

Misrepresentation

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Intro to Misrepresentation and Breach of Contract

When a contract is made, the parties will make various statements and promises to one another.

Some of them are statements that are incorrect.
Some of promises won't be honoured.

The person to whom they were made will want a remedy - either to get out of the contract or to claim damages.

Whether or not there is a remedy will depend on the status the law attributes to the particular statement or promise.

Difference between a "statement that is incorrect" and a "promise that is broken"

Promise: refers to a statement of intention, that is an undertaking to do or refrain from doing something in the future.

Statement that is incorrect: a statement relating to a matter of existing or past fact that is false. A statement capable of being verified or not verified at the time where it is made. These are called "misrepresentation".

If it is relied on (induces the party into entering into a contract), it is called "actionable misrepresentation".

Representations as Promises

A representation may be a promise in a different sense. It may be a promise in the sense that the representor accepts contractual responsibility for the accuracy of the statement. Where that is the case, it may be a "term of the contract" (just like a promise to do or refrain in the future).

That distinction is important due to New Zealand legislation.

If that statement is classified a "term of the contract," it is described as a "warranty".

A promise to do or refrain from doing something is not a representation.

Therefore, failure to do that promised act is not a misrepresentation.

This is because the promise was not a false statement at the time that it was relied on to enter into the contract.

It may, however, be a misrepresentation if you never had the intention to do that thing you are promising to say.

If you promise to do something, you are implicitly saying (or saying, according to the objective standard) that it is your intention to do that thing.

If you never have that intention, then it is also misrepresentation as to the state of mind.

It is a (fraudulent) misrepresentation - "the state of a person's mind is just as a matter of fact as the state of his digestion".

Tort of Deceit – relating to Promises without Intention

A situation such as the above, where you misrepresented your state of mind, is the "tort of deceit".

The issues with the "tort of deceit" are that dishonesty can be very difficult to show.

However, in terms of the state of mind, it is not always important. Generally, the important thing is simply to show the promise, not show the truth or state of mind. This is because, as far as contract damages go, we are concerned with enforcing the promise or putting in a position if it was enforced.

Proving a lie may not do this - suing for the legal wrong for damages is for reparation for harm done. It is recovery for loss suffered, and there will be no such harm or loss if there was a good bargain where you are still in a better position as a result of entering into the contract that you were induced into.

However, if you can show that it was contractually binding, you can show that you ought be entitled to put in the position you would be if the contract was honoured.

To enforce the promise, you must show that there was a binding term of the contract that was broken.

How do we determine if a representation was a term of the contract?

The test is the intention of the parties - was the promise intended to be contractually binding.

As, in other parts, that intention is determined objectively. As such, we cannot escape liability by showing a lack of intention - instead, we must show that the person was led reasonably to believe that they were not bound.

Parol Evidence Rule

Under (old-Contract Enforcements Act 1956) Property Law Act 2007, s 24 - all contracts for sale of land must be in writing. You cannot enforce an oral term if not in writing.

"Parol Evidence Rule"

Is a common law rule that holds "evidence is inadmissible to vary, add to, or contradict the terms of a written contract". It barred the enforcement of oral promises or anything that was outside of the writing.

At times, this led to very unjust results.

Circumventing the Rule

Collateral Contract Rule

A promise the consideration for which is entry into the main contract.

That is treated as a contract separate from the main contract, except to the extent that entry into the main contract provides consideration for the main contract.

e.g.

Payment of \$500, in return for entering into a lease contract with you. The lease is the main, the \$500 is therefore the "collateral".

It is largely the Courts creating a fiction.

Even where the real intention was almost certainly for a single contract, the Courts are willing to treat the oral term as a collateral contract.

It allowed to circumvent any statutory writing requirements and the common law Parol Evidence Rule. The fiction was that "they were not adding a term to an existing contract", instead, the promise is a separate contract altogether.

It is not an exception to the Parol Evidence Rule. It is a qualification - it said that the rule doesn't apply in that situation because the oral promise is altogether separate.

Equitable Remedy of Rectification

Limited, but important application in limiting the Parol Evidence Rule, in courts of equity.

This would rectify the written contract if the parties meant to include the promise, but by mistake, did not do so.

This would be rectified because it would otherwise be unconscionable to allow enforcement of the document containing the terms when it was intended to include the further term.

Partly Written, Partly Oral Contract

There are two points to start with:

1. The rule does not apply to every piece of writing that is to evidence the contract;
2. There is no reason, in principle, that parties cannot agree to put part of their contract in writing and leave the remainder as oral.

"Written contracts" for the purposes of the Parol Evidence Rule are "documents intended to contain the entire contract".

If there is evidence that a promise was made not in the written contract, then it will be evidence that not every promise was included in that written document, and so, the document was not intended to contain the entire contract.

At this point, the contract will not be a "written contract". Instead, it will be a "Partly written, Partly Oral" contract.

As such, the rule does not apply, because there is not "written contract", it is a "partly written, partly oral" contract.

The idea that a document is the entire contract is now a bit of a rebuttable presumption that a written contract is meant to be the entire contract - it can be rebutted by showing that there were oral promises which necessarily meant it was agreed to be part and part.

"Entire agreement clauses" - parts of contracts that stipulate the terms of the contract is meant to be the "entire contract".

The CCLA, s 50 (previously Contractual Remedies Act, s 4) - says that the "entire agreement clause" is only conclusive when it is "fair and reasonable" to treat them as conclusive.

This is because it is often buried in the general "boiler plate" of the contract, are not really intended to be the "entire agreement" and so it would be unfair to parties to shelter behind that untruth.

Misrepresentation - Before Reforms

An actionable misrepresentation is a false statement relating to a matter of present or past fact that induces a party to enter into a contract.

There must be a statement made.

The general rule: silence cannot amount to a representation.

A contracting party is not obliged to correct the misapprehension as long as they do not in any way contribute to the misapprehension.

Hinsat stands as authority that there are some situations where the law does impose a duty to speak and failure to speak is considered a misrepresentation.

e.g. entering into a contract for insurance where there is an obligation to disclose material facts.

The statement must be one of fact.

A statement of opinion that turns out to be incorrect is (prima facie) not actionable.

Sometimes, there is an implied requirement that there be reasonable grounds for the opinion.

We then assess how the misrepresentation relates to the contract:

Is it "mere representation", a "term (of some description" or part of a collateral contract?

Prior to Statutory Reforms

(in the Contractual Remedies Act 1979 now CCLA 2016, and Fair Trading Act 1986).

There was a mixture of common law and equity, contract and torts, statute and case law.

It could relate to the Contract in two ways:

1. Terms of the Contract - "statements that were incorporated into the contract".
If these were false, there would be a "breach of contract".
2. Mere representation - "statements not incorporated into the contract".
If these were false, in the absence of dishonesty or fraud, there would be no relief.
However, if there was dishonesty or fraud, they would give rise to relief.

