



Concentrate Questions and Answers Contract Law: Law Q&A Revision and Study Guide (3rd edn)

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6. Misrepresentation

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Abstract

The *Concentrate Questions and Answers* series offers the best preparation for tackling exam questions. Each book includes typical questions, answer plans and suggested answers, author commentary, and other features. Misrepresentation is defined as a false statement of fact, made pre-contractually, which is intended to induce the representee to enter into a contract and which has that effect. If an actionable misrepresentation is found to exist a court will then need to consider the available remedies. This chapter considers the following issues relevant to answering any problem question on misrepresentation. Has there been a false statement of fact? Is there evidence of inducement? What type of misrepresentation has potentially been made? What remedies are potentially available? Has liability for misrepresentation been effectively excluded? Has there been a breach of contract?

Keywords: contract law, misrepresentation, false statements, fraud, innocence, negligence, breach of contract, exclusion

Are you ready?

In order to attempt the questions in this chapter you must have covered the following areas in your revision:

- The development of the concept of misrepresentation;
- The interaction of the law of misrepresentation with remedies for breach of contract;

- The definition of an actionable misrepresentation as an unambiguous (incorrect) statement of fact/law addressed to the party misled and which induces that party to enter into a contract;
- What constitutes a statement of fact;
- When statements of opinion and statements of intention might constitute actionable misrepresentations;
- When silence or conduct may constitute actionable misrepresentation;
- Meaning of inducement;
- The types of misrepresentation and the available remedies. Remedies derive from both statute and common law in this area, so you will usually need to address both.

Key debates

Debate: whether the law of England and Wales should adopt a general duty of disclosure.

The law of England and Wales generally does not recognize a duty of disclosure in contractual negotiations; however, might it be preferable to follow those European systems which impose, for example, a pre-contractual duty of good faith (note also the **Consumer Protection from Unfair Trading Regulations 2008** which, to some extent, now regulate misleading omissions)?

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Debate: whether the complex situation regarding the remedy of damages for misrepresentation needs reform.

The overlap between misrepresentation and breach of contract means it can be worth considering these two areas together, for while damages in contract often focus on loss of bargain, damages for misrepresentation are usually based on reliance losses (and it depends on the precise facts as to which measure will yield the greatest damages). In addition, there are advantages to suing under **s. 2(1) of the Misrepresentation Act 1967**, where applicable, as opposed to pursuing a breach of contract action.

Question 1

Watson Summers, a well-known singer, decides to use the Biztek Concert Hall (BCH) as the first venue in his 'Round UK Music Tour'. During negotiations the BCH Manager, Jim, informs Watson that 'the hall will hold 3,000 people ... [and] ... the acoustics are suitable for the performance of your musical repertoire'.

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Watson's concert is sold out. However, only 2,500 are admitted on the instructions of the local police, and the acoustics are so bad that a large percentage of the audience demands its money back.

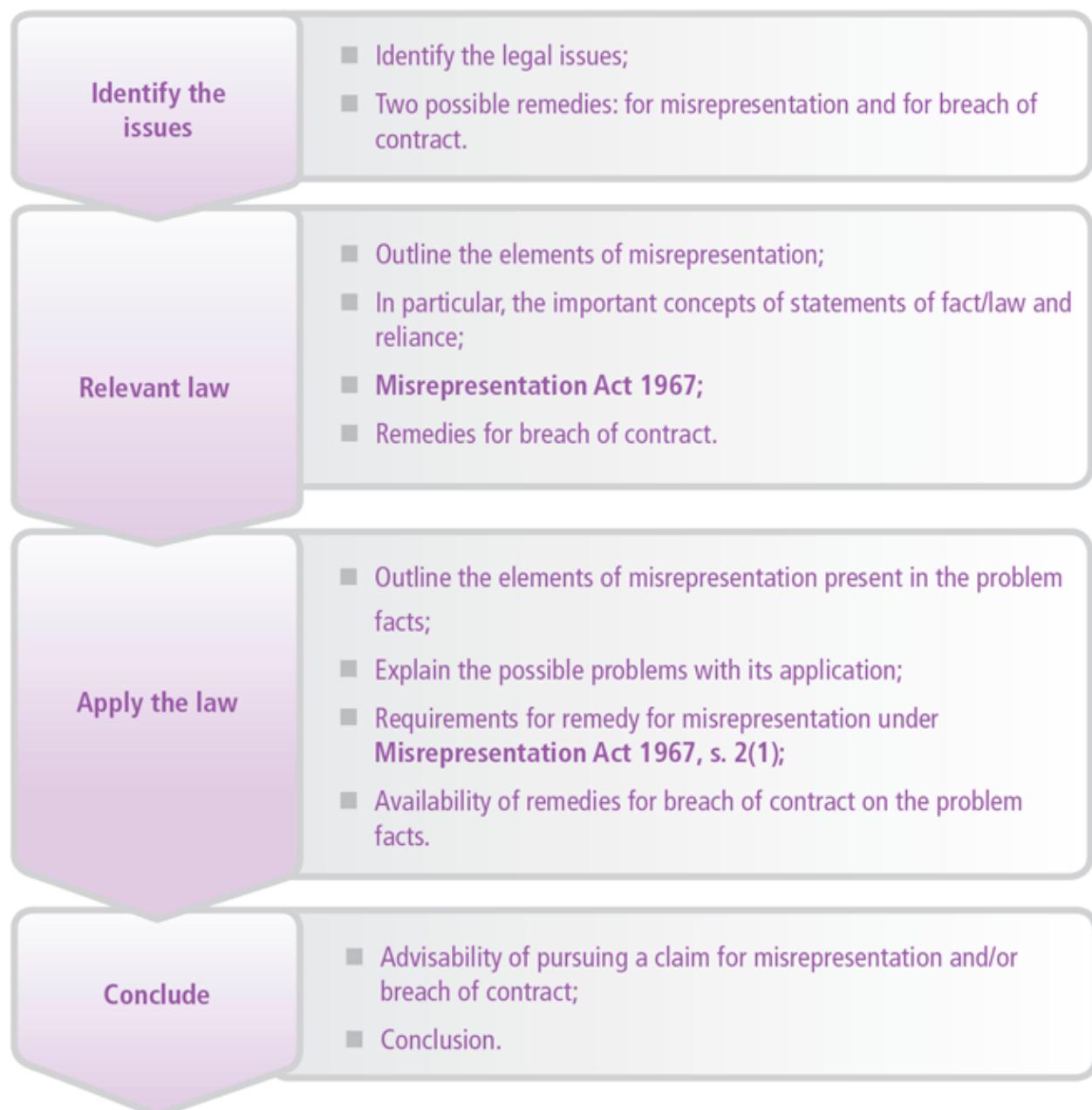
The adverse media publicity affects ticket sales for the remainder of Watson's UK tour.

