Trinity Term
[2016] UKSC 48
On appeal from: [2015] EWCA Civ 327

JUDGMENT

Hayward (Respondent) *v* Zurich Insurance Company plc (Appellant)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Clarke
Lord Reed
Lord Toulson

JUDGMENT GIVEN ON

27 July 2016

Heard on 16 June 2016

Appellant	*Respondent*
Patrick Limb QC Jayne Adams QC (Instructed by DAC Beachcroft Claims Ltd)	Guy Sims (Instructed by Hewitsons LLP)

LORD CLARKE: (with whom Lord Neuberger, Lady Hale and Lord Reed agree)

Introduction

1. In April 2012 the Supreme Court considered a case called *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004, where the facts were strikingly similar to those here. In that case, as in this one, the claimant suffered an injury at work which was caused by the negligence or breach of duty of his employer. In each case the employer was either held liable (in *Summers*) or admitted liability (here) as to 80%, the claimant accepting that he was 20% to blame. In each case the claimant dishonestly exaggerated the extent of the consequences of the injury. In *Summers* the claimant originally claimed damages of over £800,000 but was awarded a total of just over £88,000 on the basis of the true facts, which came to light after undercover surveillance evidence showed that his account of the consequences of his injuries had been grossly and dishonestly exaggerated. In the instant case, the claimant, Mr Colin Hayward, claimed £419,316.59 (exclusive of promotion prospects but discounted for loss of ill health pension). He was ultimately awarded £14,720 after a trial before His Honour Judge Moloney QC ("the judge"). The reason for the reduction was again partly as a result of undercover surveillance and other evidence that showed that Mr Hayward's claim had been grossly and dishonestly exaggerated.

2. In *Summers* the issue was what remedies were available to the employer and its insurers, whereas in the instant case the issue arises out of a settlement agreement reached between the parties on 3 October 2003, the accident having occurred on 9 June 1998. The agreement was made shortly before the issue of quantum was due to be tried and was incorporated in a Tomlin Order. The employer's case was conducted on its behalf by its liability insurer, Zurich Insurance Company Plc ("Zurich"), which is the appellant in this appeal. The employer (in practice Zurich) agreed to pay £134,973.11, inclusive of CRU of £22,473.11, in full and final settlement of Mr Hayward's claim.

3. The Tomlin order was in familiar terms as follows:

> "BY CONSENT
>
> IT IS ORDERED THAT

> All further proceedings in this action be stayed, except for the purpose of carrying such terms into effect. Liberty to apply as to carrying such terms into effect.
>
> …
>
> THE SCHEDULE
>
> The claimant accepts in settlement of his cause of action herein the sum of £134,973.11.
>
> …
>
> 4. Upon payment by the defendant of the several sums and costs before mentioned, they be discharged from any further liability to the claimant in relation to the claim herein."

4. In 2005, Mr Hayward's neighbours, Mr and Mrs Cox, who had lived next door to him since June 2002, approached the employer to say that they believed that his claim to have suffered a serious back injury was dishonest. From their observation of his conduct and activities, they believed that he had recovered in full from his injury at least a year before the settlement. They were referred to Zurich and made full witness statements to that effect.

5. In February 2009 Zurich commenced the present proceedings against Mr Hayward claiming damages for deceit. Zurich pleaded that both written statements made by Mr Hayward or on his behalf, and his statements of case in the Particulars of Claim and the Schedule(s) of Loss as to the extent of his injury, as well as his accounts given to the medical experts, constituted fraudulent misrepresentations. Damages were claimed equivalent to the difference between the amount of the settlement and the damages that should have been awarded if he had told the truth. The claim was subsequently amended to claim in the alternative rescission of the settlement agreement and the repayment of the sums paid under it.

6. No point has been taken in reliance upon the fact that the action was brought in the name of Zurich rather than the employer. Mr Hayward applied to strike out the proceedings, or for summary judgment in his favour. He contended that the Tomlin Order created an estoppel per rem judicatam and/or by record, alternatively that the action was an abuse of the process because the issue of fraud had been compromised by the settlement. Deputy District Judge Bosman refused to strike out

the claim, although he directed Zurich to amend the claim to seek an order that the compromise be set aside rather than an order for damages. Although it was pleaded in the original defence to Zurich's claim that Zurich must satisfy the test in *Ladd v Marshall* [1954] 1 WLR 1489, that contention was not ultimately pursued following the hearing before the DDJ. His decision was reversed on appeal by Judge Yelton.

7. Zurich appealed to the Court of Appeal (Maurice Kay, Smith and Moore-Bick LJJ) and the decision of the Deputy District Judge was unanimously restored: see [2011] EWCA Civ 641. It was held that the settlement gave rise to no estoppel of any kind and that the action was not an abuse of process. It was further held that the fact that Zurich had alleged deliberate exaggeration prior to the settlement did not preclude them from relying on it subsequently as a ground for rescission. In the result, the claim proceeded. I note in passing that Moore-Bick LJ said at para 58:

> "If it is to succeed in its action Zurich will have to persuade the court that it was induced to agree to the settlement by fraud on the part of Mr Hayward, a task that may not prove easy, given the fact that it already knew enough to justify the service of a defence in the terms indicated earlier."

The trial

8. The trial came before the judge in the Cambridge County Court in November 2012. He heard evidence for Zurich from Zurich's solicitor (Ms Winterbottom) and its claims manager (Mr Birkenshaw), who were responsible for the conduct of the litigation, from Mr and Mrs Cox and from Mr Sharp, who was the orthopaedic expert instructed on behalf of Zurich. Mr Hayward gave evidence together with three members of his family and also called evidence from Mr Varley, who was the orthopaedic surgeon instructed on his behalf.

9. Mr Hayward denied any suggestion that his condition was anything other than genuine or that there was any element of exaggeration. He maintained throughout that he was a seriously disabled individual whose disability arose from the original accident and was such that, ever since, he had not been able to work or carry out normal activities of daily living without assistance. As with the first series of witness statements, Mr Hayward signed the appropriate statements of truth setting out in detail the extent of his disability and presented himself to the medical experts on that basis.