There were two types of representations:

1. Fraudulent Representations – these were statements that were known to be false, but were still made with the purpose of inducing entry into the contract.
2. Non-Fraudulent/Innocent Representations – there were statements that were not known to be false. They could either be made with a genuine belief, or be made without reasonable grounds to believe that they were correct.

Remedies for non-fraudulent misrepresentation (innocent misrepresentation):

At Common Law:

The victim must show it was a term of the contract - which is difficult where the contract was in writing but the representation is not.

If they could not establish that it was binding/term of contract/collateral, then they had no *common law* remedy.

In Equity:

Equity could step in, where common law failed. They could not award damages, but they could provide equitable relief - it would be considered "unconscionable to seek to enforce a contract not fully consented to, if it was induced by the plaintiff's misrepresentation" even if that was made by mistake. That was unconscionable even if the misrepresentation was purely innocent".

Equity would allow *equitable remedy of rescission* for the innocent misrepresentation. This deems the contract to never have existed and so restitution had to be made on both sides.

However (consider example of purchase/sale of business), no damages could be recovered (in respect of trading losses made while continuing). That was only available in a "breach of contract" or "fraudulent misrepresentation".

Interestingly, we can get rescission for a misrepresentation that, had it been a term of the contract, in common law would only have given damages.

This is where there is a more minor difference between what was said and what actually was.

However, it might also be that the remedy for that breach of contract might be less attractive than that for misrepresentation, so they want to try and prove misrepresentation.

Tort of Deceit – Fraudulent Misrepresentation

If fraud/dishonesty is established, however, the victim of that fraudulent misrepresentation that induced entry into contract could have the contract set aside and/or claim damages in respect of the harm done.

There must have been:

- a. Actual knowledge of the falsity of the statement; or
- b. Absence of belief in its truth (recklessness as to the truth of the statement- fits in here, or somewhere?)

This means that a claimant suffering from misrepresentation may have a breach of contract, a claim in equity, or an action in tort.

How this, however, we need to be able to show damages/harm to be able to claim it.

For example, even if there was a misrepresentation that fills the tort of deceit, if you are in a better position after the contract than you were before then, there might not be any harm shown.

Negligent Misrepresentation

A negligent misrepresentation is one made without reasonable grounds to believe that it was true and in breach of a duty of care owed to the representee.

After some initial doubts, it became established that the required "special relationship" existed between parties creating this relationship.

Before this, innocent representation would include negligent. There was no distinction between "purely innocent" and "careless or negligent misrepresentation".

This changed with Hedley Byrne v Heller Apartments 1963:

This developed a new category of negligent misrepresentation.

Two Parts:

- a. Makes a misrepresentation without reasonable grounds to believe that it was true.
- b. Where someone makes the misrepresentation in breach of a duty of care.

There must be some form of special relationship - but we can largely assert this one way or another; don't get bogged down in it.

On authority, there can be a duty of care or "special relationship" owed from one party to another while negotiating a contract.

Esso Petroleum v Mardon (1976) QB 801.

In this, Mardon was induced to take lease of a new petroleum station by Esso's negligent misstatement that "we estimate that the turnover of the station in its third year will be 200 000 gallons of petrol."

That was hopelessly wrong, as it failed to take into account the terms of the planning permission that required the station to be built with its back facing the main road, so you could only access it via side streets.

As a result, Mardon recovered suffered substantial losses.

He recovered damages - he succeed in the tort of negligent misrepresentation in that they failed to take reasonable care when advising of the turnover.

There different types of representations:

There are representations, that are:

- "Mere representations" - these can be innocent, negligent, or fraudulent, however, are not terms of the contract.
These governed by common law of tort and equity.
- "Terms of the Contract" - where the representation has been agreed as a term/warranty.
These are governed by the common law of contract and equity.
- "Collateral Contract" - where the representation gives rise to a second, ulterior contract.
These are governed by the common law of contract.

Mere Representation (Common Law - Tort; Equity)	Term of the Contract (Common Law - Contract; Equity)	Collateral Contract
<p>Innocent Misrepresentation - Justifies rescission (equity)</p> <p><i>There is no common law remedy available as remedy, so equity intervenes. The situation may be such that, were the misrepresentation a term of the contract, it would only give rise to damages (warranty), but in this, may justify rescission.</i></p>	<p>Warranty - A <u>minor term</u>. Only gives rise to damages, and not enough to get rid of the entire contract</p> <p><i>At times is used broadly as a synonym for term of the contract.</i></p> <p>- Damages (contract)</p>	<p>Representation that gives rise to a collateral contract - it is not a term as part of the main contract, it is a different contract entirely.</p> <p><i>Cannot cancel the main contract, because there is no term as to it in the main contract.</i></p> <p>Damages only.</p>
<p>Negligent Misrepresentation - Rescission (equity) - Damages (tort)</p>	<p>Condition - "Essential Term" - that goes to the heart of the contract. Any breach of which must justify the termination of the contract.</p> <p><i>(A promise, without which, the contract would never have existed - e.g. if you wanted a car that had never been owned before, absolutely new, you said that, the seller guaranteed, but as it happens, it was not new).</i></p> <p>- Rescission (equity) - Damages (breach of contract)</p> <p><i>Rescission here was not the same as the remedy for misrepresentation. Rescission for misrepresentation deemed the contract to never have existed. However, if this was the case,</i></p>	

	<p><i>you could never claim damages because there would have never been a contract.</i></p> <p><i>In this, rescission means "contract is terminated for the future" - it remains for purpose of damages.</i></p>	
<p>Fraudulent</p> <ul style="list-style-type: none"> - Rescission (common law) - Damages (tort) 	<p>Innominate Term (also, an intermediate term)</p> <p>It is neither a warranty or a condition. It is a term that would justify rescinding the contract IF the breach has substantial effects. It depends on the effects.</p> <p><i>You need to show that the effect of the breach are such as to make the contract no longer beneficial/has substantial effects.</i></p> <p><i>e.g. an unseaworthy ship. A ship may be unseaworthy because of bung engines, or possibly a rusty hull. However, it may also be unseaworthy because of a minor technical issue or something else.</i></p> <p>The breach can be in more or less serious ways.</p> <p>If minor - damages only (breach of contract). If serious - rescission (equity) and/or damages.</p>	

Structure – Representations or Terms, and Remedies

Is the statement an actionable misrepresentation?

1. Was it a statement of existing or past fact?
2. Did the statement induce the other party to enter into the contract?

What type of misrepresentation is it?

3. What type of misrepresentation is it?

- a. A term of the contract?

The overarching inquiry is whether the parties intended to be bound to this promise and to make it a warranty.

