Neutral Citation Number: [2021] EWCA Civ 534

Case No: A3/2020/1631

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
REVENUE LIST (ChD)
MR JUSTICE ZACAROLI
[2020] EWHC 2121 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2021

Before :

LORD JUSTICE HENDERSON
LADY JUSTICE ASPLIN
and
LORD JUSTICE BIRSS

- -

Between :

(1) IGE USA INVESTMENTS LIMITED (FORMERLY IGE USA INVESTMENTS) **(2) GE CAPITAL INVESTMENTS** **(3) GE CAPITAL FINANCE** **(5) GE CAPITAL CORPORATION (HOLDINGS)** **(6) GE (HOLDINGS)** **(7) INTERNATIONAL GENERAL ELECTRIC (U.S.A.)**	**Appellants**
- and –	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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Laurence Rabinowitz QC, John Gardiner QC, John Brinsmead-Stockham, Thomas Bell, Nicholas Sloboda and Professor Paul Davies (instructed by **PricewaterhouseCoopers LLP**) for the **Appellants**
Philip Jones QC, Gareth Tilley and Barbara Belgrano (instructed by **the General Counsel and Solicitor to HMRC**) for the **Respondents**

Hearing dates : 9, 10 and 11 February 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00 a.m. on Wednesday 14 April 2021

Lord Justice Henderson :

Introduction

1. The single question raised by this appeal is whether the six-year limitation period for claims founded on the tort of deceit, under section 2 of the Limitation Act 1980 ("LA 1980" or "the 1980 Act"), at least arguably applies "by analogy", pursuant to section 36(1) of the 1980 Act, to a claim for equitable rescission of a contract for fraudulent misrepresentation.

2. Section 36(1) of LA 1980 relevantly provides as follows:

> "36. **Equitable jurisdiction and remedies**
>
> (1) The following time limits under this Act, that is to say—
>
> (a) the time limit under section 2 for actions founded on tort;
>
> …
>
> shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940."

3. It can therefore be seen that the answer to the question in [1] above depends on whether the time limit for deceit claims in section 2 of the 1980 Act "may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940", that being the date when the 1939 Act came into force.

4. Section 2(7) of the 1939 Act had itself provided, in materially similar language, that:

> "This section [*which included in subsection (1)(a) a six-year limitation period for "actions founded on simple contract or on tort*"] shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy in like manner as the corresponding enactment repealed by this Act has heretofore been applied."

5. It is common ground that the time limit applicable to actions in deceit brought before 1 July 1940 was that contained in section 3 of the Limitation Act 1623, which was repealed by the 1939 Act, and which provided that:

> "all Actions… upon the Case… shall be commenced and sued within… and not after… six Years next after the Cause of such Actions or Suit…"

6. It is a curiosity which reflects little credit on the current state of the law in this area that a question which in principle demands a clear and simple answer should depend for its resolution upon a historical enquiry into how the court applied (or would have applied: see Cia de Seguros Imperio v Heath (REBX) Ltd [2001] 1WLR 112 at 125 per Clarke LJ) the time limit in a seventeenth century statute, by way of analogy, to a claim for equitable relief brought in the twenty-first century on the basis of alleged fraudulent misrepresentation. Such, however, is the result of the legislation set out above, which remains unreformed. I respectfully agree with Sir Christopher Staughton, who said in the Cia de Seguros case at 124:

> "If a distinction still has to be drawn between common law and equitable claims for limitation purposes, I would hope that a revised statute will enact with some precision where that distinction should be drawn, rather than leave it to the product of researches into cases decided long ago."

Factual background

7. The context in which the limitation question arises was described by Zacaroli J in the introductory section of the judgment under appeal ([2020] EWHC 2121 (Ch)) in terms which I gratefully adopt:

> "1. By the Finance (No.2) Act 2005, the UK introduced "Anti-Arbitrage Rules", designed to prevent tax avoidance through the exploitation of the tax treatment of "hybrid" entities in different jurisdictions. Hybrid entities are those which are considered in some jurisdictions to have separate legal personality for tax purposes and in others to be tax transparent.
>
> 2. The defendants are entities in the GE [*General Electric*] group. I will refer to them, collectively, as "GE". GE approached HMRC in 2005 for clearance in relation to a number of transactions. One such transaction (entered into in 2004) concerned the investment by UK entities within the GE group in an Australian subsidiary (the "Australian Transaction"). On or about 21 December 2005, GE entered into two agreements with HMRC: a settlement agreement, concerning existing transactions, including the Australian Transaction (the "Settlement Agreement"), and a clearance agreement, concerning the ongoing treatment of various of GE's activities (the "Clearance Agreement").
>
> 3. From 2011 onwards, HMRC began to accumulate information concerning the Australian Transaction which, they claim, painted a different picture to that which had been presented to them during the course of the discussions seeking clearance in 2005 (the "Clearance Discussions"). After extensive discussions with GE, HMRC purported to rescind the Settlement Agreement in a letter dated 16 October 2018. The basis of the purported rescission was expressed to be material misstatements of fact and/or a failure to provide adequate disclosure.

> 4. On 23 October 2018, HMRC issued these proceedings seeking a declaration that the Settlement Agreement had been validly rescinded, and other declaratory relief. It is HMRC's contention that if the Settlement Agreement was validly rescinded it is able to recover the tax that arises upon the application of the Anti-Arbitrage Rules because the limitation period for raising discovery assessments against GE (being 20 years) has not expired.
>
> 5. On 22 October 2019 HMRC issued an application to amend the particulars of claim in the form of a draft amended particulars of claim served on GE ("APOC"). The proposed amendments delete all but one of the existing alleged representations, introduce two new representations and introduce for the first time a claim that the representations were made fraudulently. They also introduce a claim based on an implied term and a claim that the Settlement Agreement was a contract of utmost good faith.
>
> 6. On 31 January 2020, GE issued an application to strike out (or for reverse summary judgment in respect of) one sub-paragraph of the particulars of claim and one paragraph of the reply. The strike out (or reverse summary judgment) claim relates to the one representation in the existing particulars of claim which is not removed by the proposed amendments. GE contends that it discloses no reasonable grounds for bringing the claim, and that the claim has no real prospect of success.
>
> 7. Both applications were listed for hearing on 9 and 10 July 2020. The skeleton arguments, combined, ran to 115 pages, referring to numerous authorities (in an authorities bundle which extended to nearly 3000 pages) and the bundle of documents comprised over 2000 pages. Most of the hearing time was spent in describing the background to the Settlement Agreement and going through the details of the Clearance Discussions. On GE's part, this was in order to demonstrate that, on a proper understanding of the legal context and the factual background, the purported representations and the plea of fraud had no prospect of success."

8. For the purposes of this appeal, the technical details of the anti-avoidance rules involving tax arbitrage first enacted in Chapter 4 of Part 2 of the Finance (No.2) Act 2005 (sections 24 to 31) fortunately do not matter. It is enough to know that, under section 24 of the 2005 Act, if HMRC considered, on reasonable grounds, that four conditions (Conditions A to D) were or might be satisfied, in relation to a transaction to which a company resident in the United Kingdom (or resident outside the UK, but within the charge to corporation tax) was a party, then HMRC might give that company a notice under the section. The notice had to specify the relevant transactions and accounting period, and had to inform the company that, as a consequence, the rules relating to deduction in section 25 had effect in relation to the transaction. The purpose of the provisions, in broad terms, was to negate various forms of tax advantage obtained

through the use of hybrid entities in different jurisdictions. Sections 24 and 25 were concerned with "deduction cases", while sections 26 and 27 concerned "receipts cases". Detailed guidance was issued by HMRC in 2005 to assist companies in deciding whether their arrangements might fall within the scope of the new rules. Annex C to the guidance set out a procedure for obtaining clearance from HMRC, coupled with an assurance that HMRC would consider themselves bound by a clearance as long as all the relevant facts were accurately given, and the scheme was executed in accordance with the proposals set out in the clearance application: see the judgment at [13].

9. As the judge explained at [15], GE's clearance application concerned, in total, 107 cross-border loans amounting to debt financing of approximately £21.2 billion. The Australian Transaction formed one part of the application. The details of the Australian Transaction are summarised at [16] to [18].