Advise the parties.

Caution!

- Use the IRAC method to demonstrate the relevant law and how it applies to the facts.
- If any statements arguably constitute contractual terms, consider remedies for breach of contract.
- When asked to 'advise the parties', advise *all* parties.
- Be selective: the examiner does not want you to write everything you know about misrepresentation; ensure your answer is relevant to the question.

Diagram answer plan



Suggested answer

Watson will need advice on any possible remedies in misrepresentation and/or for breach of contract.¹ Misrepresentation can be broadly defined² as a false statement of fact/law made pre-contractually by one party (the representor) with a view to inducing the other party (the representee) to enter into the contract. The statement must, it seems, have been intended to be acted upon and must *actually* induce the other party to enter the contract.

¹ Answers to problem questions do not need the same type of formal introduction as for an essay answer. Following the IRAC method, your opening paragraph should analyse the facts to identify the legal issues raised.

² Outline the principal elements of an actionable misrepresentation.

Did any of the pre-contractual statements made by Jim constitute statements of fact/law (as opposed to, for example, statements of opinion which are not generally actionable)? The first statement concerned the capacity of the hall.³ It does not appear that the statement was phrased as an opinion (see *Bisset v Wilkinson* [1927] AC 177 which presumes that opinions which prove to be unfounded are not considered false statements of ‘fact’); even if that was the case, it would be possible to argue that Jim is an expert and that the figure is presumably based upon facts known to him. For example, in *Smith v Land and House Property Corp.* (1884) 28 Ch D 7,⁴ the vendor described the sitting tenant as ‘desirable and a first class investment’. This constituted a misrepresentation as the only facts known to the vendor directly contradicted this statement.

³ Apply the law to the facts of the specific question throughout.

⁴ *Esso Petroleum Ltd v Mardon* [1976] QB 801 could also be considered here.

There is, however, a further difficulty. Technically, the capacity of the hall seems to be 3,000. Did Jim realize that this figure would be limited by the local police? If this was a common occurrence when concerts were held, Jim’s silence regarding the safety feature effectively distorts his original

statement, conveying the wrong impression to Watson. One could argue that the statement constitutes a half-truth and, therefore, amounts to a misstatement of fact (eg *Nottingham Patent & Brick Tile Co. v Butler* (1889) 16 QBD 778).

Jim also states that the ‘acoustics are suitable’ for the intended performance; a relatively vague and ambiguous comment. In *Scott v Hanson* (1829) 1 Russ & M 128, the description of land as being ‘uncommonly rich water meadow’ was held only to constitute a misrepresentation with reference to non-meadow land, rather than meadow that was of poor quality. Perhaps, as in the previous paragraph, Watson will need to show that Jim had no facts upon which to base his statement (eg *Smith v Land and House Property*) in which case he is misrepresenting the state of his mind. As Bowen LJ put it in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483: ‘The state of a man’s mind is as much a fact as the state of his digestion.’⁵ There is also some precedent for suggesting that an actionable misrepresentation may lie where an opinion is stated and the representor is the only person to be in a position to know the true facts (*Brown v Raphael* [1958] Ch 636).