- a. Was it included as a written part of the contract?
- b. Consider the Parol Evidence Rule:
 - a. Part Written, Part Oral Contract
 - b. A Collateral Contract
 - c. Rectification
 - d. Effect of any Entire Agreement Clauses
- b. If it was a term of the contract, is it:
 - a. A warranty = damages
 - b. A condition = rescission and damages.
 - c. An innominate term: if serious = rescission and damages; if minor = damages.
- c. A mere representation?

If it is not a term, then it will be a "mere representation".

The plaintiff is entitled to the equitable remedy of rescission no matter what type of representation it is.

- a. Was it a negligent or fraudulent misrepresentation?

Negligent:

 - a. A representation made without belief on reasonable grounds, where there was a duty to take reasonable care.

Fraudulent:

 - a. A representation made that was knowingly false.

If it is either negligent or fraudulent, the party is entitled to common law damages in addition to rescission.

Damages - Intro and Comparison

There is a difference in the damages recoverable if they are recoverable under the "tort measure of damages" or the "contract measure of damages"/

The principle underpinnings of each measure is different:

The complaint in Tort is "your lie induced me to take action that I otherwise would not have, and therefore, caused me harm, and so you must pay me reparation for that harm".

The complaint in Contract is "you breached your promise and I want you to make it right and put me in the position if you had not breached it.

Tort Damages:

You are entitled to be put in the position you would be in if the tort had not been committed at all - that is, the position you would be in if the misrepresentation had not been made.

That means, you are compensated for all of the harm that flows from the misrepresentation itself (including the loss of bargain). It is redress for the harm attributable to the tort.

It is about "reparation for harm done".

How much worse off are they as a result of their reliance on the representation?

Basic Measure:

You find the difference between "the price they would have paid" and "the actual value of the damages".

Or, simply:

"The loss that flowed directly from the misrepresentation".

Additional Considerations:

Lost Opportunity Claim.

Contract Damages:

You are entitled to be put in the position you would have been in if the misrepresentation had been true, or the contract had been upheld.

This is a "loss of expectation".

Basic Measure:

The difference between "the actual position and the promised position".
So that is, "the position that was represented" and "the position that you are actually in".

In other words:

The damages are the difference in the value between what you received and what you would have received if the representation had been true.

Note: the price that you actually paid is not relevant to the calculation - though it may provide some indication as to what the value would be if the representation had been true.

Additional Considerations:

When they would be induced to enter into a losing contract anyway - that is, the position that they would have been in even had the representation been true may still be worse than what they paid (but better than their actual position).

Consider the Hypothetical:

Suppose a situation where the Purchaser (P) is induced by Vendor (V) to enter into a contract to buy their coffee bar business.

P is induced to do that by the representation that the outgoings of the business are substantially lower than they, in fact, are.

In this, suppose initially:

Purchaser Paid: \$50 000.

Actual value of the business: \$60 000.

Represented Value (if the representation had been true): \$80 000.

Tort Damages:

In this, there were no damages that flowed from the misrepresentation.

The price that was paid was \$50 000, and despite the misrepresentation, P is actually still making a \$10 000 profit.

As such, she is in a better position now, even with the misrepresentation, and so she cannot recover in tort.

Contract Damages:

In this, the position that the purchaser would have been in if the representation had in fact been accurate was \$20 000 better off.

P was promised to be in a position with \$80 000 worth of assets after the contract was concluded, and as such, is entitled to be put in a position she would be in if that had been true.

This means:

Position Represented - Actual Position = Damages

\$80 000 - \$60 000 = \$20 000

Note: Lost Opportunity Claims
See "Torts" Page.

Tort Measure of Damages:

Under the tort measure of damages, you are entitled to be put in the position you would be in if the tort had not been committed at all.

That means, you are compensated for all of the harm that flows from the misrepresentation itself (including the loss of bargain).

It is about "reparation for harm done".

How much worse off are they as a result of their reliance on the representation?

Basic Measure:

You find the difference between "the price they would have paid" and "the actual value of the damages".

Or, simply:

"The loss that flowed directly from the misrepresentation".

"Price Paid" - "Actual Value" = Damages.

Lost Opportunity Claims

Where you can show that, had the misrepresentation not been made (so either silence, or if the accurate representation been made) you could have driven a harder bargain and bought it for a lesser price, there will be damages in torts.

This principally takes into account the fact that, before the misrepresentation, the purchaser was not just a person with money in the pocket, but they were a person with money and the ability to choose certain courses of action.

To accurately restore them to that position, then you must restore the ability to make choices as to the courses of action,

Alternatively - but for the wrongful act, the business would have been secured for a lower price, and therefore, the opportunities maintained. Therefore, it is loss flowing from the tortious behaviour.

The "lost opportunity" could be either driving a harder bargain, or entering into another contract in addition to this.

Initially - this was not recognised (Scott Group v McFarlane [1978] NZLR 553, per Cooke J). It has since become settled law.

Examples of Authority:

Most are canvassed in *Yam Seng*.

East v Maurer [1991] 1 WLR 461 (CA)

- Plaintiffs bought a salon, on the representation that the seller was not going to work anywhere else in the area. He did and a lot of the clients left with him.
- "The plaintiffs were entitled to recover damages for the profits that they could reasonable expected to make if they had instead bought another similar hairdressing business in a different part of town".

Note: this was a hypothetical other salon, not one that was actually pointed to.

Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd [2001] QB 588 (CA):

- Distributorship agreements.
- "The judge found that, but for the deceit during the negotiations, the agreements would have contained more favourable terms as to price and profits made by the plaintiff".
 - Plaintiff was entitled to recover damages for additional profits.

Note: alternative form of that same bargain, as it would have been in the event of the misrepresentation not occurring.

2 Eng Ltd v Harper [2009] Ch 91

- Awarded on a "loss of chance basis for the lost opportunity of entering into another, more profitable transaction".
- There was another company the purchaser would have sought to buy and there was a good chance of the sale, and so the damages for the income and capital gain he would have received in that alternative bargain.

Note: entirely different bargain that was demonstrated to have been available.

For example:

Consider a purchaser buying a small business. There is a misrepresentation as to the overheads (much as the other hypotheticals).

The purchaser paid: \$50 000.

The actual value: \$40 000.

The represented value (value had it been true) is \$80 000.

The price that the purchaser would have paid given the real information: \$30 000.

Ordinary Tort Damages:

The purchaser paid \$50 000 for an actual value of \$40 000. Therefore, the recover would be \$10 000.

Lost Opportunity Damages:

If it had not been for the misrepresentation, then the price that they would have paid would be \$30 000. This means that they would have had an extra \$20 000 in their pocket for some alternative use.

As such, the recovery:

"Price Paid" - "Price WOULD have secured had it not been for the misrepresentation"
= \$50 000 - \$30 000 = \$20 000.

