

MISREPRESENTATION

A misrepresentation is a misrepresentation of a statement of fact, not of general opinion, it is not a contract term, it must be material, in that it influenced a person to enter in to the contract and it is false.

FACT

A fact is something current and cannot be something future. In order to have a remedy on a promise the promise must be a contract.

Edgington v Fitzmaurice [1885] 29 Chd 459

The plaintiff was induced to buy “debentures” of a company, the prospectus claimed that the money raised would be used to develop and improve the company, new capital equipment and upgrade buildings; in fact the money was used to clear existing debts. The plaintiff also believed (mistakenly) that debenture holders would have a charge on the company’s premises.

HELD: The statement was a statement of fact as they were proved not to have that intention. The plaintiff could rescind the contract, as there had been a misrepresentation of fact

Bisset v Wilkinson [1927] AC 177

The seller of a farm that had never run sheep gave his opinion that it would support about 2000 of them. This turned out not to be the case, and the buyer sued for the return of his purchase money.

Held - The Privy Council Rejected his appeal, saying that the statement had not been a representation of fact but merely an expression of the sellers honestly held opinion.

“The person making the opinion should genuinely believe it”

Smith v Land and House Property Corp. [1884] 28 ChD 7

The plaintiff advertised a Hotel for sale, stating that *“it was let to Mr Frederick Fleck, a most desirable tenant ... thus offering a first class investment”*. In fact Mr Fleck was in arrears and close to bankruptcy,

Held - Court of Appeal held that since the plaintiff was in a position to know the true facts, his statement was a statement of fact rather than of opinion, hence a misrepresentation.

An opinion can also be a representation if the person making it has special knowledge, particularly in a trade or industry.

Esso Petroleum Co Ltd v Mardon [1976] QB 801

The plaintiffs sold a new garage, forecasting that sales of petrol would be roughly 200,000 gallons per year. Actual sales turned out to be less than half of this; the plaintiffs claimed their forecast was mere opinion as in *Bisset v Wilkinson*.

Held - The Court rejected their claim, saying that while the vendor in *Bisset* had no special knowledge and the parties were equally able to form their own views, the experience and skill of the plaintiff's market analysts created a different position.

Their expert forecast was to be treated as a statement of fact, and since they had not exercised reasonable care it was a negligent misrepresentation.

There must have been reliance by the representee: misrepresentation does not affect the validity of a contract unless it induced the other party to enter the contract. A misrepresentation is quite irrelevant if the supposed representee did not know of it, did not believe it, or for any other reason was not influenced by it. The question of reliance is particularly important where the party to whom the statement is made is in a position to check its truth for himself

Furthermore, a statement of law cannot be a representation as all statements as to what the law is are opinions.

SILENCE

In normal circumstances silence is not a representation

Turner v Green [1895] 2Ch 205

Shortly before an interview between the plaintiff's solicitor "X", the defendant, and his solicitors, to arrange for the compromise of an action, "X" received a telegram informing him of the result of certain proceedings in the action favourable to the defendant, but did not disclose his information before the terms of compromise were agreed. The defendant claimed that the agreement was no longer binding, on the ground that a material fact had been suppressed.

Held – There was no obligation on "X" to disclose all he knew, the defendant was bound by the terms of the settlement.

The silence, although misleading, could not be construed as a statement.

But it will be in three particular instances:

1. Failure to correct a previous statement

With v O' Flanagan [1936] Ch 575

A doctor, the defendant, sought to sell his medical practice, and told the plaintiff that the annual income for the past three years had been about £2000 and that there were 1480 patients on the "panel". ***These statements were true when they were made***, but the Doctor then fell ill and was unable to work.

By the time the contract was signed, 6 months later, the number of "panel" patients had fallen to 1260 and four months had passed during which there had been almost no income. When the plaintiff discovered these facts (*which the defendant had not disclosed*) he sought to rescind the contract.

Held - The Court said a party who makes a representation and then discovers that the situation has changed is under a duty to disclose that fact, since the representation is deemed to continue up to the time that the contract is made. Once it became false there was a misrepresentation which was not corrected.

2. Insurance Contracts

A contract of insurance is of a special nature, or "UBERRIMA FIDES" (the most perfect frankness) and the person entering into it must disclose all matters the insurer considers relevant. Failure to do so amounts to a misrepresentation.

e.g. using your car for work when you state social use only, lying about any accidents or convictions, health, etc.

3. Contracts of a Fiduciary Nature

These are circumstances in which a person has a special relationship with the other party, normally as trustee, advisor, etc. In such cases all facts known to the person must be disclosed.

INDUCEMENT

In order to be actionable the representation must have induced the action.

Attwood v Small [1838] 6 Cl & Fin 232

A seller of a mine made statements as to the earnings of the mine; the statements were exaggerated and unreliable. The prospective purchaser sent his own agents to check the owner's statements about a mine, and they reported that the seller's statements were true.

Held – There was no fraud, the buyers had relied on their report rather than on the seller's original (false) representation

Although the representation was untrue it had not influenced the buyers so there was no actionable misrepresentation.

TYPES AND REMEDIES

There are 3 types of misrepresentation, fraudulent, negligent and innocent.

s.2(1) Misrepresentation Act 1967

This provides, in extremely awkward language, that where a contract results in damages can be awarded, in addition to or instead of rescission, unless the person making the statement can show reasonable grounds for believing it to be true.

As this reverses the normal burden of proof and brings the same damages as fraudulent misrepresentation there is no longer any need to consider fraudulent misrepresentation.

Royscot Trust v Rogerson [1991] 3 All ER 294

A dealer sold a car to a customer for £7,600 and gave false information to the finance company as to its price and the deposit paid. The customer sold the car and disappeared without completing his payments and the finance company, having discovered the misrepresentation, sued the dealer for their losses.

Held - The Court of Appeal, allowed the Finance Company to recover all damages arising from the misrepresentation.

The higher measure of damages available for fraud were recoverable.

The burden of proof in this area is extremely high.

Howard Marine & Dredging Co Ltd v A Ogden & Sons [1978] 2 All ER 1134

A rare error in Lloyd's Register of Shipping led the owners of two seagoing barges to overstate their capacity "1,600 tons" in pre-contract negotiations with a prospective hirer. The true figures "1,055 tons" were given in the barges' own documents, which the owners did not consult. On discovering the misrepresentation, the hirers sought damages under the 1967 Misrepresentation Act.

Held – The Court of Appeal said they should succeed. On the evidence, the owners had shown no reasonable grounds for their having consulted Lloyd's Register rather than the original document, and under the wording of the Act that was enough to establish the plaintiff's case.

Where there has been a misrepresentation the contract is voidable and the innocent party may have a right to damages.

Hedley Byrne v Heller & Partners [1964] AC 465

The plaintiffs were advertising agents who booked TV time on behalf of Easypower Ltd. They asked their bankers to obtain a reference from Easypower's bankers (*defendant*). They had the same banker, and the latter replied favourably. Easypower went into liquidation; the plaintiffs lost money £17,000 and (*having no contractual relationship with the Defendants*) sued them in tort.

Held - The House of Lords said the defendants owed a duty of care and could in principle have been liable for the consequences of their negligent misstatement, but they escaped liability because of a “*without responsibility*” disclaimer in their letter.

Where the representation becomes a term of the contract the remedies are as for other contract terms.