THE VALUATION DATE OF BENEFITS RECEIVED BY A VICTIM OF FRAUD

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I. INTRODUCTION

In English law, damages for a fraudulent misrepresentation that has induced the claimant to enter into an unfavourable contract aim to place the claimant in the position as if the contract had not been made.[1] The measure of such damages was first laid down in cases in which the claimant was induced to purchase an asset from the defendant or a third party for an inflated price.[2] The basic amount is the difference between the contract price and the actual value (if any)[3] of the asset at the date of purchase.[4] Where the asset has since depreciated in value,

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1. Smith New Ct. Sec. Ltd. v. Citibank NA [1997] AC 254 (HL) 281 (approving Doyle v. Olby (Ironmongers) Ltd. [1969] 2 QB 158 (CA)).

2. Most cases involved the purchase of shares. *See, e.g.*, Peek v. Derry (1887) 37 Ch D 541 (CA); McConnel v. Wright [1903] 1 Ch 546 (CA). For assets other than shares, see, *e.g.*, Doyle v. Olby (Ironmongers) Ltd. [1969] 2 QB 158 (CA) (business); Butler-Creagh v. Hersham [2011] EWHC 2525 (QB) (real property).

3. If the asset had no value, the claimant could recover the contract price. *See* Twycross v. Grant (1877) 2 CPD 469 (CA); 4 Eng. Ltd. v. Harper [2008] EWHC 915 (Ch), [2009] Ch 91. This applies even if the contract cannot be rescinded. Burki v. Seventy Thirty Ltd. [2018] EWHC 2151 (QB) [174]-[175].

4. *E.g.*, Peek v. Derry (1887) 37 Ch D 541 (CA); McConnel v. Wright [1903] 1 Ch 546 (CA); Glossop Carton and Print Ltd. v. Contact (Print and Packaging) Ltd. [2021] EWCA Civ 639, [2021] 1 WLR 4297 [36]-[37], [42], [59]. Some scholars regard an award in the basic amount as a substitute for the right infringed and not as compensation for loss. *See* Jason W Neyers, 'Form and Substance in the Tort of Deceit' in FORM AND SUBSTANCE IN THE LAW OF OBLIGATIONS (Andrew Robertson and James Goudkamp eds., Hart, 2019) 326 (citing Robert Stevens, TORTS AND RIGHTS (Oxford University Press, 2007) 60). This makes no difference to the arguments advanced in this Article.

its value at a later date (such as the date of resale or the trial)[5] can be used if the depreciation is due to an inherent characteristic present at the date of purchase and not an external factor arising thereafter.[6] Consequential loss, such as money spent on running a business that was acquired as a result of fraud, can be recovered if it has directly flown from the fraud, even if it was not reasonably foreseeable.[7]

The converse scenario—where the defendant fraudulently induced the plaintiff to sell an asset to the defendant or a third party—has arisen far less frequently. In some of those cases, the measure of damages was the difference between the actual value of the asset at the time of the impugned transaction and the price paid.[8] In other cases, the measure of damages was the loss directly flowing from the fraud.[9]

The scenario of a claimant being fraudulently induced to sell an asset was present in *Tuke v. Hood*.[10] The defendant fraudulently induced the claimant to sell some of his classic cars to the defendant at undervalue.[11] In the absence of the fraud, the claimant would have kept the cars, whose value rose between the date of their sale to the defendant and the date of the trial. The English Court of Appeal identified two items of recoverable loss: basic loss constituted by the difference between the actual value of the cars at the date of their sale to the defendant and the purchase price, and consequential loss in the amount of the cars' appreciation in value in the period between the sale and the trial.

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5. Where it was unreasonable for the claimant to retain the asset, the relevant time is the time at which the claimant ought to have sold it. *See* Smith New Ct. Sec. Ltd. v. Citibank NA [1997] AC 254 (HL) 268.

6. *Id.* at 267, 285. An example was given by Cockburn CJ in Twycross v. Grant (1877) 2 CPD 469 (CA) 544-45 (where a racehorse bought by the claimant subsequently dies of a disease, the claimant can recover the full contract price if it was a latent disease inherent in the horse's system at the time of purchase, but not if the horse caught the disease thereafter).

7. Smith New Court Sec. Ltd. v. Citibank NA [1997] AC 254 (HL) 264-67, 282. It is not settled whether the court can award compound interest on money obtained by a fraudster. *See* James Edelman, MCGREGOR ON DAMAGES (21st ed., Sweet & Maxwell, 2021) [19-068].

8. Platt v. Platt [2001] 1 BCLC 698 (CA) [19], [43], [74].

9. Dadourian Grp. Int'l Inc. v. Simms (Damages) [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep. 601 [145].

10. [2022] EWCA Civ 23, [2022] QB 659.

11. In fact, the claimant parted with his cars (which were undervalued by the defendant) in return for other cars (which were overvalued by the defendant) and cash.

