

Deception in Commercial Dealings

1. INTRODUCTION	1
2. CONDUCT – WHAT DID THE DEFENDANT DO TO MISLEAD THE PLAINTIFF?	3
2.1 The issue	3
2.2 Different types of statement: facts, opinions, predictions, intentions, promises	3
2.3 Express statements of fact – when are they insufficient to establish liability?	4
<i>Reliance – an essential ingredient</i>	5
<i>Xanthe is not entitled to rely on the statement</i>	7
2.4 Implied statements	11
<i>Implied statements generally</i>	11
<i>Predictions and opinions about the future</i>	12
<i>Statements in the form of opinions</i>	13
<i>What is implicit in a statement of intention (which is not a contractual promise)?</i>	14
<i>What is implicit in a contractual promise?</i>	15
2.5 Conduct	15
2.6 Silence and failures to warn/disclose	16
<i>Non-disclosure as a misrepresentation</i>	16
<i>Non-disclosure and the Fair Trading Act</i>	17
2.7 Assuming responsibility for the accuracy of a third party's statements	18
2.8 Failure to disabuse the plaintiff of a known (or suspected) error	20
2.9 Shared misconceptions	21
2.10 Disappointment of defendant's objective in entering into a transaction	21
2.11 Mere puffs	22
2.12 Who is responsible for the conduct?	22
<i>Liability of principal for agent's statements</i>	23
<i>When is a company director or employee personally liable in respect of statement?</i>	24
3. Knowledge – what did the defendant know [about what?] and does it matter?	25
3.1 What do we mean by knowledge?	25
3.2 When does knowledge matter?	27
<i>Claims under statute</i>	27
The Fair Trading and Contractual Remedies Acts	27
The Contractual Mistakes Act	29
The Illegal Contracts Act	30
<i>Non-statutory causes of action</i>	33
Claims in equity	33
Dishonest accessories	34
Knowing receipt	36

<i>Common law claims</i>	38
Money had and received	38
Contract	39
Deceit	39
Conversion	40
Negligence	41
3.3 Knowledge and corporate defendants	41
3.4 The Special Position of Third Parties	42
4. CAUSES OF ACTION AND THEIR ELEMENTS	45
4.1 Introduction	45
<i>Claims against the deceiver</i>	45
<i>Claims against third parties</i>	46
4.2 Fair Trading Act 1986	46
4.3 Breach of a contractual term, express or implied	49
<i>Express terms</i>	49
<i>Implied terms</i>	50
4.4 Contractual Remedies Act 1979, ss 6 and 9	50
4.5 The tort of deceit	53
<i>Proprietary claims based on deceit</i>	54
4.6 The tort of negligent misstatement	56
4.7 Breach of fiduciary duty	58
4.8 Estoppel	59
4.9 The Contractual Mistakes Act 1977	62
4.10 The Illegal Contracts Act 1970	63
4.11 Proprietary claims at law	63
4.12 Proprietary claims in equity	65
4.13 Money had and received	65
4.14 "Knowing receipt or dealing"	67
4.15 Unjust enrichment?	68
4.16 Claims against third parties	68
<i>Third party "involved in" the deception</i>	69
<i>Third party enriched as a result of the deception</i>	69
<i>Third party should have prevented the deception</i>	70
4.17 Dishonest accessory liability	70
5. CONTRACTING OUT	73
5.1 General comments	73
5.2 Contractual Remedies Act	74
5.3 Contractual Mistakes Act	77
5.4 Fair Trading Act	78
6. RELIEF	81
6.1 Introduction	81

6.2 The move towards greater flexibility in remedies	81
6.3 Expectation damages under the Fair Trading Act?	86
6.4 Causation and remoteness tests applied to equitable compensation	89
6.5 Scope of duty in tort as a limit on types and amounts of recoverable loss	92
<i>Limits on type of loss recoverable</i>	92
<i>Limits on quantum of loss recoverable</i>	94
6.6 Where does this leave us?	97
6.7 Expectation damages	98
6.8 Proprietary remedies against the primary wrongdoer	99
<i>Property interest retained by the victim</i>	100
<i>Constructive trust</i>	101
<i>Statutory discretion to order return of property</i>	103
<i>Discretionary relief of a proprietary nature</i>	104
6.9 Proprietary remedies against a third party	106
6.10 Remedies based on the wrongdoer's gain	107
6.11 Compensation for losses – some relevant factors	108
6.12 Doing better than compensation for reliance losses – the need for an "x-factor"	109
7. LIMITATION	111
7.1 Introduction	111
7.2 Fair Trading Act claims	111
7.3 Contract claims	113
7.4 Negligent misstatement	113
7.5 Deceit	114
7.6 Claims for breach of fiduciary duty	114
7.7 Knowing receipt and dishonest accessory claims	115
<i>Knowing receipt or dealing</i>	115
<i>Dishonest accessories</i>	117
7.8 Other common "deception-related" claims	117
7.9 Extension of limitation period in cases of fraud	117
8. A WORD ABOUT CONTRIBUTORY FAULT	119
PROBLEM 1 – MARGARET'S MARVELLOUS MUFFINS	123
PROBLEM 2 - HARRY'S HOPELESS HONEY	125