Assuming that a false statement of fact is established, was it intended to induce Watson to enter into the contract and was it material? If so, did Watson actually rely upon it in this way?⁶ It seems, although it is not without controversy, that there is an objective element to inducement (see *Sharland v Sharland* [2015] UKSC 60): would a reasonable person have considered the statement to be a material factor? Here, the answer is yes. The capacity of the hall will influence the hire charge. The standard of acoustics will determine suitability for its intended use.

⁵ Quotations are not essential to this answer, but can attract additional marks if relevant to the points you make.

⁶ Explain the legal rules relating to the concepts of materiality and reliance and apply to the question.

☛ The next important question is whether Watson *actually* relied upon the statement in entering into the contract.⁷ The facts suggest that Watson had already decided to hire the concert hall before negotiations began. However, if Jim had proposed a much greater hire charge or the capacity of the hall was embarrassingly low or the acoustics were only considered suitable for the performance of classical opera, Watson would have presumably withdrawn. In such a case, arguably Watson can demonstrate some form of potential reliance (although care must be exercised as in *BV Nederlandse Industrie Van Eiproducten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596 the view was expressed that in cases of non-fraudulent misrepresentation the ‘but for’ test still needs to be satisfied).

⁷ Addresses one of the essential questions raised in relation to misrepresentation.

The remedies for misrepresentation will be determined by the state of mind of the misrepresentor at the time of the misrepresentation.⁸ Traditionally, fraud has attracted the widest remedies for the representee but the burden of proof is a heavy one to discharge (eg *Derry v Peek (1889) 14 App Cas 337*). Also, in the light of case law concerning s. 2(1) of the Misrepresentation Act 1967 (MA 1967),⁹ it is unlikely that Watson would be advised to pursue a claim in fraud unless he had firm evidence that Jim was intentionally lying.

⁸ To determine an appropriate remedy, first establish the type of misrepresentation in question.

⁹ Spell out the name of a statute the first time you use it in your answer; you can then use abbreviations like MA 1967.

Alternatively, if a duty of care exists between the parties (and this will depend on whether there was an assumption of responsibility by Jim, see *Steel v NRAM Ltd (formerly NRAM Plc) [2018] UKSC 13*) Watson might consider suing in the tort of negligent misstatement (eg *Esso Petroleum Co. Ltd v Mardon [1976] QB 801*). Here, Watson must affirmatively establish negligence on the part of Jim in making those pre-contractual statements. However, as we shall see, in view of s. 2(1) of the 1967 Act, it seems pointless to pursue this line of argument.¹⁰

¹⁰ Such statements can indicate confidence to an examiner.

Section 2(1) of the MA 1967 reverses the burden of proof, requiring Jim to prove that he had ‘reasonable grounds’ for his belief. This may be difficult to establish, especially in the light of *Howard Marine & Dredging Co. Ltd v A Ogden & Sons (Excavations) Ltd [1978] QB 574*, where the Court of Appeal stated that a party had an ‘absolute obligation’ not to state facts which he had no reasonable grounds for believing were true. As honest belief is insufficient, it may be difficult for Jim to argue that, for example, he was not expected to know of the theatre’s capacity when negotiating the hire charge. Perhaps his only escape route would be if the capacity of the hall had never previously been

restricted by police measures and the acoustics had always been found to be suitable at previous concerts of a similar nature. If not, the possibility of innocent misrepresentation is unlikely, as it generally refers to false statements made without provable fault.

Rescission is the principal remedy for misrepresentation,¹¹ subject to the standard bars such as *restitutio in integrum* being impossible. ↗ As the concert has already been performed, it may be that rescission is no longer available.

¹¹ State the legal rule, and apply it to the facts of the question.

Regarding the remedy of damages for misrepresentation,¹² Watson would be best advised to pursue his claim under s. 2(1) of the 1967 Act. Case law indicates that damages will be assessed in the tort of deceit (eg *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297). Watson will be entitled to reclaim all those damages which directly flow from his reliance upon the misrepresentation, such as the losses sustained in returning money to dissatisfied customers. This might also include any subsequent losses incurred on the remainder of the tour, resulting from the adverse media publicity, as well as any personal distress and anxiety suffered by Watson (see, generally, *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; *Archer v Brown*).

¹² Do not assume that there will be only one possible remedy available on the facts. Explain the possibility of an alternative remedy, apply the law and draw a conclusion.

