

THE UNIVERSITY OF HONG KONG
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LAW OF CONTRACT

MISREPRESENTATION

MASSIMO LANDO

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OUTLINE

- **What is misrepresentation**
- **Rescission:**
 - bars
 - damages in lieu
 - damages in addition
- **Exemption from liability**

MISINTERPRETATION: IN GENERAL

- **General idea—a party should not make false statements to induce another to make a contract**
- **General definition of misrepresentation:**
 - unambiguous false statement of fact or law
 - made to another
 - not made honestly or on reasonable grounds
 - that induces them to enter into a contract
- **Innocent (incl. negligent) v fraudulent:**
 - depends on state of mind (knowledge, recklessness)
 - affects availability of damages

MISREPRESENTATION: REMEDIES

- **Remedy in termination:**
 - term—repudiation only if serious breach
 - representation—rescission for all cases
- **Remedy in damages:**
 - term—forward-looking
 - representation—backward-looking
- **Availability of damages:**
 - Common law—only if fraudulent misrepresentation
 - Misrepresentation Ordinance (Cap. 284)—widens availability beyond fraud

STATEMENT:

TYPES OF STATEMENTS

- **Three different kinds of statements:**
 - if false statement is term of the contract—action and damages for breach
 - if false statement is representation—action and damages for misrepresentation
 - if false representation mere ‘puff’—no action and no damages

STATEMENT: TERMS v REPRESENTATIONS

- **Depends on parties' intention:**
 - objective test (*Oscar Chess Ltd v Williams* [1957] 1 WLR 370)
 - indices:
 - importance (*Bannerman v White* (1861) 10 CB NS 844)
 - special knowledge (*Dick Bentley v Harold Smith* [1965] 1 WLR 623)
 - requests for verification (*Ecay v Godfrey* (1947) 80 Lloyd's Rep 286)

STATEMENT: ACTIONABLE STATEMENTS

- **Actionable statements:**
 - statements of fact
 - statements of law
 - statements of intention
 - statements of opinion
- **Non-actionable statements :**
 - puffs

STATEMENT:

STATEMENTS OF FACT AND LAW

- **Statements of fact:**
 - by words or conduct—*Walters v Morgan* (1861) 3 DF & J 718 (nod, wink, smile, etc)
 - may be implied—*Spice Girls v Aprilia World Service* [2002] EWCA Civ 15
- **Statements of law—*Pankhania v Hackney London Borough Council* [2002] NPC 123**

STATEMENT:

STATEMENTS OF INTENTION

- **Statements of intention implies a statement of fact if it corresponds to maker's state of mind**
 - honest statement—*Kleinwort Benson Ltd v Malaysian Mining Corporation* [1989] 1 WLR 379 (representation on company policy)
 - dishonest statement—*Edgington v Fitzmaurice* (1885) 24 Ch D 459 (purpose of raising money)

STATEMENT: STATEMENTS OF OPINION

- **General rule**—not statements of fact and thus not actionable
- **Exceptions**—actionable if:
 - dishonest
 - no reasonable basis for opinion:
 - court implies statement of fact that maker has reasonable basis for opinion (*Brown v Raphael* (1958) Ch 636)
 - but not actionable where parties have same knowledge (*Bisset v Wilkinson* [1927] AC 177)

STATEMENT: PUFFS

- **Exaggerated statements—examples:**
 - advertising
 - laudatory statements by vendor
- **Actionable?**
 - general rule—not actionable because unreasonable to rely on them
 - exception—actionable if overlap with statements of opinion (*Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256)

STATEMENT: SILENCE

- **No general duty of disclosure (*Keates v The Earl of Cadogan* (1851) 10 CB 591)—why?**
 - promote self-interest
 - uncertainty as to meaning of silence
 - floodgates
- **Exceptions:**
 - continuing statements of fact + knowledge of change (*With v O'Flanagan* [1936] Ch 575)
 - half-truths (*Clinicare Ltd v Orchard Homes & Developments Ltd* [2004] EWHC 1694)
 - special relationships—insurance, fiduciary duties

MADE TO THE OTHER PARTY

- **No chain of statements**
- **Representation made to:**
 - other party directly
 - third person with intention that it reaches other party—*Smith v Eric S Bush* [1990] 1 AC 831

INDUCEMENT: TEST

- **General test—“but for”** (*Assicurazioni Generali v Arab Insurance* [2002] EWCA Civ 1642)
- **Must representee make inquiries?**
 - No—*Redgrave v Hurd* (1881) 20 Ch D 1
 - Reasonable to discover truth—*Smith v Eric S Bush* [1990] 1 AC 831
 - Contributory negligence
- **Test for fraudulent misrepresentation—“material influence” of representation** (*Zurich Insurance v Hayward* [2016] UKSC 48)