10. Following a four-day trial, the judge found that Mr Hayward had deliberately and dishonestly exaggerated the effects of his injury throughout the court process.

Of Ms Winterbottom and Mr Birkenshaw, the judge said (at para 2.6 of his judgment quoted in full below) both that: "[n]either can be said to have believed the representations complained of to be true" and that "[t]hey may not themselves have believed the representations to be true; but they did believe that they would be put before the court as true, and that there was a real risk that the court would accept them in whole or part and consequently make a larger award than Zurich would otherwise have considered appropriate". The judge further found that, although Zurich was aware at the time of the settlement of the real possibility of fraud, Mr Hayward had continued his deliberate misrepresentations even after the disclosure of the 1999 video, and that those continuing misrepresentations influenced Zurich into agreeing a higher level of settlement than it would otherwise have done. The judge therefore set aside the compromise.

11. It followed that the issue of quantum in the original action remained to be tried. That issue was heard on 6 September 2013 and, having found that Mr Hayward had made a full recovery from any continuing physical disability by October 1999, the judge thereafter handed down a judgment awarding Mr Hayward damages in the modest sum of £14,720, which was about 10% of the settlement figure. An order was made in the later action directing him to repay the sum paid under the settlement less that amount, namely £97,780, interest of £34,379.45 and £3,951 adjustment for CRU.

The appeal to the Court of Appeal

12. Mr Hayward appealed to the Court of Appeal against the decision that the settlement should be set aside but did not appeal against the judge's assessment of quantum or (contingent on whether the settlement was set aside) against the order for re-payment. Moreover, the judge's findings of fact were not challenged. To my mind, as appears below, this is a critical factor in this appeal.

13. The appeal was heard by Underhill, Briggs and King LJJ. They agreed that the appeal should be allowed. Substantive judgments were given by Underhill and Briggs LJJ. Although King LJ agreed with both judgments, I do not read their reasoning as quite the same.

14. In his para 9 Underhill LJ set out para 2.5 of the judge's judgment, where he said that the judge addressed the issue of reliance and dealt with the law. Para 2.5 is in these terms:

> "Lastly, of course, it is necessary that the employer/Zurich should *rely* on the representations and suffer loss as a result.

> Here an interesting (and apparently unresolved) question of principle arises. In the ordinary case, sale of goods for example, reliance by the purchaser is effectively equivalent to his *belief in the truth* of the statement; if he believes the goods are as represented, he will be relying on the representation (and acting on it by his purchase) and if not, not. In the litigation context the position is different. In such a situation, the party to whom the representation is made is by no means likely to believe it to be true at the pre-trial stage. At the very least, statements made in the course of litigation will be viewed with healthy scepticism and weighed against the other material available. Often the other party will not be sure, even then, whether the statement is in fact true, and will mainly concern himself with how likely it is to be accepted by the court. Sometimes (a staged road traffic 'accident' for example) the other party may actually be certain from his own direct knowledge that the statement is a deliberate lie. But even then he and his advisers cannot choose to ignore it; they must still take into account the risk that it will be believed by the judge at trial. This situation is quite different from a proposed purchase, where if in doubt one can simply walk away. For these reasons, it appears to me that the many dicta relied on by CH, to the effect that liability requires that the representation must be believed by the other party, are not applicable to a case like the present. The formulation adopted by the editors of Clerk and Lindsell, 20th ed (2010), at 18-34 fits the case better; 'The claimant must have been *influenced* by the misrepresentation' (my emphasis)."

15. After noting that 'CH' was shorthand for Mr Hayward, Underhill LJ set out (also in his para 9), para 2.6 of the judge's judgment as follows:

> "I heard the evidence of Ms Winterbottom and Mr Birkinshaw respectively in 2003 Zurich's litigation solicitor and claims handler. Each was aware of the 1999 video and of the real possibility that this was a fraudulent claim. Each was frustrated by the reluctance of 'their' expert, Mr Sharp, to produce a clear supplemental report saying that he now believed CH to have been shamming and to have sustained far less harm than was being claimed. Neither can be said to have believed the representations complained of to be true. But, if the law is as stated at 2.5 above, this does not matter provided the representations *influenced* them in their decision how much to pay CH in settlement. I am in no doubt that they did. They may not themselves have believed the representations to be true; but

> they did believe that they would be put before the court as true, and that there was a real risk that the court would accept them in whole or part and consequently make a larger award than Zurich would otherwise have considered appropriate. Acting in reliance on *that* belief (which, whether or not CH was truthful or honest, was the belief he and his advisers must have wanted them to form on the basis of the statements) they made the payment into court which led to the Tomlin Order settlement."

Underhill LJ then set out the substance of the judge's ultimate conclusions from para 6.6 in these terms:

> "… although Zurich was aware at the time of the settlement of the real possibility of fraud here, CH had continued his deliberate misrepresentations even after the disclosure of the 1999 video, and those continuing misrepresentations did influence Zurich into agreeing a higher level of settlement than it would otherwise have made."

The judge added: "The conditions required for setting aside the settlement are therefore made out and I so order."

16. Para 6.6 must be put in its context, which includes paras 6.4 and 6.5. Between paras 6.1 and 6.3 the judge explained why he accepted the evidence of Mr and Mrs Cox as credible. He then said this in paras 6.4 and 6.5:

> "6.4. The choice before me is not the stark one between 'no pain at all' and 'complete disability'. What I have to decide is whether CH's actual level of pain and disability at the time of the representations was materially less than he was representing, and if so whether that misrepresentation was deliberate and dishonest. It is accepted that there was here an injury leading to a measure of pain and disability, at least up to 2002; and Mr Sharp and Mr Varley do not exclude some continuing pain (as opposed to disability) in the period after the settlement. That being so, the records of pain management and analgesic drug treatment which gave me concern are not irreconcilable with Zurich's case.
>
> 6.5 There is no special standard of proof for fraud in civil proceedings; the normal test of balance of probability applies,

> though of course in assessing the probabilities one bears in mind that fraud is an unusual matter. In this case, the evidence, summarised above, that CH was not in fact suffering from the level of pain and disability that he claimed is so strong that it prevails over his innocent explanations. The probability is, and I so find, that CH was experiencing some pain both before and after the settlement, and did want it treated and managed; but at the same time, he also wanted the maximum compensation he could obtain, and to get it he was dishonestly willing to exaggerate his symptoms to the doctors, and to conceal his real level of ability from them and from the world, so as to give the false impression that he was not capable of heavy work when in fact he was. He must have been aware by the time of the 14 October 1999 surveillance video (at the latest) that his physical abilities were considerably greater than he thereafter represented to the doctors and his employers' representatives, and I find that his representations made after that date were knowingly false and misleading."