Crucially, the Court of Appeal in *Tuke v. Hood* rejected the defendant's argument that the claimant was required to give credit for a notional amount of interest on the money he had received in return for the cars, for the period between the impugned transaction and the trial. This Article examines that aspect of the decision.

It should be said at the outset that the outcome was unobjectionable on the facts. The money the claimant received in return for his cars was used by him to repay a loan that he had been forced to obtain as a result of an earlier fraud by the defendant. It could therefore not be said that the claimant had received any benefit from obtaining the money.[12]

The Court of Appeal, however, used the occasion to pronounce a wider principle applying beyond the facts of the instant case. The court rejected taking account even of an actual benefit received from investing the money, or of the appreciation in value of an asset received by the claimant as part of the impugned transaction. This Article examines that wider principle.

This Article considers three scenarios, which differ in relation to what a victim of fraud received in return for parting with an asset that subsequently appreciated in value. Part II concerns an asset (not being money) which also appreciated in value in the period between the impugned transaction and the trial. Part III concerns money that has been invested by the claimant in some way and thereby generated some profit. Part IV concerns money that the claimant has left on a non-interest-bearing bank account.

This Article will refer to the tort of deceit as the cause of action.[13] In general, the arguments made in this Article apply equally to a claim under section 2(1) of the Misrepresentation Act 1967 (UK), which provides for an entitlement to damages where a person has been induced to enter into a contract by a misrepresentation of the contract-partner and the representor cannot prove the absence of fault. It has been held that the

12. However, care must be taken that the combined damages for the two frauds do not count the same loss twice.

13. For an overview of this tort including the measure of damages, *see* JOHN CARTWRIGHT, MISREPRESENTATION, MISTAKE AND NON-DISCLOSURE (6th ed., Sweet & Maxwell, 2022) ch. 5.

measure of damages under section 2(1) is in general the same as in the tort of deceit.[14] A difference does exist in that the Law Reform (Contributory Negligence) Act 1945 (UK) applies to a claim under section 2(1),[15] but not to a claim in the tort of deceit.[16] That difference has little relevance to the issue discussed in this Article.[17]

II. THE CLAIMANT RECEIVED AN ASSET THAT HAS APPRECIATED IN VALUE

This Part examines the scenario where the defendant fraudulently induced the claimant to part with an asset (the "lost asset") in return for another asset (the "gained asset"), neither asset being money. Both assets appreciated in value in the period between the fraudulent transaction and the trial, but the market value of the lost asset was always higher than that of the gained asset.

The Court of Appeal in *Tuke v. Hood* stated that the claimant is not required to give credit for the gained asset's appreciation in value.[18] Andrews LJ, with whom Baker LJ and Coulson LJ agreed, noted that an argument by the defendant that the claimant was required to give credit for an appreciation in value of the cars he had received from the defendant in part-exchange and still owned by the time of the trial would have failed.[19] Considering that the Court permitted the claimant to be debited with the appreciation in value of the cars he had transferred to the defendant, the court took the view that the amount of damages is the difference between the lost asset's value at the date of the trial and the gained asset's value at the date of the fraudulent transaction.

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14. Royscot Tr. Ltd. v. Rogerson [1991] 2 QB 297 (CA). This has been criticised on the ground that the very claimant-friendly remoteness test applying to a fraudster's liability should not be applied to a defendant who was merely negligent. *See, e.g.*, Richard Hooley, *Damages and the Misrepresentation Act 1967,* 107 L. Q. REV. 547 (1991).

15. Gran Gelato Ltd. v. Richcliff (Group) Ltd. [1992] Ch 560, 573-4; Taberna Europe CDO II plc v. Selskabet AF1 [2016] EWCA Civ 1262, [2017] QB 633 [51]-[52].

16. Alliance & Leicester Bldg. Soc'y v. Edgestop Ltd. [1993] 1 WLR 1462 (CA); Standard Chartered Bank v. Pakistan Nat'l Shipping Corp. (Nos 2 and 4) [2002] UKHL 43, [2003] 1 AC 959 [18].

17. The reason is set out in Part IV.

18. [2022] EWCA Civ 23, [2022] QB 659 [37].

19. *Id.* at [36]-[37].

Andrews LJ reasoned as follows: A distinction must be made between the basic loss and consequential loss.[20] The basic loss is the difference between the lost asset's value and the gained asset's value.[21] Authority had established that the date of valuation is generally the date of the impugned transaction.[22] A later date may be used, but only where this favours the claimant.[23] In the instant case, the date of the transaction was to be used.[24] The lost asset's appreciation in value between that date and the date of the trial is consequential loss.[25] The claimant must give credit for benefits received at the date of the transaction.[26] In the circumstances under discussion, the claimant had not received any benefits since the date of the transaction.[27]

In support of this line of reasoning, Andrews LJ quoted the following passage from Lord Browne-Wilkinson's speech in *Smith New Court Securities Ltd v. Citibank NA*: "[A]s a general rule, the benefits received by [a victim of fraud] include the market value of the property acquired at the date of acquisition; but such general rule is not inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered . . . "[28]

