# Misrepresentation

This section considers misrepresentations and how liability for misrepresentations might be limited.

# Recap on misrepresentation

A misrepresentation is generally an untrue statement of fact which one party makes to another, that induces the other to enter into a contract with the person making the representation and that causes that person loss.  **Misrepresentation is fundamentally different to breach of warranty** and the law relating to it has been codified in the Misrepresentation Act 1967 (note that common law rules and equity still apply notwithstanding codification).

Misrepresentations can be important in the context of corporate transactions because they can offer the buyer **an alternative remedy** to breach of warranty in the event that the representations in question have been incorporated as express terms of the contract.  Where this is the case, the innocent party potentially has a choice of remedy – it may make a claim for contractual damages for breach of warranty, or it may make a claim for misrepresentation.

However, whilst many of the representations (whether oral or written) made during the course of negotiating an acquisition agreement will subsequently become express terms of the contract, others may not.  Where the representation has not become an express term of the contract, the innocent party has no choice of remedy – they may only make a claim for misrepresentation.

# Breach of warranty or misrepresentation?

Where the buyer has a choice between a breach of warranty claim and a misrepresentation claim, the choice made will depend on the remedies available for each and the limitations on liability for each.

**Remedies for misrepresentation**

You will recall from your previous studies in relation to misrepresentation that the main remedies for misrepresentation are **the equitable remedy of rescission and the remedy of damages.**

Which of these remedies is available, and how the damages are calculated, depends on the categorisation of the misrepresentation (innocent, negligent or fraudulent).

In the case of a corporate transaction where signing and completion happen simultaneously, it is very unlikely that the remedy of rescission will be available.  By the time the misrepresentation has been discovered, even if it is discovered very quickly, rights will almost certainly have been acquired by third parties and in any event it will not be possible to restore the parties to their pre-contractual positions.

However, where there is a gap between signing and completion, provided the misrepresentation comes to light before completion, a court may well take the view that it is still possible to restore the parties to their pre-contractual positions and so order rescission.

# Limiting liability for misrepresentation

Despite the legal remedies available for misrepresentation, in the context of a private acquisition, the parties will almost always include wording in the acquisition agreement to limit or exclude liability for misrepresentation by way of an **entire agreement clause**.

An entire agreement clause (or non-reliance clause) is a ‘boilerplate’ provision that is found in many written agreements and has been subject to extensive judicial scrutiny.  Such a clause will contain a **statement that the written contract constitutes the entire agreement between the parties and supersedes any prior agreements or negotiations.**  As this statement alone is insufficient to exclude liability for misrepresentation, and clear wording is required, the clause has developed over time to include (often all three of) the following additional elements:

* an express exclusion of liability for misrepresentation;
* a non-reliance statement (an acknowledgement by the parties that they have not relied on any representation outside the agreement, reliance being a key ingredient of misrepresentation); and
* statement limiting remedies for misrepresentation to those available for breach of contract which has the effect of excluding all remedies for misrepresentation whether made in the pre-contractual period or in the agreement itself (this has the effect of excluding the remedy of rescission and changes the measure of damages available).

The clause will usually include a confirmation that it is not intended to exclude liability for fraudulent misrepresentation. This wording is intended to prevent the courts from finding that the restriction of liability for misrepresentation is ineffective for unreasonableness under UCTA.

An entire agreement clause is considered standard practice and is usually accepted by the buyer.

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In the case of Al-Hasawi v **Nottingham Forest Football Club Ltd** [2018] EWHC 2884, the High Court held that an entire agreement clause in a share purchase agreement which did not have wording to negate reliance or exclude liability for misrepresentation was not effective to exclude misrepresentation claims.

It held that clear words are needed to exclude misrepresentation claims and an entire agreement statement that sets out the scope of the agreement is not sufficient.

Instead, what must be shown is:

*"clear wording establishing an intention to go beyond defining the scope of the contractual agreement and exclude other claims."*

# Summary

* Misrepresentations can be important because they can offer the buyer an alternative remedy to breach of warranty in the event that the representations in question have been incorporated as express terms of the contract. Where the representation has not become an express term of the contract, the innocent party has no choice of remedy – it may only make a claim for misrepresentation.
* However, it will almost always be the case that the ability of the buyer to bring a misrepresentation claim will be limited or excluded by the inclusion of an entire agreement clause in the acquisition agreement.
* A clause which limits or excludes liability for fraudulent misrepresentation will be ineffective and so the clause will usually include confirmation that it is not intended to limit or exclude such liability.