

## CONTRACT – Misrepresentation (lectures 13 and 14)

**Misrepresentation is a vitiating factor. The effect of misrep is that it makes the contract voidable ie makes it weak. The court may allow rescission for all types of misrepresentation.** It is first important to distinguish between a mere puff (hyperbolic ambiguous statements as seen in *Dimmock v Hallett*), which is not actionable and also terms (contractual promise as seen in *J.Evans & Son v Andrea Merzario Ltd*), which give an action for breach. **An actionable misrepresentation is an unambiguous false statement of fact or law, made to the C and which induces the C to enter into the contract with the statement maker, such that they might sustain loss. All elements must be proven.**

### UNAMBIGUOUS AND FALSE

It has to be unambiguous – *McInerny v Lloyds Bank Ltd*. If wording is clear, the C can't manipulate the meaning.

False – *Avon Insurance Plc v Swire Fraser*. It has to be substantially correct, then it is not false ie not a misrep.

### STATEMENTS OF LAW OR FACT

**Statements of fact:** A representation is not an undertaking to do, or not to do something. It is a statement asserting a given state of affairs (*Klienwort Benson Ltd v Malaysia Mining Corp*).

1. **Conduct may be fact:** Attempts at concealment (*Gordon v Selico*); conduct (*Spice Girls Ltd v Aprilia WS*)

2. The statement must be clear and unambiguous false statement of fact not opinion – *Bisset Wilkinson*. A layman's **opinion** with no greater knowledge than C is **not fact**.

However, **opinion with greater knowledge** may be **fact** – *Smith v Land & Housing Property Corp*. If the facts are not equally well known on both sides, then a statement of opinion involves very often a statement of material fact, for he impliedly states that he knows facts which justify his opinion.

3. **Expert opinion may be fact** where expert gives opinion in area of their expertise – *Esso v Marden*

4. **Future intention is not fact.** "A representation that something will be done in the future cannot be true or false at the moment it is made" – *Beattie v Ebury*. There is no duty to inform other party of change of future intentions – *Wales v Wadham*.

**Must be a fact not a promise.** A representation is different from a promise and is not an undertaking to do or not do something. It is a statement asserting a given state of affairs – *Kleinwort Benson Ltd v Malaysia Mining Corp*.

However, a **dishonest statement of intention is fact** – *Edgington v Fitzmaurice*.

5. **Silence is not a fact.** No general duty to disclose information – *Keates v The Earl of Cadogan*; *Sykes v Taylor-Rose*.

However, half truths (*Dimmock v Hallett*; *Notts Patent Brick & Tile v Butler*) and continuing representations, which were true initially but false at the time of contracting (*With v O'Flanagan*) eg contracts uberrimae fidei (insurance contract) and fiduciary relationships. This didn't apply in *Wales v Wadham*, as this is about intentions. Commercially it is probably different.

**Statement of law:** *Pankhania v Hacknet LBC* can constitute a misrep.

### ADDRESSED TO THE PARTY MISLED

Misreps can be addressed directly to the C or they can be addressed indirectly through a third party, if D knew at the time that the statement would be passed on – *Commercial Banking Co of Sydney v RH Brown & Co*.

### MATERIALITY AND INDUCEMENT

\*Test for materiality is objective ie does the statement relate to issue that would influence the reasonable man? – *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*

\*If statement is found to be material, actual inducement will be inferred (*Smith v Chadwick*), subject to d proving otherwise (subjective test).

\*If the statement is not material, actual inducement cannot be inferred, unless the c can prove subjective inducement (*Museprime Properties v Adhill Properties*)

\*There is a debate as to whether the misrep must have been material – *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*

\*Inducement need not be the sole factor (*Edgington v Fitzmaurice*), but it must be a factor (*UBS Fasteners v Marks Bloom*)

\*There is no inducement where c is unaware of the representation (*Horsfall v Thomas*), the c knew that the statement was untrue (*Redgrave v Hurd*), or the C did not rely on misrep (*Smith v Chadwick*), or the rep did not affect the c's judgment ie no inducement if rely on own investigation (*Attwood v Small*).

\*However, even if have investigated, partial reliance on misrep also is sufficient – *Edgington v Fitzmaurice*.