Andrews LJ interpreted this passage as permitting a deviation from the general rule (valuation as at the date of acquisition) only where this favours the claimant, but not where this favours the defendant. In support, Andrews LJ relied on two cases in which a claimant, who had been induced by fraud to purchase an asset at overvalue, obtained damages in the amount of the difference between the price paid and the value of the asset at the date of the purchase, ignoring an increase in the asset's value.[29] It was said in one of those cases:

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20. *Id.* at [37]-[38].
21. *Id.* at [20].
22. *Id.* at [31].
23. *Id.*
24. *Id.* at [36].
25. *Id.* at [38].
26. *Id.* at [29].
27. *Id.* at [38].
28. [1997] AC 254 (HL) 267.
29. Great Future Int'l Ltd. v. Sealand Hous. Corp. [2002] EWHC 2454 (Ch) [29]; OMV Petrom SA v. Glencore Int'l AG [2016] EWCA Civ 778, [2017] 3 All ER 157 [39]. The same

> The purpose of the flexibility of approach about the valuation date to which Lord Browne-Wilkinson referred was to ensure that the person duped should not suffer an injustice by failing to recover full compensation in the type of circumstances to which he referred. There is no need to adopt such an approach in order to relieve the fraudster from the general rule as to damages . . . [30]

This rule, which has also been applied in cases involving negligent misrepresentation,[31] is justified.[32] An award in the difference between the price paid and the value of the asset at the date of acquisition rectifies the effects of the wrong as at the date of the wrong, and subsequent changes in the asset's value (in either direction) are on the claimant's own account.[33] It may be said that the claimant adopts the transaction and gives credit for the asset's value at the date of acquisition.[34] The effect of inflation in the period between the fraudulent transaction and the trial may be addressed through an award of pre-judgment interest.[35]

The same rule may be applied where a claimant was induced by fraud to part with an asset in return for another asset, by awarding damages in the amount of the difference in the assets' values at the date of the exchange and leaving subsequent changes in value out of account. But this requires ignoring value changes of both assets, not just one of them. The two cases on which Andrews LJ relied (or the cases applying the same rule to

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rule was applied in *MDW Holdings Ltd. v. Norvill* [2022] EWCA Civ 883, [2023] 4 WLR 33 [85].

30. OMV Petrom SA v. Glencore Int'l AG [2016] EWCA Civ 778, [2017] 3 All ER 157 [39] (Christopher Clarke LJ speaking for the court).

31. Primavera Ltd. v. Allied Dunbar Assurance PLC [2002] EWCA Civ 1327, [2003] PNLR 276; Quilter v. Hodson Devs. Ltd. [2016] EWCA Civ 1125, [2017] PNLR 7. *See also* JAMES EDELMAN, *supra* note 7 [9-143]-[9-152].

32. The argument made here assumes that the contract is not being rescinded.

33. It has been argued that gains and losses may not be ignored for the time before the claimant became aware of the wrong. *See* Andrew Summers and Adam Kramer, *Deceit, Difference in Value and Date of Assessment*, 133 L. Q. REV. 41, 43-44 (2017).

34. Great Future Int'l Ltd. v. Sealand Hous. Corp. [2002] EWHC 2454 (Ch) [29].

35. Pursuant to s 35A(1) of the Senior Courts Act 1981 (UK), the court has the discretion to award simple interest from the date when the cause of action arose. At common law, compound interest may be awarded as part of the damages (subject to mitigation and remoteness) where the claimant would have invested the money given to the defendant or was forced to borrow money. Sempra Metals Ltd. v. Inland Revenue Comm'rs [2007] UKHL 34, [2008] 1 AC 561. For interest awards at common law and under statute, see JAMES EDELMAN, *supra* note 7 ch. 19.

negligent misrepresentation) do not support the proposition that an increase in the gained asset's value must be ignored even when an increase in the lost asset's value is taken into account in assessing damages.

Nor does Lord Browne-Wilkinson's statement support that proposition. His Lordship merely pointed out that a court is not required to use the date of the transaction as the valuation date where this would lead to an under-compensation of the claimant. He did not say that a court must use the date of the transaction as the valuation date even when this leads to an overcompensation of the claimant. Indeed, just before the passage quoted above, Lord Browne-Wilkinson said that the claimant "must give credit for any benefits which he has received as a result of the transaction."[36] A benefit received after the transaction may still be received as a result of the transaction.

Lord Steyn in the same case said that the date of the transaction "is only prima facie the right date. It may be appropriate to select a later date. That follows from the fact that the valuation method is only a means of trying to give effect to the overriding compensatory rule."[37] The compensatory rule has two rules (each of which has exceptions): (1) all losses attributable to the wrong must be compensated; and (2) the amount of damages must not exceed the amount of those losses.[38] Lord Steyn's remark may therefore be understood as permitting the use of a later valuation date not only for the purpose of avoiding under-compensation, but also for the purpose of avoiding overcompensation.[39] After all, compensatory damages are compensatory and not punitive.[40]

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36. Smith New Ct. Sec. Ltd. v. Citibank NA [1997] AC 254 (HL) 267.

