



### Contract Law Concentrate: Law Revision and Study Guide (6th edn) Adam Shaw-Mellors and James Devenney

## p. 190 9. Misrepresentation

James Devenney, Head of School and Professor of Transnational Commercial Law, School of Law, Reading University, UK, Visiting Full Professor, University College Dublin, Ireland & Visiting Professor Dalian Maritime University, China. and Adam Shaw-Mellors, Senior Lecturer in Commercial Law, Law School, Aston University, UK

<https://doi.org/10.1093/he/9780198904618.003.0009>

**Published in print:** 05 August 2024

**Published online:** August 2024

### Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter discusses the identification of actionable misrepresentations which affect the fairness of the process by which a contract was entered into, and render that contract voidable for misrepresentation (liable to be set aside and the parties restored to their pre-contractual positions). It identifies three types of misrepresentation depending on the state of mind of the misrepresenter: fraudulent, negligent, or innocent. It distinguishes between remedies available for the different types of pre-contractual statements, specifically rescission and damages for the different types of misrepresentations, and briefly explains the distinction between commercial contracts and the remedies available to consumers under the Consumer Protection from Unfair Trading Regulations 2008.

**Keywords:** actionable misrepresentations, remedies, pre-contractual statements, silence, inducement, fraudulent, negligent, deceit, Misrepresentation Act 1967, Consumer Protection from Unfair Trading Regulations 2008

### Key facts

---

- Where the making of a contract has been induced by a false statement of fact (or some forms of misleading conduct) by one party to a contract, the party induced to contract (the misrepresentee) may have a remedy for actionable misrepresentation.

-

Misrepresentation renders the contract voidable so that the misrepresentee may be able to set aside (rescind) the contract and be restored to the position that the misrepresentee was in before the contract was made. This may involve an additional award of damages for misrepresentation.

- However, the ability to rescind will be lost where any of the bars to rescission apply, e.g. if the misrepresentee has affirmed the contract or failed to avoid the contract in a timely manner. In such circumstances, the only way for the misrepresentee to be restored to their original position is by means of an award of damages (where available).
- The availability and measure of damages for misrepresentation are determined by the state of mind of the misrepresenter, and whether the misrepresenter was fraudulent (damages in the tort of deceit), negligent (common law damages for negligent misstatement, or damages for negligent misrepresentation in accordance with s. 2(1) **Misrepresentation Act (MA) 1967**), or wholly innocent (damages in lieu of rescission where rescission would otherwise have been available).
- Controversially the judicial interpretation of s. 2(1) **MA 1967** means that damages awarded under this section are based on the (wide) principles governing the measure of damages for fraud due to the ‘fiction of fraud’.

p. 191 ● Following the amendments to the **Consumer Protection from Unfair Trading Regulations (CPUTRs) 2008** made by the **Consumer Protection Amendments Regulations 2014 (SI 2014/870)**, after 1 October 2014 consumers who entered into a contract for the sale or supply of a product by a trader or who entered into a contract to sell a product to a trader (e.g. selling their car to a car dealer) or made a payment to a trader for the supply of a product, *and* that trader engaged in certain prohibited practices in relation to the product (e.g. a misleading action—misrepresentation) have an extended range of specific consumer ‘rights to redress’ under the **CPUTRs** (right to unwind, right to a discount, and specific right to damages). This regime is separate from the consumer’s general remedies but the consumer cannot make a claim twice in respect of the same loss. In addition, there was an amendment to s. 2 **MA 1967** which removed the ability of consumers to recover damages under that legislation where they have a right to redress under the **CPUTRs** in respect of the misrepresentation. This is an important removal of a consumer remedy of damages and makes it more likely that the **CPUTRs** remedies will be used in practice in B2C misrepresentation claims. It should be noted that, at the time of writing, the Digital Markets, Competition and Consumers Bill is before Parliament. That Bill proposes to repeal the **CPUTRs** and re-enact them with various tweaks in a (proposed) Digital Markets, Competition and Consumers Act. Clauses 230–233 of the Bill would give consumers rights to unwind the contract, to a discount, and to a specific right of damages.

### 9.1 Introduction

---

This chapter examines the identification of actionable misrepresentations which, in broad terms, can be said to affect the fairness of the process by which a contract was entered into and which potentially render that contract voidable for misrepresentation (liable to be set aside and the parties restored to their pre-contractual positions). The discussion distinguishes between remedies available for the different types of pre-contractual statements.

### Practical example 1

Ranjit and Scott operate taxi businesses. Following a period of negotiations, Ranjit agreed to purchase one of Scott's taxi cabs after Scott told him that it had been fitted with a brand-new engine only a month earlier and that the oil had been changed. In fact, the Canley Garage had warned Scott that the engine would need replacement within weeks and that, although the oil had been changed, there was an oil leak. Scott decided that the new engine and fixing the oil leak would cost too much money and that he would attempt to sell the cab to another firm. The cab broke down on the journey from Scott's premises and was taken to Canley Garage where Ranjit discovered the need for a new engine and the existence of the oil leak. Can Ranjit get his money back and recover the costs of towing the broken-down cab to the garage?

### Practical example 2

Following a period of negotiations, Tamzin agreed to purchase Umar's bicycle shop and business as a result of Umar's statement that the turnover in the last accounting year had been £75,000. Umar

↩ had made this statement following a quick glance at the annual accounts but was not very good with figures. He offered to allow Tamzin to take the books away to be checked but she said that 'she trusted him' and did not bother. A few months after the purchase, Tamzin discovered that the true turnover figure was only £25,000 and the business is struggling. Can she avoid the purchase, secure damages for any expenditure she has wasted in the meantime, and claim for lost profits?

p. 192

### Think like an examiner

Problem-style questions involving one or more actionable misrepresentations are easily drafted, particularly scenarios where the misrepresentations induce the purchase of a small business such as a public house, restaurant, newsagent shop, or beauty salon, and are therefore a relatively common inclusion in Contract Law examination papers. The technicality of the law on remedies also allows the better students to shine. (You will be in this position once you have digested this chapter and its helpful hints!)

### Don't fall into the trap

On occasions, statements which appear to be misrepresentations are in fact broken contractual promises (terms) so that the focus of the question should be on identifying the type of term and remedies for breach of contract (see Chapter 5). Examiners may set questions involving statements which are both terms and misrepresentations. This necessarily requires a judgement as to best remedies.

Even if you are convinced that the question concerns only actionable misrepresentations, your first paragraph should explain the legal principles and application which lead you to conclude that the statements are representations and not terms. A kind examiner will leave various hints in the problem-question facts.