INDUCEMENT: MATERIALITY

- **General idea—statement must have been important for it to count as inducement**
 - if statement material—inducement presumed
 - if statement not material—claimant to prove inducement (*Museprime Properties Ltd v Adhill Properties Ltd* (1991) 61 P & CR 111)
- **Exception—fraudulent misrepresentation (*Smith v Kay* (1859) 7 HLC 750)**

RESCISSION: OVERVIEW

- **Contracts affected by misrepresentation are voidable (≠ void)**
- **Self-help remedy**
- **Equitable remedy—discretionary**
- **Similar to termination for breach—both bring contract to an end BUT**
- **Different from termination for breach:**
 - **rescission terminates *ab initio***
 - **termination for breach terminates only prospectively**
- **Rescission takes effect when communicated—timing key in transfer of property to third parties**

BARS TO RESCISSION: IN GENERAL

- **Developed at common law**
- **s2 Misrepresentation Ordinance (Cap. 284) removes two bars to rescission:**
 - where misrepresentation becomes term
 - where contract is performed
- **Remaining bars:**
 - impossibility of mutual restitution
 - affirmation
 - lapse of time
 - Third-party rights
 - inequity

BARS TO RESCISSION: IMPOSSIBILITY OF MUTUAL RESTITUTION

- **Contract performed and impossible to return benefits**
- **Rescission barred if return:**
 - to representee—never possible (services, *Boyd & Forrest v GWSR* HL 16 May 1912) or has become impossible (e.g., transfer of property, *White v Garden* (1851) 10 CB 919)
 - to representor—not substantially possible (*Vigers v Pike* (1842) 8 Cl&F 562)
- **Bar relaxed by unjust enrichment**

BARS TO RESCISSION: AFFIRMATION

- **Claimant can decide if to rescind or affirm**
- **Affirmation requires knowledge of facts giving rise to right to rescind**
- **Affirmation can be implied by conduct:**
 - continue to reside on leased premises (*Kennard v Ashman* (1894) 10 TLB 213)
 - order a chartered ship to sail (*SK Shipping Europe v Capital VLCC* [2022] EWCA Civ 231)
- **Close relation to estoppel**

BARS TO RESCISSION: LAPSE OF TIME & THIRD-PARTY RIGHTS

- **Lapse of time—difference depending on existence of fraud:**
 - if fraud—frozen while claimant ignorant of misrepresentation (*Armstrong v Jackson* [1917] 2 KB 822)
 - if no fraud—claimant must rescind within reasonable time (*Ceviz v Frawley* [2021] EWHC 8 (Ch))
- **Third-party rights—innocent third party has given consideration to acquire interest in subject-matter of contract (e.g., transfer of property to third party)**

BARS TO RESCISSION: INEQUITY

- **s3(2) Misrepresentation Ordinance (Cap. 284)—
courts may award damages in lieu of rescission**
- **Only for non-fraudulent misrepresentation—aim
to protect non-fraudulent misrepresenter from
effect of trivial misrepresentations**
- **Example—*William Sindall v Cambridgeshire
County Council* [1994] 1 WLR 1016**

DAMAGES IN LIEU OF RESCISSION

- **s3(2) Misrepresentation Ordinance (Cap. 284)**
- **Requirements:**
 - misrepresentation not made fraudulently
 - claim for rescission available (i.e., not barred)
 - claimant must have tried to rescind but court has denied rescission
 - equitable to award damages instead of rescission

DAMAGES IN ADDITION TO RESCISSION

- **s3(1) Misrepresentation Ordinance (Cap. 284)**
- **Requirements:**
 - misrepresentation innocent+ loss resulting from misrepresentation
 - defence—representor has no reasonable grounds to believe and did not believe that facts represented are untrue
- **Burden to show reasonable belief is on representor**
- **s3(1) ≠ common law—equates innocent to fraudulent misrepresentation**

EXEMPTION FROM LIABILITY

- **At common law—cannot exclude liability for fraudulent misrepresentation (*S Pearson & Son v Dublin Corp* [1907] AC 351)**
- **s4 Misrepresentation Ordinance (Cap. 284)—can exclude liability if reasonable under s3(1) CECO**
 - no distinction between innocent and fraudulent
 - same test as for all other exclusion clauses
- **Entire agreement clauses—do not stop a claim for misrepresentation but outside scope of s4 (*Watford Electronics v Sanderson* [2001] EWCA Civ 317)**
- **No-reliance clauses—within scope of s4 (*First Tower Trustees Ltd v CDS* [2018] EWCA Civ 1396)**