37. *Id.* at 284.

38. "The court in applying the compensatory principle is charged with avoiding under-compensation and also overcompensation. Justice is not achieved if a claimant receives less or more than its actual loss." Sainsbury's Supermarkets Ltd. v. Visa Eur. Servs. LLC [2020] UKSC 24, [2020] 4 All ER 807 [217]. However, overcompensation is accepted where the only alternative on the facts is under-compensation: Swift v. Carpenter [2020] EWCA Civ 1295, [2021] QB 339 [206]. See generally David McLauchlan, *Some Damages Dilemmas in Private Law*, 52 VIC. U. WELL. L. REV. 875 (2021).

39. In Gosden v. Halliwell Landau *(a firm)* [2021] EWHC 159 (Comm), [2021] PNLR 397 [26], where the defendant solicitors negligently failed to register the claimants' interest in the land registry, the judge said that the date of assessment should be chosen so as to avoid both overcompensation and under-compensation.

40. Ruxley Elecs. and Const. Ltd. v. Forsyth [1996] AC 344, 373 (Lord Lloyd); Morris-Garner v. One Step (Support) Ltd. [2018] UKSC 20, [2019] AC 649 [25].

To avoid a valuation of both the gained asset and the lost asset as at the date of the trial, Andrews LJ distinguished between basic loss (being the difference in value between the two assets at the date of the transaction) and consequential loss (being the lost asset's appreciation since the transaction) and argued that the claimant had not received any benefit since the transaction. It is true that there was no further transaction between the parties. However, the appreciation in value of the cars the claimant had received from the defendant in part-exchange does constitute a benefit received as a result of the fraud. Moreover, it is a benefit that accrues automatically without the need for the claimant to do anything. The benefit is intrinsically connected with the fraudulent transaction and not collateral.[41]

Both the gained asset and the lost asset have increased in value since their exchange. If the lost asset's appreciation is conceptualised as a loss resulting from the fraud, the gained asset's appreciation must, by the same token, be conceptualised as a benefit resulting from the fraud.

Andrews LJ somewhat undermined her argument by saying that there would be "a respectable argument" that any depreciation in value of the gained asset constitutes recoverable consequential loss.[42] If a depreciation in value of the gained asset is taken into account in assessing damages, so must be an appreciation in value.

III. THE CLAIMANT RECEIVED MONEY AND HAS DERIVED A BENEFIT FROM ITS USE

This Part is concerned with a claimant who received money from the defendant as part of the fraudulent transaction and has derived a benefit from using that money in the period between the fraudulent transaction and the trial. For example, the claimant may have bought shares in a company which have increased in value, or bought property that increased in value, or placed the money in an interest-bearing bank account.

41. The rules on when credit must be given for benefits resulting from a civil wrong are set out in Part III below.

42. [2022] EWCA Civ 23, [2022] QB 659 [36].

Andrews LJ in *Tuke v. Hood* expressed the view that such benefits cannot be taken into account in assessing damages even if the appreciation in the lost asset's value is taken into account.[43] Her Honour said that these benefits cannot be properly described as benefits conferred on the claimant by the sale transaction with the defendant.[44]

It is established for civil wrongs in general that a benefit attributable to the events which caused the claimant's loss must be taken into account in assessing damages unless the benefit is collateral.[45] A benefit may be taken into account even if it is not of the same kind as the loss.[46] An example is the benefit of the claimant and his wife living in part of the premises of the business that the defendant fraudulently induced the claimant to acquire at overvalue.[47] Examples of benefits that are collateral are a gift to the claimant,[48] and the payment out of a private insurance that the claimant had taken out.[49]

Difficulties arise where the benefit has arisen from a post-wrong action of the claimant that would not have been taken but for the wrong. In those circumstances, a benefit is not collateral if it is derived from steps the claimant took to mitigate the loss,[50] or if it can otherwise be properly attributed to the wrong. The demarcation line is difficult to define with precision. It is not sufficient that the benefit would not have accrued but for the

43. *Id.* at [40]-[47].

44. *Id.* at [40].

45. Tiuta Int'l Ltd. v. De Villiers Surveyors Ltd. [2017] UKSC 77, [2017] 1 WLR 4627 [12]; Swynson Ltd. v. Lowick Rose LLP. [2017] UKSC 32, [2018] AC 313 [11].

46. Fulton Shipping Inc. of Panama v. Globalia Bus. Travel SAU of Spain [2017] UKSC 43, [2017] 1 WLR 2581 [30].

47. Doyle v. Olby (Ironmongers) Ltd [1969] 2 QB 158 (CA) 169.

48. Tiuta Int'l [2017] UKSC 77, [2017] 1 WLR 4627 [12]; Swynson Ltd. v. Lowick Rose LLP [2017] UKSC 32, [2018] AC 313 [11].