### Revision tip

#### Indications that the statements are representations and not terms:

- Examiners frequently include a statement that the written contract is silent on the pre-contractual statements. This statement of silence *suggests* that it was intended that no binding promise as to the truth of those statements was being made.
- A statement suggesting that the other party (usually a prospective purchaser) should check the accuracy of any statements being made, e.g. by inspecting accounts (see *Redgrave v Hurd* (1881)) or having an independent assessment of a car, is more likely to indicate that the statement is a representation (*Ecay v Godfrey* (1947)).
- A statement made by a non-expert about his own goods is more likely to be a representation (see *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* (1965)), although it may be a statement of fact since the owner of goods may be taken to represent that he or she knows of facts which support the statement: *Smith v Land & House Property Trust Ltd* (1884).

## p. 193 9.2 Actionable misrepresentation

---

Having confirmed that the statement(s) are representations, proceed to establish whether or not the statement is an actionable misrepresentation. In *Loreley Financing (Jersey) No. 30 Ltd v Credit Suisse Securities (Europe) Ltd* (2023) at [291], Cockerill J stated: 'where a series of representations are made, regard is to be had to their cumulative effect: representations may in combination convey a meaning which no single one imparts'.

### Important fact

Only a **false statement of fact** (not opinion nor future intention) or certain misleading conduct by one party to the other **which induces the other to enter into the contract**, can constitute an actionable misrepresentation *prima facie* rendering the contract voidable (liable to be set aside) and give rise to possible remedies for misrepresentation.

### 9.2.1 Step 1: Is there a false statement?

#### Don't fall into the trap

A statement may be true, so you must be very careful to analyse all of the facts of your problem before launching into a discussion of *misrepresentation*. (Note, however, that a statement may be true when made but can become untrue *before* the contract is entered into due to a change of circumstances. There may then be a misrepresentation in failing to disclose that change of circumstances.)

This false statement can be an actual statement but it can also include **conduct (encouraging a false belief)** or sometimes an omission (failing to speak when there is a duty to do so).

#### Conduct

*Gordon v Selico Co. Ltd* (1986): covering up patches of dry rot so that they could not be seen on the inspection of a flat constituted a misrepresentation.

#### Silence or omission to speak

As a general rule, **silence does not amount to a misrepresentation** since there is no general duty in pre-contract negotiations to disclose material facts not known to the other party: *Keates v Cadogan* (1851):

- However, if a statement is a *half-truth* (what is said is true but it is misleading since it fails to present the whole picture), there may be a misrepresentation. *Dimmock v Hallett* (1866): a statement that farms on the land to be sold were let to tenants did not mention that both had given notice to quit. The misrepresentation was in the failure to disclose the notices to quit.
- If the statement was true when made but, due to a change of circumstances, has become false by the time that the contract is entered into, the representor's failure to disclose the change in circumstances may amount to a misrepresentation. *With v O'Flanagan* (1936): failure to disclose vendor's illness

occurring prior to the contract and the impact of this on the medical practice being sold. Equally in *Spice Girls Ltd v Aprilia World Services BV* (2002), the sponsor had not been informed that a member of the group had decided to leave, despite this being known to all members of the group.

### 9.2.2 Step 2: Is it a statement of ‘fact’?

This is a requirement since, in a sense, only a fact can be true or untrue.

#### 1. Statements of belief or opinion

Statements of belief or opinion are not statements of fact and do not generally result in an actionable misrepresentation, at least not where it is clear to both parties that the statement-maker is not an expert (although note that under the *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* (1964)-type of action, discussed later, a negligently given opinion can sometimes give rise to liability). Thus, in *Bisset v Wilkinson* (1927) where both vendor and purchaser knew that the land had not previously been used for sheep farming, the vendor's statement of belief relating to the number of sheep the land would support was not a statement of fact and, therefore, there was not actionable misrepresentation.

However, if either:

- the statement-maker is in a stronger position to know the truth (usually because the statement relates to their property or other facts within their control) (*Smith v Land & House Property Corp.* (1884)); or
- the statement-maker is an expert (*obiter* in *Esso Petroleum Co. Ltd v Mardon* (1976));

then it is assumed that the statement-maker knows of facts to justify any statements of their ‘opinion’. On this basis there is an implied representation of fact that, for example, the representor knows of facts which justify their opinion.

Finally, if the opinion is not honestly held, there is a statement of fact (about the misrepresenter's state of mind). For example, Alex, who is selling a picture, says that he believes the picture to be an original when he actually believes it to be a copy. This would be a misrepresentation of fact, although the difficulty would be proving the belief.

#### 2. Statements of future conduct or intention

A statement by a person as to what they will do in the future, or as to what they intend to do, is not a misrepresentation if the representor changes their mind. However, if at the time of stating the intention the person did not in fact have any such intention (again this would need to be established in evidence), then it is a misrepresentation, since a present intention is a fact that can be falsely described. ↵

### ***Edgington v Fitzmaurice (1885) (CA)***

**FACTS:** Directors of a company sought to raise money and stated that they intended to use funds raised to purchase company assets and develop its trading potential, whereas they **intended all along** to use the money to pay off existing liabilities.

**HELD:** The statement of intention was a misstatement of fact.

### **3. Statements of law**

Traditionally, statements of what the law was did not amount to statements of fact. Yet this was not entirely satisfactory especially as statements of law are rarely abstract but statements of law as applied to a particular set of facts. The traditional position is, however, no longer to be followed. *Pankhania v Hackney London Borough Council (2002)*: misrepresentation concerning the legal status of the current occupier of a property to be sold which impacted the ability to eject that occupier. However, depending on the facts, it may be that a statement of law is only a statement of opinion: see *Bolt Burdon Solicitors v Tariq (2016)*.

### **9.2.3 Step 3: Does the statement, conduct, or omission induce the other party to enter into the contract?**

The false statement of fact etc. must induce the contract, i.e. it must actually be relied upon: *Horsfall v Thomas (1862)*. The facts of *Horsfall* seem similar to *Gordon v Selico* (concealment of dry rot) since in *Horsfall* there was a concealment of a defect in a gun. However, whereas in *Gordon* the flat had been inspected and the concealment not discovered so that the concealment induced the contract (inducement in *Gordon* being described as 'obvious' in *Loreley Financing (Jersey) No. 30 Ltd v Credit Suisse Securities (Europe) Ltd (2023)*), in *Horsfall* the defect was discoverable on inspection and there had been no inspection. It followed that in *Horsfall* the concealment (misrepresentation) could not have induced the contract. See also *Hayward v Zurich Insurance Co. plc (2016)* (suspicion that the representation was false).