10. With regard to the Settlement Agreement, the judge said this:

> "19. The Settlement Agreement recorded the agreement between HMRC and GE relating to the application of the Anti-Arbitrage Rules to the funding of the Australian Transaction. It recorded that HMRC had expressed the view that the debt funding incurred in connection with the Australian Transaction may be subject to a Notice under Chapter 4 of the Finance (No.2) Act 2005.
>
> 20. Clause 4 provided that "GE has stated that it considers no Notice should be issued in relation to these matters, and has represented that it has made disclosure of all relevant facts in connection with the potential issue of a Notice…".
>
> 21. The effect of clauses 6 and 7 was that HMRC "in reliance on the information provided by GE" agreed not to issue a Notice in relation to the funding of the Australian Transaction, save that it would issue a Notice which would determine that interest on AUS$700 million of the SARL Loan would not be deductible. GE agreed not to contest that Notice.
>
> 22. By clause 10, HMRC separately agreed "again on the basis of the information provided by GE" that it would raise no challenge under paragraph 13 of Schedule 9 of the Finance Act 1996 to the deductibility of interest arising on any debt incurred in connection with the Australian Transaction. This related to the "unallowable purpose" provisions, now to be found in the Corporation Tax Act 2009.
>
> 23. By clause 14, GE confirmed to HMRC that it had "made adequate disclosure of the matters dealt with in [*the Settlement Agreement*] (and the underlying facts and circumstances)"."

The present proceedings

11. As the judge's introduction makes clear at [5], quoted above, the proposed APOC deleted all but one of the existing alleged representations, but introduced two new representations, claiming for the first time that they had been made fraudulently.

12. The first of the new representations was to the general effect that the funding of the Australian Investment by loans channelled through the UK Subgroup was carried out for mainly commercial reasons, and did not have as one of its main purposes the securing of a UK tax advantage. The judge described this as the "Main Purpose Representation". The existing representation which was retained was described by him as the "Hybrid Opportunity Representation". The Main Purpose Representation and the Hybrid Opportunity Representation no longer matter, because the judge refused permission to amend for the former and struck out the latter on factual grounds, and HMRC have not appealed against that refusal.

13. The second of the new representations was pleaded in paragraph 38(h) of the APOC. The judge referred to it as the "Full Disclosure Representation". It alleged that during the Clearance Discussions GE had falsely represented to HMRC:

> "that the UK Subgroup had made disclosure of all relevant facts and matters in connection with the potential application of the Anti-Arbitrage Rules and/or the legislation relating to unallowable purpose in connection with the funding of the Australian Investment. The UK Subgroup knew that HMRC had no direct knowledge of the facts and matters and were relying on the UK Subgroup to make such disclosure. By supplying the information that they did the UK Subgroup thereby represented that this information constituted all such relevant facts and matters… The representation was false in that the UK Subgroup had not given full disclosure; rather it had omitted to disclose the facts and matters pleaded in paragraph 41 below. Further:
>
> (i) the UK Subgroup, acting by Roy Clark (who signed the Agreements on behalf of the UK Subgroup) and Jan Martin (who was responsible alongside others for the conduct of the Clearance Discussions) knew the representation to be untrue (alternatively did not believe it to be true, alternatively was reckless to the truth of the representation) in that…
>
> [*particulars were then given in eight numbered sub-paragraphs*]
>
> (ii) alternatively the UK Subgroup, acting by Mr Clark and Ms Martin made the representation negligently for the same reasons as in sub-paragraph (i) above."

14. Paragraph 45 of the APOC then pleaded that:

> "As a result of the said misrepresentations HMRC were entitled to rescind the Settlement Agreement and the Clearance Agreement from their beginning. HMRC validly rescinded the

> Settlement Agreement in a letter to IGE dated 16 October 2018. Alternatively HMRC are entitled to exercise the rights they would have had but for the Settlement Agreement. Alternatively to the extent that HMRC was only entitled to rescind in equity and requires a court order to do so, the Claimants seek such an order and all necessary consequential relief."

15. The relief sought was summarised in paragraph 56, and included a declaration that HMRC were:

> "entitled to seek to recover from the First to Third Defendants tax liabilities that would otherwise have been settled under the terms of the Settlement Agreement/ Clearance Agreement or otherwise exercise the rights they would have had but for the Agreements, alternatively damages in lieu of rescission, whether subject to conditions imposed by the court, or upon the giving of undertakings, or not."

16. The prayer for relief then claimed:

> "(1) A declaration that the Settlement Agreement has been validly rescinded, alternatively terminated.
>
> (2) Alternatively a declaration that the Settlement Agreement is void or liable to be set aside or terminated, an order setting it aside, and any consequential order that the court considers necessary.
>
> (3) If necessary, equivalent declarations to (1) and (2) above in respect of the Clearance Agreement.
>
> (4) A declaration that the claimants are entitled to seek to recover from the Defendants tax liabilities that would otherwise have been settled…
>
> …
>
> (7) All necessary accounts and enquiries to put the Claimants in the position they would have been in but for the Settlement Agreement/Clearance Agreement.
>
> …"

17. In his judgment, the judge dealt with the Full Disclosure Representation at [104] to [112], deciding that the amendment should be allowed in full and the issue should go to trial on the allegation of fraud (in respect of which GE had opposed the grant of permission to amend) as well as on the allegations that the representation was false and that it induced HMRC to enter into the Settlement Agreement (which GE had not opposed, while making it clear that the substance of the allegations was strenuously denied). This conclusion made it necessary for the judge to deal with the question of

limitation, which he proceeded to do at [113] to [133]. It is those paragraphs of the judgment which are the focus of the present appeal.

The judge's decision on the question of limitation

18. The judge began his analysis by recording some important common ground. It was (and is) agreed that the proposed amendment to plead a claim of rescission on the ground of fraudulent misrepresentation is a new claim within the meaning of section 35 of LA 1980 and CPR rule 17.4. It is also agreed that the new claim, involving allegations of fraud, does not arise out of the same or substantially the same facts as the claim as previously pleaded. Accordingly, the burden lay on HMRC to establish that GE did not have an arguable case on limitation which would be prejudiced by the new claim if it were brought by way of amendment. As the judge said, at [117]:

> "If there is a reasonably arguable defence, then HMRC must be left to bring the new claim by a separate action (thus preserving in favour of GE any arguable limitation defence)."

19. The judge then noted that HMRC's claim was principally for declaratory relief. Although the pleading did not clearly state whether rescission of the Settlement Agreement was sought at common law or in equity, HMRC had explained in their written submissions that the claim was framed in three ways: first, as a claim for a declaration that the rescission was validly effected at common law; secondly, as a claim for a declaration that the rescission was effective in equity; and thirdly, as a claim seeking an order effecting rescission in equity. The judge continued, at [120]:

> "Insofar as the declaration for fraudulent misrepresentation is sought at common law, HMRC contend that there is no applicable limitation period (save that there is a six year period running from the date that rescission was effected by way of self-help, for bringing claims arising as a result of the rescission). GE does not dispute this, but instead contends that it has cast-iron defences to any claim at common law. It does not, however, rely upon those defences in opposition to the amendment. Accordingly it is common ground that limitation is not a bar to the amendment to plead fraud insofar as HMRC's claim is based on declaratory relief at common law."

20. It remains common ground in this court that rescission of a contract at common law for fraudulent misrepresentation is a self-help remedy which does not require the intervention of the court, and that it is not subject to any period of limitation under the 1980 Act. Nor can any question arise of applying a limitation period by analogy under section 36, because rescission at common law is obviously not an equitable remedy.

21. The "cast-iron defences" that GE says it has to any claim for rescission of the Settlement Agreement at common law principally relate to the alleged impossibility of effecting *restitutio in integrum.* As the judge rightly observed, however, GE did not rely on the existence of such defences in opposition to the proposed amendment, so HMRC's claim for rescission at common law will in any event go forward to trial.

22. The judge then turned to the critical issue, namely GE's contention that the six-year limitation period for a claim based on the tort of deceit must be applied by analogy, pursuant to section 36 of LA 1980, to HMRC's claim to rescind the Settlement Agreement in equity. In support of that contention, GE placed at the forefront of its argument before the judge, as it does before us, the decision of this court in Molloy v Mutual Reserve Life Insurance Company (1906) 94 LT 756 ("Molloy"). As the judge explained, at [123]:

> "In that case, the plaintiff claimed a declaration that an insurance policy entered into by him with the defendant was induced by fraudulent misrepresentation, rescission of the policy, an account of payments made by him under the policy and payment of the sum found due on taking the account. The Court of Appeal held that the claim was barred because, even though there was no statutory bar to a claim for rescission (being a claim for equitable relief), the six-year limitation period that applied to a claim for damages in the tort of deceit applied by analogy."