49. Bradburn v. Great Western Ry. Co. (1874) LR 10 Ex 1; Tiuta Int'l [2017] UKSC 77, [2017] 1 WLR 4627 [12]; Swynson Ltd. v. Lowick Rose LLP. [2017] UKSC 32, [2018] AC 313 [11]. If the insurance is an indemnity (as opposed to contingency) insurance, the insurer will be subrogated to the insured's claim against the wrongdoer; *see* Caledonia North Sea Ltd. v. Brit. Telecomms. Plc [2002] UKHL 4, 2002 SC (HL) 117 [11], citing previous authority.

50. Brit. Westinghouse Electric and Mfg. Co. Ltd. v. Underground Electric Rys. Co. of London Ltd. [1912] AC 673 (HL); Bacciottini v. Gotelee & Goldsmith (a firm) [2016] EWCA Civ 170, [2016] 4 WLR 98; Swynson Ltd. v. Lowick Rose LLP. [2017] UKSC 32, [2018] AC 313 [11].

wrong.[51] The courts have made a distinction between a benefit that is "part of a continuous transaction" of which the wrong was the inception,[52] and a benefit that has arisen from an independent decision of the claimant[53] and is *res inter alios acta*.[54] A benefit resulting from a post-wrong action of the claimant may be ignored where the action had the potential to produce a loss and the defendant would not have been liable for such loss.[55]

Relying on these principles, Andrews LJ in *Tuke v. Hood* stated that where a victim of fraud uses the money received from the defendant to gamble and wins £1,000,000, those winnings will not be brought into account in assessing damages; nor will the increase in value of an investment car which the claimant has bought from a third party with the money received from the defendant.[56] This is convincing, not least because either scenario involves a chance that the claimant's spending decision results in a loss rather than a gain, and the defendant would not be liable for such loss.

Andrews LJ also observed that interest the claimant has earned by placing the money received from the defendant in an interest-bearing bank account is not to be taken into account in assessing damages.[57] This is not convincing. Being capable of producing interest is an inherent characteristic of money. The claimant received the money from the defendant with that potential in it. There does exist a difference to an asset that automatically increases in value, in that money does not produce interest unless the claimant places the money into an interest-bearing bank account. However, in the age of Internet banking, this takes only a few minutes. It is therefore appropriate to

51. Assetco plc v. Grant Thornton UK LLP [2019] EWHC 150 (Comm), [2019] Bus LR 2291 [895].

52. *E.g.*, Hussey v. Eels [1990] 2 QB 227 (CA) 241 (Mustill LJ speaking for the court); Needler Financial Servs. v. Taber [2002] 3 All ER 501 [24] (Sir Andrew Morritt VC).

53. *E.g.*, Koch Marine Inc. v. D'Amica Societa di Navigazione A.R.I. (The Elena d'Amico) [1980] 1 Lloyd's Rep 75, 89; Thai Airways Int'l Pub. Co. Ltd v. KI Holdings Co. Ltd [2015] EWHC 1250 (Comm), [2016] 1 All ER (Comm) 675 [46].

54. Swynson Ltd. v. Lowick Rose LLP. [2017] UKSC 32, [2018] AC 313 [11].

55. Assetco [2019] EWHC (Comm) 150, [2019] Bus LR 2291 [904]. *See also* Fulton Shipping Inc. of Panama v. Globalia Bus. Travel SAU of Spain [2017] UKSC 43, [2017] 1 WLR 2581.

56. [2022] EWCA Civ 23, [2022] QB 659 [47].

57. *Id.* at [40].

equate the earning of interest with an asset's appreciation in value. Furthermore, since interest paid on a loan that the fraud forced or induced the claimant to obtain is a recoverable loss,[58] interest earned on money received as part of the fraudulent transaction should equally be taken into account in assessing damages. Similar considerations apply where the claimant has used the money received from the defendant to repay a loan on which the claimant would otherwise have paid interest in the period between the fraudulent transaction and the trial.

However, the benefit of having earned interest or avoided paying interest should be taken into account only if the same is done with the increase in the lost asset's value. If the court assesses damages by taking the difference between the lost asset's value at the date of the fraudulent transaction (ignoring its subsequent increase in value) and the price paid, any benefit resulting from the use of the money must be ignored. As in the case of an exchange of assets discussed in Part II above, the claimant can adopt the transaction and give credit only for the value of the gained asset (which is now money) at the date of the transaction.

The arguments made here can be illustrated by reviewing two examples given by Andrews LJ in *Tuke v. Hood*. Her Honour was concerned with notional interest (i.e., interest that could have been earned), but since she treated actual and notional interest in the same way, the examples can be considered here.