17. Underhill and Briggs LJJ allowed Mr Hayward's appeal for similar but not identical reasons. They did so essentially because of the state of mind of Zurich (and the employer) when the settlement was made. They rejected the conclusions of principle expressed in para 2.5 of the judge's judgment set out above. The parties to this appeal agreed that the appeal raised two issues. The first was this.

> "In order to set aside a compromise on the basis of fraudulent misrepresentation, to show the requisite influence by or reliance on the misrepresentation:
>
> > a) must the defrauded representee prove that it was induced into settlement because it believed that the misrepresentations were true; or
> >
> > b) does it suffice to establish influence that the fact of the misrepresentations was a material cause of the defrauded representee entering into the settlement?"

The second was this.

> "Under what circumstances, if any, does the suspicion by the defendant of exaggeration for financial gain on the part of the

> claimant preclude unravelling the settlement of that disputed claim when fraud is subsequently established?"

Discussion

Issue 1

18. Subject to one point, the ingredients of a claim for deceit based upon an alleged fraudulent misrepresentation are not in dispute. It must be shown that the defendant made a materially false representation which was intended to, and did, induce the representee to act to its detriment. To my mind it is not necessary, as a matter of law, to prove that the representee believed that the representation was true. In my opinion there is no clear authority to the contrary. However, that is not to say that the representee's state of mind may not be relevant to the issue of inducement. Indeed, it may be very relevant. For example, if the representee does not believe that the representation is true, he may have serious difficulty in establishing that he was induced to enter into the contract or that he has suffered loss as a result. The judge makes this point clearly and accurately in the third sentence of para 2.5 of his admirable judgment.

19. He makes a further point in the same paragraph which is of importance in the context of this somewhat unusual case. It is this. A person in the position of the employer or its insurer may have suspicions as to whether the representation is true. It may even be strongly of the view that it is not true. However, the question in a case like this is not what view the employer or its insurer takes but what view the court may take in due course. This is just such a case, as the judge correctly perceived. As he put it, the employer and its advisers must take into account the possibility that Mr Hayward would be believed by the judge at the trial. That is because the views of the judge will determine the amount of damages awarded.

20. In any event this is not a case in which Zurich or the employer knew that Mr Hayward was deliberately exaggerating the seriousness and long term effects of his injuries. We now know that he was thoroughly dishonest from October 1999 and that he continued to make false claims in the witness box at the trial even when the evidence against him was overwhelming. Each case of course depends upon its own facts but it seems to me to be putting the case too high to say, as Briggs LJ does at para 30, that Zurich went so far as to plead that Mr Hayward was fraudulent and to support it by a statement of truth. He says this at para 31:

> "In my opinion the true principle is that the equitable remedy of rescission answers the affront to conscience occasioned by

> holding to a contract a party who has been influenced into making it by being misled or, worse still, defrauded by his counterparty. Thus, once he discovers the truth, he must elect whether to rescind or to proceed with the contract. It must follow that, if he already knows or perceives the truth by the time of the contract, he elects to proceed by entering into it, and cannot later seek rescission merely because he later obtains better evidence of that which he already believed, still less if he merely repents of it. This seems to me to be *a fortiori* the case where, as here, the misrepresentation consists of a disputed claim in litigation, and the contract settles that claim."

21. To my mind that is to put the position too high in favour of fraudsters in general and Mr Hayward in particular. It is true that in its defence dated 30 October 2001 the employer (no doubt through Zurich) stated that the facts stated in the defence were true. The relevant facts were pleaded in paras 6 and 7 as follows:

> "6. It is admitted that the claimant suffered an injury to his back as a result of the accident. The defendant relies on the medical reports of Mr Sharp dated 11 June 2000, 20 August 2000 and 26 November 2000. The view of the claimant's ongoing physical condition from Mr Bracegirdle relied on by the claimant is not accepted by the defendant. As a result of video surveillance obtained Mr Sharp formed the view that the claimant's disability was not as great as he had described and he was capable of working full time even if not with heavy lifting. In view of the claimant's lack of candour in relation to his physical condition it is not possible to accept that his depressive state, as described, has been consistent, is continuing or will continue into the future.
>
> 7. The claimant has exaggerated his difficulties in recovery and current physical condition for financial gain."

22. These pleas show that Zurich was suspicious of Mr Hayward but no very clear allegations were, or could be, made. However, it is not in dispute that Zurich did as much as it reasonably could to investigate the position before the settlement. The evidence was not as good from its point of view as it might have hoped but the fact is that Zurich did not know the extent of Mr Hayward's misrepresentations. The case was settled at a time when the only difference between the experts was the likely duration of future loss. The figure agreed was about half way between the respective opinions of the experts. It was not until the advent of Mr and Mrs Cox that Zurich realised the true position. Hence, as the judge expressly found, the

amount of the settlement was very much greater than it would have been but for the fraudulent misrepresentations made by Mr Hayward. The small amount ultimately awarded by the judge, which is not challenged, shows the extent of the dishonest nature of the claim. I am not persuaded that the importance of encouraging settlement, which I entirely agree is considerable, is sufficient to allow Mr Hayward to retain moneys which he only obtained by fraud.

The authorities

23. I am not persuaded that the authorities lead to any other conclusion. As stated above, the ingredients of the tort of deceit are not in dispute subject to one question, which is whether a claimant alleging deceit must show that he believed the misrepresentation. In my opinion the answer is no.