Watson could consider the alternative possibility of claiming damages for breach of contract.¹³ The test for determining whether a pre-contractual statement has become part of the contract is one of objective intent (eg *Heilbut, Symons & Co. v Buckleton* [1913] AC 30). The courts have developed a variety of guidelines as aids to identifying the requisite degree of contractual intent. For example, Watson could argue that Jim possessed specialist knowledge (eg *Oscar Chess Ltd v Williams* [1957] 1 WLR 370), that he (Watson) attached considerable importance to the statement (eg *Bannerman v White* (1861) 10 CB (NS) 844), and that he was not encouraged by Jim to verify the statement. Jim would point out that the statement was not incorporated into the written contract (eg *Birch v Paramount Estates (Liverpool) Ltd* (1956) 16 EG 396), that Watson's previous experience of arranging musical venues should be taken into account as it created an equality of expertise between the parties (see generally *Bentley (Dick) Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 WLR 623), and, finally, that there was no evidence of a collateral contract as Watson did not place any specific emphasis on Jim's statement during the negotiations (unlike in *City and Westminster Properties* (1934)

Ltd v Mudd [1959] Ch 129. The decision could go either way but it does seem that the statement lies at the heart of the hire contract and therefore would be intended to have some legal effect, especially with regard to the hall's capacity which is couched in a clear and definite manner.

- 13** Discuss this alternative briefly: keep the focus of your answer on the law relating to misrepresentation.

Looking for extra marks?

- When discussing rescission, additional marks could be gained by noting that there may be a trend to introduce more flexibility in the *restitutio in integrum* principle (see, for example, *Halpern v Halpern* [2007] EWCA Civ 291).
- It is unlikely that an examiner would expect an extended analysis of damages for breach of contract in a problem question so clearly based on misrepresentation, but a brief explanation may achieve extra marks.

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Question 2

Case law suggests that, where there is a choice, litigants are generally better advised to pursue a claim in misrepresentation rather than an action for breach of contract.

Discuss.

Caution!

- Use the PEA structure for essays: introduce the Point (this can be your opinion); add the Evidence to support your point (e.g. indicate from what/where you have drawn your opinion); offer your Analysis (explain how and why this evidence supports your point). Do not forget to explain how the point helps to answer the question.



The general remedies for breach of contract are termination and/or damages, whereas in misrepresentation the general remedies are rescission and/or damages. Your answer should compare: (a) the availability of rescission and termination; and (b) the basis upon which damages are assessed in misrepresentation and for breach of contract.

Diagram answer plan

Outline the general remedies for breach of contract and for misrepresentation.

Compare the availability of rescission and termination.

Compare the basis upon which damages are assessed for misrepresentation and breach of contract.

Address the impact of the **Misrepresentation Act 1967**.

Retain a focus on case law in the explanation and analysis.

Consider whether the evidence in the essay points to a preferable course of action for claimants.

Conclusion.

Suggested answer

This question requires a general comparison of the remedies available for misrepresentation and for breach of contract, especially with a specific focus upon the decisions in which damages under s. 2(1) of the **Misrepresentation Act 1967 (MA 1967)** have been equated with the expansive damages available for an action in deceit. The general remedies for breach of contract are termination and/or damages, whereas in misrepresentation the general remedies are rescission and/or damages. This

essay will therefore compare¹ the availability of rescission and termination, and the basis upon which damages are assessed in misrepresentation and for breach of contract, to reach a conclusion on which course of action litigants could best be advised to pursue.²

¹ Introduces the PEA structure, showing awareness that the question calls for a general comparison of the remedies available for misrepresentation and for breach of contract.

² Clear focus upon decisions in which damages under s. 2(1) of the MA 1967 have been equated with those available for an action in deceit.

Rescission v Repudiation

In relation to rescission as opposed to termination,³ a victim of a breach of contract does not have an automatic right to terminate the contract. The right of termination generally arises only in two circumstances. First, where it is established that the term which has been broken constitutes either a condition or, following the decision in *Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, an innominate term, breach of which has deprived the victim of a substantial part of the intended benefit under the contract. Secondly, where a party commits an anticipatory breach by, for example, intimating by words or conduct his/her refusal to perform particular contractual obligations when they fall due (see, generally, *Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd* [1980] 1 WLR 277). If neither of these situations applies, the victim of a breach will be left with a remedy in damages.⁴

³ First address the difference between repudiation and rescission. Some examiners dislike subheadings in essays, so you might choose to avoid this style.

⁴ This sentence clearly sets out the relationship between termination and damages.

The law on misrepresentation does not really consider the relative importance of pre-contractual statements. Provided a false statement of fact/law has been made, the representee will usually have the right to claim rescission and thereby avoid the contract. The representee need only establish that the statement induced him/her to enter the contract; and it need not be the only factor (see *Edgington v Fitzmaurice* (1885) 29 Ch D 459). This right is available for all types of misrepresentation—innocent, negligent, and fraudulent. However, the right to rescission can be lost on certain grounds:

by affirmation of the contract (see *Long v Lloyd* [1958] 1 WLR 753); by lapse of time (see *Leaf v International Galleries* [1950] 2 KB 86 although note *Salt v Stratstone Specialist Limited T/A Stratstone Cadillac Newcastle* [2015] EWCA Civ 745); where third parties have acquired rights in the subject matter prior to avoidance of the contract (see *White v Garden* (1851) 10 CB 919); and where the parties cannot be restored substantially to their original positions (see *Clarke v Dickson* (1858) EB & E 148).