The contract damages is whatever is required to put them in the position that they would have been had it been true:

Therefore, it is whatever it takes for them to have \$80 000 worth of value.

Therefore, it is \$80 000 - \$40 000 = \$40 000.

That is unaffected by a change in the price that they would have paid.

Alternative Losing Bargains / Yam Seng Claims

This is the flip side to the "lost opportunity claims".

We can start from the point that, if a plaintiff can show that had the misrepresentation not been made, they would have been able to enter into an alternative, better bargain that would have otherwise left them in a better position and increase their entitlement to damages, then it is just to consider the alternative.

This means that, if a defendant can show that had the misrepresentation not been made, then the plaintiff nonetheless would have entered into an alternative bargain and in that would have suffered a loss, then that loss will reduce the entitlement to damages.

This point of law comes from *Clef Aquitaine*, but more accurately, from Yam Seng [2013] EWHC 111 (QB).

Underpinning Rationale and Discussion

By analogy to the access to "lost opportunity claims"

If we are going to allow damages to be awarded on a proven lost opportunity (by proving that another profitable contract would have been entered into) then we should allow the defendant to show that an alternative contract which would have been another losing one would have been entered into. The extent of that loss ought be taken into account in assessing damages for the tort of deceit.

By consideration of the assessment that the damages compensate for "harm done" by the tortious conduct and seek to put them in the position that they would have been had it not been for the misrepresentation.

We ask ourselves: what position would the plaintiff have been in, had the contract not been entered into as a result of the misrepresentation?

The argument is that it would be artificial to put the purchaser in a position where they made no loss at all, as that would not be the position they would be in had the misrepresentation not been made.

How we assess them?

We ask ourselves: what position would the plaintiff have been in, had the contract not been entered into as a result of the misrepresentation?

1. Is there an alternative bargain that would have been entered into had the misrepresentation not been made?
2. Would there have been a loss in that alternative bargain, had the misrepresentation not been made?
3. What would the loss have been?
4. Calculate the damages as required?
5. Take away the loss that would have been occurred anyway.

The other way we can think about it:

1. Is there an alternative bargain that would have been entered into had the misrepresentation not been made?
2. What would the plaintiff's position have been, had that alternate bargain been entered into?
3. What is their current position as a result of the misrepresentation?
4. What is required to restore them to the position that they would have been in, after that alternate bargain?

Case Brief: *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 CLC 662; [2013] EWHC 111 (QB)

Stands as authority that where a defendant can show that, had it not been for the misrepresentation:

- a. The claimant would have entered into another transaction;
- b. They would have suffered loss as a result of that transaction;

then that will reduce the damages owed.

On Alternative Bargains

- The question was: "Is it relevant to consider what, if any, other transaction the claimant would have entered into if the misrepresentation had not been made?"

There was a line of cases that considered (and was rejected by *Yam Seng*) the superficial view of tort damages - that the damages are designed to restore them to the position before the contract had been made.

Cited some authority on the matter - *Downs v Chappell*; *Slough Estates Plc v Welwyn Hatfield District Council*; *Naughton v O'Callaghan*

However, the Court preferred: the line of cases where Courts have inquired and taken account in assessing damages of what other transaction the claimant would have entered into if no misrepresentation had been made.

Note: all of these cases are presently about the lost opportunity.

Given that it was taken into account for "lost opportunity" , "should account also be taken of a transaction which probably would have resulted in a loss?"

Clerk and Lindsell on Torts: "If the claimant can increase his recovery by showing he would have invested his money profitably, by parity of reasoning the defendant ought to be able to reduce his exposure by showing that, but for his deceit, the claimant would have lost it in any case".

Yam Seng Pte: "In circumstances where it is established that the claimant can recover a profit that would have benefit obtained from entering into some other transaction, it must in principle be equally relevant to take account of any loss"

"There is no difference in principle between an alternative transaction which would have been more profitable and one which would have been less profitable than the actual transaction, such that it can be relevant to take account of the former but not the latter"

Smith New Court and Chitty - were disapproving of the idea that we should consider the situation as one of what the claimant would have done if the representation had been true.

Instead: "An award based on the hypothetical profitable business in which the plaintiff would have engaged but for deceit is permissible".

Evidential burden to demonstrate this is on the defendant.

Conclusion on this point:

"If the misrepresentations had not been made, then it is likely that *Yam Seng* would nevertheless have entered into a similar contract at a later date and lost money."

The alternative of what would have happened would be that the distribution agreement would have concluded a few months later, and there would have just been the same delay.

However, there would not be the same delay between the conclusion of contract and the sales of the goods, and therefore, the marketing would have been different.

Note, it is mentioned that had the misrepresentation not been made, it is likely that the purchaser would have asked for this information anyway.

Hypothetical:

Drawing on the hypothetical in *Clef Aquitaine*, consider a situation where there were two paintings on display.

Consider the situation where the seller is able to prove that, had the misrepresentation not been made, the purchaser would have bought a Degas on display for £1 000 000. Note, that Degas is genuine and is only worth £800 000.

Due to the misrepresentation, they bought the "Manet" for £1 000 000, when it is in fact fake, and worth £1 000. Had the representation been correct, it would be worth £2 000 000.

Price Paid: £1 000 000.

Actual Value: £1 000

If the representation had been true: £2 000 000.

Loss that would have been incurred in the alternative bargain, had it not been for the misrepresentation: £200 000.

Tort Damages

As basic tort damages, the loss incurred as a result of being induced to enter into the contract was: £990 000.

We can then think:

What losses would have been incurred, had it not been for the misrepresentation?

Given that this is £200 000, we would then reduce the damages by that amount.

Therefore, actual damages are: £799 000.

Another way we can think about this, is: "What would the position have been had it not been for the misrepresentation?"

Buyer would have had a painting worth £800 000, and that is the position tort damages should restore them to.

Contract Measure Damages:

You are entitled to be put in the position you would have been in if the misrepresentation had been true.

This is a "loss of expectation".

Basic Measure:

The difference between "the actual position and the promised position".

So that is, "the position that was represented" and "the position that you are actually in".

In other words:

The damages are the difference in the value between what you received and what you would have received if the representation had been true.

Note: the price that you actually paid is not relevant to the calculation - though it may provide some indication as to what the value would be if the representation had been true.

Additional Considerations:

When they would be induced to enter into a losing contract anyway - that is, the position that they would have been in even had the representation been true may still be worse than what they paid (but better than their actual position).

Losing Bargains

It is quite possible that the misrepresentation induced them to enter into a contract where, had the misrepresentation actually been true, they would have lost money anyway.

This is where the purchaser may just not be as clever as they think they are, and, as a result, even with the misrepresentation, they weren't actually making a profit.