24. There are many formulations of the relevant principles in the authorities. I take two examples. In *Briess v Woolley* [1954] AC 333, 353 Lord Tucker said:

> "The tort of fraudulent misrepresentation is not complete when the representation is made. It becomes complete when the misrepresentation - not having been corrected in the meantime - is acted upon by the representee. Damage giving rise to a claim for damages may not follow or may not result until a later date, but once the misrepresentation is acted upon by the representee the tortious act is complete provided that the representation is false at that date."

To like effect, Lord Mustill said in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd (No 2)* [1995] 1 AC 501, 542A:

> "In the general law it is beyond doubt that even a fraudulent misrepresentation must be shown to have induced the contract before the promisor has a right to avoid, although the task of proof may be made more easy by a presumption of inducement."

25. The authorities show that questions of inducement and causation are questions of fact. I would accept the submissions made on behalf of Zurich in support of the proposition that belief is not required as an independent ingredient of the tort. It may however be relevant as part of the court's consideration of the questions whether there was inducement and, if so, whether causation has been established.

26. In this regard I agree with the judge when he said at the end of para 2.5 that Clerk and Lindsell's statement in the previous edition fits the case better. It simply said "The claimant must have been influenced by the misrepresentation". That is a sub-heading to para 18-34 in the 21st ed. In para 18-35 the editors say that, although the claimant must show that he was induced to act as he did by the misrepresentation, it need not have been the sole cause. It is submitted on behalf of Mr Hayward that the claimant's mind must be at least partly influenced by the defendant's misstatements. In *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483 Bowen LJ said:

> "The real question is, what was the state of the plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference."

I see no conflict between the judge's approach and those conclusions.

27. Mr Hayward relies upon the references in the textbooks and, indeed, in cases like *Edgington v Fitzmaurice* to the requirement that the representation must have impacted upon the representee's mind. To my mind that simply means that the representee must have been induced to act as he did in reliance upon the representation.

28. In Zurich's written case its argument in support of the position that belief in the truth of the representation is not required is summarised as follows:

> "(i) Inducement is concerned with causation - not the representee's credulity. Although one may infer that a representee who believes a misrepresentation has been induced to rely on it, an absence of belief does not mean there was no inducement. This is because what is required for there to be inducement is a causal connection between the misrepresentation and the representee making a decision or undertaking a course of action on the basis of that representation. That does not require belief in the misrepresentation itself.
>
> (ii) Just as belief in the misrepresentation is not required, so also belief in other inducing causes is irrelevant.

(iii) There is a '*presumption of inducement*', particularly where there is an intention to induce by means of fraud. If the defrauded representee first had to show he *believed* the misrepresentation, there would be little (or no) utility in having the presumption.

(iv) That presumption should not be rebutted merely because the representee is sceptical. Otherwise, the doubting representee would be placed in a worse position than the gullible or trusting one. Given that misgivings and suspicion might be more likely to arise where there is fraud, it would be perverse for the prospects of redress to be extinguished on account of those very doubts. Of all representees, it may be thought the defrauded representee (whether believing or not) should be the most deserving of protection.

(v) There is no duty upon the defrauded representee to exercise 'due diligence' to determine whether there are reasonable grounds to believe the representations made. Conversely, the fact that the representee does not in fact wholly credit the fraudster and carries out its own investigations does not preclude it from having been induced by those representations. Qualified belief or disbelief does not rule out inducement, particularly where those investigations were never going to find out the evidence that subsequently came to light.

(vi) Whereas proof that the representee had knowledge (or 'blind eye knowledge') of the falsity suffices, nothing short of that avails the misrepresentor."

29. As to sub-para (i), inducement, I would accept the submission on behalf of Zurich that materiality is evidence of inducement because what is material tends to induce. As Hutley JA put it in the Court of Appeal of New South Wales, *Gipps v Gipps* [1978] 1 NSWLR 454, 460, "[t]o state that a person is induced by a statement is to affirm a causal relation which is a question of fact, not of law". See also *Downs v Chappell* [1997] 1 WLR 426, per Hobhouse LJ at 433. Moreover, albeit by reference to section 18(2) of the Marine Insurance Act 1905, in *Pan Atlantic* Lord Goff, accepted at 517C and 517E respectively that in gauging materiality it suffices if the misrepresentation (or non-disclosure) had "an impact on the mind" or an "influence on the judgment". In the same case Lord Mustill adopted references to inducement not being established where the misrepresentation (at 545E) "did not influence the judgment", (at 546C) "did not influence the mind" or (at 551C) "had no effect on the decision".

30. In para 6.6 of his judgment (quoted at para 15 above) the judge held that the continuing representations influenced Zurich into agreeing to a higher level of settlement that it would otherwise have done. The judge was entitled to adopt the proposition in *Clerk and Lindsell* that "the claimant must have been influenced by the misrepresentation".

31. In para 28 of his judgment Briggs LJ said this:

> "In my judgment the authorities on rescission for misrepresentation speak with one voice. For a misstatement to be the basis for a claim to rescind a contract, the claimant must have given some credit to its truth, and been induced into making the contract by a perception that it was true rather than false. Where judges and text-book writers have used the word 'influenced' as the touchstone for reliance they have done so in order to allow for belief in the truth of the misrepresentation to be a contributory rather than sole cause of the representee's entry into the contract: see for example Clerk and Lindsell on Torts (21st ed) para 18-35. They have not thereby intended to allow in any case where the representee can show that he was influenced into making the contract by the mere making of a representation which he did not believe was true."

32. I would not accept this analysis. As I see it, the representee's reasonable belief as to whether the misrepresentation is true cannot be a necessary ingredient of the test, because the representee may well settle on the basis that, at any rate in a context such as the present, he thinks that the representation will be believed by the judge. But it is centrally relevant to the question of inducement and causation. Logically, the representee is more likely to settle for a different reason other than the representation, if his reasonable belief is that it is false. One of the extraneous factors in this case, for example, was the fact that the insurers' expert Mr Sharp had failed to produce, in their view, a report which set out the extent of the misrepresentations with sufficient clarity - see para 15 above.