### **There must be knowledge of the statement**

It follows that there must be knowledge of the existence of the statement in order to be induced by it and normally that means that the statement must have been made to the party induced: *Peek v Gurney (1873)*. However, if it can be shown that the statement-maker knew that the statement would be passed onto someone else, it is passed on (so that there is knowledge of it), and then the person receiving the information is the party actually induced to contract, there may be liability in misrepresentation to the party induced despite the fact that they were not the original addressee of the statement (*Pilmore v Hood (1838)* and *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd (2001)*). For a warning against loosening this requirement in the internet age see: *Taberna Europe CDO II plc v Selskabet (formerly Roskilde Bank A/S) (In Bankruptcy) (2016)*.

**Where a claimant relies on their own judgement or investigations, as a general principle they will not have been induced by the misrepresentation**

### ***Attwood v Small (1838)***

**FACTS:** False statements as to the earning capacity of a mine were confirmed by the purchasers' independent experts.

**HELD:** The purchasers could not rely on the vendors' false statements as constituting actionable misrepresentations since they had not relied on these but on the statements made by their own experts.

### **Revision tip**

Do not place too much reliance on *Attwood v Small* since, following *Edgington v Fitzmaurice*, there can be reliance where the representation was not the only reason inducing the claimant to contract.

*Attwood v Small* would therefore have application where, for example, the purchasers *rely entirely* on their own experts and not at all on the previous statements. Note, however, that in cases of non-fraudulent misrepresentation it seems that it must be shown that the misrepresentee would not have entered the contract 'but for' the misrepresentation: see *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises Inc. (2019)* but contrast *ACL Netherlands BV (as Successor to Autonomy Corp. Ltd v Lynch (2022)* at [559] where Hildyard J made a distinction between questions of inducement and quantification of loss).

### **Think like an examiner**

*Redgrave v Hurd (1881)* is useful for examiners in testing knowledge of inducement and introducing a later discussion of contributory negligence.

This case is authority for the fact that where a misrepresentation is made (e.g. false statement about turnover or profits) and the misrepresentee is given the opportunity to test the accuracy of the statement (e.g. in the account books) but does not take it, the misrepresentation will still be considered as an inducement since it will still be an active influence. This relates to establishing the actionable misrepresentation. This authority can be put another way in terms of legal principle:



**Constructive notice will not suffice to prevent inducement: the knowledge of the true position must be actual.**

However, there may still be a price to be paid for failing to inspect accounts or failure to check a statement, but this relates to any damages award. The damages awarded might be reduced to take account of the misrepresentee's contributory negligence in contributing to their own loss.

### p. 197 **9.2.4 Step 4: Was the misrepresentation material to the decision to contract?**

Whereas the question of whether the misrepresentee was induced is subjective (i.e. it depends on the actual state of mind of the misrepresentee)—although it is not without controversy—it seems the statement must also relate to a matter which would have influenced the reasonable person (objective test) to contract (see *Sharland v Sharland* (2015) although the scope of that decision is debatable (see, e.g., *Terry v BCS Corporate Acceptances Ltd* (2018) at [77])), as opposed to something which has no obvious connection. Where the misrepresentation is fraudulent, inducement may be assumed from materiality: *Barton v County NatWest Bank Ltd* (1999).

## **Actionable misrepresentations in Practical examples 1 and 2**

### **Practical example 1**

There is a false statement relating to the 'brand-new engine' and it is a false statement of fact since, although Scott is not an expert on cab maintenance, he is clearly 'in a better position to know the truth' as the cab owner and so is impliedly stating that his statement is based on fact (*Smith v Land & House Property*). It appears that the oil has been changed (so this is a truthful statement) but there is no mention of the 'oil leak'. Is the failure to mention the oil leak an actionable misrepresentation? It may be a half-truth (what is said is true but it is misleading since it fails to present the whole picture: *Dimmock v Hallett*). Changing the oil will be defeated if it is leaking.

Both statements appear to be material and are relied upon in deciding to contract.

### **Practical example 2**

There is a false statement of fact concerning the turnover of the business made by the business owner. It still operates as an inducement to contract since Tamzin does not check the accounts and therefore places reliance on the turnover figure (*Redgrave v Hurd*). (Tamzin might have been contributorily negligent in failing to check the accounts but this is only (potentially) relevant to the damages award and does not impact on the finding that there is an actionable misrepresentation.)

### 9.3 Type of misrepresentation

Having established one or more actionable misrepresentations, you should now consider what type of misrepresentation each statement might be.

There are three types which depend on the state of mind of the misrepresenter: fraudulent, negligent, or innocent (see Table 9.1). We have already noted that the statement must be false; this may either be because the statement-maker always knew it was false or because the statement-maker's belief in the truth of their statement turns out to be misplaced. ↩

p. 198

**Table 9.1 Types of misrepresentation**

Type	Definition	Detail
<b>Fraudulent</b>	<p>Absence of an honest belief that the statement is true. Statement is made:</p> <ul style="list-style-type: none"> <li>(i) knowing it is false; or</li> <li>(ii) not believing it is true; or</li> <li>(iii) recklessly—not caring whether it is true or false.</li> </ul>	<p>Claimant has to establish this on the evidence.</p> <p><b><i>Derry v Peek</i> (1889)</b></p> <p><b><i>Thomas Witter Ltd v TBP Industries Ltd</i> (1996)</b>: Jacob J stated that 'recklessness' meant dishonesty: making a statement (so asserting its truth) not knowing whether it is true or false—and not caring.</p>
<b>Negligent</b>	<p>An honest belief that the statement is true but the statement-maker has failed in their duty to use reasonable care and skill to check accuracy and so failed to appreciate it is false.</p>	<p>There are two types of damages claim for negligent misrepresentation:</p> <ul style="list-style-type: none"> <li>(i) negligent misstatement at common law (claimant needs to establish the defendant's negligence);</li> <li>(ii) negligent misrepresentation under <b>s. 2(1) MA 1967</b> (defendant has to establish that they were not negligent). This statutory damages claim has greater practical significance where there is a contract with the statement-maker (as is likely to be the case in all Contract Law assessments and exams). Bear in mind the current exclusion of this remedy where the <b>CPUTRs 2008</b> apply.</li> </ul>
<b>Innocent</b>	<p>An honest belief that the statement is true where that belief is based on reasonable grounds. However, the statement turns out to be false.</p>	<p>The remedy of rescission (where available) may be lost in such circumstances and damages awarded in lieu (instead) applying the discretion in <b>s. 2(2) MA 1967</b>. Again, currently these damages in lieu will not be available as a remedy in a B2C situation where the <b>CPUTRs 2008</b> apply.</p>

## Practical examples 1 and 2

Sometimes examiners give you hints about the state of mind of the statement-maker, e.g. compare Scott's state of mind in Example 1 with Umar's state of mind in Example 2. In Example 1 (taxi cab), it is clear that Scott knows that the cab has not had a new engine fitted and that there is an oil leak, i.e. there is a deliberate lie and failure to speak which induces the sale to Ranjit (fraudulent misrepresentation). However, in Example 2 (sale of the bicycle shop), it appears that Umar is honest but careless (negligent misrepresentation) and Tamzin is also negligent in failing to take the opportunity to check the accounts.

