English Law of Contract: Misrepresentation

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Overview

- What is representation?
  - A statement which induces entry into a contract but which is not part, i.e. a term, of the contract.

- What is misrepresentation?
  - An untrue statement of fact made by one party to the other which was intended and did induce the latter to enter into the contract.

- What happens when there is misrepresentation?
  - A contract entered into as a result of misrepresentation is voidable.

- What is the remedy in case of misrepresentation?
  - Rescission
  - Damages in tort or under the Misrepresentation Act 1967 may also be available (see below).
No requirement of precontractual “good faith”

- English law traditionally does not recognize any doctrine of precontractual good faith.
  - See e.g. *Walford v. Myles* [1992] 2 AC 128 per House of Lords.

- However, some signs of greater judicial readiness to recognize such a doctrine have emerged in recent years (see e.g. *Philips Electronique Grand Publique SA v. British Sky Broadcasting Ltd.* [1995] EMLR 472), particularly under the influence of EU legislation.
Elements of misrepresentation (1)

A. Untrue statement of fact

• Test of falsity = whether statement is “substantially correct”
  – see Avon Insurance plc. v. Swire Fraser Ltd. (2000) per Rix J.

• The notion of “statement” can extend to mere conduct without words. See e.g. Spice Girls v. Aprilia World Service B.V. (2002).
Elements of misrepresentation (2)

A. Untrue statement of fact (cont.)

• The follow are not untrue statements of fact:
  – A mere “puff” or “sales patter” – see e.g. *Dimmock v. Hallett* (1866)
  – Statements of intention, unless at the time of stating the intention the party did not actually have such an intention – see e.g. *Edgington v. Fitzmaurice* (1885).
  – Statements of opinion, unless the maker of the statement did not actually hold the opinion or had no reasonable grounds on which to base the opinion – see e.g. *Bisset v. Wilkinson* (1927); *Smith v. Land & House Property Corp.* (1884); *Humming Bird Motors Ltd. v. Hobbs* (1986)
  – Representations of law in the abstract, unless made dishonestly or without reasonable basis. However, if representation really deals with application of law to particular facts so that it is a statement about the effect of the law in a particular situation, it can be actionable as misrepresentation – see e.g. *Pankhanaia v. London Borough of Hackney* (2002)
  – Silence (see below). 

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Elements of misrepresentation (3)

• Disclosure duty?
  – No duty to disclose facts which if known would affect the other party’s decision to enter into the contract – see e.g. *Keates v. The Earl of Cadogan* (1851); *Turner v. Green* (1895); *Bell v. Lever Bros. Ltd.* (1932)
  – However, silence will amount to misrepresentation in four situations:
    • Half-truths: if a party makes a statement which is in fact true they may still be guilty of misrepresentation by what is left unsaid. See e.g. *Dimmock v. Hallett* (1866);
    • Change of circumstances: if a statement, which was true at the time it was first made, becomes (due to change of circumstances) no longer true (prior to the contract being made), then party who made statement has a duty to inform the other party about the change: see *With v. O’Flanagan* (1936); cf. Uncertainty regarding change of intention – compare *Wales v. Wadham* (1977) with *Inclusive Technology v. Williamson* (2009);
    • Contracts *uberrimae fidei* (of the utmost good faith) – e.g. insurance contracts;
    • Certain confidential or fiduciary relationships,

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Elements of misrepresentation (4)

B. Party to contract

– Misrepresentation must be made by a party to the contract, though it can be made via a party’s agent. There is no remedy in contract law for a misrepresentation made by a non-party; there may be, however, a remedy in tort (see below).

C. Inducement

– To be actionable, the misrepresentation must influence a party in deciding whether or not to enter into the contract. The misrepresentation need not be sole inducement, just one of the inducements. See Edgington v. Fitzmaurice (1885) (above); if misrepresentation is fraudulent, rebuttable presumption that it induced contract; Dadourian Group International Inc. V. Simms (Damages) (2009).

– Thus misrepresentation is not actionable if representee:
  • Never knew of its existence – Horsfall v. Thomas (1862)
  • Did not allow it to affect their judgement – Smith v. Chadwick (1884); Atwood v. Small (1838).

– Verification duty? Redgrave v. Hurd (1881)
Types of misrepresentation

• Need to differentiate between different types of misrepresentation in order to determine the available remedies.

A. **Fraudulent misrepresentation (deceit)** = false statement made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless about whether it be true or false – *Derry v. Peek* (1889)

B. **Negligent misrepresentation** (i.e. misrepresentation is neither fraudulent, or not proved to be made, fraudulently but made carelessly)

C. **Innocent misrepresentation** (i.e. misrepresentation is neither fraudulent nor negligent; representor honestly believes in truth of statement and had reasonable grounds for their belief).