Andrews LJ started with the following simple example:

> [I]f [the claimant] is fraudulently induced to sell an asset worth £10,000 for £4,000, he is compensated by an award of £6,000 because, by keeping the £4,000, he has received £10,000 in total. If he also had to give credit for interest notionally (or even actually) earned on the £4,000 he would be under-compensated, because he would receive less than the full £10,000 that the asset was worth at the time of sale.[59]

A claimant who has earned interest on the £4,000 received from the defendant would in fact be overcompensated by an award of damages in the amount of £6,000, as the claimant would

58. Archer v. Brown [1985] QB 401, 417.
59. [2022] EWCA Civ 23, [2022] QB 659 [40].

end up with £10,000 plus the interest earned. In the absence of the fraud, the claimant would now possess an asset worth £10,000 and would have earned no interest.

Andrews LJ then changed the scenario:

> Now suppose that the asset sold at an undervalue was bought as an investment, and by the time the balance of the £10,000 (i e the £6,000) is awarded, the asset is worth £25,000 and the injured party proves that he would have kept it . . . . The consequential loss is £15,000, which is the difference between the £25,000 . . . and the £10,000, which is what it was worth when he did sell it to the fraudster. If he receives the £15,000 on top of the £6,000 basic damages, he is put in the position in which he would have been but for the fraud . . . . There is . . . no logical basis for suggesting that the claimant would be over-compensated if he receives that additional £15,000 without credit being given for the 'time value' of the £4,000[.] [60]

A claimant who has earned interest on the £4,000 received from the defendant would in fact be overcompensated by an award of damages in the total amount of £21,000, as the claimant would end up with £25,000 plus the interest earned. In the absence of the fraud, the claimant would now possess an asset worth £25,000 and would have earned no interest.

As in the scenario of a gained asset that appreciates in value, Andrews LJ was seeking to justify her conclusion in the second example by distinguishing between the basic loss (the difference between the lost asset's value at the date of the fraudulent transaction and the purchase price) and consequential loss, i.e., the increase in the lost asset's value in the period between the fraudulent transaction and the trial. But this distinction is a technicality and cannot overcome the fundamental point that the same transaction through which the claimant lost an asset provided the claimant with an amount of money which has the inherent potential to earn interest, and if the lost asset's appreciation in value in the period between the fraudulent transaction and the trial is taken into account in assessing

60. *Id.* at [42]-[43].

damages, so must be any interest earned on the money received from the defendant.

IV. THE CLAIMANT RECEIVED MONEY BUT HAS DERIVED NO BENEFIT FROM IT

In *Tuke v. Hood*, the defendant argued that credit should be given for the "time value" of the money the claimant had received from the defendant in the period between the fraudulent transaction and the trial. The defendant did not assert that the claimant had actually derived a benefit from the use of the money (which the claimant might or might not have done), but simply relied on the fact that money has the potential to earn interest. The defendant suggested that the rate of such notional interest should be calculated in the same way as either compound interest in equity or discretionary pre-judgment interest under statute.[61] The Court of Appeal refused to deduct notional interest on the money for the period between the fraudulent transaction and the trial. As seen before, the Court expressed the view that even actual interest earned would not have been deducted.

It has been argued before that benefits flowing from what the claimant received as part of the fraudulent transaction may be ignored where the court uses the date of the transaction as the valuation date for both what the claimant gave away and what the claimant received. An award of damages in the difference between those two values rectifies the wrong as the date of the wrong and subsequent developments are on the claimant's account. Therefore, even if the "time value" of money can be characterised as a benefit, the decision in *Tuke v. Hood* to not give credit for such "time value" would have been unobjectionable if the increase in the value of the cars the claimant gave the defendant had equally been ignored. But the Court of Appeal took that increase into account in assessing damages, and the question arises whether this required a deduction of notional interest on the money the claimant had received from the defendant. The remainder of this Part is only concerned with the scenario where the appreciation in the lost asset's value is taken into account in assessing damages.

61. *See id.* at [2].

A claim that credit should be given for the "time value" of money is made in one of two scenarios. The first is that the claimant has actually derived a benefit from using the money received from the defendant, although the defendant is not relying on that fact. In those circumstances, the benefit received by the claimant should be treated in accordance with the rules suggested in Part III above. Credit ought to be given for interest earned or avoided but not for benefits derived from less secure investments. Since the defendant will seldom know what the claimant has done with the money, the onus of proof could potentially be reversed in that notional interest on money received may be deducted from the damages unless the claimant demonstrates that the money has been used for an investment the consequences of which are *res inter alios acta*, i.e., the benefit of which is collateral and not taken into account in assessing damages. However, Andrews LJ in *Tuke v. Hood* said that "a dishonest wrongdoer cannot expect the court to make 'tender presumptions' or to exercise discretions in his favour."[62]

The second scenario that may be present where credit for the "time value" of money is being claimed is where it is clear that the claimant has not made any use of the money but simply left it in a non-interest-bearing bank account that was always in credit (and would always have been in credit even without that amount). In those circumstances, the claimant has obtained no benefit from the money received from the defendant. The argument that notional interest on that sum of money should be deducted from the damages cannot be based on the fact that such interest has been earned because it has not. It can only be based on the notion that the claimant ought to have used the money to repay a loan or earn interest. Such an argument does not invoke the rules about benefits flowing from a civil wrong, but the rules about a claimant's contribution to the loss resulting from a wrong. Three doctrines cover this area:[63] mitigation[64] (more

62. *Id.* at [35].

