

Law, Legislation and Legal Commentary Looks to Evaluate the Principle of Misrepresentation

This essay, through relevant case Law, legislation and legal commentary look to evaluate the principle of Misrepresentation under English Law as per the facts are given. I will be outlining the characteristics of the different types of misrepresentation and their applicable remedies pursuant to the relevant precedence. Lastly, I will be evaluating their applicability to the case in question, as well as determining the relevant course of action that should be pursued by the claimant if the case does in fact amount to a misrepresentation.

Definition of misrepresentation

A misrepresentation is when a false statement of fact or law is made which induces the claimant to enter into a contract. When a statement which is made during the course of negotiations is classed as a representation instead of a term, the claimant may approach the courts for an act of misrepresentation if the statement turns out to be incorrect. There are three types of misrepresentation, namely: fraudulent misrepresentation, negligent misrepresentation, and innocent misrepresentation.

The result of a case of misrepresentation is the contract is voidable, for example, the existing contract may be set aside by the claimant. The available remedy is dependent on the type of misrepresentation but generally includes of the rescission of a contract and or damages. The option to rescind a contract may be lost in some instances. The law relating to misrepresentation is mainly found in the Misrepresentation Act 1967 as well as the common law with legal precedence providing some further details.

Types of misrepresentation

A misrepresentation is when an incorrect statement of fact (not opinion) is made by the representor before a contract is concluded. If the representee relied on the above statement when deciding whether or not to enter the contract, they may be able to claim compensation.

There are three different types of misrepresentation and the options for remedies will depend largely upon whether the false statement was made either negligently, fraudulently, or innocently. The general remedy for misrepresentation is voiding or rescinding the contract so that both parties are placed back in the position they were in prior to concluding the contract. Damages may also be available in certain circumstances, either in a supplement to or as an alternative to the rescission of the contract.

Damages or rescinding the contract:

Once it is established that there has in fact been a misrepresentation and the type of misrepresentation has been determined, then the remedies available can be decided.

There are two types of remedy:

- Damages by way of [financial compensation](#) which is designed to compensate the victim of a misrepresentation for the harm done as far as money may allow.
- Rescinding a contract or the ability to end a contract so that the parties are placed in the position they were in prior to the contract coming into existence.

The availability of the different remedies is generally determined by the types of misrepresentation that are present and the stage of the contract when the misrepresentation is discovered.

Fraudulent misrepresentation:

A fraudulent misrepresentation occurs when someone makes a statement that;

- They know to be a false state of affairs, or,
- That they make without believing it is, in fact, the truth, or,
- That they recklessly make (for example, the party does not care about the truth of the statement or not).

If a contract is entered into as a result of a fraudulent misrepresentation, then you may choose to claim damages, rescind the contract, or both. You may, however, lose your right to rescind the contract as detailed below.

Negligent misrepresentation under s.2 (1) Misrepresentation Act 1967:

Negligent misrepresentation is a representation made recklessly and in breach of the duty of contracting parties to take necessary and reasonable care that the representation is accurate. If a "special relationship" does not exist, then there may be a misrepresentation under section 2(1) of the Misrepresentation Act 1967 where a statement is carelessly made or without reasonable grounds for believing it is true.

Negligent misstatement at common law:

This occurs when the represent carelessly makes a representation while no reasonable basis to believe the representation is true exists. This misrepresentation is relatively new and was introduced to allow for damages in cases where neither a collateral contract nor fraud was found. It was first seen in the case of *Hedley Byrne v Heller* [1964] A.C. Where the court found that a negative statement that was relied upon can be actionable. Lord Denning in *Esso Petroleum Co*

Ltd v Mardon [1976] Q.B. 801, however, moved the tort into contract law, stating the rule as: “if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another...with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable”

Innocent misrepresentation:

This type of misrepresentation occurs, when the representor had reasonable grounds to believe that his or her false statement was true. Prior to the case Hedley Byrne v Heller [1964] A.C. All misrepresentations that were not deemed fraudulent were then considered innocent. The primary remedy for innocent misrepresentation is rescission, the purpose of which is place the parties back in the position they were in prior to the contract being entered into. Section 2(2) of the Misrepresentation Act 1967, allows, however, for damages to be awarded in lieu of rescission if it is deemed equitable to do so by the court. This is judged on both the nature of the innocent misrepresentation as well as the losses suffered from it.

Limitations of a misrepresentation

There are certain limitations when it comes to rescinding a contract.

- If the claimant is aware that a misrepresentation has taken place, but nonetheless chooses to go through with the contract (either by way of writing or through conduct). The claimant will therefore not be able to rescind the contract as the claimant will be viewed as having ratified the contract through their actions.
- Timely reporting of misrepresentation; A Lapse in time can often be a defense for the defendant as the right to rescind a contract will be lost after a lapse of time has been completed. If it is proven however that the misrepresentation has been made negligently or fraudulently then the “time” only runs from the discovery of the misrepresentation. If however, the court finds the misrepresentation to be innocent, then the time period runs from the date the contract is entered into. We see this in the case Leaf v International Galleries [1950] 2 KB 86 where the parties are found to have entered a contract based on innocent misrepresentation, and after a long time lapse the court orders that rescission is not possible but the only remedy damages. However, if fraudulent or negligent misrepresentation could be proven then the time lapse would not take effect.