Example:

There is a misrepresentation about a car, that said it was just a year old and had fully original parts. As it happened, this was not the case. The purchaser thought that it being that new, with original parts, would mean it was worth \$60 000. This was hopelessly inaccurate and, even if that had been the state of the car, it would only be worth \$45 000.

The purchaser paid \$50 000, but the car, with the replacement parts, was actually only worth \$40 000.

Therefore:

Price Paid: \$50 000.

Actual Value: \$40 000.

Value, had the representation been true: \$45 000.

In Tort:

Assuming that there was no alternative bargain that could be shown (around a harder bargain, or other car etc), then there would be damages:

Price Paid - Actual Value = \$10 000

In Contract:

This is going to be lower.

The position that they are presently in is \$40 000; while they are entitled to be in a position of \$45 000.

This means they have damages of \$5 000, but are still \$5 000 out of pocket from before the exchange.

Discussion of *Clef Aquitaine* [2001] QB 488 (Ward LJ)

“Art dealer A offers to sell to another dealer B for £1m a painting which A represents to B is a Manet. B is induced to believe it is a Manet but he believes that as such he can sell it for £2m. It turns out to be a good fake worth £1,000. The measure of damages in deceit [tort] is the difference between the price paid (£1m) and its actual value (£1,000). If a contractual warranty had been given, then the measure of damages is the difference between the price paid (£1m) and the value if it had been genuine (£2m).

If, however, it turned out not to be a Manet but, because B was not as knowledgeable as he thought he was, a Degas worth £1.5m, then, B might not have acquired what he thought he was acquiring but nonetheless he suffered no loss and was fully entitled to keep his gain of £0.5m.”

Critiquing this Analysis:

What is correct?

- The way that the measure of damages in tort (deceit) is calculated.
- The latter hypothetical, if it relates to tort.

What is incorrect?

- The description of contract damages, and therefore, the latter hypothetical as it relates to contract.

The analysis of the present tort damages are correct.

Assuming it can be shown that, were the representation not made, then B would not have entered into that contract at all...

The loss that flows from the contract is the difference between the price that he did pay, and the position that he is currently in.

That means:

Price Paid - Actual Position = Damages, as discussed.

However, there is an issue with the description of damages had the representation been a contractual warranty.

If the representation had been a contractual warranty, then B would have been entitled to be put in the position that they would have been in, had the misrepresentation been correct.

That means the damages in contract would need to be the difference between the position that they are currently in and the position that they would have been in if the representation had been true.

So:

"Actual Value - Represented Value".

This means that the position they are entitled to be put into is the £2m.
The position they are in is £1,000.

As such, they would be entitled to £1.999 million pounds.

As an aside, it is not sufficient that B would believe that he can sell the painting for £2million. It would be necessary to actually demonstrate to the Court that this was the actual value.

This means that the comments around "if a contractual warranty had been given, then the measure of damages is the difference between the price paid and the value if it had been genuine" are incorrect. It will not be the difference between the "price" and the "value".

There was also an issue with the hypothetical offered around the potential situation where what they thought was the Manet was in fact a Degas.

"If, however, it turned out not to be a Manet but, because B was not as knowledgeable as he thought he was, a Degas worth £1.5m, then, B might not have acquired what he thought he was acquiring but nonetheless he suffered no loss and was fully entitled to keep his gain of £0.5m."

In Contract: (and David believes that the Ward LJ was discussing the contract measure of damages), it would be incorrect.

If the representation that the painting was a Manet was a term of the contract, then the damages are such that he is entitled to be put in a position he would have been if the misrepresentation had been correct.

The position that was represented was £2million.
The position that he is actually in is £1.5million pounds.

Therefore, he would be entitled to damages for £500 000 to put him in the position he would have been in, had the representation made been correct.

In Tort: this would be correct.

There would be no loss as, the position that he is in as a result of the misrepresentation is better than he would have been in had it not been for the misrepresentation.

There are no losses flowing from the misrepresentation (leaving aside lost opportunity claims, perhaps).

The "Price Paid - Actual Value" does not yield damages.

Hypotheticals based on *Clef Aquitaine*

Consider a situation where the painting was a lesser work from Manet's experimental works. In this, even if it had been genuine, the market value would only have been £700,000?

Within this, we assume that it was still represented as being an original Manet's.

We also assume that it is still a forgery worth about £1,000.

Price Paid: £1 000 000
Represented Value (if it had been genuine): £700 000
Actual value: £1 000

In Tort: this is still the same.

The price will still be the difference in the position that they were in before reliance on the representation.

Their net assets beforehand were £1 000 000.
Now it is £1 000.

To restore that position, the purchaser needs the £999 000 damages.

In Contract: this will change.

The position that the purchaser would have been in had the representation (that the Manet was genuine) been true was £700 000.

The position he is in has a value of £1 000.

As such, the damages is the difference, and therefore, he will be able to retrieve damages of £699 000.

Consider a situation where there was another painting, a Degas, that was on display.
The Manet we are considering is the original Manet, that we assume is worth £2 000 000.
It can be shown that, had the misrepresentation not induced the purchaser to buy the Manet, then the purchaser would have bought the Degas for £1 000 000.
As it was, he paid £1 000 000 for the fake Manet.

The Degas is worth £800 000.
The fake is still worth \$1 000.

This is a situation where *Yam Seng* applies.

The Price Paid: £1 000 000
Represented Value of the Manet (had it been true): £2 000 000
Actual Value: £1 000

Loss that would have been incurred had the misrepresentation not been made: £200 000.

In Tort:

Without the alternative bargain being considered, the purchaser paid £1 000 000 and received £1 000.
This would give rise to £999 000 damages.

However:

He could demonstrate that a loss of £200 000 would have been incurred anyway.

As such, the damages would be £799 000.

Reformed Misrepresentation

Contractual Remedies Act 1979

Purpose: to rationalise and simplify the law of contract, principally by giving largely the same remedies for misrepresentation inducing the making of the contract and entering into the contract.

This has, largely, been replaced by the **Contract and Commercial Law Act 2007**.

Section 6 - Damages for Misrepresentation that - Not Terms

Under Section 6, they are now recoverable on the same basis as if they were a Breach of Contract.

Even if they are not a term, we recover damages as though they are.

We care about this.

This meant that a party can no longer claim for tortious damages in the "tort of deceit" - it is now governed by the Act.

1. If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract—
 - a. he shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken; and
 - b. he shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation.

David's Comments

"Innocent Representation made negligently" - feels like a bit of an oxymoron. The language is responsive to the difference between innocent representations and fraudulent misrepresentations.

From Common Law, ALL representations that were not fraudulent were considered "innocent", however, this Act wanted to narrow application to those made negligently - *Headley Byrne*.

