

ANSWERS - SELF-TEST - MISREPRESENTATION

1. What is needed in order to establish that there has been an actionable misrepresentation? (2)

- (a) A false statement of fact (1)
- (b) Which induces the other to contract (1).

2. In what circumstances can a statement of opinion establish liability in misrepresentation? (2)

A statement of opinion which is (a) made by a person in a better position to know the truth (Smith v Land & House Property Corporation)(1) or (b) made by a person who possesses special skill or knowledge in relation to the subject matter (Esso Petroleum v Mardon)(1), will constitute a false statement of fact because of the implied statement that the maker knows of facts to justify his opinion (either because of his position or because he has exercised reasonable care and skill in preparing an estimate).

Another example is the situation where a person states an opinion which does not reflect his true belief (untrue statement about the fact of his belief).

3. What does the decision in *Edgington v Fitzmaurice* establish? (2)

- (a) If a person makes a statement of future intention that is false at the time he makes it, then he has made a false statement of fact i.e. the fact of the state of his mind as to his future intention. This also applies to statements about an opinion that is not in fact held (see above question 2). (1)
- (b) A false statement of fact (made fraudulently) need only be ONE of the reasons that induced the representee to contract. It need not be the sole reason (recently applied in Morris v Jones [2002] EWCA Civ 1790 (CA)) (1).

4. Define fraudulent, negligent and wholly innocent misrepresentations. (3)

- (a) A fraudulent misrepresentation is a false statement made knowingly or without believing it to be true or recklessly not caring whether the statement is true or false. Absence of honest belief (Derry v Peek). (1)
- (b) A negligent misrepresentation is a false statement which, although it is honestly made, is made without having reasonable grounds for belief in its truth (e.g. because of failure to take reasonable care to check it). (1)

(c) A wholly innocent misrepresentation is a false statement that is both honest and based on reasonable grounds for belief in its truth, but nevertheless turns out to be false. (1)

5. What are the possible remedies available for an actionable misrepresentation? (3)

The basic remedy is rescission which is available for all types of misrepresentation (although the right to rescind will be lost if one of the bars to rescission applies) (1). *In addition*, (fraudulent and negligent misrepresentations only) damages for misrepresentation will be available (1). If the misrepresentation was wholly innocent damages may be awarded at the discretion of the court but only *instead of* rescission, on the basis that rescission would be too drastic a remedy and damages are a more appropriate remedy. (See question 13) (1).

6. What is the effect of rescission on a contract? (1)

An actionable misrepresentation renders the contract voidable, i.e. liable to be set aside by the misrepresentee. This is achieved by exercising the remedy of rescission and each party returns what he received under the contract so that both are returned to the positions they were in before the contract was made. (1) [Damages may be an additional remedy if rescission on its own fails to restore the status quo position. Damages will be the only way of achieving this position if the remedy of rescission is lost - see question 7].

7. What are the bars to rescission? (5)

Bars to rescission in misrepresentation - affirmation (with full knowledge of the misrepresentation indicates intention to continue with the contract)(1), lapse of time (1), restitution is impossible (1), a bona fide third party has acquired rights in the property (1), damages are awarded instead of rescission under s.2(2) M.A. 1967 in the case of a non-fraudulent misrepresentation (1).

8. What is the basis and aim of damages for fraudulent misrepresentation? (2)

Damages for fraudulent misrepresentation - tort of deceit (1). The aim of such damages is tortious i.e. to restore the claimant to the position he would have been in had the representation not been made (restore the status quo). (1)

What is the remoteness rule for fraudulent misrepresentation? (1) Give authority. (1)

The remoteness rule is that the plaintiff can recover for all direct loss incurred as a result of the fraudulent misrepresentation - regardless of foreseeability. (1)

Authority = Doyle v Olby (1).

9. On what basis can loss of profit damages be recovered where there has been a fraudulent misrepresentation? (3)

Give authority. (1)

Loss of profits can be recovered if they are within the remoteness rule i.e. if the loss directly results from the fraudulent misrepresentation. (1) However, the aim is tortious and therefore the profit recoverable would need to be the profit that the representee would have made had the representation not been made at all (and had this contract not been entered into), rather than the profit based on the representation being true (which would be the same as loss of profit in a breach of contract claim) (2).

Authority = East v Maurer (1).

[Additional Note : The courts have awarded loss of profits based on the profit that would have been made from another business of the type purchased for the price paid. However, whereas in East v Maurer the CA looked at this matter purely hypothetically, in Davis v Churchward the CA looked at other actual businesses and concluded that the profits would have been the same in those other businesses. However, that ignores the fact that the representee would not have purchased the actual business purchased, or the others in the area, had he in fact known the true profit position. He purchased the actual public house because he was fraudulently led to believe its profits were better].

10. What are the alternative damages claims for negligent misrepresentation? (2)

(a) Damages for negligent misstatement in tort under the principle in Hedley Byrne v Heller. (1)

(b) Damages for negligent misrepresentation under s.2(1) Misrepresentation Act 1967. (1)

What are the limitations and advantages of each? (6)

(a) Hedley Byrne v Heller (*HB v H*)

The real advantage of this action is that it can be used where no contract exists between the misrepresenter and the person to whom the statement was made . See

Hedley Byrne v Heller as an example of this. However, it is not limited to non-contractual situations of this kind - see Esso v Mardon as an example of its use where there is a contractual link between statement maker and person to whom statement made. (1)

Claimant must prove that D was negligent which includes establishing that D owed him a duty of care, i.e. that there was a special relationship - increasingly more difficult to establish - see Caparo v Dickman. (1)

Can cover negligent advice or opinion as long as the special relationship can be shown to exist.