## Revision tip

Even if you are uncertain, it is often possible to rule out one or more possible types of misrepresentation by a careful reading of the facts that the examiner presents.

## p. 199 9.4 What remedies are available for the misrepresentation?

The basic remedy is rescission since the contract is voidable. This involves setting aside the contract—handing back the property received under the contract and the return of the price paid (see also the interesting case of *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises Inc.* (2019) which involved the rescission of a revised contract with the consequence that the original contract was restored). ↵

p. 200

## Revision tip

Remember that the aim of remedies for misrepresentation is to put the parties in the position they were in *before* the misrepresentation was made which induced the contract. If rescission is either unavailable (see bars to rescission, Table 9.2) or does not fulfil this aim then a claim for damages for misrepresentation (wasted expenditure) should be considered.

**Table 9.2 Bars to rescission**

<b>Affirmation</b>	Knows about the misrepresentation but continues with the contract or acts in such a way that an unequivocal intention to	<b>Long v Lloyd</b> (1958): purchase of lorry. Took it out on first journey and defects were discovered identifying misrepresentations had been made. P
--------------------	--	---

continue with the contract can be implied from conduct. In **Ceviz v Frawley** (2021) Judge Keyser QC stated: 'Affirmation requires knowledge not only of the material facts but of the right to rescind, absent at least a deliberate decision not to investigate that right.' See also **SK Shipping Europe Plc v Capital VLCC 3 Corp.** (2020) at [202] for a statement that the means of discovering the truth is not the same as knowledge (this seemed to be approved on appeal: (2022) at [74]).

accepted D's offer to pay part of the costs of repair. P then took the lorry on a second journey after the repair. Rescission no longer possible as there had been affirmation. Nor will a reservation of a right to later rescind necessarily prevent the court finding that there has been an affirmation: **SK Shipping Europe Plc v Capital VLCC 3 Corp.** (2022).

### Lapse of time

Traditionally period from the date of the contract (non-fraudulent misrepresentations) and from date when fraud could reasonably have been discovered (fraudulent). On wider limitation periods see **Riyait v Dawett** (2018) and **Revenue and Customs Commissioners v IGE USA Investments Ltd** (2021) (common law and equitable rescission).

Lapse of time may be evidence of affirmation. **Leaf v International Galleries** (1950): picture represented (non-fraudulent) to be 'Salisbury Cathedral' by Constable. Five years later the purchaser attempted to sell it and discovered it was not by Constable. The Court of Appeal (CA) held that rescission had been lost as not exercised within a reasonable time. However, some doubt has been cast on **Leaf v International Galleries** (1950) by the CA in **Salt v Stratstone Specialist Ltd** (2015) where Longmore LJ stated: 'It must, moreover, be remembered that **Leaf** was decided well before the **Misrepresentation Act** was passed. It must be doubtful whether since the enactment of **section 1** it is still good law that a representor should be in no worse position than if the representation had become a term of the contract, particularly if the representor takes no steps to prove that he was not negligent.'

### Restitution impossible

It has become impossible to restore the parties to their original positions, e.g. if the subject matter has deteriorated or changed.

There is an equitable discretion in cases of substantial restitution to order rescission while allowing for a financial adjustment to take account of inability to make full restitution: **Erlanger v New Sombrero Phosphate Co.** (1878).

**Clarke v Dickson** (1858): purchaser of shares in a mining company could not have rescission once he had worked out of the mine.

Rescission of a contract to purchase goods cannot be rescinded once the goods have been consumed.

***Thomas Witter Ltd v TBP Industries Ltd (1996):***  
changes to a business purchased as a result of misrepresentation prevented restitution.

**Third party rights**

Rescission is a personal right against the representor and the misrepresentee cannot claim the return of property so as to defeat rights acquired by a subsequent bona fide third party purchaser.

If A obtains goods from B as a result of misrepresentation and sells them to C, who takes in good faith, B cannot later rescind on learning of the misrepresentation in order to recover the goods from C. See mistake as to identity (discussed Chapter 2) and **s. 23 Sale of Goods Act (SGA) 1979**.

**Damages instead of rescission under s. 2(2) MA 1967**

The court has a discretion under **s. 2(2)** to award damages instead of rescission that is otherwise available in the case of innocent or negligent misrepresentation. If the court exercises this discretion, then the right to rescission is lost and **s. 2(2)** damages are awarded instead.

This discretion is most likely to be exercised in the case of an innocent misrepresentation where rescission can be seen as too drastic a remedy.

### Revision tip

Ensure you spend sufficient time considering the remedies for misrepresentation since it is likely that many of the marks will be awarded for this discussion. An ability to identify actionable misrepresentations is not sufficient to provide advice. The range of available remedies for each type of misrepresentation in the B2B context is considered in Table 9.3.

## 9. Misrepresentation

**Table 9.3 Remedies which may be available for misrepresentation (assuming not a B2C contract and that the (current) CPUTRs 2008 do not apply)**

<b>All types of misrepresentations</b>	<b>Rescission alone.</b>	Rescission is available and rescission alone will, on the facts, restore the parties to their original positions—therefore no additional loss.	As there is no additional loss, there will be no claim for damages (although see innocent misrepresentation and <b>s. 2(2) MA 1967</b> ).
<b>Fraudulent or negligent misrepresentation</b>	Rescission.	<i>And</i> if there is additional loss suffered ...	Damages (wasted expenditure)—usually <b>s. 2(1) MA 1967</b> .
<b>Fraudulent or negligent misrepresentation</b>	<b>Where rescission has been lost.</b>	Damages alone (substantial damages to restore parties to original positions).	Usually damages under <b>s. 2(1) MA 1967</b> .
<b>Innocent misrepresentation</b>	<b>Where rescission is available.</b>	Rescission may be too drastic a remedy.	The court may exercise its discretion under <b>s. 2(2) MA 1967</b> to award <b>s. 2(2)</b> damages instead of rescission.
Innocent misrepresentation	<b>Where rescission has been lost.</b>	No rescission and therefore no damages instead of rescission.	Possible indemnity only.

p. 201 **9.4.1 Step 1: Always start by considering whether rescission is possible—since the circumstances may indicate that the remedy has been lost**

These bars (with the exception of s. 2(2) MA 1967) apply generally to the remedy of rescission (i.e. they are not limited to rescission for misrepresentation): for example, *Halpern v Halpern* (2007): bars to rescission (restitution impossible) also apply to the remedy of rescission for duress.

