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NO AWARENESS NEEDED TO FOUND DECEIT CLAIM

IMPLICATIONS OF IVANISHVILI FOR SECURITIES LITIGATION

A recent judgment from the Privy Council brings valuable clarity to the law on deceit and could have wider implications for securities law claims.

The principle underlying the tort of deceit is simple: someone who causes another person to suffer loss by deceiving them is liable to compensate them for their loss. But does that other person need to have been aware of their deception at the relevant time to bring a claim? No, said the Privy Council in Credit Suisse Life (Bermuda) Ltd v Ivanishvili and others [2025] UKPC 53. The decision overturns a string of cases which had made it difficult for claimants to bring successful claims, particularly where they relied on implied representations.

The background

The traditional understanding of the elements of the tort of deceit – which following the Privy Council's decision in Ivanishvili have now been confirmed as the correct approach – is set out in the box on this page. The judgment was concerned with an additional requirement to prove deceit which first appeared 15 years ago in a High Court decision called Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland. In that case, the court said that a claimant must have understood that a representation was being made at the time it acted on it.

Later cases elaborated this requirement. In a 2019 judgment relating to the manipulation of EURIBOR, a judge said that the claimant *"should have given some contemporaneous conscious thought to the fact that some representations were being impliedly made"*. A mere assumption that the defendant bank was acting honestly was insufficient to found the awareness necessary to show the claimant had relied on the representations.

By 2021, in Leeds City Council v Barclays, proof that the claimant had understood the representations in question had crystallised into the "critical boundary" between an actionable claim in fraudulent misrepresentation (a close relation of deceit) and a mere non-disclosure, actionable only in limited circumstances. In the absence of an appellate court judgment, other first-instance judges wrestled with this distinction between "awareness" (assumed to be necessary) and "assumption" (assumed to be inadequate). The fine line between the two seemed at points to dissolve under analysis, but the theoretical importance of the distinction exercised a strong hold.

The tort of deceit

A person who causes another person to suffer loss by deceiving them is liable to compensate that other person for their loss. The ingredients of the claim are:

- the defendant makes a false representation, by word or conduct, to the claimant;
- the defendant knows the representation is false or is reckless as to its truth;
- the defendant intends that the claimant will act in reliance on the representation; and
- the claimant does act in reliance on the representation and suffers loss as a result.

The tort of deceit is in key respects the same as fraudulent misrepresentation (and the two terms are often used interchangeably). An essential difference is that a claim in fraudulent misrepresentation can only be brought where a contract has been entered into as a result of a misrepresentation. No contract is required for a claim in deceit.

The result was that in cases where a representation was implied, particularly in complex financial transactions where many evidential factors were in play, the need to show conscious awareness of a representation risked becoming an insuperable hurdle for many claimants.

The decision in Ivanishvili

Mr Ivanishvili, a wealthy businessman and former prime minister of Georgia, transferred $750 million to Credit Suisse Life ("**CSL**"), a Bermuda insurance company owned by Credit Suisse, to pay the premia on life insurance policies. Ivanishvili made the transfer on the advice of his relationship manager at Credit Suisse. Later, Ivanishvili discovered that his relationship manager had been defrauding him and he began legal proceedings in Bermuda against CSL. He claimed for breach of contractual and fiduciary duties and later added a claim in deceit.

The deceit claim was based on implied representations Ivanishvili said were made to him to the effect that neither his relationship manager nor CSL were managing his accounts fraudulently. CSL did not dispute that the representations were made, that they were false, and were intended to and did induce Ivanishvili to buy the policies. But the Bermuda Court of Appeal dismissed the claim because Ivanishvili had neither pleaded nor proved that he had any conscious understanding or awareness of the representations.

On appeal to the Privy Council, Lord Leggatt put the issue plainly: is it a legal requirement of a claim in deceit that the claimant was aware of the representation on which the claim is based? The Privy Council had no hesitation in concluding that it did not. Lord Leggatt explained that people often form and act on beliefs without giving them conscious thought, and a claimant does not need to be aware that a representation has been made to have been deceived. Relevant examples were situations where a waiter in a restaurant assumed that a diner who ordered food intended to pay for it, or a person who hailed a cab had the means and intention to pay for it. *"It will not do to say that in these cases there is always a process of awareness and understanding which is always distinct from assumption, even though [it] may look like assumption … Of course in these examples the claimant is aware of the defendant's conduct. But there is no separate awareness of a representation that the defendant intends and has the means to pay for the services or goods which he or she is impliedly offering to purchase."* In short, the tortured distinction between awareness and assumption was unreal.