33. As to sub-para (ii), multiple causes, the text books strongly support the proposition that it is sufficient for the misrepresentation to be an inducing cause and that it is not necessary for it to be the sole cause: see eg *Chitty on Contracts*, 32nd ed, volume 1, para 7-37. See also, for example, *Barton v Armstrong* [1976] AC 104, where Lord Cross, delivering the majority advice of the Privy Council in a case involving duress by threats of physical violence, invoked, as an appropriate analogy, the treatment of contributing causes in fraud cases. He said at p 118G-H:

> "If it were established that Barton did not allow the representation to affect his judgment then he could not make it a ground for relief. … If on the other hand Barton relied on the misrepresentation Armstrong could not have defeated his claim to relief by showing that there were other more weighty causes which contributed to his decision … for in this field the court does not allow an examination into the relative importance of contributing causes …"

Lord Hoffmann made much the same point in *Standard Chartered Bank Ltd v Pakistan National Shipping Corpn Ltd (Nos 2 and 4)* [2003] 1 AC 959, paras 15-16:

> "if a fraudulent representation is relied upon, in the sense that the claimant would not have parted with his money if he had known that it was false, it does not matter that he also had some other negligent or irrational belief about another matter and, but for that belief, would not have parted with his money either. The law simply ignores the other reasons why he paid."

Lord Hoffmann then quoted with approval the part of the advice of Lord Cross quoted above and added:

> "This rule seems to me to be based upon sound policy."

Finally, reliance is placed upon the decision of the High Court of Australia in *Gould v Vaggelas* (1984) 157 CLR 215, which was a case of deceit, where Wilson J said at p 236:

> "The representation need not be the sole inducement in sustaining the loss. If it plays some part, even if only a minor part, in contributing to the course of action taken a causal connection will exist."

34. As to sub-para (iii), the "presumption" of inducement, it is not a presumption of law but an inference of fact. For example, *Chitty* on Contracts, 32nd ed (2015), vol 1, put it thus at para 7-040:

> "Once it is proved that a false statement was made which is 'material' in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair

> inference of fact (though not an inference of law) that he was influenced by the statement, and the inference is particularly strong where the misrepresentation was fraudulent."

35. Lord Mustill put it in this way in *Pan Atlantic* at p 551. He said that the representor:

> "… will have an uphill task in persuading the court that the ... misstatement ... has made no difference … [T]here is a presumption in favour of a causative effect."

We were further referred to the decision of Briggs J in a case about fraudulent misrepresentations, namely *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), [2008] 1 All ER 1004, para 241, where he said:

> "First and foremost, in a case where fraudulent material misrepresentations have been deliberately made with a view (as I find) improperly to influence the outcome of the negotiation of the cont[r]act in favour of the maker and his principal, by an experienced player in the relevant market, there is the most powerful inference that the fraudsman achieved his objective, at least to the limited extent required by the law, namely that his fraud was actively in the mind of the recipient when the contract came to be made."

See also *Australian Steel & Mining Corpn Pty Ltd v Corben* [1974] 2 NSWLR 202 per Hutley JA at 208-209.

36. As to sub-para (iv), rebutting the presumption of inducement, the authorities are not entirely consistent as to what is required to rebut the presumption. However, it is not strictly necessary to address those differences in this case because, however precisely the test is worded - whether what must be proved is that the misrepresentation played 'no part at all' or that it did not play a "determinative part", or that it did not play a 'real and substantial part' - I would accept the submission made on behalf of Zurich that the presumption is not rebutted on the facts as found in this case. There can be no doubt on the judge's findings of fact that, if Zurich had known the true position as to Mr Hayward's state of recovery, it would not have offered anything like as much as it in fact offered and settled for in October 2003.

37. Since the issue was touched on in argument, I would simply say that the authorities seem to me to support the conclusion that it is very difficult to rebut the

presumption. As it seems to me, the orthodox view is contained in *Sharland v Sharland* [2015] 3 WLR 1070. In *Smith v Kay* (1859) 7 HLC 750, 759 Lord Chelmsford LC asked this question in a rescission case based on an allegation of fraudulent misrepresentation:

> "can it be permitted to a party who has practised a deception, with a view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth?"

In *Sharland v Sharland* Baroness Hale observed of *Smith v Kay* that it indeed held that a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality or that it actually played a causative part in inducement.

38. This view is supported by *Downs v Chappell* [1997] 1 WLR 426, 433D-E, where Hobhouse LJ said:

> "The judge was wrong to ask how they [the representees] would have acted if they had been told the truth. They were never told the truth. They were told lies in order to induce them to enter into the contract. The lies were material and successful. ... The judge should have concluded that the plaintiffs had proved their case on causation ..."

See also *BP Exploration Operating Co Ltd v Chevron Shipping Co* [2003[1 AC 197, per Lord Millett at 244H to 245A. The Hon KR Handley wrote an impressive article entitled "Causation in Misrepresentation" in 2015 LQR 277, where he expressed this view at p 284:

> "The representor must have decided to make the misrepresentation because he or she judged that the truth or silence would not, or might not, serve their purposes or serve them so well. In doing so they fashioned an evidentiary weapon against themselves, and the court should not subject the victim to 'what if' inquiries which the representor was not prepared to risk at the time."

39. As to sub-para (v), I would accept the submissions made on behalf of Zurich. In particular I agree that the representee has no duty to be careful, suspicious or

diligent in research. As Rigby LJ put it in *Betjemann v Betjemann* [1895] 2 Ch 474, 482:

> "What is the duty of a man to inquire? To whom does he owe that duty? Certainly not to the person who had committed the concealed fraud."

Here Zurich did as much as it reasonably could to investigate the accuracy and ramifications of Mr Hayward's representations before entering into any settlement.

40. As explained above, the questions whether Zurich was induced to enter into the settlement agreement and whether doing so caused it loss are questions of fact, which were correctly decided in its favour by the judge. I accept the submission that the fact that the representee (Zurich) does not wholly credit the fraudster (Mr Hayward) and carries out its own investigations does not preclude it from having been induced by those representations. Qualified belief or disbelief does not rule out inducement, particularly where those investigations were never going to find out the evidence that subsequently came to light. That depended only on the fact that Mr and Mrs Cox subsequently came forward. Only then did Zurich find out the true position. As Mr Hayward knew, Zurich was settling on a false basis.