63. *See* ANDREW TETTENBORN, CLERK AND LINDSELL ON TORTS (24th ed., Sweet & Maxwell, 2023) [2-125]. In some cases, loss resulting from unreasonable conduct of the claimant has been held to be too remote; *see, e.g.*, Baxendale v. London, Chatham, and Dover Ry. Co. [1874] LR 10 Exch. 35; Berryman v. Hounslow LBC [1997] PIQR P83.

64. In addition to the avoidable loss rule, which is concerned with unreasonable conduct of the claimant, the mitigation doctrine also encompasses the avoided loss rule and the rule that the plaintiff can recover for the cost of reasonable attempts to minimise

precisely, the avoidable loss rule),[65] intervening act (*novus actus interveniens*), and contributory negligence.

Under the avoidable loss rule, a wrongdoer is not liable for an item of loss that results from unreasonable conduct of the claimant (an item of loss that a reasonable person in the claimant's position would have avoided).[66] There is authority to the effect that this rule does not apply to a claimant's conduct that occurred before the claimant became aware of the wrong,[67] although awareness of the relevant facts may be sufficient.[68] In particular, it has been said that a victim of fraud must "mitigate his loss once he is aware of the fraud. So long as he is not aware of the fraud, no question of a duty to mitigate can arise."[69] The question therefore is whether, once the claimant has become aware of the fraud (or at least the facts disclosing the fraud), it is unreasonable for the claimant to let the money received from the defendant lie idly on a non-interest-bearing bank account. The answer should generally be affirmative unless the claimant had a reason for doing so, for example, keeping the money ready for an imminent expenditure. It will depend upon the individual circumstances of the particular claimant, and a court may be more lenient with a claimant who is a consumer.

A defendant's liability for an item of loss is also excluded where that item has resulted from conduct of the claimant that occurred after the wrong (even if before the claimant became

loss; *see* JAMES EDELMAN, *supra* note 7 [9-004]-[9-006]; quoted with approval in many cases, a recent example being E D & F Man Cap. Mkts. Ltd. v. Come Harvest Holdings Ltd. [2022] EWHC (Comm) 229 [582].

65. It has been said that the avoidable loss rule "is an aspect of the principle of causation that the contract breaker will not be held to have caused loss which the claimant could reasonably have avoided." Bunge SA v. Nidera BV [2015] UKSC 43, [2015] 3 All ER 1082 [81] (Lord Toulson); *see also* Hughes-Holland v. BPE Solics. [2017] UKSC 21, [2018] AC 599 [20]. However, it is useful to consider the avoidable loss rule as a doctrine separate from legal causation because the avoidable loss rule has developed its own rules and is more frequently applied to omissions rather than positive actions: ADAM KRAMER, THE LAW OF CONTRACT DAMAGES (3rd ed., Hart, 2022) [15-11].

66. *E.g.*, Sainsbury's Supermarkets Ltd. v. Visa Europe Servs. LLC [2020] UKSC 24, [2020] 4 All ER 807 [214]. The defendant bears the legal onus of proof, but the claimant may bear an evidential onus; *see* JAMES EDELMAN, *supra* note 7 [9-020].

67. Youell v. Bland Welch & Co. Ltd. (No 2) [1990] 2 Lloyd's Rep 431, 462; Cnty Ltd. v. Girozentrale Secs. [1996] 3 All ER 834 (CA) 857.

68. Cnty. Ltd. v. Girozentrale Secs. [1996] 3 All ER 834 (CA) 858.

69. Smith New Ct. Sec. Ltd. v. Citibank NA [1997] AC 254 (HL) 266 (Lord Browne-Wilkinson).

aware of the wrong)[70] and constitutes an intervening act (*novus actus interveniens*) breaking the chain of causation between the wrong and the item of loss.[71] To have this effect, the claimant's conduct must obliterate the effect of the defendant's wrong.[72] This requires something more than ordinary unreasonableness, such as recklessness, at least where the conduct occurred before the claimant became aware of the wrong.[73] It is unclear whether this doctrine can apply to a claimant's failure to obtain a benefit that would reduce the loss. Even if it could, it is unlikely that the decision to keep money on a non-interest-bearing bank account could be characterised as "reckless" or otherwise attaining the level of unreasonableness required for an intervening act.