\*It seems to now depend on whether it might be reasonable to check – *Smith v Eric Bush* (if the c is a **commercially aware party then may be reasonable to expect them to have checked whether the statement was true or not**) If don't check and should have or do a negligent job of checking then may be a defence of contrib neg for the d in limited circumstances – if misrep is fraudulent then investigation is ignored by court – *S. Pearson & Son Ltd v Dublin Corp*.

### FOUR CATEGORIES OF MISREPRESENTATION

**FRAUDULENT** – tort of deceit (common law). A false representation made: knowing it was untrue, or without belief in its truth, or reckless as to its truth – *Derry v Peek*

\*Reckless: "disregard for the truth" – *Thomas Witter Ltd v TBP Industries Ltd*

\*Difficult claim as burden on c to prove actual fraud. Once proven – motive irrelevant (*Derry v Peek*)

\*BUT, the court will ignore investigation (*Attwood v Small*) by c (*S Pearson & Son v Dublin Corp*)

\***Remedies** – Indemnity if relevant AND rescission AND damages (extensive)

\*Measure of damages is loss 'directly flowing from the transaction', does not have to be foreseeable, not rendered too remote by C – *Doyle v Olby Ironmongers Ltd*. *Smith New Court v Scrimgeour Vickers* confirmed *Doyle*, but C must mitigate as soon as fraud discovered and damages will be reduced by benefits obtained by C.

\*C can also recover loss of profits (*Down v Chappell*) but note the measure (*East v Maurer*) ie tortious – put c back in position s/he would've been in had contract not taken place. D cannot argue contrib neg (*Standard Chartered Bank v Pakistan National Shipping*).

**NEGLIGENT MISREP** – s2 (1) misrep act 1967. Unless misrep or had reasonable grounds to believe in truth of statement will be deemed negligent AND treated as having made fraudulent misrep ie the 'fiction of fraud' – *Howard Marine v Ogden*. The burden is on the D to prove they weren't negligent.

\***Remedies** – Indemnity if relevant AND rescission + damages (s2(1)MA 67) OR damages in lieu (instead of rescission (s2(2)MA67)).

\*Just the losses directly flowing from that NM (*Royce Trust v Rogerson/Smith new ct v Scrimgeour Vickers*). Reduced by any s2(2) damages in lieu.

\*S2(2) MA 67 ct MAY award rescission OR damages 'in lieu' of rescission. NB Grey area: *government of Zanzibar v British Aerospace* (no damages if right to rescind is lost)/ cf *Thomas Witter v TBP Industries* (if ever had a right to rescind, can get s2(2) damages).

\*Can damages be reduced for contrib neg? NB Grey area: *Gran Gelato Ltd v Richcliff of Royscott Trust v Rogerson* (treat NM same as FM ie d cannot argue contrib neg)

**INNOCENT MISREP** – s2(1) misrep act 1967. Burden on misrepresenter to prove he had reasonable grounds to believe up to the time the contract was made that the facts represented were true.

\***Remedies** – Indemnity (if relevant). No automatic right to damages – discretionary area (*UCB Corporate Services v Thomason & Anor*). C will be awarded either rescission OR damages in lieu (s2(2) MA). If right of rescission lost, s2(2) damages should not be awarded (*government of Zanzibar v British Aerospace*)

**RESCISSION** – equitable remedy (*Whittington v Seale-Hayne*). Misrep renders contract voidable. Misrepresentor must inform misrepresentor of intention of rescind (*Car & Universal Finance Co v Caldwell*).

\*Rights to rescind may be lost: third party rights (*Phillips v Brooks*); affirmation (*Long v Lloyd*); lapse of time (*Leaf v International Galleries*); impossibility (*Clarke v Dickson*). Cts will do what is 'practically just' (*Erlanger v New Sombrero Phosphate*).

\*Indemnity is available for all types of misrep. Awarded for costs/expenses resulting from obligations assumed under the contract. NB Generally no indemnity given if damages awarded.

**EXCLUSION?** – cannot exclude liability for misrep (s3 MA 67), unless reasonable to do so under s11 & sch2 UCTA 77 –