41. I do not think that any of the cases relied upon on behalf of Mr Hayward, or by the Court of Appeal in his favour justifies its decision. They include *Kyle Bay Ltd (t/as Astons Nightclub) v Underwriters Subscribing under Policy No 019057/08/01* [2007] EWCA Civ 57; [2007] 1 CLC 164. Underhill LJ stressed, in his analysis in para 24, that Kyle Bay "was not on all fours with the present case", but that it was illustrative of a similar principle. To my mind it is of no real assistance because it was a case which, as Neuberger LJ observed in *Kyle Bay* at para 42, involved unusual facts and in which the approach of the claimant appeared mystifying. That is not the position here.

42. As to further cases that were said to establish a requirement of belief, in the Court of Appeal Underhill LJ referred at para 12 to *Sprecher Grier Halberstam LLP v Walsh* [2008] EWCA Civ 1324, para 17, *Arkwright v Newbold* (1881) 17 Ch D 301, p 324, and *Strover v Harrington* [1988] Ch 390, p 407. However, as Underhill LJ said, none of those cases contains any relevant discussion of a principle to the effect that belief in the representation is required before a settlement such as this can be set aside.

43. As to sub-para (vi), knowledge of falsity, as I understand it, it is accepted on behalf of Zurich that, where the representee knows that the representation is false,

he cannot succeed. There is some support in the authorities for this view. So, for example Chitty says at para 7-036,

> "The burden of proving that the claimant had actual knowledge of the truth, and therefore was not deceived by the misrepresentation, lies on the defendant; if established, knowledge on the part of the representee is of course a complete defence, because he is then unable to show that he was misled by the misrepresentation."

In the 5th ed (2014) of Spencer Bower & Handley on Actionable Misrepresentation at p 122, para 11.07 say this.

> "A representee cannot be misled by a statement which he knew to be false. … The representee's knowledge of the truth must normally be full and complete. Partial and fragmentary information, or mere suspicion, will not do, 'suspicion, doubt and mistrust do not have the same consequence as knowledge'. A representee who knows that the representation was false to some extent, but acts on it, may establish inducement if the departure from the truth was significantly greater than expected."

See also *Gipps v Gipps* per Hutley JA at p 460.

44. As I said earlier, it cannot fairly be said that Zurich had full knowledge of the facts here. It follows that it is not necessary to express a final view on the question whether it always follows from the fact that the representee knows that the representation is false that he cannot succeed. As explained earlier, questions of inducement and causation are questions of fact. It seems to me that there may be circumstances in which a representee may know that the representation is false but nevertheless may be held to rely upon the misrepresentation as a matter of fact.

45. This very case could have been such a case. The judge considered this possibility in para 2.5 of his judgment (quoted at para 14 above), where he said:

> "At the very least, statements made in the course of litigation will be viewed with healthy scepticism and weighed against the other material available. Often the other party will not be sure, even then, whether the statement is in fact true and will mainly concern himself with how likely it is to be accepted by the

> court. *Sometimes (a staged road traffic 'accident' for example) the other party may actually be certain from his own direct knowledge that the statement is a deliberate lie. But even then he and his advisers cannot choose to ignore it; they must still take into account the risk that it will be believed by the judge at trial*. This situation is quite different from a proposed purchase, where if in doubt one can simply walk away."

It seems to me that in the kind of case which I have put in italics the claimant may well establish inducement on the facts. This was not however a case in which the judge found that Zurich was certain from its own direct knowledge that Mr Hayward's representations contained deliberate lies.

46. Quantum is not in issue.

47. It follows that I would answer the questions posed by the first issue (and set out in para 17 above) in this way. I would answer (a) no and (b) yes and would allow the appeal.

Issue 2

48. The second issue (also set out in para 17 above) is in these terms:

> "Under what circumstances, if any, does the suspicion by the defendant of exaggeration for financial gain on the part of the claimant preclude unravelling the settlement of that disputed claim when fraud is subsequently established?"

The answer seems to me to follow from the answer to the first question. As I see it, it is difficult to envisage any circumstances in which mere suspicion that a claim was fraudulent would preclude unravelling a settlement when fraud is subsequently established.

Conclusion

49. For these reasons I would allow the appeal.

LORD TOULSON: (with whom Lord Neuberger, Lady Hale and Lord Reed agree)

50. I agree with the judgment of Lord Clarke. I add this judgment because of the importance of the matter, about which we are differing from the judgment of the Court of Appeal, based on what I respectfully consider to have been an erroneous conclusion drawn from earlier case law. The issue raised by this appeal is important both as a matter of law and for its practical consequences for insurers and dishonest claimants. I gratefully adopt Lord Clarke's account of the facts.

51. Bogus or fraudulently inflated personal injury claims are not new. One of the great advocates of the 20th century, Sir Patrick Hastings, recounted vividly in his memoirs, "Cases in Court" (William Heinemann Ltd, 1949, pp 4 to 20), how as a young barrister before World War 1 he built up a practice defending insurance companies against such claims. Now as then, they present a serious problem. Personal injury claims usually fall to be met by insurers and the ultimate cost is borne by other policy holders through increased premiums.

52. Insurers may often have grounds for suspicion about a claim but lack the hard evidence necessary to prove fraud. To pursue an allegation of fraud without strong evidence is risky. If in such circumstances insurers settle a claim, not in the belief that it is bona fide but in the belief that it is likely to succeed, and if afterwards they discover evidence which proves that the claim was fraudulent, can they bring proceedings to set aside the agreement and recover damages for deceit? In this case the judge at first instance said yes, but the Court of Appeal said no, because in such circumstances the insurers were not deceived. The question which court gave the right answer is important, both for insurers and for those who advise personal injury claimants.