The doctrine of contributory negligence has little relevance in the circumstances under discussion. It has usually (although not exclusively) been applied to unreasonable conduct of a claimant that occurred prior to the wrong, which is not the scenario under discussion, and it leads to an apportionment of the item of loss to which the claimant contributed rather than a total exclusion of the defendant's liability.[74] It is doubtful that the doctrine can be used to deduct from the damages a proportion of a benefit that the claimant ought to have obtained. As mentioned in the Introduction, the doctrine does not apply at all to liability in the tort of deceit.

In conclusion, where a victim of fraud has not made any use of the money received from the defendant, it is unlikely that account can be taken of interest that the claimant could have earned or avoided before the claimant became aware of the fraud. Interest that the claimant could have earned or avoided after the claimant became aware of the fraud ought to be taken into account in assessing damages if it was unreasonable for the claimant not to use the money to earn or avoid interest. This will

70. Stacey v. Autosleeper Grp. Ltd. [2014] EWCA Civ 1551 [14].

71. *E.g.*, Quinn v. Burch Bros (Builders) Ltd. [1966] 2 QB 370; M'Kew v. Holland & Hannen & Cubitts (Scotland) Ltd. 1970 SC (HL) 20; Clay v. TUI UK Ltd. [2018] EWCA Civ 1177, [2018] 4 All ER 672. *See* JAMES EDELMAN, *supra* note 7 [8-097], [8-203]-[8-209].

72. Stacey v. Autosleeper Grp. Ltd. [2014] EWCA Civ 1551 [14].

73. *See id.*; Cnty. Ltd. v. Girozentrale Secs. [1996] 3 All ER 834 (CA) 857.

74. A reduction of the damages to nil is not possible under the Law Reform (Contributory Negligence) Act 1945 (UK): Pitts v. Hunt [1991] 1 QB 24 (CA) [48], [51], [52].

depend upon the circumstances of the individual case, and the court should not be too demanding of the claimant.

CONCLUSION

A transaction induced by fraud usually involves an exchange. The claimant purchases an asset at overvalue, or sells an asset at undervalue, or makes an unfavourable exchange of one asset for another. The basic amount of damages is the difference between the value of what the claimant gave away and the value of what the claimant received. Where either value has changed in the period between the fraudulent transaction and the trial, the question arises whether the values at the date of the fraudulent transaction or at a later date should be used to calculate damages.

It is established that while the date as at which damages for fraud are assessed is generally the date of the fraudulent transaction, there is flexibility in that the court may adopt a later date where this is required to give effect to the compensatory principle. This principle requires, as a general rule, that all losses attributable to the wrong be compensated and that the amount of damages not exceed the amount of those losses. Both overcompensation and under-compensation must generally be avoided.

This Article has suggested that the court has the choice between two approaches. One approach is to assess damages by reference to the values of all relevant items at the date of the fraudulent transaction and ignore any subsequent changes in such values. Thus, where the claimant purchased an asset that subsequently appreciated in value, damages may be calculated by reference to the difference between the price paid and the asset's value at the date of purchase—ignoring the subsequent appreciation in the asset's value. It may be said that the claimant adopts the transaction and gives credit only for the asset's value at the date of purchase. This approach has been taken in a number of cases involving fraudulent or negligent misrepresentation.

The other approach is to assess damages by reference to the values of all relevant items at a date that is later than the date of the fraudulent transaction, such as the date of the trial. Account

will be taken of an appreciation in value of an asset that the claimant gave away in the fraudulent transaction, but also of an appreciation in value of an asset that the claimant received in that transaction. A claimant who received money ought to give credit for a benefit obtained from using the money in the period between the receipt of the money and the date of assessment, unless the benefit is collateral. Credit should be given for interest avoided (by repaying a loan) or interest earned (by placing the money in an interest-bearing bank account), but not for benefits from using the money for a less secure investment that had the potential to result in a loss, such as the purchase of shares. A claimant who left the money in a non-interest-bearing bank account (that was always in credit and would always have been in credit even without that amount) might have to give credit for interest that could have been avoided or earned after the claimant became aware of the fraud, pursuant to the avoidable loss rule, but the court should not be too demanding of the claimant.

In *Tuke v. Hood*, the English Court of Appeal adopted a third approach, by taking the value of the lost asset at the date of the trial and the value of the gained asset at the date of the fraudulent transaction. An appreciation in the value of an asset given away is taken into account but not an appreciation in the value of a gained asset or interest earned on money received from the defendant. The court came to this result by distinguishing a basic loss, being the difference in the two values at the date of the fraudulent transaction, and consequential loss in the amount of the subsequent appreciation in the lost asset's value, and by arguing that benefits obtained from an asset or money received from the defendant have nothing to do with that consequential loss. This is not convincing. An appreciation in the value of a gained asset, or interest avoided or earned by using money received from the defendant, are intrinsically connected with the same transaction in which the claimant lost an asset, and an appreciation in the lost asset's value should not be taken into account unless the same is done for those benefits. The court's approach leads to avoidable overcompensation. It finds no support in either principle or authority.