(b) s.2(1) MA

Can only be relied upon where the false statement of fact induced a contract with the person to whom the statement was made (i.e. the contractual link is required). (1)

Claimant need only establish actionable misrepresentation and then the burden shifts to the defendant to show that he was not negligent and he must achieve this by showing (as a positive requirement) that he had reasonable grounds for his belief in the truth of the statement and did in fact believe it to be true. (2) *Note that this is a procedural issue and does not create a separate type of misrepresentation. S.2(1) is a damages claim only and not a type of misrepresentation.*

Favourable damages - tortious but remoteness rule is all direct loss regardless of foreseeability, whereas HB v H remoteness rule is limited to recovery based on foreseeability. (1) This should logically mean that all fraudulent misrepresentation case law also applies to s.2(1), e.g. East v Maurer - recovery of lost profits and Smith New Court – all direct loss post contract if tied in by the fraud. The Smith New Court principle was accepted by the judge in Pankhania v Hackney LBC (Damages) as applicable in principle in the context of s.2(1) claims.

11. What is the significance of the decision in *Howard Marine & Dredging Co. Ltd v Ogden & Sons (Excavations) Ltd*? (3)

Howard Marine establishes that in the context of the claimant's claim for s.2(1) damages, it will be very difficult for a D to discharge the burden placed upon him to escape liability by establishing that he was not negligent in making his statement. This is because the wording of s.2(1) was held to impose a positive requirement to prove that he believed the statement to be true up to the time the contract was made and that he had reasonable grounds for that belief. (2)

The majority in Howard Marine held that it was not enough that the representor relied on an official register and that he should have checked his figures in the records held

at his company's head office. (1) It therefore seems that this standard is very demanding.

12. Give **two** criticisms that might be made of the decision in *Royscot Trust Ltd v Rogerson*. (4)

Any **two** suggestions (2 for each) [Three possibilities given here].

(a) Over-reliance on literal interpretation of wording of subsection and fiction of fraud has meant that there is now no difference between a statement made dishonestly (fraud) and a statement made honestly (although negligent). Arguably the rules on measure of damages should be the same.

(b) Did not think out implications of decision, e.g. does this mean that East v Maurer is also applicable to s.2(1) case law? Does it mean that contributory negligence is not available in a claim for damages under s.2(1) since it cannot be available in a claim based on the tort of deceit?

(c) Hedley Byrne v Heller can no longer be regarded as alternative since the measure of damages is now fundamentally different. Ignored academic preference for foreseeability rule under s.2(1).

13. What factors will be relevant in the decision to exercise the discretion to award damages instead of rescission under s.2(2) M.A. 1967? (6)

The section itself states that this discretion is available in cases of non-fraudulent misrepresentations (where the remedy of rescission would be available - see Zanzibar v British Aerospace but compare Thomas Witter v TBP Industries). The court must regard it as equitable to declare the contract to be subsisting and to award damages in lieu. (2)

The court will have regard to the nature of the misrepresentation (this may mean its significance and type i.e. negligent or wholly innocent), the loss which would be caused if the contract were upheld (this is the damages award rather than damages to take account of losses caused by entering into the contract) and the loss which rescission would cause to the other party.

Recent case law has assisted in explaining these factors.

(a) The importance of the representation in relation to the subject matter of the transaction. (1)

(b) The loss which would be caused by the misrepresentation if the contract continued (i.e. not rescinded). This is the loss that would be compensated in damages in lieu of the rescission. (1)

(c) The loss which would be caused to the representor if rescission occurs.(1)

William Sindall plc v Cambridgeshire C.C. Hoffmann L.J. (1)

14. In what circumstances will it be possible to apportion damages for misrepresentation to take account of the misrepresentee's contributory negligence ?

(3)

Redgrave v Hurd is authority for the fact that there is no duty on a representee to check a statement. What matters is that he relies upon it. However, because of the overlap with tort and the fact that contributory negligence must apply to HB v H (tort) claims, there are difficulties in upholding this position and in Gran Gelato v Richcliff it was held that if there are concurrent claims under HB v H and s.2(1) MA (i.e. both claims pleaded together), then the 1945 Act would apply to both claims and allow for apportionment in cases of contributory negligence. (1)

It was therefore logical to consider that the Act would probably apply to a claim based solely on s.2(1). However, this view has been put in doubt by the decision in Alliance & Leicester BS v Edgestop (see also Standard Chartered Bank v Pakistan National Shipping Corpn 2002 (HL)). In this case it was held that there can be no apportionment for contributory negligence in a claim for fraudulent misrepresentation (tort of deceit) and due to the Royco "fiction of fraud" that should mean that principles affecting damages for fraudulent misrepresentation also apply to s.2(1) claims (1). If this is the position, then there would be different positions on the availability of apportionment for contributory negligence between a HB v H claim and a claim under s.2(1), at least in cases where they are not concurrent claims. This would result in an unfortunate position whereby a claimant has a procedural advantage in pleading **only** s.2(1) (no apportionment for his contributory negligence) and pleading both HB v H and s.2(1) (apportionment for contributory negligence). Such a position is nonsensical.

Points scored [maximum of 50] =