Damages

Whereas some contractual remedies depend upon whether the term which the defendant has broken is a condition, innominate term or a warranty, in misrepresentation it is the culpability of the defendant which will determine some of the claimant's remedies. In misrepresentation, generally damages⁵ will be assessed on a tortious basis, the aim broadly being to place the victim in the position he/she would have occupied had the wrong (the actionable misrepresentation) not taken place. This normally means that the court will seek to place the victim in the position they occupied before entering into the contract by, for example, compensating the victim for losses incurred as a result of entering into the contract. This 'compensation for reliance losses' does not take account of the profit which the victim was expecting to derive from a proper performance of the contract in question. Conversely, damages for breach of contract may include such profits and, indeed, incorporate wasted expenditure under the heading of 'loss of bargain' (where the claimant made a 'good' bargain in the sense that they would have recouped this expenditure if the contract had been duly performed). Here, the usual purpose of damages is to put the claimant, so far as possible, in the position he/she would have occupied had the contract in question been properly performed (see *Robinson v Harman* (1848) 1 Ex 850 at 855), although a court, in appropriate circumstances, may just focus on a victim's reliance or restitution interests (see *Anglia Television Ltd v Reed* [1972] 1 QB 60).

⁵ Address the basis for awarding damages for breach of contract and for misrepresentation.

Prior to the passing of the MA 1967 damages were generally only available for a fraudulent misrepresentation—and allegations of fraud are extremely difficult to substantiate. Damages were based on the tort of deceit, the representor being liable for all the losses flowing directly from his/her fraud even though such losses might not have been reasonably foreseeable (see *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769). Moreover, apart from pecuniary loss the courts have permitted the recovery of various types of non-pecuniary losses, including damages for pain and suffering (see *Burrows v Rhodes* [1899] 1 QB 816), physical inconvenience, and discomfort (see *Mafo v Adams* [1970] 1 QB 548) and mental disquiet (see *Archer v Brown* [1985] QB 401; *Kinch v Rosling* [2009] EWHC 286 (QB), [2009] All ER (D) 54). Contrast this with the pre-1967 position for non-fraudulent misrepresentations where rescission was the primary remedy, if available, and

available monetary awards took the very limited form of an ‘indemnity’ (see *Whittington v Seale-Hayne* (1900) 82 LT 49). At that time, an action for breach of contract contrasted favourably with that in misrepresentation. However, the passing of the MA 1967 has changed this in at least four ways.⁶

⁶ This point makes clear that evidence will be offered to show the advantages of suing under s. 2(1) of the MA 1967.

First, damages are now available for all non-innocent misrepresentations, innocence in this context proving difficult to establish (see *Howard Marine & Dredging Co. Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574). In particular, the burden of proof is reversed under s. 2(1) of the 1967 Act, requiring the representor to prove that he/she had reasonable grounds to believe, and did believe up to the time the contract was made, that the facts represented were true.

Secondly, it is currently assumed that the measure of damages under s. 2(1) is based on the tort of deceit. This results from the peculiarity of the wording employed in the subsection (although certain *obiter* comments in *Smith New Court* might suggest a level of disquiet with this conclusion as do the more recent comments in *Hodgson v Creative Consumer Finance Ltd* [2021] EWHC 2167 (Comm)). Specifically, if the representor would have been liable in damages had the misrepresentation been made fraudulently, ‘that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently’ provided objective ‘innocence’ cannot be proven. Thus, unlike damages for breach of contract which are limited by the reasonable contemplation of the parties (see *Hadley v Baxendale* (1854) 9 Exch 341), damages under s. 2(1) follow the test laid down in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158. These damages are based on a direct consequence test in which reasonable foreseeability seems to have no application, an approach adopted in such cases as *Naughton v O'Callaghan* [1990] 3 All ER 191; *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297; and *Cemp v Dentsply R&D Corp. (No. 2)* [1991] 34 EG 62.

Thirdly, a further effect of this is that many types of non-pecuniary loss which are not normally available for breach of contract can be recovered in the tort of deceit and also by using s. 2(1) of the 1967 Act (eg anxiety and stress although compare at *Hodgson v Creative Consumer Finance Ltd* [2021] EWHC 2167 (Comm) at [159]).