23. The judge recorded the submission of Mr Jones QC, appearing then as now for HMRC, that Molloy is distinguishable because the relief sought was the recovery of money paid under the policy. It was only for that reason, said Mr Jones, that it was appropriate to apply by analogy the limitation period for the common law action for damages for deceit. The judge then set out a number of passages in the judgments upon which Mr Jones relied in support of his submission. I will need to return to those passages, and to a detailed examination of Molloy, later in this judgment.

24. After referring to (a) two subsequent first instance cases in which Molloy was followed (Oelkers v Ellis [1914] 2 KB 139 and Armstrong v Jackson [1917] 2 KB 822), (b) a short passage in the judgment of Asplin J (as she then was) in Property Alliance Group Ltd v The Royal Bank of Scotland PLC [2016] EWHC 3342 (Ch) ("PAG"), where she appeared to accept as "quite clearly correct" the submission "that there is no period of limitation which can apply to the claim for rescission for misrepresentation", and (c) the decision of this court in P&O Nedlloyd BV v Arab Metals Co (No.2) [2006] EWCA Civ 1717, [2007] 1 WLR 2288, upon which Asplin J had apparently based her conclusion, the judge set out his conclusions in a passage which I need to quote in full:

> "130. In my judgment, HMRC's arguments are to be preferred. The question is whether, having regard to the nature of the claim made in the particular case, the same facts give rise to a claim in law in respect of which the same kind of relief is obtainable (adopting the words of Moore-Bick LJ in *P&O Nedlloyd* quoted above), and to which a statutory limitation period applies. In *Molloy*, Romer LJ identified the equivalent common remedy as "an action for damages". Collins MR similarly noted that the equivalent common law action to that claimed in equity was "an action for damages at law". I accept Mr Jones QC's submission that it was the fact that the claimant sought to recover money or property as a consequence of rescission that justified adopting the limitation period applicable to the common law claim of

> deceit. The two first instance cases that followed *Molloy* do not take the matter further. They simply followed *Molloy* in similar circumstances, where the claim was to set aside a contract to recover payments made under it.
>
> 131. That is likely to be the case in relation to many claims for rescission of a contract, because the claimant will normally require an order of the court to recover sums paid under the contract in addition to the declaration or order as to rescission itself. The distinguishing feature of this case is that HMRC do not need, and do not ask for, an order of the court to recover the tax said to be due (if the Settlement Agreement is set aside), and its right to recover the tax is not subject (yet) to any statutory time bar. Accordingly, unlike in *Molloy*, the only remedy sought is declaratory relief.
>
> 132. In those circumstances, there is an obvious and direct analogous action at common law, namely the claim for a declaration as to the validity of the rescission effected at common law. It is common ground (as I have already noted) that there is no limitation period applicable to such action at common law. The fact that the common law claim is brought in the same action, based on the same facts said to give rise to the equitable equivalent, reinforces the conclusion that the appropriate analogy in this case is the common law claim for declaratory relief. Accordingly, I consider that there is similarly no limitation period applicable to the equitable claims made by HMRC in this case.
>
> 133. Mr Gardiner QC [*counsel for GE*] submitted that in view of the fact that there was Court of Appeal authority (*Molloy*) apparently to the contrary effect, I should conclude that there was at least an arguable limitation defence. The issue, however, is a pure one of law, capable of being resolved either way on this application. My conclusion on the issue puts an end (subject only to an appeal) to the argument."

25. It can be seen, therefore, that the judge rested his conclusion on two grounds. The first ground was his acceptance of Mr Jones' submission that Molloy was distinguishable because of the financial relief sought in that case, whereas the only remedy sought by HMRC is declaratory relief. The second ground was that, in those circumstances, there is an obvious and direct analogy with an action for a declaration as to the validity of the rescission effected by HMRC at common law, to which (as is common ground) no limitation period would apply.

26. In the remainder of the judgment, the judge briefly considered, and rejected, various submissions by GE that the amendment to plead fraud should be refused on discretionary grounds, even if it was not barred by limitation: see [134] to [136]. Finally, the judge considered, and decided to permit, alternative amendments put

forward by HMRC to the effect that (a) the Settlement Agreement was a contract of utmost good faith, and (b) there was an implied term in the Settlement Agreement which would permit HMRC to rescind, or terminate, it for failure to give full disclosure of any material fact relating to it. The judge considered both claims to be arguable, while doubting whether they would in practice add anything of substance to the claim already made in misrepresentation: see [137] to [149].

27. In the final paragraph of his judgment, the judge described the overall result:

> "152. The overall result is that, while I have rejected the attempts to infer many years after the event that specific positive representations could be implied from limited references in the contemporaneous documents, the essential allegation which lay at the heart of Mr Jones QC's submissions – that GE failed to disclose the complete picture, and that it did so deliberately – will be permitted to go to trial on the various alternative legal bases asserted by HMRC. I stress that, beyond the conclusion that there is a sufficient pleading for this purpose, and that the prospects of success cannot be shown to be fanciful on an interlocutory application such as this, I say nothing about the merits of the claims of deliberate non-disclosure or fraud."

GE's appeal to this court

28. GE now appeals to this court on the limitation issue alone, with permission granted by the judge. There are two grounds of appeal. The first, and primary, ground is that the judge wrongly explained the decision in Molloy on the basis that the plaintiff had claimed the repayment of monies:

> "In fact, *Molloy* is authority for the proposition that any claim for equitable rescission of a contract on the ground of fraudulent misrepresentation is subject to a six-year limitation period by analogy to a claim for damages in the tort of deceit, where the facts as pleaded would allow either claim."

The second ground is that, if the judge's explanation of Molloy is correct, he was nevertheless wrong to distinguish the facts of that case:

> "The remedy which HMRC seek is both in form and substance materially indistinguishable from the remedies claimed by the plaintiff in *Molloy*."

29. By a respondent's notice, HMRC ask us to uphold the judge's order on different or additional grounds which may be broken down as follows:

> (1) The ratio of the decision in Molloy, "whatever it might be, is wrong and is inconsistent with the underlying principles in numerous Court of Appeal and House of Lords cases such that

> the Court of Appeal's jurisdiction to depart from the ratio of its own previous decisions is engaged."
>
> (2) On the facts in Molloy, "the Court of Appeal ought to have held that in equity no statutory limitation period was applicable by analogy to a claim that rescission had been effected, or ought to have been effected, as a result of fraudulent misrepresentation."
>
> (3) On the facts of Molloy, "the most analogous common law remedy was, at that time, a claim for money had and received (now a claim in unjust enrichment), the statutory limitation period for which would not commence until rescission had been effected."
>
> (4) "Equity would only apply by analogy the statutory limitation period for a claim at common law for damages for fraudulent misrepresentation to a claim in equity for damages for fraudulent misrepresentation, but that is not what Mr Molloy was claiming."
>
> (5) "[A] claim at common law for damages in deceit is not analogous to a claim in equity relating to rescission for fraudulent misrepresentation, no matter what consequential orders are sought in equity, with the consequence that the limitation period for such a claim at common law has no application to a case in equity such as was before the Court of Appeal in Molloy, or in relation to the present case."

30. It will be apparent from the grounds of appeal, and from the contentions raised in HMRC's respondent's notice, that our first task must be to ascertain the true ratio of the decision of this court in Molloy. Only when that has been done can we determine whether the judge was correct to distinguish Molloy on the grounds advanced to him by Mr Jones. Furthermore, the ratio of Molloy, whatever it may be, is binding on us unless HMRC can persuade us that the case falls within one of the exceptional categories in which the Court of Appeal is permitted to depart from one of its previous decisions: see Young v Bristol Aeroplane Company, Ltd [1944] KB 718, where the full court presided over by Lord Greene MR stated its conclusion in a very well-known passage at 729:

> "On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise: (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its

> opinion, stand with a decision of the House of Lords. (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam."

What is the ratio of *Molloy*?

31. As an introduction to Molloy, it is convenient to refer to the summary of the case given by Lord Reed PSC and Lord Hodge DPSC in Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2020] UKSC 47, [2020] 3 WLR 1369, at [204]:

> "The plaintiff took out a life assurance policy after being told by the insurer's agent that, under the policy, the premiums would remain at a fixed rate. When the insurer later increased the premiums, the plaintiff brought proceedings in the County Court to recover the overpayments. The County Court held, however, that the insurer was entitled under the policy to charge the increased premiums. Several years later, another policy holder brought similar proceedings in the High Court, in which he succeeded. That decision was overturned on appeal, but the Court of Appeal, and ultimately the House of Lords, held that the contract should be rescinded, and the premiums returned, on the ground of fraudulent misrepresentation. The plaintiff (in the *Molloy* case) was by then out of time to bring a common law claim for the return of his premiums, but instead brought proceedings in equity for rescission, an account of the premiums paid (as a consequence of the setting aside of the contract), and payment of the amount found due on the account. Since the claim to an account was subject by analogy to the statutory limitation period, the plaintiff sought to rely on the equitable principle allowing for its extension in a case of fraud, and argued that he had been unable to discover that he had a cause of action prior to the decision of the House of Lords."