Now: CCLA, Section 35

Assimilation of Remedies

Sections 7-8 were an "assimilation of remedies" that was completed by a later section of the Act.

They set rules governing the cancellation of a contract and those rules apply equally to misrepresentation and a breach.

It meant that the same basic criteria for cancellation of a contract apply when it comes to both misrepresentation and a breach of contract.

We don't care about this as much.

Now: CCLA, Sections 36-42.

Broad Powers to Grant Relief where it is "Just"

Section 9 gave broad powers to grant relief on the justice of the case when the contract is cancelled for "breach".

This may look like things like adjustments when the contract is subject to rescission etc.

Contract and Commercial Law Act 2007

Section 35, Damages for Misrepresentation

1. If a party to a contract (A) has been induced to enter into **the contract by a misrepresentation, whether innocent or fraudulent, made to (A) by or on behalf of another party to that contract (B),—**
 - a. A is entitled to damages from B in the **same manner and to the same extent as if the representation were a term of the contract** that has been breached; and
 - b. A is **not**, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, **[NOT] entitled to damages from B for deceit or negligence in respect of the misrepresentation.**
2. Subsection (1) applies to contracts for the sale of goods—
 - a. Despite sections 197 and 201(2); but (b) subject to section 34.

This is exactly the same as above.

Key Points:

- Tortious damages against parties to a contract are now barred.
- Any damages that would accrue from tortious liability will be measured by a contract measure of damages.

Structure from that:

- a. **There must be a misrepresentation**
- b. **It must have been made to (A), by or on behalf of (B).**
- c. **The misrepresentation must have induced entry into the contract - that is, it must have been a factor that influenced the decision to enter into the contract.**

This means that, prima facie, any misrepresentation - including innocent - which was relied upon by (A) or induced (A) to enter the contract would be actionable.

Common Law has added two further requirements:

- d. **It must have been reasonable in the circumstances for (A) to rely on (B)'s representation.**

This was not in the Act, it was an entirely common law addition.

It could be said that if it were not reasonable to rely on, it likely would not have induced entry (or would be difficult to demonstrate), but really, this is a common law addition.

- e. **The misrepresentation must have been made with the intention of inducing entry into the contract.**

Comments:

David feels that both of these common law additions are unnecessary and only serve to complicate the Act, and for our purposes at least, we are able to assume any misrepresentation that induced entry would be sufficient.

In NZLJ David wrote "A Misrepresentation Muddle" about this.

It came about as a result of a mistake by the NZCA, however, the Courts are not looking to change this.

He argues that the extra steps adds unnecessary complexity and length to already complex judgments.

If it was found that the representation did in fact induce the plaintiff into a contract on those terms (and it was "reasonable to believe that there was a contract in those terms") then the Court will never really find that it was "unreasonable to rely on".

If it was a representation made directly to the plaintiff, then the Court tends to infer that it was made for the purpose of inducing entry, such that this will almost never fail.

Effects of Section 35:

A contract party seeking to recover damages in respect of an inducing misrepresentation is **no longer** required to establish fraudulent or negligent misrepresentation, breach of a term of the contract, or breach of a collateral contract.

Misrepresentation: not defined, but, "clearly intended to bear its technical common law meaning "false statement relating to present or past fact".

Damages can be claimed for purely innocent misrepresentation.

Before this, the only remedy available for innocent misrepresentation was rescission. Now, the primary remedy was for "damages".

The right to terminate remains in some occasions, but it has been severely restricted in line with the object of assimilating that misrepresentation.

Damages are to be assessed by the contract measure.

All damages for misrepresentation, claimed under s 35, are to be assessed according to the contract measure as though the representation had been a term of the contract.

Statutory Bar: No "tort of deceit" between parties to a contract

In simplifying the law relating to damages, the Act also removes the possibility of suing for misrepresentation in tort, with respect to parties to the contract.

Any action for misrepresentation must be brought under s 35.

Cancellation:

- The new remedy that arises when it comes to what would have been "rescission" is now "cancellation".
- Where "rescission" deemed the contract to never have existed, that doesn't quite work when you want to claim damages that are akin to treating the representation as a term of the contract. If no contract had ever existed, it is logically inconsistent to be dealing with something as a "term" of that contract.

David's Reckons

On making damages available under s 35 on the same basis as Breach of Contract:

The goal of that change was to "rationalise" and "simplify" the law by giving similar actions the same set of available remedies.

David argues that the enactment of s 6 (now s 35) was misguided for two key reasons.

Providing the measure for contract damages does not pay due regard to the essential complaint of victims of misrepresentation.

The complaint is that they were wrongfully induced to enter into a contract that they otherwise would not have entered into if the truth had been told, and as such, they should be entitled to the position if that had not been done.

The principle of awarding damages for this harm is that it should provide reparation for the harm resulting from the unlawful conduct.

To put this right, and provide an adequate remedy, then the defendant ought to "pay for the loss resulting from reliance on that misrepresentation".

The complaint is NOT: "you broke your promise and I want to hold you to it" - the complaint is "you made me enter into a contract and put me in a position due to your misrepresentation, but based on the actual and true state of affairs, I don't want to be in that position. I want to be compensated for the harm that I have incurred".

While the complaint about a "broken promise" is often a greater level of compensation, there are also situations where it will deny any compensation.

It would deny any compensation where the misrepresentation was important to the inducement to enter, but concerned a "collateral matter" that did not affect the condition or value of the subject matter, so it does not relate to actual benefit of the contract.

e.g. where P is induced to buy shares in a mining company by D's negligent misrepresentation that Ms X (a wealthy entrepreneur) has invested in the company. However, P loses most of her money when the company collapses, but it would have collapsed even if Ms X had invested the money.

e.g. P buys D's house for \$500,000, relying on the representation that the house is in a school zone that P is particularly anxious to send her children to. The actual value of the house is \$450,000, but even if the representation had been true, the reputation of the school more broadly is not such that the house would have been worth more.

In this one, the resulting loss in tort would be \$50,000.

In contract, the position if the representation had been true is the same as it is now, and so the contract measure yields nothing.

e.g. P is induced to buy a block of land from D by D's misrepresentation that half of the land is covered with millable timber. P buys the land for \$100,000. It transpires that there is only a one-quarter coverage of millable timber. As a result, the land is worth \$60,000. However there is evidence that, if the representation had been true, it would still only have been worth \$80,000.

Prima facie P might previously have recovered damages of \$40,000 under the tort measure, but she now recovers only \$20,000 under the contract measure embodied in s 35.

There could be an even greater discrepancy if P could show a lost opportunity to offer and have accepted a lesser price (for example a price of \$50,000 would allow \$50,000 damages under tort: price paid - price would have been paid).