Remedies to misrepresentation

The Remedies available for misrepresentation depend on the type of misrepresentation. For all four types, the remedy of rescission is available. Which in essence is placing the parties back in their pre-contractual position; each party returns the benefit that they have received under the contract. It must be noted, however, that it is not always possible to rescind the contract and, in some circumstances, the right to rescind may be lost.

Remedies for fraudulent misrepresentation: Where there has been a fraudulent misrepresentation, the innocent party is entitled to rescind the contract and claim damages. The damages awarded are not based on the principles of contract, but are rather the damages available in the tort of deceit.

There is, therefore, no requirement that the damages must be foreseeable: This is clearly seen in *Doyle v Olby* [1969] 2 QB 158, where the court held that contractual damages do not apply to misrepresentation as a representation is not a contractual term. However, where there have been a fraudulent misrepresentation damages may be assessed in the tort of deceit.

Remedies for negligent misrepresentation: S.2 (1) of the Misrepresentation Act 1967 states that the same remedies are available to a claimant where a negligent misrepresentation is made as if it were made fraudulently. This principle is confirmed in *Royscott Trust v Rogerson* [1991] 2 QB 297 where it was held that; the principle in fraudulent misrepresentation relating to damages in tort also applied to negligent misrepresentation. Thus allowing for both rescission and damages.

Remedies for innocent misrepresentation: According to S.2 (2) of the Misrepresentation Act 1967 the remedies available for an innocent misrepresentation are rescission or damages in lieu of rescission. The claimant is, however, unable to claim both. Damages are determined on the normal principles of a contract.

As mentioned above, there may under certain circumstances, be bars to rescission: The right to rescind a contract may be lost when a third party acquires rights against the contractor object in question. Or where the representee ratifies the contract, through lapse of time or where restitution in integrum (restoration to the original state of affairs prior to the contract) is impossible.

Facts of the case in question

The claimant (Shahida) entered into a commercial contract with the defendant (Benjamin's Looking-glass), to purchase a painting for her business. The claimant consulted the sales assistant and informed him that she was looking for an original painting by the artist Hilda des Ste Croix. She was therefore shown to a painting that was labeled as a painting by the artist in question, the sales assistant then reaffirmed that it was in fact by the artist. The claimant was therefore induced into the purchase of the artwork for the amount of ?20000. Only five years later when it became damaged did she uncover that the painting was in actual fact not an original but rather one done by the artist's assistant, which is valued at ?2000 or ?2500 if undamaged.

Application of rule of Law to the facts:

According to the facts of the case, we can deduce that this is indeed a commercial contract of purchase and sale entered into between both parties with the intention for it to be binding. The express terms of this contract are that there has been an exchange of consideration based on the promise that the goods are in fact as stated. These terms have been made both in writing through the advertisement next to the painting and declared orally by the sales assistant when pointing the buyer to the painting in question. Also, there have been no puffs when entering into this contract as well as no clauses expressly outlawing the agreement, which may have been used as defenses by the defendant.

There is no evidence in the facts of the case to rebut the assumption that both parties intended for the contract to be binding as a purchase price was agreed upon and paid in accordance with the facts given by the defendant. It can also be argued that the defendant and his assistant were in a

professional position to be able to determine the true facts of the goods in question. As stated in the case of *Harling v Eddy* [1951] 2 KB 739 if the person making the statement about the goods in a contract of purchase and sale has special knowledge or skill in comparison to the other contracting party then the court will be more willing to make this statement an express term.

Contracts often result in a false statement of fact, which is when a statement is made prior to the contract, which has the intention to induce a party to enter into a contract. In order for this claim to succeed the statement must be of fact and not an opinion which is seen in *Bisset v Wilkinson* [1927] AC 177 where; the claimant purchased land to farm sheep. He queried how many sheep the land would hold. The land had not been used as a sheep farm but the seller estimated that it would carry 2,000 sheep. The claimant relied on this statement and bought the land. The seller's assumption turned out to be wrong and the claimant approached the courts. The Court held that the seller's statement was merely his opinion and not a statement of fact and therefore, the claimant's action was unsuccessful.

A false statement of Fact but the seller has Expert Knowledge:

We see this in the case of *Esso Petroleum v Mardon*, where the above case states that an opinion does not amount to an actionable misrepresentation. We see the contrary in the case of *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA, as they represent was in a position of holding expert knowledge of the deal in question (selling of a fuel station) and was not merely making an estimated opinion but should have been better informed due to their position as a petroleum company. The claimant was therefore awarded damages because Esso had a duty of care to make the correct statements when contracting due to their expert knowledge

Generally, the rule with false statements of facts is that once it is established that a false statement has indeed been made, it is then necessary for the claimant to demonstrate that this false statement is what induced them to contract with the defendant. If this can be proven the claimant may apply for damages and the right to rescind the contract. It must be noted however that where it is no longer possible to restore the parties to their pre-contractual position, for example where the goods have become damaged or consumed, the right to rescind will be lost.

As per the requirements of misrepresentation and facts of the case set out above I would advise Shahida to institute a claim of innocent misrepresentation with the action for damages for the deficit in what she paid for the artwork versus its actual worth. This case meets the requirements for damages only as there has been damage to the painting which results in the loss of the right to rescind. Also according to the facts, we have no reasonable knowledge to show that the defendant acted either fraudulently or negligently.

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