32. It is important to emphasise that the aspect of the decision of the Court of Appeal in Molloy with which the Supreme Court was concerned in the recent FII case was the question of when the period of limitation began to run against Mr Molloy. It was in that connection that Lord Reed and Lord Hodge found the decision of this court in Molloy "particularly helpful": ibid. That is not the aspect of the case, however, with which we are now concerned. Nor are we directly concerned with the statutory limitation period, or its equitable analogue, which apply to a claim for an account. Nevertheless, the summary which I have quoted brings out the key stages in the story, which I can now flesh out with a little more detail.

33. On 8 March 1890, the plaintiff (Mr Molloy) effected a policy of insurance upon his own life with the defendant corporation ("the Insurer") in the sum of £1000, expressed to be payable to his wife if she survived him, or otherwise to his personal

representatives. Mr Molloy was induced to effect the policy by certain statements made by an agent of the Insurer which led him to believe, and were intended by the Insurer to lead him to believe, that the maximum amounts which could be recovered from him by way of yearly premium could not exceed the amounts shown in a table opposite to his age at the date of effecting the policy (which was 52).

34. In 1898, the Insurer began to demand premiums at higher rates linked to the increase in Mr Molloy's age since the date when the policy was first taken out. Believing this to be contrary to the representations made to him by the Insurer's agent, Mr Molloy paid the difference under protest. He also took proceedings in the County Court to recover the alleged overpayment. On 27 May 1898, the County Court judge held that, on the true construction of the policy, the Insurer was entitled to increase the premiums in accordance with Mr Molloy's age, with the result that the claim failed. Mr Molloy did not appeal against that judgment, but he continued to pay the increased premiums under protest.

35. Meanwhile, another policyholder (Mr Foster), whose policy was in the same terms, brought similar proceedings against the Insurer in the High Court. Mr Foster was supported financially in bringing his claim by a number of other policyholders, including Mr Molloy. He advanced the same arguments on the construction of the policy as Mr Molloy had done, and claimed in the alternative to have the policy set aside for misrepresentation, together with repayment of all sums paid under it with interest. At first instance, Kekewich J decided in favour of Mr Foster on the question of construction, with the result that the alternative claim for rescission fell away and was dismissed. Both parties then appealed, and the appeal was heard in March 1903 by the same constitution of the Court of Appeal as was to hear Mr Molloy's appeal some three years later (Sir Richard Collins MR, sitting with Romer and Cozens-Hardy LJJ).

36. The Court of Appeal allowed the Insurer's appeal on the issue of construction, but upheld Mr Foster's alternative claim to rescind the policy. The judgment of the court, delivered by Cozens-Hardy LJ, is reported at (1903) 19 TLR 342. The court held, at 345, that the documents circulated by the Insurer were "tricky and misleading", and that the policy issued to Mr Foster "differs essentially from the representations made to the plaintiff before and at the time when the proposal was signed, and upon which he acted". The judgment concluded as follows:

> "The plaintiff by his cross-notice asks to have the contract of insurance set aside, and we think he is entitled to this relief. This is not an action of deceit in which fraud on the part of the company's agents would have to be alleged and proved, but an action of rescission, in which such fraud need not be alleged or proved. The result is that in our opinion the plaintiff is entitled to a judgment for rescission of the policy and for a return of all monies paid thereunder, with interest…"

37. The case then went to the House of Lords, where it was heard by the Earl of Halsbury LC, Lord Macnaghten and Lord Lindley in July 1904. As appears from the report at (1904) 20 TLR 715, the appeal was argued for three days and then adjourned so that witnesses for the Insurer could be examined and cross-examined – something that the law reporter considered to be "absolutely without precedent, at all events since the House assumed its present form as a strictly legal tribunal": see the first paragraph of

the headnote. The Insurer was represented by three counsel headed by Mr Haldane QC, while Mr Foster appeared in person. In the event, Mr Foster, having crossed-examined the witnesses, was not called upon to make submissions, and the Insurer's appeal was dismissed. According to the report of what Lord Halsbury said in moving that the appeal be dismissed, at 717:

> "… there were one or two questions raised which might be summarily dismissed. The first was the nature of the document tendered to Mr Foster, which the Court of Appeal had described as "tricky". His Lordship concurred in that description. After three days' elaborate exposition their Lordships had at last arrived at what the real meaning was. There had been great ingenuity in concealing the real effect of the contract."

To similar effect, Lord Lindley considered that "the Court of Appeal had not gone too far in characterising these documents as tricky and deceptive" (ibid).

38. Returning to Mr Molloy's case, he began proceedings in the High Court in September 1904, barely one month after the House of Lords had given its judgment in Mr Foster's case on 29 July 1904. This was more than six years after the County Court had determined the question of construction against Mr Molloy in May 1898, at which stage (as this court was to hold) he had all the necessary knowledge to bring an action in deceit against the Insurer. Since that course was no longer open to him, the relief which he claimed in the action consisted of a declaration that he was induced to effect the policy in 1890 by the misrepresentations of the Insurer or its agents; rescission of the policy; an account of payments; and payment by the Insurer of the amount found due on the account: see the beginning of the judgment of Sir Richard Collins MR at 760.

39. The Insurer's defence was that the action was time-barred, and that Mr Molloy had in any event, with full knowledge of the fraud perpetrated on him, elected to affirm the contract: see the report of the judgment of Swinfen-Eady J, who heard the case at first instance, at 759 (first column). The judge held that the defence failed, because in his view Mr Molloy was entitled to wait for the decision of the House of Lords in Mr Foster's case before beginning his own action, and he had not at any stage affirmed the transaction. As Swinfen-Eady J said, at the end of his judgment (ibid):

> "In my opinion, from beginning to end the plaintiff has not affirmed the transaction. He waited, I repeat, to be fully informed as to what his legal rights really were, and, as soon as the position was definitely and finally ascertained, he issued his writ and brought this action for trial. Under those circumstances I am of opinion that the plaintiff is entitled to the relief for which he asks…"

40. The Insurer's appeal to this court was unanimously allowed, although in the case of Cozens-Hardy LJ "with regret".

41. There is one preliminary point which I need to clear out of the way. It seems abundantly clear from all three judgments in this court that the claim brought by Mr Molloy was

for rescission of the contract on the ground of *fraudulent* misrepresentation. In their written submissions, counsel for HMRC question whether this can be correct. They point out that the claim brought by Mr Foster had not been an action for deceit, but an action for rescission in which fraud need neither be alleged nor proved: see the extract from the judgment of Cozens-Hardy LJ which I have quoted at [36] above. They also point out, correctly, that the recitation by Sir Richard Collins MR of the relief claimed by Mr Molloy refers only to "the misrepresentations of the defendant corporation or its agents", without describing them as fraudulent. It is therefore suggested that when the members of the court used the word "fraud" in their judgments, they may have been referring to the kind of conduct which a court of equity would regard as fraudulent, even if it would not satisfy the common law test of deceit as formulated by the House of Lords in Derry v Peek (1889) 14 App. Cas. 337 at 376 (Lord Herschell).

42. There is some force in these submissions, but I am not convinced by them. The Master of the Rolls said in terms of Mr Molloy that "His action is for fraudulent misrepresentation", and similar statements may be found, as I have said, in all three judgments, as well as in Swinfen-Eady J's reference to "the fraud" with knowledge of which Mr Molloy was said to have affirmed the contract. In my view, it is simply not plausible that all three members of the court should have been mistaken upon such a fundamental point, especially as they had heard Mr Foster's appeal some three years earlier. The likeliest explanation, to my mind, is that Mr Molloy had indeed framed his claim for rescission as one based upon fraudulent misrepresentation, relying for that purpose on the views trenchantly expressed by the House of Lords, after hearing oral evidence, in Mr Foster's case.

43. I can now turn to the critical passages in the three judgments.

44. Sir Richard Collins MR stated that:

> "The circumstances of the case are very short, and I think they admit of very short grounds for our decision."

He then set out the relevant history, and after referring to the decision of the House of Lords, in the Foster case, as being founded on "fraudulent misrepresentation", recited Mr Molloy's assertion that until July 1904:

> "he never really appreciated his true position in relation to the defendants, and that therefore he was entitled, notwithstanding what had happened in the County Court in May 1898, to bring the present action."