With those situations said, however, there are also times where it would impose unfair damages on the defendant as well.

e.g. P is induced to buy a block of land from D by the negligent misrepresentation of D's (insolvent) agent that half of the land is covered in millable timber. P buys the land for \$100,000. It transpires that there is only a one-quarter coverage of millable timber. The land is still worth \$100,000, but, if the representation had been true, it would have been worth \$200,000.

In the absence of a proven lost opportunity to pay less for the land, P would previously have recovered no damages under the tort measure, but she now recovers the substantial sum of \$100,000 under the contract measure embodied in s 35.

This is why, arguably, s 35 orders too much.

There might be objections that it is not as unfair as he said to impose this on D because P could recover the same amount by establishing that the representation gave rise to a collateral contract.

However, that would not work in this particular situation and is not an objection, because D's real estate agent who made the representation does not normally have authority to give contractually binding promises. Usually, they only have authority to make representations, not apparent authority to bind contractually.

Fair Trading Act 1986

This acts as a supplement to some situations where misrepresentation would otherwise have applied.

Section 9 - Misleading and Deceptive Conduct Generally

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Key Points:

This only applies to misleading conduct in trade.

- The conduct must be undertaken by the individual who is acting, in that moment, "in trade". It required a commercial or business conduct.
- It does not apply to private sales, as a private individual.
- It does apply to real estate agents in their ordinary business.
- Trade depends on the context - the same individual can be acting in trade and not in trade, depending on the circumstances.
For our circumstances, it will be clear.

Statutory, Strict Liability

- There is no need to show fault of any description. We do not need either negligent or fraudulent behaviour.

Also Note: A lot of case law relates to senior employees or directors of companies.

There are questions of whether they can be held liable, personally, rather than liable as a matter of individuals.

an example - a director of a one-person building company was selling leaky homes. Under the Fair Trading Act, even though it was a LLC, it was held that he could be sued for misleading conduct. He could not just wind up the company and say no liability.

The case law is still evolving.

However, there is not much risk of junior employees being held liable.

We don't really need to unpack this distinction, just yet.

Section 43 - Other Orders

These discuss the orders that can be made against a defendant under the Fair Trading Act, that is, what relief can be awarded.

Section 43

1. This section applies if, in proceedings under this Part or on the application of any person, a court or the Disputes Tribunal finds that a person (**person A**) has suffered, or is likely to suffer, loss or damage by conduct of another person (**person B**) that does or may constitute any of the following:
 - a. a contravention of a provision of [Parts 1 to 4A](#) (a **relevant provision**):
 - b. aiding, abetting, counselling, or procuring a contravention of a relevant provision:
 - c. inducing by threats, promises, or otherwise a contravention of a relevant provision:
 - d. being in any way directly or indirectly knowingly concerned in, or party to, a contravention of a relevant provision:

- e. conspiring with any other person in the contravention of a relevant provision.
2. The court or the Disputes Tribunal may make 1 or more of the orders described in subsection (3)—
 - a. whether or not the court grants an injunction, or the court or the Disputes Tribunal makes any other order, under this Part; and
 - b. whether or not person A made the application or is a party to the proceedings.
3. The orders are as follows:
 - a. an order declaring all or part of a contract made between person A and person B, or a collateral arrangement (for example, a collateral credit agreement) relating to such a contract,—
 - i. to be void; and
 - ii. if the court or the Disputes Tribunal thinks fit, to have been void at all times on and after a date specified in the order, which may be before the date on which the order is made:
 - b. if an order described in paragraph (a) is made in respect of a contract that is associated with a collateral credit agreement, an order vesting in person B all or any of the rights and obligations of person A under the collateral credit agreement:
 - c. an order in respect of a contract made between person A and person B, or a collateral arrangement (for example, a collateral credit agreement) relating to such a contract,—
 - i. varying the contract or the arrangement in the manner specified in the order; and
 - ii. if the court or the Disputes Tribunal thinks fit, declaring the varied contract or arrangement to have had effect on and after a date specified in the order, which may be before the date on which the order is made:
 - d. if an order described in paragraph (c) is made in respect of a contract that is associated with a collateral credit agreement, and if that order results in person A no longer having property in the goods that are the subject of the contract, an order vesting in person B the rights and obligations of person A under the collateral credit agreement:
 - e. an order directing person B to refund money or return property to person A:
 - f. an order directing person B to pay to person A the amount of the loss or damage:
 - g. an order directing person B, at person B's own expense, to repair, or to provide parts for, goods that have been supplied by person B to person A:
 - h. an order directing person B, at person B's own expense, to supply specified goods or services to person A.
4. In subsection (3)(a) to (d), **collateral credit agreement**, in relation to a contract for the supply of goods, means a contract or an agreement that—
 - a. is arranged or procured by the supplier of the goods; and
 - b. is for the provision of credit by a person other than the supplier to enable person A to pay, or defer payment, for the goods.
5. An order made under subsection (3)(a) to (d) does not prevent proceedings being instituted or commenced under this Part.

Key Parts:

Recover Damages - Section 43(3)(f)

The orders are as follows:

an order directing person B to pay to person A the amount of the loss or damage:

This is the statutory provision that allows damages to be recovered from the person engaged in the misleading conduct.

This means that the Court is able to award damages, at their discretion.

Declaring Contract to be Void/Have no effect - Section 43(3)(a)

- a. an order declaring all or part of a contract made between person A and person B, or a collateral arrangement (for example, a collateral credit agreement) relating to such a contract,—
 - a. to be void; and
 - b. if the court or the Disputes Tribunal thinks fit, to have been void at all times on and after a date specified in the order, which may be before the date on which the order is made:

Under this, the contract is "void" or can be deemed to never have existed.

Note: this stands in contrast to the CCLA where the contract is deemed "cancelled" where there is no need for future performance, but it is deemed to have existed prior for the purpose of damages.

However, that does all depend on the date from which it was declared void.

Liable if you provide false information to the agent - Section 43(1)(d)

1. This section applies if, in proceedings under this Part or on the application of any person, a court or the Disputes Tribunal finds that a person (**person A**) has suffered, or is likely to suffer, loss or damage by conduct of another person (**person B**) that does or may constitute any of the following:
 - d. being in any way directly or indirectly knowingly concerned in, or party to, a contravention of a relevant provision:

This means that if you are selling a home, and you make a misrepresentation to the agent, then you can be sued under s 9 of the Fair Trading Act, as this would be "indirectly knowingly party to".

This means you would be liable both under s 9 FTA and s 35 CCLA.

Section 45(4) - Any conduct engaged in on behalf of a person other than a body corporate-

- a. by a servant or agent of the person acting within the scope of that person's actual or apparent authority; or
 - b. by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, given within the scope of the actual or apparent authority of the servant or agent—
- shall be deemed, for the purposes of this Act, to have been engaged in also by the first-mentioned person.