*Cf. Negligent misstatement at common law* – arises in context of “special relationship” between persons; in such context, the maker of a statement is under a duty of care at common law to do all that is reasonable to ensure that the statement is correct; *Hedley Byrne v. Heller & Pnrs.* (1964). This tort provides remedy where misstatement made by non-party to contract.
Remedies for misrepresentation (1)

A. Rescission

– Equitable remedy available for all types of misrepresentation.
– Innocent party must exercise choice: to rescind or to affirm contract.
– Effect of rescission: parties are put back to their pre-contractual position.
– Notice: Generally, innocent party must notify representor of decision to rescind. If impossible to find representor, contract can be rescinded by conduct of representee – *Car and Universal Finance Co. Ltd. v. Caldwell* (1965)

– **Bars to rescission:**
  • When innocent party affirms contract (after discovering true state of affairs) – *Long v. Lloyd* (1958)
  • When parties cannot be restored to substantially same pre-contractual position (principle of *restitutio in integrum*)
  • When third party has acquired an interest in good faith and for value of subject-matter of contract – *White v. Garden* (1851); cf. *Car and Universal Finance Co. Ltd. v. Caldwell* (1965)
  • When substantial time has elapsed. However, in cases of fraud or breach of fiduciary duty, lapse of time before discovery that statement is false is not bar to rescission, but lapse of time after discovery is evidence of affirmation.
Remedies for misrepresentation (2)

B. Damages (1)

• For fraudulent misrepresentation:
  – Damages available in tort of deceit. Innocent party can recover all loss (including consequential loss) directly flowing from breach to put them in position they would have been in had representation not been made: *Doyle v. Olby (Ironmongers) Ltd.* (1969); affirmed in *Smith New Court Securities Ltd. v. Scimgeour Vickers (Asset Management) Ltd.* (1997). Innocent party also entitled to full compensation for loss suffered after date of contract.
Remedies for misrepresentation (3)

B. Damages (2)

• For negligent misrepresentation:
  – Damages available under s.2(1) of Misrepresentation Act 1967 (MA):
    • “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.”
  – Burden of proof (or, more accurately, disproof) is quite onerous – see e.g. *Howard Marine & Dredging Co. Ltd. V. A. Ogden & Sons Ltd.* (1978).
 Remedies for misrepresentation (4)

B. Damages (3)

• For negligent misrepresentation (cont.):
  – Where misrepresentation made by agent, innocent party can only bring action under MA s. 2(1) against contracting party, not party’s agent: *Resolute Marine v. Nippon Kaiji Kyokai* (1983).
  – Damages may be reduced if evidence of contributory negligence on part of innocent party – see *Gran Gelato v. Richcliff (Group) Ltd.* (1992).
Remedies for misrepresentation (5)

B. Damages (4)

- For negligent misrepresentation (cont.):
  - Damages may be awarded in lieu of rescission in cases of (non-fraudulent) negligent and non-negligent misrepresentation: see MA s.2(2).
  - “(2) 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.”
  - Measure of damages here is at court’s discretion.
  - Damages in lieu of rescission usually assumed as not available if right to rescind has already been lost – see e.g. Government of Zanzibar v. British Aerospace (Lancaster House) Ltd. (2000); cf. Thomas Witter v. TBP Industries (1996) per Jacobs J.
Remedies for misrepresentation (6)

B. Damages (5)

• For innocent misrepresentation:
  – MA s.2(2) may give monetary relief in cases of wholly innocent misrepresentation, but up to the court to decide.
  – Note too possibility to get indemnity in connection with action for rescission – see e.g. *Whittington v. Seale-Hayne* (1900).

• Misrepresentations which become terms
  – See MA s. 1: right to rescission for misrepresentation not lost when misrepresentation becomes term.
Remedies for misrepresentation (7)

B. Damages (6)

• Limiting liability for misrepresentation:
  – Contractual clauses attempting to exclude or limit liability for misrepresentation are construed strictly – see e.g. *Thomas Witter v. TBP Industries Ltd.* (1996); *Inntrepreneur Pub Co. v. East Crown Ltd.* (2000).
  – Also several statutory controls, the central of which is MA s. 3:
    “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 in so far as it satisfies the requirement of reasonableness as stated in section 11(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.”
  – However, some types of clauses (e.g. “no-reliance” clauses) may not be caught by MA s. 3 – see e.g. *Watford Electronics Ltd. v. Sanderson CFL Ltd.* (2001).