45. The Master of the Rolls continued:

> "That raises the point. His action is for fraudulent misrepresentation. It might have been an action for damages at law on that footing. As a matter of fact it was an action claiming the relief which I have read from the claim. Now, what is the relation of the Statute of Limitations to a man claiming equitable relief? It is stated, as clearly as it is possible to put it, in a judgment of Lord Redesdale in *Hovenden v Lord Annesley* (2 Sch. & Lef. 607, at p.630) as follows:

> "But it is said that courts of equity are not within the Statutes of Limitations. This is true in one respect; they are not within the words of the statutes because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake, in point of language, to say that courts of equity act merely by analogy to the statutes; they act in obedience to it. The Statute of Limitations, applying itself to certain legal remedies, for recovering the possession of lands, for recovering of debts, &c., equity, which in all cases follows the law, acts on legal titles, and legal demands, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies; nevertheless, in thus administering justice, according to the means afforded by a court of equity, it follows the law."

46. The Master of the Rolls went on to consider when Mr Molloy's cause of action for fraudulent misrepresentation had arisen, concluding that he had all the requisite knowledge by the date of the County Court judgment in May 1898, with the consequence that time then began to run against him.

47. Romer LJ agreed, saying at the beginning of his judgment:

> "I am of the same opinion. In a case where a fraud has been committed, the defrauded person may have two remedies. He may have an action for damages at common law; or he may have, possibly, in any case like the present, an equitable remedy for rescission of contract. If he brings his action at common law he has to take care that he is not met by the plea of the Statute of Limitations, which would be a good plea in answer to his claim, though based on fraud, if he knew all the main relevant circumstances on which his claim in respect of the fraud was based more than six years before action brought. Now, if instead of bringing his action at law, he seeks the equitable remedy, it is true that the Statute of Limitations does not directly apply. But it applies indirectly, for it is settled law that where it is only a question of the remedy and you come into equity with a case such as I am considering for the purpose of getting equitable relief, then the equity of the court acts by analogy to the Statute of Limitations, and will not allow the plaintiff to succeed if his action is brought more than six years after knowledge of the facts has been acquired by him which justify his coming to the court."

48. Romer LJ proceeded to consider the knowledge which Mr Molloy had more than six years before the commencement of his claim, concluding (like the Master of the Rolls) that once the County Court judgment had been given, "he knew all the facts on which his claim for rescission was based". Romer LJ then concluded his judgment by saying:

> "It appears to me that under these circumstances it is impossible to say that the Statute of Limitations did not commence to run if he brought a common law action and ought not to be applied in equity by analogy now that he has brought an action for rescission. On that short ground it appears to me that the learned judge's decision in the court below is wrong, and that this appeal should be allowed."

49. The third member of the court, Cozens-Hardy LJ, agreed that the appeal should be allowed, although (as I have said) with regret. He agreed that there was "a short and simple answer" to the case, for the reasons given by the Master of the Rolls and Romer LJ. He added:

> "It is true that this is not an old common law action. The plaintiff asks relief which may be specifically called equitable relief in so far as he asks the court to set aside the policy. But it is old and well-settled law that in a case of this kind the courts of equity regard that which would have been a bar to similar relief in a court of common law as also being a bar in a court of equity."

50. Cozens-Hardy LJ then referred to another passage in the judgment of Lord Redesdale LC in Hovenden v Lord Annesley (loc.cit.), where he said at 632:

> "I think it is impossible not to see that courts of equity have constantly guided themselves by this principle, that, wherever the Legislature has limited a period for law proceedings, equity will, in analogous cases, consider the equitable rights as bound by the same limitation."

51. Cozens-Hardy LJ then concluded, on the facts, that Mr Molloy's cause of action in fraud was complete once the County Court judgment had been given. There was no case of concealed fraud, and the County Court judgment meant that the construction of the policy was *res judicata* as between Mr Molloy and the Insurer.

52. In the light of the passages which I have cited from the judgments, what is the ratio to be derived from the decision of this court in Molloy? In my view, there can be no real doubt about the answer. The fundamental reasoning of all three judges was that the six-year limitation period which applied to actions at common law for deceit under section 3 of the Statute of Limitations 1623 should be applied by analogy to a claim brought in equity to rescind the policy for fraudulent misrepresentation. This reasoning was critical to the decision, because in the absence of a statutory limitation period applied by analogy, the 1623 Act would have had no application to Mr Molloy's claim. Yet the court unanimously held that the Insurer's defence based on the Statute succeeded.

53. In order for the Insurer's defence to succeed, two things had to be established: first, that a statutory limitation period applied by analogy to the claim brought by Mr Molloy; and secondly, that time had begun to run against him under the Statute (as so applied)

more than six years before he issued his writ in September 1904. As we have seen, both questions were decided adversely to Mr Molloy in this court. Furthermore, it is important to note that the second question arises only if the first question has already been answered in the Insurer's favour.

54. The fact that the court was consciously applying the statutory time limit for deceit claims by way of analogy is apparent from all three judgments. The reasoning perhaps appears most clearly at the beginning of Romer LJ's judgment: see the passage quoted at [47] above, and see too the conclusion of his judgment at [48] above. This was also the "short and simple answer to the case" identified by Cozens-Hardy LJ: see [49] above, and in particular his statement that:

> "… it is old and well-settled law that in a case of this kind the courts of equity regard that which would have been a bar to similar relief in a court of common law as also being a bar in a court of equity."

This shows that the relief sought in the comparator common law claim does not have to be identical to that sought in equity: it is enough if the relief is "similar". Accordingly, although Mr Molloy's claim was for rescission of the policy in equity, an account of payments made under the policy and payment by the Insurer of the amount found due on the account, the court found an appropriate analogy in the common law claim that Mr Molloy could in principle have brought (if it were not time barred) for damages for deceit. The similarity no doubt lay in the fact that, in either case, the claim was based on fraudulent misrepresentations and the relief ultimately sought was a payment of money, whether by way of damages (at law) or by way of restitution following an account (in equity).

55. Sir Richard Collins MR was clearly well aware of the differences between the relief actually claimed by Mr Molloy and an action for damages in deceit. As he said, in the passage quoted at [45] above:

> "His action is for fraudulent misrepresentation. It might have been an action for damages at law on that footing. As a matter of fact it was an action claiming the relief which I have read from the claim."

Nevertheless, this did not deter the Master of the Rolls from holding that the Statute of Limitations applied. Indeed, he went even further than saying it applied by way of analogy, by endorsing the view of Lord Redesdale in Hovenden v Lord Annesley that courts of equity do not "act merely by analogy to the statutes; they act in obedience to it". According to Lord Redesdale, this was an application of the principle that equity "follows the law". Whether or not that explanation is correct does not, for present purposes, matter. The important point is that, in common with both his colleagues, Sir Richard Collins MR was clearly of the opinion that the limitation period in the 1623 Act should apply to Mr Molloy's claim, because it would in principle have been open to him to bring an action at law claiming damages for the alleged fraudulent misrepresentations. I am unable to accept the implausible submission of Mr Jones QC that Sir Richard Collins MR was labouring under a misapprehension as to the differing remedies available to Mr Molloy at law or in equity.

56. The basic reason why statutory time limits could be applied by way of analogy to claims for similar equitable relief lies in the public interest which is served by statutory limitation periods. As Sir Richard Collins MR said, at 761:

> "The policy of the Statute of Limitations is based on the old maxim, *Expedit reipublicae ut sit finis litium* [*it is in the public interest that there should be an end of litigation*]. Therefore the object of it was really to put an end to actions after a lapse of time; and where a person knows the facts relating to his case, everybody being presumed to know the law, he is presumed to know all those limitations which arise to him by reason of knowing the facts."

57. It is a striking feature of the English law of limitation that, even in a case where fraud is alleged, the basic six-year time limit for claims in tort applies, in the same way as it would for claims based on conduct which falls short of fraud. The only relaxation of the basic rule lies in the provisions now contained in section 32(1) of the 1980 Act, which provides that where:

> "(a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

Thus the public policy to which I have referred is served by the combination of a strict time limit, even in cases of fraud, coupled with specific provisions which postpone the running of time in cases of fraud, concealment or mistake until the claimant has discovered the relevant facts, or could with reasonable diligence have done so.

58. Against that background, it would in my judgment be anomalous if claims based upon fraud in equity could be brought without any time limit, even where the relief sought is the same as, or similar to, that which the claimant could have obtained in an action which is subject to a statutory time limit. Hence the development of the doctrine of application of statutory time limits by analogy in the case law, and the recognition and preservation of that doctrine in section 2(7) of the 1939 Act and section 36(1) of the 1980 Act.

