

Week 1: Misrepresentation

What has to be shown to constitute actionable misrepresentation?

1. A false statement has been made before or at the time of the making of the contract;
 2. Which **induces** the innocent party to enter into the contract;
 3. The misrepresentation was an inducement to enter into the contract.
 - It need not be the sole inducement but must be one of the reasons for entering the contract.
- The misrepresentation must be of a fact past or present.
 - It must be a misrepresentation of fact, not law.
 - However, please note that this distinction between misrepresentation of fact and misrepresentation of law has been regarded as an artificial distinction.
 - In the context of mistake, the distinction between fact and law has been rejected.

The nature of factual misrepresentations

A series of examples.

Balfour and Clark v Hollandia Ravensthorpe NL

- A real estate agent made the following misrepresentations of facts:
 - A. He misrepresented to the couple, Balfour and Clark that they could buy a house with a minimal deposit and a two year loan.
 - B. Upon payment of the loan, a further loan to the extent of 90% of the value of the property could be arranged, provided the couple opened an account with Hindmarsh Building Society and saved 10% of the purchase price with them during the 2 year period.
 - C. **However, the agent knew** that in respect of the refinancing arrangement the couple on their income at that time, **could not have afforded the payments on the refinancing scheme.**
- The full Court of South Australia **found in favour of the couple** on the basis of the allegation made by them that the agent had fraudulently misrepresented to them.

Edgington v Fitzmaurice

- The directors of the Army and Navy Provision Market made the following representations in their prospectus:
 - A. That the company was raising capital to improve its operations and renovate its new premises;
 - B. Further representations in the prospectus were that certain mortgages were not immediately payable;
 - C. That any monies used to purchase the debenture bonds would create a charge over the company's property.
- Edgington invested 1,500 pounds sterling in the company. No charge over its property was created.

- Monies invested were used to pay up existing loans.
- When the company was wound up, Edgington was paid a dividend of 45 pounds sterling as an unsecured creditor.
- Edgington's suit against the Directors in their personal capacity was **successful on the basis of fraudulent misrepresentation**.

The commonality in the two above cases was the **dishonest/fraudulent misrepresentations** that were made.

Statements of future intention are not misrepresentations unless:

- The maker makes the statements without the genuine intention of fulfilling them; or
- There are no reasonable prospects of fulfilling those expectations.

Smith v Land and House Property Corporation

- The representation made to Land and House by Smith was that the existing tenant was a 'most desirable tenant'.
 - In fact, the tenant has to be pressured into paying rent and went into liquidation prior to the completion of the sale of the property to Land and House.
- Smith sought an order for specific performance for the sale of the property to Land and House.
- Land H defended on the basis of Smith's misrepresentation as to the reliability of the tenant.
- The question was whether Smith's statement as to the tenant was one of opinion or fact.
- As Smith clearly knew the tenant's track record, it was **held that the misrepresentation was one of fact**.

Magill v Magill

- The representee must have relied on the statement by the representor.
- In this instance there was no evidence that the husband had relied on the wife's statement that the child she was carrying was theirs.
- In such an instance the husband's action for tort of deceit failed.

Requirements in misrepresentation

1. The representation must be false (s 18 ACL)

- Falsity of a statement requires a positive act by the representor.
- Where there is no legal obligation to divulge a material fact, the silence of the representor is not regarded as actionable.
- The silence will not operate to avoid the contract.
- The representor may remain **silent unless there is a special relationship between the parties in which there is a duty to disclose a material fact, or there is a requirement under ACL to do so**.

Disclosure of Material Facts

- Rationale for the rule in common law of there being no obligation to disclose a material fact lies in the principle of **caveat emptor** in that the buyer is expected to conduct his due diligence before entering into the deal.
- The other categories of contracts where there is a duty to disclose material facts are in contracts of good faith (**uberrima fidei**) such as insurance contracts and in partnership contracts.
- In these two instances, the duty of disclosure of material facts has to be adhered to.
- Non-disclosure in such contracts means that there is nothing material to disclose.
 - Wilful non-disclosure from which the innocent party suffers loss is actionable.
- What is 'material' in an insurance or partnership contract context?
 1. Where the insured is aware that it is a material fact, that the insurer would want to know before deciding whether to accept the risk and if so, on what terms or reject the risk altogether.
 2. A reasonable person would be expected to know that the fact that is undisclosed would be relevant to the insurer in that he would have wanted to know.

