

MISREPRESENTATION

INTRODUCTION

A misrepresentation is a false statement of fact made by one party to another, which, whilst not being a term of the contract, induces the other party to enter the contract.

The effect of an actionable misrepresentation is to make the contract voidable, giving the innocent party the right to rescind the contract and/or claim damages.

1. FALSE STATEMENT OF FACT

An actionable misrepresentation must be a false statement of fact, not opinion or future intention or law.

(A) STATEMENTS OF OPINION

A false statement of opinion is not a misrepresentation of fact. See:

Bisset v Wilkinson [1927] AC 177.

However, where the person giving the statement was in a position to know the true facts and it can be proved that he could not reasonably have held such a view as a result, then his opinion will be treated as a statement of fact. See:

Smith v Land & House Property Corp. (1884) 28 Ch D 7.

Some expressions of opinion are mere puffs. Thus, in *Dimmock v Hallet* (1866) 2 Ch App 21, the description of land as 'fertile and improvable' was held not to constitute a representation.

(B) STATEMENTS AS TO THE FUTURE

A false statement by a person as to what he will do in the future is not a misrepresentation and will not be binding on a person unless the statement is incorporated into a contract.

However, if a person knows that his promise, which has induced another to enter into a contract, will not in fact be carried out then he will be liable. See:

Edgington v Fitzmaurice (1885) 29 Ch D 459

Esso Petroleum v Mardon [1976] QB 801.

(C) STATEMENTS OF THE LAW

A false statement as to the law is not actionable misrepresentation because everyone is presumed to know the law. However, the distinction between fact and law is not simple. See:

Solle v Butcher [1950] 1 KB 671.

(D) SILENCE

Generally, silence is not a misrepresentation. The effect of the maxim *caveat emptor* is that the other party has no duty to disclose problems voluntarily. Thus if one party is labouring under a misapprehension there is no duty on the other party to correct it. See:

Smith v Hughes (1871) LR 6 QB 597.

However, there are three fundamental exceptions to this rule:

(i) HALF TRUTHS

The representor must not misleadingly tell only part of the truth. Thus, a statement that does not present the whole truth may be regarded as a misrepresentation. See:

Nottingham Brick & Tile Co. v Butler (1889) 16 QBD 778.

(ii) STATEMENTS WHICH BECOME FALSE

Where a statement was true when made out but due to a change of circumstances has become false by the time it is acted upon, there is a duty to disclose the truth. See:

With v O'Flanagan [1936] Ch 575.

(iii) CONTRACTS UBERRIMAE FIDEI

Contracts *uberrimae fidei* (contracts of the utmost good faith) impose a duty of disclosure of all material facts because one party is in a strong position to know the truth. Examples would include contracts of insurance and family settlements.

A material fact is something which would influence a reasonable person in making the contract. If one party fails to do this, the contract may be avoided. See:

Lambert v Co-Operative Insurance Society [1975] 2 Lloyd's Rep 485.

Where there is a fiduciary relationship between the parties to a contract a duty of disclosure will arise, eg, solicitor and client, bank manager and client, trustee and beneficiary, and inter-family agreements.

(E) OTHER REPRESENTATIONS

The term 'statement' is not to be interpreted too literally:

* In *Gordon v Selico Ltd* (1986) 278 EG 53, it was held that painting over dry rot, immediately prior to sale of the property, was a fraudulent misrepresentation.

* In *St Marylebone Property v Payne* (1994) 45 EG 156, the use of a photograph taken from the air, printed with arrows (misleadingly) indicating the extent of land boundaries, was held to convey a statement of fact (which amounted to actionable misrepresentation).

2. THE MISREPRESENTATION MUST HAVE INDUCED THE CONTRACT

The false statement must have induced the representee to enter into the contract. The requirements here are that (a) the misrepresentation must be material and (b) it must have been relied on.

(A) MATERIALITY

The misrepresentation must be material, in the sense that it would have induced a reasonable person to enter into the contract. However, the rule is not strictly objective:

In *Museprime Properties v Adhill Properties* [1990] 36 EG 114, the judge referred, with approval, to the view of Goff and Jones: *Law of Restitution* that, any misrepresentation which induces a person to enter into a contract should be a ground for rescission of that contract. If the misrepresentation would

have induced a reasonable person to enter into the contract, then the court will presume that the representee was so induced, and the onus will be on the representor to show that the representee did not rely on the misrepresentation either wholly or in part. If, however, the misrepresentation would not have induced a reasonable person to contract, the onus will be on the misrepresentee to show that the misrepresentation induced him to act as he did. See:

Museprime Properties v Adhill Properties [1990] 36 EG 114.

(B) RELIANCE

The representee must have relied on the misrepresentation.

There will be no reliance if the misrepresentee was unaware of the misrepresentation. See:

Horsfall v Thomas [1862] 1 H&C 90.

There will be no reliance if the representee does not rely on the misrepresentation but on his own judgment or investigations. See:

Attwood v Small (1838) 6 Cl & F 232.