59. For these reasons, I conclude that the ratio of Molloy is correctly stated in GE's first ground of appeal, namely "that any claim for equitable rescission of a contract on the ground of fraudulent misrepresentation is subject to a six-year limitation period by analogy to a claim for damages in the tort of deceit, where the facts as pleaded would allow either claim."

The first ground of appeal: discussion

60. Once the ratio of Molloy has been properly understood, it can be seen that it provides no support for the narrower view which was urged on the judge in the present case by HMRC, and which he adopted in his judgment at [130]. In my judgment, it is simply wrong to say that, as the judge recorded Mr Jones QC's submission, "it was the fact that the claimant sought to recover money or property as a consequence of rescission that justified adopting the limitation period applicable to the common law claim of deceit". On the contrary, as I have sought to explain, it was enough that HMRC seek rescission of the Settlement Agreement on the ground of fraudulent misrepresentation, in circumstances where they could in principle have relied upon the same facts to bring an action for damages in deceit. Such an action would not have involved setting aside the Settlement Agreement, but the damages would have been calculated on essentially the same basis as HMRC now seek to achieve by rescinding the Settlement Agreement and relying on their statutory power to make discovery assessments within a twenty year period. It is that similarity in the relief claimed which is sufficient, on the authority of Molloy, to justify and require application of the statutory six-year limit by way of analogy.

61. It cannot make all the difference that, once the Settlement Agreement has been rescinded in equity, HMRC could then use their statutory powers to recover the tax which they allege they were wrongfully prevented by the Settlement Agreement from recovering in the first place. In the exercise of their care and management powers, HMRC decided in December 2005 to reach a contractual settlement with GE in relation to certain transactions for which GE had sought clearance under the new legislation in the Finance (No.2) Act 2005 which was enacted to counter tax avoidance through the use of hybrid entities. Having decided to go down this contractual route, rather than rely on their tax-gathering powers, the rights and obligations of HMRC under the Settlement Agreement then sounded in contract, not in tax law. Accordingly, I can see no reason why ordinary principles should not apply when deciding whether, and within what time limits, HMRC should be able to seek rescission of the Settlement Agreement for fraudulent misrepresentation, or pursue the alternative remedy of an action for damages in deceit. The six-year limitation period in section 2 of the 1980 Act would admittedly have applied to any action for damages which HMRC chose to commence, but once that period (or any extension of it under section 32) had expired, such action would have been time-barred. It is precisely because that opportunity was always available to HMRC, but they did not take advantage of it, that the same time limit should be applied, by way of analogy, to their attempt in the present proceedings to achieve substantially the same result by setting aside the Settlement Agreement in equity and then using their statutory powers to recover the tax allegedly underpaid.

62. In their written and oral submissions, the latter persuasively advanced by Mr Rabinowitz QC (who did not appear before the judge), GE rely on a number of further arguments to support the conclusion which they say flows from a correct appreciation of the ratio of Molloy.

63. First, GE submits that Mr Molloy's claim for rescission was juridically no different from any other claim for equitable rescission. The nature of the remedy cannot change depending on what happens to be needed to achieve restitutio in integrum in any particular case, or how a claimant happens to plead his claim. All claims for equitable rescission seek to restore the claimant to the position that he was in before entering into

the relevant contract. There was accordingly no basis for the judge's singling out of the monetary element of Mr Molloy's claim in order to explain the analogy which the Court of Appeal drew with his potential claim for damages.

64. In my judgment, there is force in this criticism. The equitable remedy of rescission, like rescission at common law, is inextricably bound up with the possibility of achieving restitutio in integrum, although the authorities tend to show that the requirement is easier to satisfy in the case of equitable rescission because of the greater flexibility which courts of equity have traditionally been able to deploy: see generally Snell's Equity, 34th Edition (2020), at paragraphs 15-011 and 15-012. Precisely what (if anything) is required in order to achieve counter-restitution in any given case will depend on the particular circumstances, and it cannot be satisfactory for the law of limitation to draw a distinction depending on the terms of the consequential relief which the claimant needs or chooses to plead.

65. Secondly, GE submits (and I agree) that there is no support for the judge's interpretation of Molloy in the two first-instance cases in which it was followed. In Oelkers v Ellis, loc.cit., Horridge J applied Romer LJ's analysis of the law in Molloy when deciding that the plaintiff's claim to rescind a purchase of shares for fraudulent misrepresentation was not time-barred under the Limitation Act 1623, because he did not discover the fraud until a few months before the action was begun, even though more than six years had elapsed since his purchase of the shares. In Armstrong v Jackson, loc.cit., another case concerning a sale of shares induced by fraud, McCardie J said, at 830:

> "I may point out that mere lapse of time is no answer to a plea of rescission… In cases like the present the right of the party defrauded is not affected by the mere lapse of time so long as he remains in ignorance of the fraud: see per Lord Westbury in *Rolfe v Gregory* (1865) 4 D.J. & S. 576, 579. If, however, he delays his claim to rescission until after the lapse of six years from his discovery of the fraud, then the Court will (apart from any other point) act by analogy to the Statute of Limitations and refuse to grant relief: see *Oelkers v Ellis*."

66. There is no suggestion in this passage, any more than there was in the judgment of Romer LJ in Molloy, that the application by analogy of the Statute of Limitations in a case of fraudulent misrepresentation should be confined to claims where equitable rescission would involve a payment of money (although it is fair to say that the order actually made in Armstrong v Jackson did involve repayment by the defendant of all sums received by him from the plaintiff, less a credit in respect of dividends received, as well as the setting aside of the entirety of the purchase of shares).

67. Third, GE submits that the judge's interpretation of Molloy is inconsistent with the earlier decision of the Court of Appeal in Redgrave v Hurd (1881) 20 ChD 1. This case is usually cited as authority for the proposition that rescission in equity is not confined to cases of fraud, but extends to cases of innocent misrepresentation: see Snell, at paragraph 15-004. It is also authority that it is no answer to a claim to rescind a contract for misrepresentation to say that the innocent party could, with due diligence, have discovered the truth. It was in this context that Sir George Jessel MR (with whom Baggallay and Lush LJJ agreed) said, at 13:

> "I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the *Statute of Limitations*. That, of course, is quite a different thing. Under the statute delay deprives a man of his right to rescind on the ground of fraud, and the only question to be considered is from what time the delay is to be reckoned. It had been decided, and the rule was adopted by the statute, that the delay counts from the time when by due diligence the fraud might have been discovered."

68. Mr Jones QC submitted to us that Sir George Jessel was guilty of two blunders in this short passage. First, there is nothing in the 1623 Act which has anything to say about the right to rescind a contract for fraudulent misrepresentation, whether at law or in equity. Secondly, the 1623 Act had nowhere adopted the principle "that the delay counts from the time when by due diligence the fraud might have been discovered". I am unable to accept either limb of this submission. As to the first point, I agree with Mr Rabinowitz QC that Sir George Jessel's reference to delay depriving a person of his right to rescind for fraud under the statute must be read as a reference to the application by analogy of a limitation period in the statute to rescission in equity, which as Lord Redesdale LC had said in Hovenden v Lord Annesley, loc.cit., was done "in obedience to the statute". To my mind, this also provides the answer to the second objection. The proposition "that the delay counts from the time when by due diligence the fraud might have been discovered" was not literally included in the 1623 Act, but was "adopted" by the statute in the sense that it was a principle which courts of equity had developed when applying the statute by analogy, and thus in obedience to it when properly understood.

69. Although I consider that GE are correct in their analysis of what Sir George Jessel MR said in Redgrave v Hurd, and I agree that the passage which I have quoted is entirely consistent with Molloy, I would not go so far as to say that the judge's narrow interpretation of the ratio of Molloy is positively inconsistent with Redgrave v Hurd. There is nothing to indicate that the question in the present case was under consideration in Redgrave v Hurd, and I do not think it provides any independent support for GE's case beyond the fact that it sits comfortably with Molloy, and does not suggest to me in any way that Molloy was wrongly decided.

70. Next, GE referred us to various statements in textbooks which refer to Molloy without disapproval or qualification. Thus, Halsbury's Laws of England, *Limitation Periods*, (Vol. 68 (2016)) states at paragraph 986, under the heading of "The general limitation period in cases of fraud":

> "A claim for deceit is a claim in tort for which the period of limitation is six years, and in relation to equitable remedies equity followed the statute and applied the same period of limitation".

The authorities cited in the relevant footnote are Molloy, Oelkers v Ellis and Redgrave v Hurd.

