

## Diagram 5D

- 1 If A has been induced to enter a contract by the other contract party B's false statement, A has a number of avenues to pursue a claim for damages. Diagram 5D sets out how this relates to each other. The easiest route is damages under **section 2(1) of the Misrepresentation Act 1967**. What complicates matters is that the *measure* of reliance damages is linked to the damages available for common law fraud (also known as 'deceit' or 'fraudulent misrepresentation').
- 2 This means that we cannot avoid making reference to the **common law** scheme for damages which anyway, continues to be available after the Misrepresentation Act.
- 3 The crucial point is that it is very difficult to prove **fraud**. A must show that B made his false statement: knowingly, recklessly or without belief in its truth. But, the reward for clearing this high hurdle, is access to the **very generous measure of damages for fraud**. And this includes 'loss of opportunity' to make other profitable contracts, and no reduction for contributory negligence or for loss being too remote.
- 4 In contrast, common law damages for **negligent** misrepresentations *can* be reduced for being too remote or for the misrepresentee's contributory negligence, and there is no damages for 'loss of opportunity'. Even so, the *Hedley Byrne v Heller* line of cases shows that negligent misrepresentation can also be quite hard to prove; A must show that B owes him a 'duty of care' arising out of a so-called 'special relationship'.
- 5 At common law, if A cannot prove that B made his statement fraudulently or negligently, B's misrepresentation is regarded as **innocent**. A is *not* entitled to any damages. The Misrepresentation Act 1967 does not get rid of these actions but it adds an easier route to damages.

- 6 A wins damages, and the generous 'fraud measure', if B (the *misrepresentor*) cannot prove his honest and reasonable belief in the truth of his statement. This is very favourable to A, the misrepresentee for three reasons:
- First, the burden of proof is reversed, from the misrepresentee to the misrepresentor
  - Second, the measure of damages is very generous - the same as for fraud, even if there is no fraud: this is called the 'fiction of fraud'.
  - Third, the qualifying standard is lower – under the common law, A gets nothing if he can't prove B's fraud or negligence. But under the Misrepresentation Act, A may still not be able to prove B's fraud or negligence but A can get fraud damages, so long as B can't prove his honest and reasonable belief. That is to say, A can now get *fraud* damages for what might have been regarded as *innocent* misrepresentation as common law.
- 7 A is only denied damages under the Misrepresentation Act if B *can* prove his honesty and reasonableness in making the statement. This can be contrasted with common law innocent misrepresentation by calling it '**purely innocent**' misrepresentation.
- 8 Another way for A to claim damages is to argue that B's false statement, whether oral or written, has **contractual status**. B would then be in breach of a contractual term, entitling A to damages on the *expectation* (rather than the reliance) measure.
- 9 This would be available regardless of whether B's state of mind was fraudulent, negligent or innocent when he made the statement, because B will be taken to have promised the truth of it. Where A can argue his case as either a misrepresentation or a breach of contract, he will prefer the one that gives him the most in damages. And, *that* will depend on whether he made a good bargain or a bad one. If he made a *good bargain* it would be better for him to go *forward* to his expectation position, so a breach of contract action is better. If he made a *bad bargain*, then it would be better for him to go *backwards* to his pre-reliance position, and an action for misrepresentation is preferable.

- 10** Another way for A to make a money claim is to ask for **restitution**. A contract induced by misrepresentation is *voidable*; A can set it aside this is called rescission of the contract and it is subject to certain 'bars to rescission' such as affirmation, delay and third party rights. One condition of rescission is that each party must give back anything he got from the other. So A can recover any payments he made, while giving back what he got under the contract. A can also recover any payment he was *required* to make as a result of the contract; e.g. in setting aside a house purchase he can reclaim the Council Tax. This is called an *indemnity* and it's just what B would have had to pay himself had he not induced the sale by misrepresentation.
- 11** Rescission and indemnity are available for any misrepresentation; the misrepresenter's state of mind is irrelevant.
- 12** Lastly, damages may be available if the court exercises its discretion under section 2(2) of the Misrepresentation Act and denies rescission. This is most likely to happen if B's representation is relatively trivial, if A's loss is relatively small or if B stands to lose a lot if the contract is rescinded.
- 13** **Damages in lieu of rescission** is not available for *fraudulent* misrepresentations because the court can't take away A's right to rescission if there has been fraud on B's part.
- 14** It's only when the misrepresentation is *non-fraudulent* (i.e. negligent or innocent) that the court can exercise its discretion to deny the A's claim to set aside the contract and instead award him some money.