Fourthly, two Court of Appeal decisions have arguably even blurred the distinction between loss of bargain damages in contract and reliance losses in tort.⁷ In *East v Maurer* [1991] 1 WLR 461 M owned two successful hairdressing salons. E bought one of them in 1979, being induced by M’s representation that M had no intention of working in the other salon. In fact, M continued to work in the other salon, enticing many customers away from E’s salon. After several abortive attempts, E sold out several years later at a considerable loss. The court held that a fraudulent misrepresentation had been made and, among other things, awarded E a sum in respect of lost profits. More specifically,

this sum reflected the profits which E would have derived from the purchase of a *different* salon if she had not been induced to buy M's salon. This measure seems very similar to awarding damages for loss of bargain (although see *McCullagh v Lane Fox & Partners* [1994] 1 EGLR 48 and [1996] PNLR 205) and reinforces the attraction of bringing an action under s. 2(1) of the MA 1967, which employs the same measure of damages, as opposed to suing for breach of contract. In *Clef Aquitaine Sarl v Laporte Materials (Barrow) Ltd* [2000] 3 All ER 493, the claimant was allowed to argue that a different and more favourable transaction would have been entered into but for the fraud, with his recoverable loss being measured on that basis (see also *Parabola Investments Ltd v Browallia* [2010] EWCA Civ 486, [2011] QB 477; *4 Eng Ltd v Harper* [2009] EWHC 901 (Ch), [2009] Ch 91). Against this must be contrasted the problems of recovering any damages for purely innocent misrepresentations, the possible bars to the remedy of rescission, including the exercise of judicial discretion under s. 2(2) of the 1967 Act (see *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016) and the general emphasis on reliance losses in tort.

⁷ The essay title requires a focus on case law.

In conclusion,⁸ case law has suggested that the representee must think carefully before choosing which action to pursue where a pre-contractual statement constitutes *both* a breach of a contract and a misrepresentation. The use of a deceit measure for all non-innocent misrepresentations, with its disregard of any foreseeability criterion, the potentially enhanced recovery of non-pecuniary losses, and even the award of quasi 'loss of bargain' damages, is clearly advantageous in many situations.

⁸ Offer your own opinion when writing a conclusion. Conclusions can reinforce how your points answer the essay question.

Looking for extra marks?

Additional marks might be gained for addressing the right to rescind for misrepresentation in more detail:

- s. 1(a) of the 1967 Act permits the right of rescission if the representation became part of the contract (prior to the 1967 Act a representee lost the right to rescind in such circumstances).



s. 2(2) of the 1967 Act gives the court discretion, with non-fraudulent misrepresentations, to award damages in lieu of rescission, taking account of the equitable considerations affecting *both* parties (see also *SK Shipping Europe Limited v Capital VLCC 3 Corp* [2022] EWCA Civ 231).

- A misrepresentation renders a contract voidable (provided the representee elects to rescind) so the parties are restored to the positions they occupied before the contract was entered into (see *Abram SS Co. v Westville Shipping Co. Ltd* [1923] AC 773).

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Question 3

Edward decides to invest his savings in the purchase of a small post office. He consults *Postman's Gazette* and is particularly interested in one advertisement which reads: 'Post office to the community —the only lifeline for the elderly. Net profits for the current year = £25,000. A steal at £100,000.' Edward speaks to the owner, Cameron, and is offered the opportunity to view the current accounts, which he politely declines. Still uncertain as to whether he should purchase the business, he is convinced when Cameron says: 'I'm finally retiring to sunny Spain.'

Two months after purchasing the post office, Edward discovers that it had only made a profit of £25,000 in the previous year owing to a one-off 'Rural Aid Grant' of £15,000 from the district council, while a nearby grocery store has recently opened up a small post office counter and is proving particularly attractive to the more elderly members of the local community. Finally, Cameron has decided to stay in the village and set up a small corner shop after being informed by his doctor that he is displaying early signs of skin cancer, which can only be aggravated by living in a hot climate.

Edward tries to make a success of the post office, even building a small extension so that he could sell local handicrafts. Unfortunately, this new venture turns out to be a disaster and Edward loses all his savings.

Advise Edward.

Caution!

- As in Question 1, address whether or not there is a false statement of fact and inducement, as well as the type of misrepresentation and remedies. Think also whether rescission may be barred and what method will be used to assess damages.



Remember: if any pre-contractual statements were incorporated into the contract, you may have to consider the possibility of breach of contract. Keep a focus on misrepresentation by indicating that you are aware of this possibility without going into much detail.

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Diagram answer plan

Identify the issues

- Identify the legal issues;
- Two possible claims: for misrepresentation and for breach of contract.

Relevant law

- Outline the elements of misrepresentation: false statement of fact/ law, materiality, and reliance;
- **Misrepresentation Act 1967;**
- Remedies for breach of contract.

Apply the law

- Outline the elements of misrepresentation present in the problem facts;
- Explain the possible problems with its application;
- Requirements for remedies for misrepresentation under **Misrepresentation Act 1967, s. 2(1);**
- Availability of remedies for breach of contract on the problem facts?

Conclude

- Advisability of pursuing a claim for misrepresentation and/or breach of contract;
- Conclusion.