### Practical examples 1 and 2

#### Can Ranjit and Tamzin get their money back and avoid the contracts they have entered into in Examples 1 and 2?

In Example 1, Ranjit discovers the misrepresentations quickly and there seems to be no journey after discovering the true position (compare *Long v Lloyd*). He should therefore be able to rescind the contract and get his money back.

However, in Example 2 (purchasing a business), it is rarely as simple since the business will often operate for a period before the misrepresentation is discovered and rescission sought. We are told that a few months have elapsed since the purchase so that it may be impossible for Tamzin to hand the business back in its original position (*Thomas Witter v TBP Industries Ltd*). In addition, third party rights may have intervened. (Even if rescission is possible in Example 2, it seems unlikely, given the nature of the misrepresentation and its consequences, that damages in lieu of rescission would be appropriate. They are clearly also inappropriate given the fraudulent misrepresentation in Example 1. Section 2(2) MA 1967 should not therefore be considered any further.)

p. 202 **9.4.2 Step 2: Consider the remedy of damages for misrepresentation**

Where there is additional loss (i.e. not ‘remedied’ by rescission alone) or the parties are not put in their original position because rescission is unavailable, it is necessary to consider the remedy of damages for misrepresentation.

The type of misrepresentation is important in calculating the measure and ability to recover.

### Practical example 1

Rescission will not wholly remedy Ranjit’s loss as he has incurred the cost of towing the cab to the garage when it breaks down on the first journey. Can he recover this? Scott’s misrepresentation was fraudulent. (Note that this is a B2B contract.)

### Fraudulent misrepresentation—damages in the tort of deceit

The object of a damages award in the tort of deceit is, not surprisingly, tortious, i.e. the aim is to restore the misrepresentee to the position they would have been in had the representation not been made (i.e. the amount the misrepresentee is out of pocket).

The test of remoteness is very wide indeed in that the misrepresentee may recover for **all the direct loss incurred as a result of the fraudulent inducement**, regardless of foreseeability. See *Doyle v Olby (Ironmongers) Ltd* (1969): Lord Denning MR:

The person who has been defrauded is entitled to say: 'I would not have entered into this bargain at all but for your representation ...'.

### *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* (1997)

This case concerned the purchase of shares in a company as a result of a fraudulent misrepresentation. The House of Lords (HL) held that the measure of damages would normally be based on the difference between the price paid for the shares (82.25p per share) and the market value of the shares at the date of the contract to purchase (78p). However, it was later discovered that the company had been the victim of a serious additional fraud by a third party so that the real value of the shares at the time of purchase was in fact only 44p per share. **Since the purchasers were 'locked into' the transaction as a result of the fraudulent misrepresentation, this subsequent loss was a direct loss flowing from the misrepresentation.** Therefore, the HL allowed recovery of difference between 82.25p and 44p. Compare *MDW Holdings Ltd v Norvill* (2022) considering situations where the purchase would still have been made but on different terms.

### Revision tip

Where there is a fraudulent misrepresentation, if the purchaser has to retain the property in question until they can sell it, they may be able to recover the difference between the purchase price and the eventual price they obtain on sale (*Doyle v Olby*, *East v Maurer*, *Downs v Chappell*) as this is a 'direct loss' (causal link) resulting from making the contract. There is, however, a duty to mitigate so that, for example, refusing a reasonable offer from another to purchase the business or property in question may break the chain of causation (*Downs v Chappell* (1997)).



- p. 203 ↵ Loss of profits (if a direct loss) can be recovered for fraudulent misrepresentation but not on a contractual basis (i.e. not on the basis that the profit or turnover figures were correct). Recovery has to be on the tortious basis of restoring the parties to their original positions. This has been interpreted to mean allowing recovery of the profit that would have been made had this contract not been entered into but
- p. 204 another contract made instead. ↵

### ***East v Maurer (1991) (CA)***

**FACTS:** The Ps bought one of the D's hair salons for £20,000 as a result of a fraudulent representation by the D that he had no intention of working in his other nearby salon, except in emergencies. The D continued to work full time at his other salon and this had an adverse effect on the Ps' business. The Ps eventually sold the salon for only £7,500.

**HELD:** In addition to recovery of damages for loss of capital in the tort of deceit, i.e. the difference between price paid and price on selling (£20,000 – £7,500 = £12,500 (plus the expenses of the sale)), the Ps could recover their lost profits as direct loss flowing from the fraudulent inducement to make this contract.

However, this was not (as in breach of contract) to put the Ps in as good a position as they would have been in had the representation been true (i.e. the D had not worked in the other salon), but to provide them with the profit they might have made had they not entered this particular contract. This was calculated as the profit they would probably have made in another hairdressing business bought for a similar sum (calculated by the court as £10,000). Compare *Tuke v Hood (2022)* where the CA rejected an argument that the misrepresentee had to give credit for the 'time value' of the money received under the fraudulently induced transaction in that case.

### **Practical example 1**

Is the cost of towing a 'direct loss' caused by entering into this transaction? Yes, it is. The loss need not be foreseeable, although it clearly is on these facts. This is an easy example.

## **Damages for negligent misrepresentation**

There are two types of damages claim for negligent misrepresentation:

### Negligent misstatement at common law

*Hedley Byrne & Co. Ltd v Heller & Partners Ltd* (1964): *obiter* statement in this case that in certain circumstances damages may be recoverable in tort for a negligent misstatement causing financial loss. Until this case, damages could only be recovered in misrepresentation if the misrepresentation was fraudulent (see also *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* (2018)). See *Esso Petroleum Co. Ltd v Mardon* (1976) accepting that a negligent misstatement can arise from a representation made in pre-contract negotiations.

With this claim that there is no requirement to establish the existence of a contract between misrepresenter and misrepresentee (compare s. 2(1) MA 1967), e.g. in *Hedley Byrne* there was no contract between Heller (misrepresenter) and Hedley Byrne (misrepresentee) but Heller's negligent statement (about the financial standing of Easipower) led HB to enter into a contract with a third party on behalf of Easipower and HB lost money as a result.

In such a claim, the claimant needs to establish the defendant's negligence (that a duty of care was owed, this duty has been breached, and loss caused). The remoteness test is the tort test of reasonable foreseeability.