71. I also agree with GE that it is of particular relevance to note a textbook passage which pre-dates 1 July 1940. In his work Limitation of Actions in Equity (1932), John Brunyate (who was a barrister and Fellow of Trinity College, Cambridge) said in relation to Molloy, at p.228:

> "Recently, however, the Court of Appeal has actually applied the statute of 1623 in a suit to rescind a contract obtained by fraud. It is therefore certain that the Statutes of Limitations fix an upper limit to the time during which a man may make his election [*i.e. to set aside a transaction for fraud or undue influence or upon some other equitable ground: see p.20*]."

72. Standing back, therefore, in considering the question posed by section 36(1) of LA 1980, that is to say how the time limit under section 2 for actions founded on tort was applied by the court by analogy before 1 July 1940, we have the benefit not only of a decision of this court (in Molloy) which is directly in point, but also the endorsement of that decision in a textbook dating from 1932. Moreover, the ratio of Molloy is of course binding on us, unless HMRC can establish that one of the exceptions in Young v Bristol Aeroplane applies.

73. I must now consider the P&O Nedlloyd case, upon which HMRC place considerable reliance. By way of brief introduction to a rather complicated case, the judge in our case said this about it:

> "127. In *P&O Nedlloyd* the relevant issue was whether a claim for specific performance of a contract was subject to any limitation period, in particular the six-year limitation period under the Limitation Act 1980 in respect of claims for breach of contract. There was no consideration of the position in relation to claims for rescission. At [43], Moore-Bick LJ said:
>
> "It is not surprising that equity should apply by analogy the limitation periods applicable to claims at law for an account and for damages for breach of duty, whether in contract or tort, to claims for an account and for equitable compensation. In each case the same facts give rise to a claim, whether at law or in equity, and the same kind of relief is obtainable."
>
> 128. He contrasted this with specific performance, where there was no comparable relief available in the common law courts, and the facts needed to support a claim were not in all respects the same as those necessary to support a claim for breach of contract."

74. The proposition of law for which the decision of this court in P&O Nedlloyd is authority is that the six-year limitation period applicable to an action founded on simple contract should not be applied by analogy to a claim for specific performance pursuant to section

36(1) of the 1980 Act, with the consequence that no period of limitation is applicable to such claims. That conclusion is of no direct application to the present case for two reasons. First, this is a case about equitable rescission for fraud, not specific performance. Secondly, this court has already held in Molloy that the statutory predecessor of section 2 of the 1980 Act *does* apply by analogy to claims for equitable rescission founded on fraudulent misrepresentation, and we are bound by that decision unless HMRC can establish the contrary. Zacaroli J was also right to note that the position in relation to claims for rescission was nowhere considered in P&O Nedlloyd, nor was Molloy cited to the court. For those reasons alone, there could be no question of any direct inconsistency between the ratio of Molloy and the ratio of P&O Nedlloyd.

75. The reasons which persuaded Moore-Bick LJ that no limitation period should be applied by analogy to claims for specific performance were developed by him in a scholarly review of the case law and the underlying principles at [34] to [53]. The whole passage repays careful reading, but is too long to cite in this judgment. I will therefore confine myself to reference to two passages.

76. The first passage contains some of the main reasons relied upon by Moore-Bick LJ as showing that specific performance should be treated differently from other remedies for breach of contract:

> "47. No doubt it is true that most claims for specific performance are made in response to an existing breach of contract, but as *Hasham v Zenab* [1960] AC 316 shows, an accrued right of action for breach of contract is not a necessary precondition to obtaining relief of that kind. It is therefore wrong in principle to treat specific performance as merely an equitable remedy for an existing breach of contract. Moreover, since a claim for specific performance may be made as soon as the contract has been entered into, it is very arguable that, if the limitation period were to be applied by analogy, it would be necessary to regard the cause of action as accruing at that moment with the unfortunate result that the claim could become time-barred before any need for relief had arisen."

77. I pause to observe that neither of those objections has any counterpart in the present case.

78. The second passage, upon which both sides rely, is one in which Moore-Bick LJ gave a helpful explanation of the rationale which underlies the application of statutory limitation periods by analogy. After referring to Knox v Gye (1872) LR 5 HL 656, Coulthard v Disco Mix Club Ltd [2000] 1 WLR 707 and the Cia de Seguros case, loc.cit., Moore-Bick LJ said at [45] that they:

> "… are all cases in which the facts giving rise to the claim were sufficient to found an action at law and a suit in equity and in which substantially identical relief (an account in the first two cases and damages or equitable compensation in the third) was available in each case. In such circumstances one can well see

> why equity took the view that the limitation period applicable to a claim at law should also apply to a claim in equity. To hold otherwise, even at a time in the 19th century when the jurisdictions of the common law courts and the courts of equity were separate, would have undermined the statutory provisions; in the modern legal world, in which the same courts apply the rules of both law and equity, the consequences would be even more anomalous and unacceptable. However, in cases where the facts capable of supporting a claim for equitable relief differ from those capable of supporting a claim at law, or where the equitable remedy differs in a material respect from that available at law, there is not the same reason to deprive the court of the power to grant equitable relief in an appropriate case by adopting the statutory limitation period by analogy."

79. With the test formulated by Moore-Bick LJ at the end of that passage in mind, it seems to me that in the present case there is no material distinction between the facts capable of supporting a claim by HMRC for damages for deceit and a claim by them to rescind the Settlement Agreement in equity. Nor, in my view, does the equitable remedy differ in any material respect from that available at law. In the former case, HMRC would have sought to recover the underpaid tax by way of damages, quantified by reference to the assessments which they would have raised if the Settlement Agreement had never been entered into. In the latter case, the object and purpose of the rescission would be to place HMRC in a position where they could recover the same amounts of underpaid tax by direct assessment.

80. For these reasons, I consider that the decision of this court in P&O Nedlloyd is properly distinguishable, and that the principles stated by Moore-Bick LJ at [45] do in fact provide some significant support for GE's case.

81. I can now deal very briefly with PAG. As I have already noted, Asplin J appears to have relied on P&O Nedlloyd as authority that no period of limitation applies to a claim for rescission in equity for misrepresentation: see [24] above. But the point was of only incidental significance in a lengthy and complicated witness action, and Asplin J understandably dealt with it summarily at [257] to [258]. Because she did not develop her reasoning on the point, Zacaroli J said at [129] that he would consider the issue afresh, without regard to the decision in PAG. For the same reasons, neither side placed any significant reliance on PAG in this court, and Asplin LJ (as she now is) indicated during the hearing that in her view they were right not to do so.

82. I can now move on to the second main strand in the judge's reasoning, which was (in summary) that there is an "obvious and direct" analogy between HMRC's claim for rescission in equity and their claim for a declaration as to the validity of the rescission allegedly effected by them at common law: see the judgment at [132]. In my respectful opinion, this reasoning is mistaken for a number of reasons. In the first place, the judge was wrong to say, at [131], that "the only remedy sought" by HMRC is declaratory relief. That is undoubtedly the main relief which HMRC seek to obtain, but the passages which I have quoted from the APOC, and the prayer for relief, show that various forms of ancillary relief are also claimed, including "any consequential order that the court considers necessary" when setting aside the Settlement Agreement, and "all necessary accounts and enquiries" to put HMRC in the same position as they would have been in

but for the Settlement and Clearance Agreements. The position is not therefore as clear cut as the judge's language would suggest, and depending on the outcome of the trial there are various forms of ancillary financial relief which HMRC may wish to invoke.

83. Secondly, and more fundamentally, the judge's approach seems to me to rest on a misunderstanding of how section 36(1) of LA 1980 is intended to work. The analogy espoused by the judge is with a cause of action (rescission at common law) for which *no* limitation period exists under the 1980 Act, whereas the question posed by 36(1) is whether one of the specified time limits under the 1980 Act may be applied by analogy. To be relevant, therefore, an analogy must be with one of the statutory time limits, in the present case the time limit under section 2 for actions founded on tort. As I have explained, Molloy provides clear pre-1940 authority that the time limit under section 2 should be applied by analogy to a claim for equitable rescission of a contract for fraud. That decision was binding on the judge, and it was his duty to apply Molloy unless he accepted (as of course he did) HMRC's submission that it was distinguishable on the ground that HMRC were not claiming a financial remedy. The fact that there is no statutory time limit for exercise of the self-help remedy of rescission at common law is simply irrelevant to the exercise mandated by section 36(1), and the absence of such a time limit cannot therefore provide an additional, or independent, reason for not applying Molloy to cases that fall within its ratio.

