
| (4) Summary of the position before <i>Shogun</i> .....                                                              | 14–33 |
| IV. The Current Law: <i>Shogun Finance Ltd v Hudson</i>                                                             |       |
| (1) The Issue Decided by the House of Lords .....                                                                   | 14–34 |
| (2) The Decision.....                                                                                               | 14–36 |
| (3) The Impact of the Decision in <i>Shogun</i> on the Earlier Authorities.....                                     | 14–40 |
| 15. MISTAKES ABOUT THE SUBJECT-MATTER OF THE CONTRACT                                                               |       |
| I. Introduction: The Nature of a Mistake about the Subject-Matter                                                   |       |
| (1) What is a Mistake about the Subject-Matter?.....                                                                | 15–01 |
| (2) Why Should a Mistake about the Subject-Matter be Remedied? .....                                                | 15–04 |
| (3) Categories of Mistake about the Subject-Matter .....                                                            | 15–07 |
| II. Unilateral Mistake .....                                                                                        | 15–10 |
| III. Common (Shared) Mistake .....                                                                                  | 15–14 |
| (1) Risk Allocation in the Contract.....                                                                            | 15–15 |
| (2) The Common Law Rule: A Contract May be Void for Common Mistake.....                                             | 15–19 |

|                                                                      |       |
|----------------------------------------------------------------------|-------|
| (3) Can a Contract be Voidable in Equity for<br>Common Mistake?..... | 15–29 |
|----------------------------------------------------------------------|-------|

### Part 3 NON-DISCLOSURE

|                                                                             |       |
|-----------------------------------------------------------------------------|-------|
| 16. INTRODUCTION: NO GENERAL DUTY OF DISCLOSURE                             |       |
| I. Scope of this Part .....                                                 | 16–01 |
| II. The General Rule: No Liability for<br>Non-Disclosure .....              | 16–02 |
| 17. PARTICULAR DUTIES OF DISCLOSURE                                         |       |
| I. Rescission of the Contract for<br>Non-Disclosure .....                   | 17–01 |
| (1) Obligations of Disclosure in Particular Types<br>of Contract            |       |
| (a) Contracts “uberrimae fidei” .....                                       | 17–03 |
| (b) Insurance contracts .....                                               | 17–06 |
| (c) Partnership contracts.....                                              | 17–20 |
| (d) Surety Contracts .....                                                  | 17–21 |
| (e) Compromises, releases and family<br>arrangements.....                   | 17–27 |
| (f) Contracts for the sale of land .....                                    | 17–30 |
| (g) Other types of contract .....                                           | 17–32 |
| (2) Obligations of Disclosure Arising From<br>Particular Relationships..... | 17–33 |
| II. Liability in Tort for Non-Disclosure .....                              | 17–37 |
| III. Non-Disclosure as Breach of Contract.....                              | 17–39 |
| IV. Statutory Remedies for Non-Disclosure .....                             | 17–43 |
| (1) Misrepresentation Act 1967, Section<br>2(1).....                        | 17–45 |
| (2) Financial Services and Markets Act 2000,<br>Section 90 .....            | 17–46 |
| (3) Remedies for Non-Disclosure Under Other<br>Statutes.....                | 17–52 |
| V. Exclusion of Liability for Non-Disclosure.....                           | 17–56 |
| VI. Non-Disclosure as a Defence .....                                       | 17–57 |
|                                                                             | PAGE  |
| Index .....                                                                 | 853   |