### Statutory damages claim for negligent misrepresentation: s. 2(1) MA 1967

#### Revision tip

To use this section there must be a contract between the statement-maker and the person to whom the statement was made.

### Misrepresentation Act 1967

**Section 2(1):** 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.

### Revision tip

Due to its many advantages, s. 2(1) is the preferable claim in a situation where a contract has resulted between the statement-maker and the person to whom the statement was made, i.e. a typical Contract exam problem scenario. You merely need to be aware of the *Hedley Byrne* claim as an alternative claim for damages where the statement was made negligently and its disadvantages when compared to s. 2(1). You also need to be aware that currently it cannot be used in a B2C scenario where the consumer has a right to redress under the **CPUTRs 2008**. However, the extension of civil remedies (the rights to redress) in the 2014 Regulations refers only to 'misleading actions' under **reg. 5 CPUTRs** and makes no mention of 'misleading omissions' (**reg. 6**) or silence. It may be that consumers currently retain their ability to use s. 2 damages because they fall outside the current **CPUTRs** where their misrepresentation claim is, on rare occasions, based on inaction rather than action. Note also the **Digital Markets, Competition and Consumers Bill**, discussed in 'Key debates'.

#### p. 205 **Advantages of the s. 2(1) claim**

- (i) **Reversal of burden of proof:** under s. 2(1) the claimant has to prove an actionable misrepresentation and the D is deemed negligent. The D then bears the burden of showing that he had reasonable grounds for believing, and did believe, up to the time that the contract was made, that the facts represented were true, i.e. he has to disprove negligence.

### ***Howard Marine & Dredging Co. Ltd v A Ogden & Sons (Excavations) Ltd (1978) (CA)***

**FACTS:** During negotiations to hire out barges the owners' representative misrepresented their carrying capacity. He relied on the Lloyd's register but this was incorrect. The correct information was on file at the owners' head office.

**HELD (majority, Bridge and Shaw LJ):** The owners were liable to pay damages under s. 2(1) as they had not demonstrated that they had reasonable grounds to believe what they said about the carrying capacity. It was unreasonable not to refer to the shipping documents at the company's head office.

- (ii) **The fiction of fraud:** damages are assessed on the same basis as if the misrepresentation had been fraudulent (although it is not fraudulent): *Royscot Trust Ltd v Rogerson* (1991). It follows that the remoteness test for recovery under s. 2(1) is extremely wide, namely 'all direct loss regardless of foreseeability' (see the discussion of recovery of damages in the tort of deceit and compare remoteness in a claim for damages for negligent misstatement—*Hedley Byrne*). Taken to its logical conclusion the case law principles on measure of damages in the fraud cases (*Smith New Court, East v*

*Maurer* on profits) should also apply to s. 2(1) cases. However, there may be differences in relation to limitation periods: see *Rizwan Hussain v Saleem Mukhtar* (2016). Note also, as pointed out in *Hodgson v Creation Consumer Finance Ltd* (2021) at [118], in *Royscot* the relevant loss was found to be foreseeable, and so the comments on whether foreseeability was necessary are strictly *obiter*.

### Don't fall into the trap

Be careful with your terminology since s. 2(1) was not intended to cover fraudulent misrepresentations (tort of deceit). It is incorrect to state that it applies (on its wording) to fraud and negligence.

However, in practice it may be more straightforward to use s. 2(1) in cases which seem fraudulent rather than have to establish any state of mind (i.e. rather than have to prove deceit) and it is for this reason that s. 2(1) is often pleaded in preference to deceit.

- p. 206 ↩ When applying s. 2(1) to determine whether particular losses are recoverable, the only question should be one of causation. Does the loss (particular expense) result from the misrepresentation? Did the misrepresentation cause the loss? If it did, then it is recoverable. Only if there is an unreasonable intervening action will this not be the case.

### *Naughton v O'Callaghan* (1990)

**FACTS:** The Ps purchased a colt for 26,000 guineas but the pedigree was incorrectly described so that the actual value at the time of the sale was £23,500. Before the truth was discovered the Ps trained and raced the horse. It did badly and its value fell to £1,500.

**HELD:** Section 2(1) damages were awarded for all direct losses flowing from the misrepresentation. The judge considered that the fall in the horse's value to £1,500 was caused by the misrepresentation rather than the intervening actions of the Ps. The fact that the Ps had trained and raced the horse was exactly the conduct which would have been expected in the circumstances. Therefore, the Ps recovered the difference between the purchase price and the value of the horse at date of judgment.

### Practical example 2

Assuming that there can be no rescission, what would the damages award be in relation to the purchase of the bicycle business? Tamzin is also claiming for wasted expenditure in running the business and her loss of profits.

As there is a contract between Tamzin and Umar, if Tamzin relies on a claim for s. 2(1) damages she need only establish Umar's actionable misrepresentation (see earlier). The burden of proof then moves to Umar to show that he had reasonable grounds to believe his statement as to turnover to be true. He will be unable to demonstrate this, i.e. he will not be able to prove that he was not negligent since he gave the accounts no more than 'a quick glance' and admits that he is not very good with figures.

Due to the fiction of fraud, Tamzin can now recover damages on the same basis as if Umar had been fraudulent, i.e. on the basis of 'lock in' she may be able to recover the difference between the price paid for the business and the eventual sale price and sale costs, subject only to mitigation (*Smith New Court*). She can also recover additional wasted expenditure which is a direct loss (assuming causal link and reasonable expense to incur: *Naughton v O'Callaghan*). Loss of profits on a tortious basis are also recoverable (*East v Maurer*), i.e. loss of profits incurred on a similar business purchased for the same price.

#### p. 207 Damages for innocent misrepresentation: s. 2(2) MA 1967

The misrepresenter in such a case will be able to discharge the burden of disproving negligence under s. 2(1) MA 1967.

Damages may not be claimed at common law for a wholly innocent misrepresentation. However, s. 2(2) (damages in lieu of rescission) gives the court a *discretion*, where the injured party *would otherwise be entitled to rescind*, to award damages instead of that rescission based on the fact that rescission would be too drastic a remedy given the nature of the misrepresentation as innocent. (Remember that currently s. 2 MA 1967 will not apply to B2C contracts where the CPUTRs 2008 give a right to redress—s. 2(4) MA 1967, as amended by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870).)

Section 2(2) states that this discretion can be exercised if the court considers it equitable to do so having regard to:

- the type of misrepresentation;
- the loss upholding the contract would cause to the representee (it is this loss that will need to be compensated for in damages) compared to the loss that rescission would cause to the representor.

