

Fact or fiction?

Sally Ramage outlines the principles of misrepresentation within English contract law



► In English contract law, misrepresentation is an untrue statement of fact – past or present – that, though not intended to be a term of the contract, induces the other party to enter into it. The Misrepresentation Act 1967 came about ten years after the controversial *Oscar Chess v Williams* [1957] case, in which such an incorrect statement was not treated as being part of the written terms of the contract, even though it led to a contract being made.

There are four kinds of misrepresentation:

- fraudulent misrepresentation;
- negligent misstatement in common law;
- misstatement under section 2(1) of the Misrepresentation Act 1967; and
- innocent misstatement.

These are called actionable misrepresentations, which means that a party to the contract can sue for breach of contract provided that:

- the statement is one of fact, not opinion, or intention, or law; and
- the statement has induced the contract.

Opinion treated as fact

In the case of *Smith v Land & House Property Corporation* [1884], Smith had put up his hotel for sale, stating that it had been let to “a most suitable tenant”. Land & House Property agreed to buy Smith’s hotel, but the tenant was in fact bankrupt. When the directors of Land & House Property found out, they refused to complete the contract and Smith then sued them for specific

performance. Smith won the case at the High Court but Land & House appealed to the Court of Appeal, which decided that Smith had breached the contract because when he said that the tenant was “most suitable”, he was making a statement of fact.

This is a case in which a statement that was an opinion was treated as a fact. This was because the person giving the opinion (Smith) was in a position to know the truth (that the tenant was bankrupt), and it could be proved that he could not reasonably have held such a view as a result. Therefore, Smith’s opinion had to be treated as a statement of fact.

Promises, promises

The case of *Edgington v Fitzmaurice* [1885] illustrates a statement of promise as to future intention. This does not attract liability in misrepresentation because it will not be regarded as binding unless the statement is incorporated into a contract.

But if a stated intention is a lie, then it is misrepresentation. If a person knows that his promise – which has induced another person to enter into a contract – will not actually be carried out, then he will be liable.

In this case, Reverend Edgington paid £1,500 for debenture bonds which the prospectus stated as being needed for an outstanding mortgage and for the supply of cheap fish. The debenture bonds were in the company Army and Navy Provision Market Ltd., of which Fitzmaurice was a director. What the prospectus didn’t make clear was that several mortgages were already on the property, meaning that any right that

Edgington had was deferred to several prior charges. He only discovered his plight when the company went into liquidation.

Edgington claimed that the misrepresentation made him part with his £1,500, which he wished to be returned. The judge agreed that this was a misrepresentation and said: “What is the first question which a man asks when he advances money? It is, ‘what is it wanted for?’.”

This sort of misrepresentation is under the jurisdiction of civil law. It is essentially contract law and, as such, is not punishable by imprisonment. Nowadays, if evidence was found to prove that two persons thought up the misstatement in order to appropriate shareholders’ money, then a possible criminal charge of ‘conspiracy to defraud’ could result in a maximum prison sentence of seven years if successful. ■

■ **Footnote** – The 1,300 listed companies in the UK must now produce reviews for reporting years beginning on or after 1 April 2005. It is feared that investors may sue for negligent misstatement and third parties may launch claims if they suffered losses after relying on directors’ statements. Directors may have to pay out on compensation claims in civil proceedings and fines in criminal cases. From 2007, company law regulations will make it possible for companies to be made to restate their accounts.

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