The circumstances in which there is no statutory duty of disclosure:

1. A fact which diminishes the risk; or
2. A fact of common knowledge ; or
3. The insurer knows in the ordinary course of business as an insurer ought to know;
4. Where compliance with the duty of disclosure is waived by the insurer.

2. Even if a statement is only partially true or it is a distortion of the truth it is still a misrepresentation.

Dimmock v Hallett

- Here the misrepresentation was that the land was fully leased. However, in reality, many of the tenants had served notices to quit. The vendor's statement was held to be a misrepresentation, although at the time of making it, it was literally true.

Krakowski v Eurolynx Properties Ltd

- The inducement made by Eurolynx to Krakowskis to enter into the to purchase a shop premises was that they had found a tenant who was willing to lease the premises for a rental amount of \$156,000.
- What Eurolynx failed to disclose to the Krakowskis was that they had in a side agreement with the tenant agreed the following things:
 - a. That the tenant should remain rent free for the first 3 months;
 - b. They had given the tenant a payment equivalent to the tenant's first year of rental.
- The High court said that the **features of the side agreement** between Eurolynx and the tenant, amounted to a **misrepresentation** to the Krakowskis.
- In fact, the High Court went as far as holding that it was **misleading and deceptive conduct under Section 18 of the ACL** as well as fraudulent misrepresentation.

3. Mere silence - further thoughts on whether it engenders reasonable expectations.

1. If mere silence does engender reasonable expectations, then the **context** in which silence as a false representation may be found: *Demagogue Pty. Ltd v Ramensky*
2. Also, representations **may continue without being repeated** unless modified or withdrawn.
 - The representations must relate to the dealings between the parties: *Mbakwe v Sarkis (2009)*
3. Changed circumstances.
 - If a representation is true when made but over time is no longer accurate, there is an **obligation to disclose changed circumstances**.
 - *With v O'Flanagan*
 - The state of the medical practice which was being sold changed drastically from the time of the first representation (1,480 patients) to about 1,260 patients.
 - It was held that there was **duty to disclose the change of circumstance**.
 - *Lockhart v Osman*
 - Australian case where it was held that the failure to disclose the changed circumstances, was held to be a fraudulent misrepresentation.
 - Particularly if the initial representation was clearly known to be inaccurate.

4. The representation must have induced the representee to enter into the contract.

- The representation **need not have been the sole inducement** but must be **one of the factors taken into account by the representee** in entering into the contract.

Dadounian Group International Inc v Simms

- The 5 principles set out are highly relevant:
 1. Whether a representee has entered into a position upon the inducement of the representor is a **question of fact**.
 2. The **onus is on the representor** that the representee was not induced to entering into the position, if in normal circumstances it would be reasonable to assume that the reasonable person (representee) would have entered the position.
 3. The misrepresentation has to play a **real and substantial part, but not a decisive part** in inducing the representee to act.
 4. The **presumption of inducement** of the representee as a result of the misrepresentation **has to be rebutted by the misrepresentor**, to the effect that it played no real or substantial part in inducing the representee to enter into the contract.
 5. The court decides on a **balance of probabilities** as to whether the representee was induced into entering into the contract.
- What the representee must show is that there is an intention to induce and that he relied on the inducement to enter into the contract.
 - *Redgrave v Hurd*.

What is a Material Inducement?

Redgrave v Hurd

- The inducement by the representor to the representee was that the income that the business was made in a year was 300 to 400 pounds sterling, to enter into the partnership.
- If such a statement was in essence an untruth, then that provided a basis for rescinding the contract.
- That created an inference that the representee was induced by the representation.

Bear in mind the following situations:

1. The inference that the representee was induced by the representation had to be rebutted by the representor that the representee was uninfluenced by it or that the representee knew it was false.
 - *Gould v Vaggelas*
2. If the representee is aware of the falsity but is **not aware of the extent of falsity**, then reliance on the part of the representee is established.
 - *Gipps v Gipps*
3. If a false statement is made and the **representee through his/her own queries establishes the falsehood**, but still goes on to enter into the contract, then **there is no misrepresentation**.
4. The falsehood in the circumstances could not have induced the representee to enter into the contract, after having found out the true position.
 - *Holmes v Jones*
 - Where the representee entered into the contract to purchase a rural property after finding out that the statements made as to the number of stock were false.
 - No misrepresentation had occurred.