### ***William Sindall plc v Cambridgeshire County Council (1994) (CA)***

See also '8.1.1 Risk allocation'.

**FACTS:** The purchaser sought to avoid a contract to purchase land for development when the market value of the land fell dramatically. The purchaser had discovered a sewer running across the land which required a 6-foot maintenance strip.

**HELD:** On the facts there was no misrepresentation by the D council and no negligence. *Obiter* the CA considered that even if there had been an actionable misrepresentation, on these facts it would have exercised its discretion under s. 2(2) **MA 1967** and awarded damages in lieu of rescission. The representation was relatively trivial (costing £18,000 for the diversion) as compared to the value of the land (£5m). Rescission would have placed the risk of a fall in market value on the D council.

The CA rejected the argument that s. 2(2) damages were the same as s. 2(1) damages and should compensate for losses caused by entering into the transaction (i.e. the fall in the market value of the land). Instead, s. 2(2) damages are more limited (e.g. the cost of diversion of the sewer) and are unlikely to include any consequential losses (although in *SK Shipping Europe Plc v Capital VLCC 3 Corp.* (2020) Foxton J was prepared to compensate for, at least, some consequential losses (the judge in *SK Shipping* (2022) (CA) at [85], stated that it should 'not be taken as endorsing the judge's approach' but that the difficult issues around s. 2(2) should be left to future cases)). Yet the CA in *William Sindall plc v Cambridgeshire County Council* (1994) seemed to apply a contractual measure of damages which, at least in principle, is incorrect.

### **Looking for extra marks?**

Identifying any contributory negligence on the part of the misrepresentee and assessing whether this impacts to reduce the damages award will demonstrate a thorough application.

p. 208

### **Practical example 2**

Umar had offered Tamzin the opportunity to inspect the accounts for the bicycle shop and she did not take up this opportunity. We saw earlier (*Redgrave v Hurd*) that this did not affect the existence of inducement in the form of any statement about the figures, e.g. turnover of £75,000. However, Tamzin is negligent. Should this reduce the damages which Umar has to pay Tamzin?

(i)

If Umar (as misrepresenter) had been fraudulent, any contributory negligence by Tamzin (misrepresentee) can be ignored (*Standard Chartered Bank v Pakistan National Shipping Corp. (Nos 2 and 4)* (2002)). But Umar was negligent.

- (ii) Both Umar and Tamzin were negligent. Can Tamzin's damages be apportioned (reduced) to take account of her contributory negligence? If the claim for damages was based only on *Hedley Byrne* (negligent misstatement at common law), any damages payable to Tamzin would be reduced to take account of her contributory negligence (the **Law Reform (Contributory Negligence) Act 1945** applies). The same *should* be true where there are concurrent claims under *Hedley Byrne* and s. 2(1) MA 1967 (*Gran Gelato Ltd v Richcliff (Group) Ltd* (1992)) since the position should not be different where claims are pleaded as alternatives. However, if the claim for damages is formulated only under s. 2(1), it is arguable that the fiction of fraud should apply and there would be no reduction in Tamzin's damages (although the CA may have taken an alternative provisional view in *Taberna Europe CDO II plc v Selskabet AF1 (formerly Roskilde Bank A/S)* (2016) and *Hodgson v Creation Consumer Finance Ltd* (2021)).

## Key debates

---

### 1. The fiction of fraud in s. 2(1) and the resultant treatment of a negligent statement-maker as if they were fraudulent

---

- Poole and Devenney, 'Reforming Damages for Misrepresentation: The Case for Coherent Aims and Principles' [2007] JBL 269.

Academic opinion supports the view that the fiction of fraud should relate only to establishing liability rather than the measure of damages being the same as for fraud. It is arguable that the remoteness rule for **s. 2(1)** should be the same as under *Hedley Byrne* (i.e. reasonable foreseeability) because these are basically alternative types of liability for negligent misrepresentation. By relying too heavily on the fiction of fraud, the CA has created a distinction between damages for negligent misstatements in tort and damages under **s. 2(1)** for negligent misrepresentation.

This can be criticized because:

- There is a failure to draw any distinction between fraud and negligence.
- An artificial distinction is created between negligent misstatement (*Hedley Byrne*) and negligent misrepresentation (**s. 2(1)**).
- It requires a very literal statutory interpretation of the wording of **s. 2(1)**.



### 2. Misrepresentation in the consumer context

---

The Law Commission consulted (*Consumer Redress for Misrepresentation and Aggressive Practices*, LCCP 199, April 2011) and reported (Law Com. No. 332, Cm. 8323, March 2012) recommending reforming the law on remedies to protect consumers in the event of misrepresentations and aggressive practices. The Law Commission pointed in particular to consumer problems in identifying the availability of rescission and the measure of damages where damages were available. It therefore proposed tiers of remedies designed to restore consumers to their original positions. Tier 1 remedies (available for all types of misrepresentations) related to ‘unwinding’ the contract through the return of goods and services within three months of delivery, and securing a refund of the price. If ‘unwinding’ was no longer possible, the consumer would still secure a discount on the purchase price. Tier 2 remedies would apply only if a consumer could prove they had suffered actual loss over and above their recovery through unwinding or discount on the price. It was recommended that these damages should cover consequential losses and also damages for distress and inconvenience.

The **Consumer Protection (Amendment) Regulations 2014** amended the **CPUTRs 2008** to introduce consumer ‘rights to redress’ (**Part 4A**) in situations which would fall within actionable misrepresentations (‘misleading actions’ under **reg. 5**), although not ‘misleading omissions’ so that in general terms omissions and silence would appear to be excluded from the **CPUTRs 2008** ‘right to redress’ regime.

Where the regime applies, the consumer has the right to unwind the contract by rejecting the product within 90 days, assuming that the goods or services have not been *fully* consumed or performed (**reg. 27E**). This gives rise to a right to a refund for the consumer. Where the consumer has not exercised the right to unwind, there may be a right to a discount in complex circumstances which, by their very complexity seem inappropriate for the consumer context. The circumstances turn on the seriousness of the ‘misleading action’ and the difference (if any) between the contract price and the market price of the product at the time of the contract (**reg. 27I**). Finally, there is a right to damages where the consumer has suffered consequential financial loss or ‘alarm, distress or physical inconvenience or discomfort’ as a result of the ‘misleading action’. Traders have a due diligence defence in respect of any right to damages. There is no further explanation of the basis on which these damages will be calculated. While the right to unwind seems clear, the right to a discount and the right to damages provisions under the **CPUTRs 2008** appear more questionable—as does the omission of misleading omissions. By comparison, in its interpretation **s. 2(1) MA 1967** has the advantage of being reasonably clear and generous to consumer claimants who seek to recover financial compensation for consequential losses.