(Note: this rule does not apply where the misrepresentation was fraudulent and the representee was asked to check the accuracy of the statement: *Pearson v Dublin Corp* [1907] AC 351.)

There will be reliance even if the misrepresentee is given an opportunity to discover the truth but does not take the offer up. The misrepresentation will still be considered as an inducement. See:

Redgrave v Hurd (1881) 20 Ch D 1.

There will be reliance even if the misrepresentation was not the only inducement for the representee to enter into the contract. See:

Edgington v Fitzmaurice (above)

3. TYPES OF MISREPRESENTATION

Once misrepresentation has been established it is necessary to consider what type of misrepresentation has been made. There are three types of misrepresentation: fraudulent, negligent and wholly innocent. The importance of the distinction lies in the remedies available for each type.

(A) FRAUDULENT MISREPRESENTATION

Fraudulent misrepresentation was defined by Lord Herschell in *Derry v Peek* (1889) as a false statement that is "made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless as to whether it be true or false." Therefore, if someone makes a statement which they honestly believe is true, then it cannot be fraudulent. See:

Derry v Peek (1889) 14 App Cas 337.

The burden of proof is on the plaintiff - he who asserts fraud must prove it. Tactically, it may be difficult to prove fraud, in the light of Lord Herschell's requirements.

The remedy is rescission (subject to exceptions discussed later) and damages in the tort of deceit (see later).

(B) NEGLIGENT MISREPRESENTATION

This is a false statement made by a person who had no reasonable grounds for believing it to be true. There are two possible ways to claim: either under common law or statute.

(i) NEGLIGENT MISSTATEMENT AT COMMON LAW

The House of Lords have held that in certain circumstances damages may be recoverable in tort for negligent misstatement causing financial loss:

Hedley Byrne v Heller [1964] AC 465.

Success depends upon proof of a *special relationship* existing between the parties. Such a duty can arise in a purely commercial relationship where the representor has (or purports to have) some special skill or knowledge and knows (or it is reasonable for him to assume) that the representee will rely on the representation. See:

Esso Petroleum v Mardon [1976] (above)

Williams v Natural Life Health Foods (1998) *TheTimes*, May 1.

The remedies are rescission (subject to exceptions discussed later) and damages in the tort of negligence (see later).

(ii) NEGLIGENT MISREPRESENTATION
UNDER s2(1) MISREPRESENTATION ACT 1967

Section 2(1) of the Misrepresentation Act 1967 provides:

“Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.”

This provision does not require the representee to establish a duty of care and reverses the burden of proof. Once a party has proved that there has been a misrepresentation which induced him to enter into the contract, the person making the misrepresentation will be liable in damages unless he proves he had reasonable grounds to believe and did believe that the facts represented were true. This burden may be difficult to discharge as shown in:

Howard Marine & Dredging Co v Ogden & Sons [1978] QB 574.

Remedies: recent case-law has shown that the remedies available are as those available in fraud unless the representor discharges the burden of proof. In particular, damages will be based in the tort of deceit rather than the tort of negligence (see later).

(C) WHOLLY INNOCENT MISREPRESENTATION

This is a false statement which the person makes honestly believing it to be true.

The remedy is either (i) rescission with an indemnity, or (ii) damages in lieu of rescission under the courts discretion in s2(2) Misrepresentation Act 1967 (see below).

4. REMEDIES FOR MISREPRESENTATION

Once an actionable misrepresentation has been established, it is then necessary to consider the remedies available to the misrepresentee.

(A) RESCISSION

Rescission, ie setting aside the contract, is possible in all cases of misrepresentation. The aim of rescission is to put the parties back in their original position, as though the contract had not been made.

The injured party may rescind the contract by giving notice to the representor. However, this is not always necessary as any act indicating repudiation, eg notifying the authorities, may suffice. See:

Car & Universal Finance v Caldwell [1965] 1 QB 525.

BARS TO RESCISSION:

Rescission is an equitable remedy and is awarded at the discretion of the court. The injured party may lose the right to rescind in the following four circumstances:

(i) AFFIRMATION OF THE CONTRACT

The injured party will affirm the contract if, with full knowledge of the misrepresentation and of their right to rescind, they expressly state that they intend to continue with the contract, or if they do an act from which the intention may be implied. See:

Long v Lloyd [1958] 1 WLR 753.

Note that in *Peyman v Lanjani* [1985] Ch 457, the Court of Appeal held that the plaintiff had not lost his right to rescind because, knowing of the facts which afforded this right, he proceeded with the contract, unless he also knew of the right to rescind. The plaintiff here did not know he had such right. As he did not know he had such right, he could not be said to have elected to affirm the contract.

(ii) LAPSE OF TIME

If the injured party does not take action to rescind within a reasonable time, the right will be lost.

Where the misrepresentation is fraudulent, time runs from the time when the fraud was, or with reasonable diligence could have been discovered. In the case of non-fraudulent misrepresentation, time runs from the date of the contract, not the date of discovery of the misrepresentation. See:

Leaf v International Galleries [1950] 2 KB 86.

