

*Business Law: CIMA Year One*  
**Misrepresentation**

Misrepresentation is a false statement of existing fact which induces a contract.

From this definition, we can see that there are four elements we must consider to see whether misrepresentation has occurred:

- a false statement
- induction
- contract
- remedies

The second of these, induction, is not covered here.

Representation occurs before a contract is made. Parties negotiate by making statements; some of these will become terms of the contract, and some will become representations.

If the false statement becomes a term of the contract, the wronged party may sue for breach of contract. If the false statement becomes a representation, the wronged party has an opportunity to void the contract and sue for misrepresentation.

How do we decide which become terms and which become representations? There is no fixed formula, and, unless it is specified in the contract, the judge must rule on each statement. Generally, the more important statements are terms.

### **Silence**

Generally, silence does not amount to misrepresentation. However, there are a number of exceptions to this general rule. If the silence is used to mask a half-truth, then it may be considered misrepresentation. Also, if the truth is changed since an initial statement is made, and the other party is not informed of this change, then silence is again considered misrepresentation. Finally, *uberrimae fidei*: all contracts of insurance are subject to 'utmost good faith' in that applicants for insurance are obliged to disclose any detail which may be of importance to the insurers whether or not it is requested.

### **Remedies**

Two remedies are available for resolving cases of misrepresentation: rescission or damages.

Rescission is an equitable remedy – that is, it is available at the discretion of the court, and only the deceived party may void the contract. There exist four areas where rescission is not available *by default*:

- where there has been undue delay (an unreasonable lapse of time between when the reasonable person would discover the misrepresentation and the claimant suing)
- where restitution is not possible
- where third parties' rights would be affected (see below)
- where the contract has been affirmed (that is, the product has been used even if misrepresented).

### *Third Parties' Rights*

Say O owns a car, and wishes to sell. A fraudster sees the car advertised, views the car and claims to be famous. He offers a cheque to pay if he can drive the car away. O accepts since he believes F is famous. The cheque then bounces. F immediately sells the car to B.

If O finds F, he can sue for misrepresentation. O cannot rescind the contract in this case, as B has rights over the car (see third case above); O can only sue for damages<sup>1</sup>.

If F cannot be found, O can rescind the contract by telling the police of the fraud; any sale from F to B after this point of contact is a non-valid contract, and B has no right to the car in this case..

Damages depend on the type of misrepresentation. There are three types of misrepresentation, and the right to damages varies for each:

- *Fraudulent misrepresentation*: if the deceived party can prove that misrepresentation was deliberate and fraudulent, then damages can be awarded. However, this is relatively rare since it is difficult for the claimant to prove the nature of the misrepresentation.
- *Negligent misrepresentation*: under the Misrepresentation Act 1967 section 2(1), damages can be claimed unless the defendant can prove that he believed that the statements were true at the time of contracting. This shifts the burden of proof onto the defendant.
- *Innocent misrepresentation*: under the Misrepresentation Act 1967 section 2(2), the courts also have discretion to award damages under an equitable remedy in cases where the misrepresentation was not deliberate. Again, the burden of proof

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<sup>1</sup> Note that this is different if F has **stolen** the car; in this case, B has no right to the car and it can be returned to O.

lies with the defendant. The judge has the right to award damages in lieu of rescission.

A seller of a house says that the guttering is 10 years old, and believes this to be true due to false documentation when he bought the house. This is an innocent misrepresentation. The guttering is actually 25 years old and needs replacing; this will cost £500 to repair. In this case, it is fairer to charge damages than to reverse the sale of the house.