It should be noted that, at the time of writing, the **Digital Markets, Competition and Consumers Bill** is before Parliament. That Bill proposes to repeal the **CPUTRs** and re-enact them with various tweaks in a (proposed) Digital Markets, Competition and Consumers Act. **Clauses 230–233** of the Bill would give consumers rights to unwind the contract, to a discount, and to a specific right of damages.



## p. 210 Key cases

Case	Facts	Principle
<b>With v O'Flanagan</b> (CA)	In January 1934, negotiations were entered into for the sale of a medical practice which the vendor represented as having an income of £2,000 per annum. However, by the time the contract was signed in May, the practice had declined due to the vendor's illness but this was not disclosed. The purchasers sought rescission. Held: the representation was made to induce purchasers to enter into the contract and had to be treated as continuing until the contract was signed. Once it became false, to the knowledge of the representor, there was a misrepresentation if he failed to correct it before the contract was concluded.	A change of circumstances may give rise to a duty to speak before the contract is concluded so that, in a sense, silence constitutes a misrepresentation.
<b>Smith v Land and House Property Corp.</b> (CA)	Ps advertised property for sale, stating in the particulars that it was let to 'a most desirable tenant' when the tenant was in arrears with his rent at the time. Ps sued for specific performance. CA held that this description was not a mere expression of opinion but contained an implied assertion that the vendors knew of no facts leading to the conclusion that the tenant was not 'a most desirable tenant'.	Statement of opinion may be treated as a statement of fact (and so an actionable misrepresentation) where it is made by a person in a better position to know the truth—since there may be an implied representation that the statement is based on facts.
<b>Redgrave v Hurd</b> (CA)	P advertised for a partner in his solicitor's practice. D was told that the practice brought in about £300 a year and that the evidence could be seen in certain papers which P showed to D. However, D did not examine them. If he had he would have discovered that the income figure was incorrect. D entered into the contract and then discovered the truth. He sought rescission and damages for misrepresentation. CA held that D had relied on the misrepresentation since he did not know of any facts establishing that the statements were not true.	If a party fails to take the opportunity to check the accuracy of a representation, he may still be induced by it to enter the contract and have remedies in misrepresentation.  However, there may now (post- <b>Redgrave</b> ) be a reduction in any damages to account for his contributory negligence. This depends on the state of mind of the statement-maker and possibly also on the type of damages claim.
<b>Edgington v Fitzmaurice</b> (CA)	The directors of a company issued a request for loans, stating that the money raised would be used to complete alterations in the buildings of the company and to develop the company's trade. The real object of the loans was to pay off company debts. P claimed to have relied on these	A statement of future intention which is made knowing it is a false intention is a false

Case	Facts	Principle
	statements but also admitted to have mistakenly thought that there was security for the loan and that he would not have lent money if he had known that there was none. CA held that the misstatement of the company's intentions amounted to a misstatement of fact which had induced the contract.	statement of fact (misrepresenting the state of a man's mind).  The false statement of fact does not need to be the only reason inducing the contract as long as it was one of the reasons.
<b>Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd (HL)</b>	Purchase of shares in a company as a result of a fraudulent misrepresentation. HL held that the measure of damages would normally be based on the difference between the price paid for the shares and their market value at the date of the contract to purchase. However, it was later discovered that the company had been the victim of a serious fraud by a third party so that the real value of the shares at the time of purchase was in fact much less. Since the purchasers were 'locked into' the transaction as a result of the fraudulent misrepresentation, HL allowed recovery of this full loss.	Measure of damages in tort of deceit: all direct loss so that if the fraud locks the innocent party into the transaction, he may recover for his losses down to the point of sale or judgment.
<b>East v Maurer (CA)</b>	Ps bought one of D's hair salons as a result of a fraudulent representation by D that he had no intention of working in his other nearby salon, except in emergencies. D continued to work full time at his other salon and this had an adverse effect on Ps' business. They sought their loss of profit. CA held that they could recover lost profits on a tortious basis as a direct loss flowing from the fraudulent inducement. This was calculated as the profit they might have made had the representation not been made at all and they had bought another hairdressing business for a similar sum.	Loss of profits can be recovered in a claim based on the tort of deceit but on a tortious, not a contractual, basis.

## Exam questions

### Problem question

Peggy decides to sell her café. Jim is interested in purchasing Peggy's café and enters into negotiations with Peggy. During negotiations Peggy states:

- (i) that the café has a net profit of £30,000 per year (when in fact it has a gross profit of £30,000 per year). Jim was provided with the accounts for the café but did not bother to look at them;

## 9. Misrepresentation

---

- (ii) that the café is 'the most trendy in town';
- (iii) that there would be no need for planning permission if Jim wished to extend the café (which was incorrect).

Jim agreed to buy the café for £200,000 and the written contract, which contained an entire agreement clause, made no mention of the above statements. The purchase has been a disaster and Jim wishes to know whether or not he has any claim against Peggy in misrepresentation.

**Head to the Outline Answers** <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-9-outline-answers-to-essay-questions?options=showName> **section of the online resources for help with this question.**

### Essay question

---

Critically discuss the operation of the **Misrepresentation Act 1967, s. 2(1)**.

### Online Resources

---

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-9-outline-answers-to-essay-questions?options=showName>
- Interactive key cases <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-9-interactive-key-cases?options=showName>
- Multiple-choice questions <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-9-multiple-choice-questions?options=showName>

You can also find an interactive glossary <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-interactive-glossary?options=showName> on our online resources.

Additionally, to help you focus your revision, there is also a diagnostic test <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-diagnostic-test?options=showName> available. For general advice on your revision and exam technique, you can listen to our podcast <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/lawrevision-advice-on-revision-and-exam-technique-audio-podcast?options=showName>, or alternatively, you can access the transcript here <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/lawrevision-advice-on-revision-and-exam-technique-podcast-transcript?options=showName>.

© James Devenney & Adam Shaw-Mellors 2024

### Related Books

View the Essential Cases in contract law

### Related Links

Test yourself: Multiple choice questions with instant feedback [\\_<https://learninglink.oup.com/access/content/poole-devenney-shaw-mellors-concentrate5e-student-resources/poole-devenney-shaw-mellors-concentrate5e-diagnostic-test>](https://learninglink.oup.com/access/content/poole-devenney-shaw-mellors-concentrate5e-student-resources/poole-devenney-shaw-mellors-concentrate5e-diagnostic-test)

### Find This Title

In the OUP print catalogue [\\_<https://global.oup.com/academic/product/9780198904618>](https://global.oup.com/academic/product/9780198904618)