Strike out application

53. The Court of Appeal rightly rejected Mr Hayward's application to strike out the action on the ground that the issue was res judicata or that the action was an abuse of the process of the court: [2011] EWCA 641. The claim had been compromised by an agreement but, as Lord Bingham emphasised in *HIH Casualty and General Insurance Ltd v Chase* [2003] UKHL 6, [2003] 2 Lloyd's Rep 61, paras 15 and 16, "fraud is a thing apart" and "unravels all". Once proved, "it vitiates judgments, contracts and all transactions whatsoever" (per Denning LJ in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712, cited by Lord Bingham). I refer to this matter because in his judgment now under review Underhill LJ called into question the correctness of the Court of Appeal's earlier judgment, and Mr Hayward's

arguments on this appeal were similarly flavoured with criticism of it, although it was not open to him to attack it directly.

Judgment of the County Court

54. I would like to pay testimony to the judgment of His Honour Judge Moloney QC as a model of clarity and cogency. Lord Clarke has set out at, paras 14 and 15, the judge's self-direction as to the law (para 2.5) and his application of it to the facts (para 2.6).

Judgment of the Court of Appeal

55. Briggs LJ's reasoning was short and direct. He held that for a misstatement to be the basis for a claim to rescind a contract, the claimant must have given some credit to its truth and have been induced into making the contract by a perception that it was true rather than false. He said that when judges and text-book writers used the word "influenced" as the touchstone for reliance, they did so in order to accommodate cases where belief in the truth of the statement was a contributory rather than the sole cause of the representee's entry into the contract.

56. Underhill LJ's reasoning was somewhat different but led him to the same place. His starting point was that when a person enters into a contract to settle a dispute he knowingly takes the risk of making a payment for a claim which may be ill-founded, and he pays a sum commensurate with his assessment of that risk. But he said that the risk which a settlor must be taken to have accepted will depend on the circumstances of the case. A settlor will not normally be taken to have accepted the risk that the claimant's case is not just ill-founded but dishonest. However, if it is sufficiently apparent that the settlor intended to settle notwithstanding the possibility that the claim was fraudulent, he will be held to the settlement. The fact that the insurers had pleaded that the claim was exaggerated for financial gain proved their awareness of the possibility of fraud, but they chose to settle the claim with that awareness, and it was contrary to the public interest in the settlement of disputes for them to be allowed to set aside the settlement.

57. Underhill LJ was conscious that the logic of this reasoning was that Mr Hayward's application to strike out the insurers' action ought to have succeeded, contrary to the Court of Appeal's earlier decision. He described it as a "debatable point" whether that decision precluded him from deciding the case on the reasoning which he thought should apply, but he considered that it was possible to re-cast his reasoning in a form which was perhaps less satisfactory, but which avoided conflict with the earlier decision. He held that although in one sense the misrepresentations

operated on the mind of the insurers, that did not constitute reliance in the relevant sense. In deciding whether to settle, the insurers formed their own independent judgment whether the claim was likely to succeed, and there was no "relationship of reliance" of the kind which was required for the insurers' action to succeed. Ultimately, therefore, he allowed the appeal on substantially the same ground as Briggs LJ.

Analysis

58. To establish the tort of deceit it must be shown that the defendant dishonestly made a material false representation which was intended to, and did, induce the representee to act to its detriment. The elements essential for liability can be broken down under three headings: (a) the making of a materially false representation (the defendant's conduct element); (b) the defendant's accompanying state of mind (the fault element); and (c) the impact on the representee (the causation element). Where liability is established, it remains for the claimant to establish (d) the amount of any resulting loss (the quantum element).

59. In this case there is now no issue as to elements (a), (b) and (d). Mr Hayward made false and material representations to the insurers as well as to the court, both directly and through what he told the doctors and his own legal advisers with a view to it being communicated to insurers and to the court. He did so dishonestly, with the intention of inducing the insurers to pay compensation to him on a false basis. The judge's assessment of quantum is not challenged. The issue concerns element (c).

60. In the statement of facts and issues, the parties have identified the critical issue in these terms: In order to set aside a compromise on the basis of fraudulent misrepresentation, to show the requisite influence by or reliance on the misrepresentation,

> (a) must the defrauded representee prove that it was induced into settlement because it believed that the misrepresentations were true; or
>
> (b) does it suffice to establish influence that the fact of the misrepresentations was a material cause of the defrauded representee entering into the settlement?

61. The parties have raised an additional question as to the circumstances, if any, in which suspicion by a settlor of exaggeration of the claim precludes unravelling

the settlement when fraud is subsequently established; but insofar as the question involves any point of law, it is enveloped by the first issue.

62. Some torts do not require the claimant to have suffered any detriment. Trespass is an example. Deceit is not in that category. It is essential to show that the defendant's false representation caused the claimant to act to its detriment. It stands to reason that this should be so. The vice of the defendant's conduct consists in dishonestly making a false representation with the intention of influencing the representee to act on it to its detriment. If it does not cause the representee to do so, the mischief against which the tort provides protection will not have occurred. A misrepresentation which has no impact on the mind of the representee is no more harmful than an arrow which misses the target.

63. Inducement is a question of fact. In a typical case the only way in which a dishonest representation is likely to influence the representee to act to its detriment will be if the representee is led to believe in its truth. It is therefore not surprising to find statements by judges in such cases that the misrepresentee must show that he believed or "relied on" the misrepresentation.

64. *Redgrave v Hurd* (1881) 20 Ch D 1, to which Underhill LJ referred, is an example. The plaintiff, an elderly solicitor wishing to retire, advertised for someone to enter into partnership with him and to buy his house. The defendant responded to the advertisement and negotiations followed, in which the plaintiff stated that the practice brought him in about £300 a year. In fact it did not bring in anything like that amount. The parties entered into partnership and into a separate contract for the sale of the house, which made no reference to the business. The defendant paid a deposit and was let into possession. On discovering that the practice was not worth what the plaintiff had said, the defendant gave up possession and refused to complete the purchase. It was therefore a classic case of a purchaser who claimed to have entered into the contract in reliance on the truth of a misrepresentation by the seller. The plaintiff sued for specific performance; the defendant counterclaimed for rescission of the contract and damages for deceit. The plaintiff succeeded at first instance before Fry J, who was not satisfied that the defendant had proved that he relied on the misrepresentation. The Court of Appeal upheld the dismissal of the defendant's counterclaim in deceit on the ground that he had not sufficiently pleaded or proved dishonesty, but it allowed his appeal on the issue of rescission on the ground that the facts gave rise to an inference that he was induced to enter into the contract by the plaintiff's misrepresentation. Jessel MR said at p 21:

> "If it is a material misrepresentation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the

> ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation."