84. For all these reasons, I would allow GE's appeal on ground 1, subject only to the issues raised by HMRC's respondent's notice. On that basis, it is unnecessary to consider ground 2, which would arise only if the judge's explanation of Molloy were correct.

Is this court free to depart from the ratio of *Molloy*?

85. As I have explained, this court is bound by the ratio of Molloy, unless one of the three exceptions identified in Young v Bristol Aeroplane applies. To recapitulate, the first exception is that "[t]he court is entitled and bound to decide which of two conflicting decisions of its own it will follow". The second exception is that the court "is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords", or now of the Supreme Court. The third exception is that the court "is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam".

86. Two categories of decisions per incuriam were listed by the court in Young at 729, namely:

> "those where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it – in such a case a subsequent court must decide which of the two decisions it ought to follow; and those where it has acted in ignorance of a decision of the House of Lords which covers the point – in such a case a subsequent court is bound by the decision of the House of Lords."

When this passage is read with the court's conclusions in the following paragraph, it is reasonably clear that where a decision of this court is reached in ignorance of a *prior* decision of the House of Lords or Supreme Court which covers the point, the decision must be treated as reached per incuriam; with the consequence that the second exception

to the general rule must in turn be read as referring to a *later* decision of the House of Lords or Supreme Court which implicitly overrules an earlier decision of this court.

87. Other examples which the court gave of decisions per incuriam are "where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force a statute": ibid. The court added:

> "We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts."

88. In the light of this established jurisprudence, it is a matter of some surprise that nowhere in the respondent's notice did HMRC specify which exceptions to the general rule were said to be engaged, or which particular decisions of this court or the House of Lords, whether before or after Molloy, were said to be inconsistent with its ratio. Nor were matters much improved by HMRC's so-called skeleton argument in support of the appeal dated 28 October 2020, which although more than double the length normally permitted under the rules, nowhere identified which exceptions were said to be engaged, or on what grounds. Instead, a number of cases were discussed at great length, with copious citations from the judgments, in a style more appropriate to an article in a learned journal than to a document intended to assist the court with its pre-reading. I should add that permission for this skeleton argument was granted by a Master, in response to a letter from Mr Jones QC seeking to justify its length. I can only say that, for my part, I would have found a document half its length, which complied with the rules in PD52A para 5(1), considerably more useful.

89. After GE had filed a supplemental skeleton argument in December 2020 dealing, as best they could, with HMRC's apparent reliance on one or more of the exceptions set out in Young, HMRC filed a further skeleton argument on 20 January 2021 (for which I granted permission), paragraph 23 of which began with the optimistic assertion:

> "As HMRC hope is clear from paragraph 11 of their main skeleton argument, HMRC rely on the first two grounds in *Young*…"

This appeared to be a clear acceptance that no reliance was being placed on the third, per incuriam, exception, and that HMRC had therefore abandoned any case that Molloy could not stand with prior decisions of the House of Lords, including in particular Peek v Gurney (1873) LR 6 HL 377 and Directors of the Reese River Silver Mining Co Ltd v Smith (1869) LR 4 HL 64 ("Reese River"), both of which had been extensively discussed in HMRC's original skeleton. However, that was still not the end of the matter. When Mr Jones QC came to make his oral submissions, he made no reference to Young until prompted to do so by the court at the conclusion of his argument. He then clarified that he did still wish to contend that the ratio of Molloy conflicted with previous House of Lords decisions, but he accepted that this would fall into the per incuriam category. He said that he had misunderstood the scope of the second exception

in Young, taking it to refer to prior as well as subsequent inconsistent decisions of the House of Lords.

90. Against this rather unsatisfactory background, I can deal with the issue quite briefly. The reason is that I am not persuaded that any of the exceptions in Young is even arguably engaged, let alone so clearly engaged that we could fairly refuse to allow GE the benefit of a limitation defence in a fresh action if HMRC still wish to pursue their equitable rescission claim. Viewed from that perspective, it is the absence of any limitation period (statutory or by analogy) for rescission for fraud at common law which may seem anomalous, and it would in my view need clear authority, either binding on us or truly inconsistent with the ratio of Molloy, to ground an argument that the same treatment should be afforded to rescission for fraud in equity, with the result that no limitation period at all applies to it.

91. The ratio of Molloy, as I have sought to explain, lies in the potential availability of a claim for damages in the tort of deceit arising from the same facts as are relied upon to justify rescission in equity. If that condition is satisfied, the strong public interest in curtailing the period within which even fraud claims may be brought must prevail, subject only to the limited circumstances in which the running of time against the claimant may be postponed. It is irrelevant for this purpose whether, or to what extent, or in what sense, rescission in equity for fraud is properly to be characterised as a self-help remedy which does not require the intervention of the court. That is a notoriously difficult subject, on which the authorities are in such a state of disarray that, in my judgment, only the Supreme Court can reconcile them: see generally Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, The Law of Rescission, (2nd edition, 2014) at paragraphs 11.107 and 11.108, and the illuminating article by Janet O'Sullivan, Rescission as a self-help remedy: a critical analysis, (C. L. J. 2000, pp 509-543). This uncertainty, I may add, is reflected in the various alternative ways in which HMRC plead their claim for rescission in equity in the APOC.

92. It is also irrelevant, to my mind, that for extraneous reasons HMRC do not need to claim equitable compensation for fraud in addition to rescission, or that the measure of damages for an action in deceit (being compensatory in nature) is not necessarily the same as the restitutionary measure which the court would apply in seeking to achieve restitutio in integrum as a condition of rescission (whether at common law or in equity), or in an action for unjust enrichment.

93. All of these topics, which are canvassed at length and with an impressive display of learning in HMRC's written submissions, would provide interesting raw material for several academic seminars or journal articles, but they do not impinge except peripherally on the task in hand, which is to determine whether we are bound to follow Molloy. In my view, we clearly are so bound. Nor, speaking for myself, is this a conclusion which I reach with any reluctance. As I have said, it is the absence of any limitation period for rescission for fraud at common law which is at first sight surprising, although the apparent anomaly is perhaps tempered by the strict approach which the court normally adopts to restitutio in integrum in such cases: see Snell at para 15-011.

94. In the light of this discussion, and with no disrespect to the interesting submissions which Mr Jones QC ably developed before us, I do not intend to prolong this judgment with a detailed explanation of how each of the cases upon which HMRC seek to rely

falls far short of satisfying the stringent requirements of Young v Bristol Aeroplane. By way of example only, I will confine myself to a few observations on the decision of the House of Lords in Reese River, upon which HMRC placed considerable reliance.

95. The first point to note is that the decision in Reese River preceded Molloy by some thirty seven years, so if any of the exceptions in Young were to be engaged, it would be the per incuriam exception for cases where this court has acted in ignorance of a decision of the House of Lords which covers the point in issue.

96. Secondly, and crucially, Reese River was not a case about limitation of actions at all. The issue was, rather, one of interpretation of section 98 of the Companies Act 1862, which gave the court full power to rectify the list of contributories to a company after the date of a winding-up order, in circumstances where the respondent alleged that he had been induced by fraud and misrepresentation to become a member of the company, and had instituted proceedings seeking removal of his name from the register before the winding-up order had been made. The House of Lords held, distinguishing its earlier decision in Oakes v Turquand (1867) LR 2 HL 325, that the claim should succeed, even though the court had made no order in the proceedings before the winding-up ensued.

97. It was in that context that Lord Hatherley LC analysed the position in terms which have had an influential afterlife as apparent authority for the proposition that rescission in equity for fraud is, in at least some senses, a self-help remedy which takes immediate effect. But his discussion of the topic was closely tied to his analysis of the 1862 Act, and it may be questioned how widely he intended it to apply. Furthermore, the reasoning of the other three members of the court (Lord Westbury, Lord Colonsay and Lord Cairns) is more ambivalent, and appears to place more emphasis on the fact that the respondent had actually instituted proceedings before the winding-up. The short point is that the case is not an authority on limitation at all, nor does it even provide unequivocal support for the proposition that equitable rescission for fraud is a self-help remedy. Finally, even if it were an authority on the latter topic, it would not have required this court in Molloy to reach a different conclusion.

98. In sum, therefore, I remain firmly of the opinion that we are bound by Molloy, and that none of the exceptions in Young v Bristol Aeroplane applies.

Overall conclusion

99. If the other members of the court agree, I would therefore allow GE's appeal and vary the order of Zacaroli J so as to refuse HMRC permission to amend in respect of their claim for equitable rescission on the ground of fraudulent misrepresentation.

Lady Justice Asplin:

100. I agree that the appeal should be allowed for the reasons given by Henderson LJ.

Lord Justice Birss:

101. I also agree.