Suggested answer

Edward's first possible course of action is to claim that the contract is voidable for misrepresentation. For our purposes, an actionable misrepresentation can be defined as a false statement of fact/law, made pre-contractually by one party (representor), with a view to inducing the other party (representee) to enter into the contract. The statement must be intended, it seems, to be acted upon and must *actually* induce the other party to enter the contract.

In deciding whether any pre-contractual false statements of fact/law have been made it is probably best to separate out Cameron's comments¹ as follows: 'Post office to the community—the only lifeline for the elderly' ... 'Net profits for the current year = £25,000. A steal at £100,000' ... 'I'm finally retiring to sunny Spain.' With regard to the first of those comments, how clear is this statement? For example, what is the meaning of 'lifeline'? On the one hand, it is arguable that the statement is sufficiently vague to make the establishment of an underlying 'fact' problematic (see eg *Dimmock v Hallett (1866)* 2 Ch App 21 where use of the words 'fertile' and 'improvable' was considered too vague to constitute 'statements of fact'). On the other hand, Edward might counter this by drawing the court's attention to the post-office conversion within the other village shop as this seems to represent an alternative 'lifeline'. If the statement was accurate at the time of purchase Edward will probably fail, whereas, if the conversion took place before Edward bought the post office (or if Cameron became aware of the planned conversion prior to the sale), Cameron may have a duty to alert Edward to this change of circumstances (see *With v O'Flanagan [1936]* Ch 575). On the facts stated it appears that Edward will struggle to convince a court on this point.

¹ Address whether, during the preliminary negotiations, Cameron made any false statements of fact, or were all his comments mere puffs/opinions?

Edward's next argument concerns the profit achieved by the post office in the previous year. Here, again, the statement appears accurate, but Edward will argue that it constituted a half-truth² as it gave the impression that the post office generated that level of profit through normal retailing activity, rather than relying on a 'one-off' grant. Reference might be made to *Atlantic Estates plc v Ezekiel [1991]* 35 EG 118 where the impression given in auction particulars was that a wine bar (for sale) was a thriving business, whereas its alcohol licence had recently been revoked. On balance, Edward's argument appears reasonably persuasive.

² Where Cameron remained 'silent' on particular issues, could Edward claim misrepresentation based on a 'half-truth' or a 'change of circumstances'?

Finally, Cameron informed Edward of his plans to retire to ‘sunny Spain’. This represents a statement of future conduct which is rarely actionable unless the representor knew at the time that he had no intention of carrying out his plans (see *Edgington v Fitzmaurice* (1885) 29 Ch D 459). On the facts, this is difficult to prove unless Cameron was already aware of his skin cancer before he sold his post office to Edward.

Assuming Edward succeeds in establishing a false statement of fact (eg a half-truth regarding last year’s profit), he must convince a court that it induced him to purchase the post office,³ which on the facts he should be able to achieve. All of Cameron’s statements were communicated to Edward, there is no evidence that Edward ignored any of those statements, and each of those statements had the capacity to influence the judgement of a reasonable person when purchasing the business (especially the previous level of profitability and/or existence of local competition). It is true that Edward was given the opportunity to scrutinize the accounts but, as he did not view them, this simply represents constructive knowledge of the true position which is insufficient to disprove Edward’s reliance on Cameron’s statement(s) (see *Redgrave v Hurd* (1881) 20 Ch D 1).

³ Apply the law: establish whether any ‘statements of fact’ have induced Edward to enter into the contract.

The next question is what type of misrepresentation Cameron has made.⁴ Focusing on Cameron’s failure to explain fully the constituents of last year’s profit figure, Edward would presumably argue that Cameron had been guilty of fraudulent misrepresentation. Fraud was defined in *Derry v Peek* (1889) 14 App Cas 337 as making a ‘false statement’: (a) knowingly; or (b) without belief in its truth; or (c) recklessly, careless whether it be true or false. The litmus test is that of an absence of honest belief, subjectively assessed (see *Akerhielm v Rolf De Mare* [1959] AC 789). Cameron will presumably plead his innocence by arguing that he had no *intention* to mislead Edward (although an ‘intention to deceive’ is not an additional requirement of the tort of deceit, see *Ludsin Overseas Ltd v Eco3 Capital Ltd* [2013] EWCA Civ 413), and that his statement of last year’s profit was accurate. The court may need some convincing on this point but, if Cameron was successful, it would simply transfer judicial attention on to s. 2(1) of the **Misrepresentation Act 1967 (MA 1967)**. That subsection primarily affords Edward the same level of damages by treating any misrepresentation by Cameron ‘as if’ it had been made fraudulently, unless the misrepresentor had ‘reasonable’ grounds for making that statement. Under s. 2(1) the onus of proof rests with Cameron. The Court of Appeal decision in *Howard Marine & Dredging Co. Ltd v Ogden & Sons Ltd* [1978] QB 574 demonstrates the difficulty that Cameron may face in rebutting the statutory presumption as it interpreted s. 2(1) as imposing an ‘absolute obligation’ on the misrepresentor not to state facts of which he had no reasonable grounds for believing were true. Cameron will struggle on this point. Nor will his task necessarily be easier with regard to the other possible misrepresentations; for example, if he knew of local competition, then he would have no ‘reasonable grounds’ for using the words ‘only lifeline’.