65. *Smith v Chadwick* (1884) 9 App Cas 187 was another case of a purchaser who claimed to have entered into the contract in reliance on the truth of a misrepresentation by the seller. The plaintiff claimed damages for deceit through having been induced to buy shares in an iron company by false representations in a prospectus as to the output of the iron works. The House of Lords held that his claim failed because the critical words of the prospectus were ambiguous, and the plaintiff had failed to show that he understood them in a sense which was false. Lord Blackburn surmised, at p 200, that the plaintiff's counsel refrained from asking the plaintiff in examination-in-chief how he understood the wording for fear of receiving a damaging answer. The case was cited in the present case for the opening passage in the speech of Lord Selborne LC at p 190:

> "My Lords, I conceive that in an action of deceit, *like the present*, it is the duty of the plaintiff to establish two things; first, actual fraud, which is to be judged by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts: and, secondly, he must establish that this fraud was an inducing cause to the contract; for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct." (Emphasis added)

66. In the same case Lord Blackburn had pertinent things to say about the fundamental link between fraud and damage in an action for deceit, at p 195:

> "In *Pasley v Freeman*, 2 Smith's Leading Cases 66, 73, 86 (8th ed), Buller J says: 'The foundation of this action is fraud and deceit in the defendant and damage to the plaintiffs. And the question is whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies, per Croke J, 3 Bulst 95.'

> Whatever difficulties there may be as to defining what is fraud and deceit, I think no one will venture to dispute that the plaintiff cannot recover unless he proves damage. In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shews damage; if he did not, he shews none."

67. So far I have been considering the typical case. But it is possible for a representor to make a false and fraudulent misrepresentation, with the intention of influencing the representee to act on it to its detriment, without the representee necessarily believing it to be true. If the representor succeeds in his object of influencing the representee to act on the representation to its detriment, there will be the concurrence of fraud and deceit in the representor and resulting damage to the representee. In principle, the representee should therefore be entitled to a remedy in deceit.

68. That inducement is a question of fact, necessary to establish causation in all cases but not necessarily in the same way, was recognised and well expressed in the decision of the Court of Appeal of New South Wales in *Gipps v Gipps* [1978] 1 NSWLR 454. A woman sued her former husband for deceit in relation to a property settlement which they had entered into at the time of their divorce. They were joint shareholders in a private company and as part of the settlement the wife transferred her shares to the husband. The shares were valued by an independent accountant, but the husband dishonestly contrived to see that the valuation was a substantial undervaluation. The wife did not trust the husband and suspected that the shares were worth more than the valuation, but she did not know the extent of the undervaluation. It was submitted on the husband's behalf that if a representee knows that a representation is false in a material particular, as a matter of law he or she cannot sue in respect of it. The court rejected that argument.

69. After referring to various authorities, including particularly the passage from the judgment of Jessel MR in *Redgrave v Hurd* set out at para 64 above, Hutley JA said (at p 460):

> "The question whether a person has been induced by a statement made to him to enter into an agreement is, in my opinion, a single issue of fact. No doubt pre-contractual knowledge that the statement made is not wholly true has a very direct bearing on the resolution of this question of fact but it does not of itself necessarily provide the answer. To say that it does is to formulate a different question.

> To state that a person is induced by a statement is to affirm a causal relation which is a question of fact, not of law. That being so, it is impossible to apply to any situation a rule which produces a final result. The trial judge or jury have to answer the question: Did the misrepresentation cause the representee to enter into the contract, it being understood that the representation, as was stated in *Australian Steel and Mining Corpn Pty Ltd v Corben* [1974] 2 NWLR 202, 207, 'was among the factors which induced the contract.'"

70. Some assistance may also be had from the judgment of Hobhouse LJ in *Downs v Chappell* [1997] 1 WLR 426, 433, where he said that for a plaintiff to succeed in the tort of deceit of deceit it is necessary for him to prove that (1) the representation was fraudulent, (2) it was material and (3) it induced the plaintiff to act to his detriment. He added that "As regards inducement, this is a question of fact" and that "The word "reliance" used by the judge has a similar meaning but is not the correct criterion."

71. I agree with His Honour Judge Moloney QC's analysis in para 2.5 of his judgment. The question whether there has been inducement is a question of fact which goes to the issue of causation. The way in which a fraudulent misrepresentation may cause the representee to act to his detriment will depend on the circumstances. He rightly focused on the particular circumstances of the present case. Mr Hayward's deceitful conduct was intended to influence the mind of the insurers, not necessarily by causing them to believe him, but by causing them to value his litigation claim more highly than it was worth if the true facts had been disclosed, because the value of a claim for insurers' purposes is that which the court is likely put on it. He achieved his dishonest purpose and thereby induced them to act to their detriment by paying almost ten times more than they would have paid but for his dishonesty. It does not lie in his mouth in those circumstances to say that they should have taken the case to trial, and it would not accord with justice or public policy for the law to put the insurers in a worse position as regards setting aside the settlement than they would have been in, if the case had proceeded to trial and had been decided in accordance with the corrupted medical evidence as it then was.

72. For those reasons, which accord to all intents and purposes with the judgment of Lord Clarke, I too would allow the insurers' appeal and restore the order of Judge Moloney.

Postscript

73. It was expressly conceded on behalf of the insurers for the purposes of the present appeal that whenever and however a legal claim is settled, a party seeking to set aside the settlement for fraud must prove the fraud by evidence which it could not have obtained by due diligence at the time of the settlement. It makes no difference to the outcome of the present case and the court heard no argument about whether the concession was correct. Any opinion on the subject would therefore be obiter, and since the court has not considered the relevant authorities (including Commonwealth authorities such as *Toubia v Schwenke* [2002] NSWCA 34) or academic writing, it is better to say nothing about it.