In Lord Leggatt's view, there was no doubt that reliance or inducement was an essential element of deceit. But there were two aspects to this requirement: first, the representation must cause the claimant to hold a false belief. Second, the claimant must act because of this belief and suffer loss as a result. Both aspects require the representation to operate on the mind of the claimant. But neither requires the claimant to be consciously aware of the representation at the relevant time, nor was there any reason why that should be necessary to bring a successful claim. Indeed, such a requirement was liable to produce absurd results: the dine-and-dash and the taxi examples were evidence of that.

In this way, the Privy Council dissolved the Gordian knot. It concluded without hesitation that the law of Bermuda, and of England, did not impose a requirement in a deceit claim that a claimant was contemporaneously aware of the representation that induced it to act and suffer loss.

Potential impact on securities litigation

Section 90A and Schedule 10A, Financial Services and Markets Act 2000 impose liability on UK issuers where a person deals in or holds an issuer's securities in reliance on certain published information and goes on to suffer loss as a result of misrepresentations in that information. The meaning of reliance in this context has been highly contested, and different first-instance judges have taken different approaches in cases where passive investors or tracker funds have sought to bring claims in reliance on s.90A/sch.10A.

In Allianz v Barclays, in 2024, Mr Justice Leech held that Parliament must have intended reliance to bear the same meaning as it had at common law and therefore the caselaw on deceit should be read across to securities litigation. This echoed the approach Hildyard J had taken in ACL Netherlands v Lynch (the only claim brought under s.90 and s.90A/sch.10A which has reached judgment).

At the time of the Barclays judgment, Leech J considered that the test for deceit included a requirement of contemporaneous awareness. Accordingly, he concluded that investors must be able to show they had applied their mind to the relevant statement when taking investment decisions. Passive investors could not do this, and their claims were struck out.

In 2025, the same issue arose in a different case, Various Claimants v Standard Chartered. Mr Justice Michael Green expressed some scepticism about the decision in Barclays, concluding that the test for reliance was broader than expressed in earlier cases. But rather than contradict another first-instance judge, he was able to distinguish the facts of Standard Chartered. He refused to strike out the claims of passive investors so they could

be considered at trial. Before that could happen, the litigation was settled.

If Standard Chartered gave passive investors a glimmer of hope, the judgment in Ivanishvili will add further fuel to the fire. If there is no longer an awareness requirement to prove deceit, it should follow that there is no longer such a requirement for a claim under s.90A/sch.10A. A passive investor may no longer need to prove that they were "consciously re-assured by the context" or that they applied their mind to the published information; their mere "assumption" that the information was correct could be sufficient. This would remove a core argument advanced by the defendants in Barclays and Standard Chartered. It would also reduce the burden on active investors, who might still have found it difficult to demonstrate that published information was an "active presence" in their mind when investing.

However, the significance of Ivanishvili should not be overstated. Section 90A/Schedule 10A, while similar to the tort of deceit, is not the same. Most notably, a claimant under sch.10A must show their reliance on published information was reasonable in the circumstances – an open-textured assessment not present in the test for deceit. Further, the evidential burden on claimants remains significant. The first limb of the reliance/inducement test as newly articulated in Ivanishvili is that the claimant must prove the representation caused them to hold a false belief. In cases involving a complex web of communications – as claims under sch.10A usually do – rather than simple representations, this burden will still be challenging to discharge.

Conclusions

Ivanishvili restates the traditional position on the tort of deceit, overturning a recent line of judgments that had introduced an "awareness" requirement to prove reliance. In doing so, the Privy Council looks to have significantly reduced the burden on claimant-investors in securities law cases, where the test has traditionally followed the common law tort. In particular, the judgment gives renewed hope to passive investors, whose prospects of success had seemed small after the decision in Barclays. Although the settlement of the Standard Chartered litigation means there will be no test of Ivanishvili in a sch.10A context in the short term, there is no doubt that the Privy Council's decision will be deployed in other ongoing and future securities law claims.

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