4 Identify what type of misrepresentation, if any, Cameron was guilty of making.

If successful,⁵ the remedies available to Edward will be rescission and/or damages. Common law bars to rescission include: lapse of time, affirmation, impossibility to restore the parties to their original positions (ie *restitutio in integrum*), and third-party rights acquired over the subject matter of the contract prior to any attempted rescission. Here, as Edward continued to run the business after discovering the true state of affairs, a court might refuse rescission on grounds of affirmation (see also *Leeds City Council v Barclays Bank Plc* [2021] EWHC 363 (Comm) at [165]). Failing that, rescission is likely to be refused as it will be difficult to return the parties to their original positions in the light of the physical structure of the post office having been altered by the building extension (and presumably the ↗ diversification into the sale of local handicraft products) as well as tax considerations, etc. (see *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573). It therefore seems that Edward must settle for damages only.

5 Note how this concluding section encompasses IRAC in one paragraph.

Damages under s. 2(1) of the MA 1967 are based on those awarded in the tort of deceit.⁶ The standard test of ‘reasonable foreseeability’ gives way to the ‘direct consequence’ test (see *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297) whereby a court awards the claimant all losses *directly* flowing from the misrepresentation, however unforeseeable those losses proved to be.⁷ Edward could receive damages under the following headings:⁸ (a) diminution in value (the difference between the contract price and the true value of the business)—whether the true value is estimated at the date of purchase or at a later date is subject to the guidance proffered by the House of Lords in *Smith New Court Securities v Scrimgeour Vickers* [1996] 4 All ER 769; and (b) consequential losses generated by reliance on the misrepresentation (eg Edward’s loss of personal savings, subject to the rules on double recovery). Edward may also consider the possibility of claiming ‘lost opportunity costs’ (see *East v Maurer* [1991] 2 QB 297) as he was deprived of the opportunity to use his original start-up capital to invest in a more profitable business. Indeed, following *4 Eng Ltd v Harper* [2008] EWHC 915 (Ch), [2009] Ch 91, it seems Edward will not even need to prove that there was some other profitable business that he was actively considering purchasing, in substitution for the post office.

6 Identify the types of losses for which Edward can be compensated.

7 Explain the rule.

8 Apply the rule by explaining the measure of damages Edward could recover.

Edward's alternative course of action is to sue Cameron for breach of contract,⁹ requiring proof that one of Cameron's pre-contractual statements constituted a term of the contract that had subsequently been broken. However, this is unlikely on the facts. Cameron's statements mainly appear in an advertisement, which, following *Partridge v Crittenden* [1968] 1 WLR 1204, are unlikely to form part of any 'offer' that Edward accepted when agreeing to purchase the post office. Also, it would be difficult for Edward to prove that the relevant statements—for example, 'a steal' or 'a lifeline'—contained a sufficient degree of objective intent to imbue them with a contractual status (see *Heilbut, Symons & Co. v Buckleton* [1913] AC 30). On that basis, it may be unlikely that a court will identify a specific breach of contract. However, if Edward was successful, his primary remedy would lie in damages. Termination of the contract, assuming the relevant term was viewed as a condition, would be unlikely as Edward continued trading after he had discovered the full extent of his problems and even extended the premises.

⁹ Indicates awareness of this possibility without going into much detail on the point.

Looking for extra marks?

■ When considering the possibility of claiming 'lost opportunity costs', although following *4 Eng Ltd v Harper* [2008] EWHC 915 (Ch), [2009] Ch 91, it seems Edward would not need to prove that there was another profitable business that he was actively considering purchasing, additional marks may be awarded for noting that under s. 2(1) of the MA 1967, as opposed to fraud, damages may be reduced by the court if it is of the opinion that the claimant had been contributorily negligent—see *Gran Gelato v Richcliff* [1992] 1 All ER 865.

Taking things further

■ Atiyah, P.S. and Treitel, G., 'Misrepresentation Act 1967' (1967) 30 MLR 369.

6. Misrepresentation

Addresses the effects of the **Misrepresentation Act 1967**.

- O'Sullivan, J., 'Rescission as a Self-Help Remedy: A Critical Analysis' (2000) 59 CLJ 509.

Questions whether rescission should be a court-ordered remedy rather than an act of the rescinding party.

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

Considers whether damages in cases under s. 2(1) of the Misrepresentation Act 1967 should be limited to losses resulting from the specific misrepresentation.

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