

### 5.1.2.3 Statements of opinion

Page 203, at the end of **(ii)**, **delete-**

And, again, in *Kyle Bay Ltd v* (2006) where K carelessly relied on U's erroneous statement about the basis for calculating an insurance claim without checking the policy itself. The court held U's statement to be simply a negotiating position or an opinion containing no implication of a reasonable basis since '[t]his was a commercial negotiation being conducted by experienced professionals on both sides. Both had equal access to the papers and were well able to form their own opinions' (at [54]).

**Add-**

Similarly, in *Kyle Bay Ltd v Underwriters* [2007] EWCA Civ 57 where K, the insured, carelessly relied on U's erroneous statement about the basis for calculating an insurance claim without checking the policy itself, the Court of Appeal held that U's statement was actually a contention and not a representation. It was relevant that K's agent was professionally qualified and experienced and must be taken to have a copy of the policy. Moreover, it was open to the trial judge to find that K's agent was not induced by U's statement, but simply decided to proceed on the assumption of the correctness of U's contention.

### 5.1.3 Silence

#### 5.1.3.3. Exceptions to the noliability rule based on special relationships

Page 209, **(i) Contracts uberrimae fidei: contract of utmost good faith** at end of first bullet point, **delete –**

The Association of British Insurance's statement of good practice encourages insurers to draw customers' attention to the sorts of information which might be considered material and not to refuse claims for failure to disclose information which could not reasonably have been expected.

**Insert –**

The Law Commission has published a Consultation Paper No. 182 *Insurance Law: Misrepresentation, Nondisclosure and Breach of Warranty by the Assured* (<http://www.lawcom.gov.uk/docs/cp182.pdf>) and see Merkin and Lowry 'Reconstructing insurance law: the Law Commissions' consultation paper' MLR (2008) 95-113) in which it advocates that:

- The **consumer's** duty to disclose should be abolished and replaced by a duty to answer questions carefully (the standard is determined by the type of policy, the way it was advertised and sold and the characteristics of a normal consumer (not of the individual consumer analyst known to the insurer)) and honestly; consumers complying with this duty are protected. Otherwise, the insurer's remedy depends on the insured's state of mind: if unreasonable, the insurer's remedy is in negligent misrepresentation; if fraudulent, the insurer can refuse to pay.
- **Businesses** would continue to have a duty to volunteer information, but now limited to the facts a reasonable insured in the circumstances would realize the insurer wanted to know about. This can be contracted out of (in reality this permits the insurer to impose harsher terms) if this is made clear to, and would not defeat the reasonable expectations of, the insured.

#### 5.1.5.1 Inducement

Page 213, before 5.1.5.2, **insert –**

A more controversial question is whether the misrepresentation must *also* have been made with the *intention* of inducing the other party to contract. It is clearly necessary for fraudulent misrepresentation (*Tackey v McBain* (1912) A.C 186 (PC); *Jurong Town Corp v Wishing Star Ltd* (2004) 2 SLR 427). It is also arguably necessary for misrepresentation under section 2(1) of the Misrepresentation Act 1967, since the 'fiction of fraud' contained therein merely fictionalizes the dishonesty of the maker of the statement, not his or her intention to induce thereby. However, the law will impute to a contracting party the intention to produce those consequences that naturally follow from his or her actions.

### 5.2.1.2 The remedial advantage of a section 2 (1) claim: the fiction of fraud

Page 221, at **4. Loss of opportunity** 8 lines down, **insert** –

In *4 Eng Ltd v Harper* [2007] EWHC 1568. H sold 4 Eng a company based on fraudulent practices, a fact concealed from 4 Eng. The company subsequently went into liquidation, and 4 Eng sued to recover, among other things, the loss of opportunity to acquire another company, T, which it was seriously considering investing in at the time it acquired H's company. David Richards J held (at [46]) that, in a deceit claim, 'a loss is too remote only if it is not in the eyes of the law directly caused by a defendant's deceit'. On the balance of probabilities, the judge found that 4 Eng would have bought T had it not been for H's fraudulent misrepresentations, and awarded substantial damages to reflect lost capital value and profits.

### 5.4.2.1 Section 3 Misrepresentation Act 1967

Page 234, at the end of page on **entire agreement clauses**, **insert**-

However, an 'entire agreement clause' is ineffective if the representor knows that the representee *has relied* on his pre-contractual statements. For instance, in *Quest 4 Finance Ltd v Maxfield* [2007] EWHC 2313 Q lent money to a company, of which the defendants were directors, on terms including an entire agreement clause. When the company went into administration, Q unsuccessfully sued the defendants to recover its losses. Q had made 'clear and unequivocal' statements in its brochure that personal guarantees were not required, on which it must have known the defendants would rely. Therefore, its claim was defeated.

The court held that, for an entire agreement clause to raise an effective estoppel, three criteria (set down by the Court of Appeal in *Lowe v Lombank* [1960] 1 WLR 196) must be satisfied –

- 1) The statement of non-reliance (the entire agreement clause) must be clear and unequivocal;

- 2) The maker of the statement must have intended that the other party rely on it; and
- 3) The recipient of the statement must have believed its veracity and acted upon it.

Similarly, in *Peart Stevenson Associates Ltd v Brian Holland* [2008] EWHC 1868, a franchisor's fraudulent misrepresentations as to the likely turnover and profitability of the business and the low risks associated with becoming a franchisee meant that it could not rely on the term in its franchise agreement with the franchisee stating that the latter was not relying on the franchisor's statements when entering a contract.