(iii) RESTITUTION IN INTEGRUM IMPOSSIBLE

The injured party will lose the right to rescind if substantial restoration is impossible, ie if the parties cannot be restored to their original position. See:

Vigers v Pike (1842) 8 Cl&F 562.

Precise restoration is not required and the remedy is still available if substantial restoration is possible. Thus, deterioration in the value or condition of property is not a bar to rescission:

Armstrong v Jackson [1917] 2 KB 822.

(iv) THIRD PARTY ACQUIRES RIGHTS

If a third party acquires rights in property, in good faith and for value, the misrepresentee will lose their right to rescind. See: *Phillips v Brooks* [1919] 2 KB 243 under Mistake.

Thus, if A obtains goods from B by misrepresentation and sells them to C, who takes in good faith, B cannot later rescind when he discovers the misrepresentation in order to recover the goods from C.

(v) NOTE:

The right to rescind the contract will also be lost if the court exercises its discretion to award damages in lieu of rescission under s2(2) of the Misrepresentation Act 1967.

For innocent misrepresentation two previous bars to rescission were removed by s1 of the Misrepresentation Act 1967: the misrepresentee can rescind despite the misrepresentation becoming a term of the contract (s1(a)), and the misrepresentee can rescind even if the contract has been executed (s1(b)). Generally, this will be relevant to contracts for the sale of land and to tenancies.

(B) INDEMNITY

An order of rescission may be accompanied by the court ordering an indemnity. This is a money payment by the misrepresenter in respect of expenses necessarily created in complying with the terms of the contract and is different from damages. See:

Whittington v Seale-Hayne (1900) 82 LT 49.

(C) DAMAGES

(i) FRAUDULENT MISREPRESENTATION

The injured party may claim damages for fraudulent misrepresentation in the tort of deceit. The purpose of damages is to restore the victim to the position he occupied before the representation had been made.

The test of remoteness in deceit is that the injured party may recover for all the direct loss incurred as a result of the fraudulent misrepresentation, regardless of foreseeability:

Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158

Smith New Court Securities v Scrimgeour Vickers [1996] 4 All ER 769.

Moreover, damages may include lost opportunity costs, eg loss of profits. See:

East v Maurer [1991] 2 All ER 733.

In *Archer v Brown* [1984] 2 All ER 267, the court held that the plaintiff was entitled to aggravated damages in deceit for the distress he had suffered.

The claimant will not be entitled to recover damages after the date he discovered the misrepresentation and had an opportunity to avoid further loss:

Downs v Chappell [1996] 3 All ER 344.

(ii) NEGLIGENT MISREPRESENTATION

The injured party may elect to claim damages for negligent misrepresentation at common law. The test of remoteness in the tort of negligence is that the

injured party may recover for only reasonably foreseeable loss (*Esso Petroleum v Mardon* [1976] QB 801).

Alternatively, the injured party may claim damages for negligent misrepresentation under s2(1) of the Misrepresentation Act 1967. This will be the normal course to pursue as s2(1) reverses the burden of proof. Damages will be assessed on the same basis as fraudulent misrepresentation rather than the tort of negligence, ie 'direct consequence' rather than 'reasonable foreseeability'. See:

Royscott Trust Ltd v Rogerson [1991] 3 WLR 57

(iii) WHOLLY INNOCENT MISREPRESENTATION

In cases of non-fraudulent misrepresentation, s2(2) of the Misrepresentation Act 1967 gives the court a discretion, where the injured party would be entitled to rescind, to award damages in lieu of rescission. Damages under s2(2) cannot be claimed as such; they can only be awarded by the court. Section 2(2) states:

"Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party."

It is not clear from the above words if the right to damages will be lost if the representee has lost the right to rescind (See *Cheshire & Fifoot*, p3012; *Treitel*, p333). According to *Thomas Witter v TBP Industries* (1996) (below), this will not be a bar provided the plaintiff had such a right in the past.

It is not yet clear what the measure of damages is under s2(2):

- According to *Treitel* (p337) and to *Chitty*, damages under s2(2) may be lower than the damages awarded under s2(1). *Chitty* suggests the possibility of a special measure to compensate the injured party for the loss of the right to rescind.
- According to *Cheshire & Fifoot*, compensation should be limited to an indemnity (p305). This was in substance the view taken by the High Court in:

Thomas Witter v TBP Industries [1996] 2 All ER 573.

5. EXCLUDING LIABILITY FOR MISREPRESENTATION

Any term of a contract which excludes liability for misrepresentation or restricts the remedy available is subject to the test of reasonableness. Section 3 of the Misrepresentation Act 1967, as amended by s8 of UCTA 1977, provides that:

"If a contract contains a term which would exclude or restrict:

- a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
 - b) any remedy available to another party to the contract by reason of such a misrepresentation,
- that term shall be of no effect except insofar as it satisfies the requirement of reasonableness as stated in s11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does."

(Section 11(1) UCTA 1977 provides that "... the term shall have been a fair and reasonable one to be included having regard to the circumstances which

Asif Tufal

were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.")