In essence, the conduct of an agent or employee is deemed to have been engaged in by the employer or principle.

That is, the conduct of the agent or employee is essentially the conduct of the principle.

Note: even if the employer or principle is deemed to have engaged in that conduct, it does not necessarily bring it within the scope of the Act.

It will only be brought within the scope of the Act if the Principle, at the point where they would have engaged in that conduct, would have done so in trade.

For example, if a real estate agent made a misrepresentation in the course of selling a house, they would be liable under the FTA. That misrepresentation would also be considered the conduct of the vendor, so the vendor would also be considered to have misrepresented to the buyer. However, that vendor will only be liable if they, too, are in trade for the purposes of selling that property.

Section 45(2) - the same but on behalf of a body corporate.

Tort Measure of Damages Available under s 43 (based on s 9)

The question arose:

Does the loss or damage in respect of which the Court may order include the loss of expectation (Contract Measure),

or

Is recovery for the "tort measure of damages" - that is, the payment of the amount required to put the plaintiff in the position as if the misrepresentation had not been made?

Damages are to be assessed according to the Tort Measure of Damages - *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15

Damages for "lost opportunity" can be recovered" - *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15

This was a 2:3 split, in favour of assessing the damages by analogy to the tort measure of damages.

Henry and Blanchard JJ (26)

"Section 9 creates a duty not to mislead. If the duty has been breached, money may be awarded to make good, or compensate for, loss or damage which has been caused by the breach".

"It is a general and basic principle of law that the remedy by way of monetary award is to put the wronged party in the same position as he or she would have been, but for the wrong".

"If they would not have purchased at all, then prima facie, the loss would be based on the difference between the value of the property and the price paid, or in some circumstances, the loss of an opportunity to buy a different property. On the other hand, if they still would have purchased, the resulting loss could only be one arising in some collateral way, such as lost opportunity to buy at a reduced price or some other direct out of pocket consequence".

"Here, the wrong complained of is making the representation, not in failing to honour it... Section 43(1) does not purport to make a representation enforceable against a representor. It says there is liability for loss or damage resulting from the representation."

"To [employ the contract measure of damages] is to turn on its head the whole rationale of the measure of damages for a civil wrong. Failing to make good a misleading statement does not constitute a breach of the Act. It is fundamental that the remedy must be directed

to the consequences of the breach of the imposed duty, not the consequences which are attributable to some other cause which is not the subject of an actionable duty.

However, it is worth noting that at one point, there was a line of cases in the HC that held that s 43 awarded "loss of bargain damages", and contract measure was awarded.

David's Comments:

No Statutory Right to Damages

During the passage of the Act, a section from the Australian Trade Practices Act that was initially included was explicitly excluded.

That section conferred a "statutory right to damages" for misleading conduct.

It basically held that "anyone who breaches s 9 is liable to pay damages" (as well as other parts of the Australian Act that allowed the full suite of damages).

Parliament officials misread the reference to the s 43(3)(f) in an Australian Textbook as operating in the same way as conferring a statutory right to damages.

However, there is a difference between the conferment of a statutory right and waiting on the Court's discretion to confer damages. Under s 43, the Court has discretion to make the order, and what the quantum of that order might be. In most cases, that will be the full award of loss, but the Court does also have the discretion to say that it's a bit much.

Practically, this doesn't change too much, though it does put the defendant in a slightly stronger position to bargain to reduce the claim. There is an increased litigation risk in terms of the discretion, which means in extra-judicial settlement processes, there is a stronger defendant position.

Misc: The Role of Real Estate Agents

Real Estate Agents are still liable for their negligent or fraudulent misrepresentations, which would bring either liability in tort (or under section 9 of the Fair Trading Act). The statutory bar in s 35 doesn't apply to them.

Representations on Behalf of the Clients/Parties to a Contract

A real estate agent will almost always have actual or ostensible authority to make the representations about the subject matter that they are marketing, on behalf of the vendor.

This means that they can bind their principle (vendor)/s 35 (old: s 6) explicitly includes provisions that makes the vendor liable for those representations made on their behalf. This means that the principle may incur liability for the actions/representations of their agent (for either negligent or fraudulent representations).

Liabilities

- If that principle makes a statement that was negligent or fraudulent, they can be sued by the party who that misrepresentation was made to.
- If that representation is outside the bounds of their agency contract, the real estate agent may need to indemnify/compensate their agent for the damages awarded to the purchasers.
That would mean that the agent would need to compensate the vendor for the contract measure of damages (as that is what would have been awarded against the vendor under s 35).
- If the client gives false information to the agent, then the agent may not be responsible but can be sued anyway.
In this position, the agent would be able to sue the principle.

It may be preferable to sue the agent rather than the principle, as the principle may be out of the country, or just have less money, or anything like that.

Exam Focus

1. What causes of action are available to the plaintiff? **[Diagrams]**

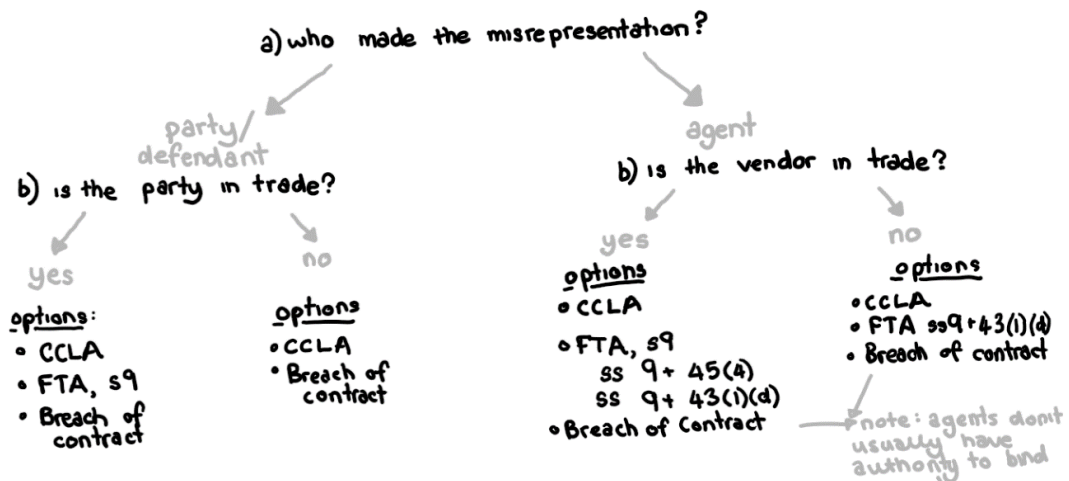
Explain why other causes of action are not available and you can disregard them.

General: CCLA – not a party to the contract; FTA – party is not in trade; Tort – Statutory Bar under CCLA; Contract – cannot be shown to be a term.

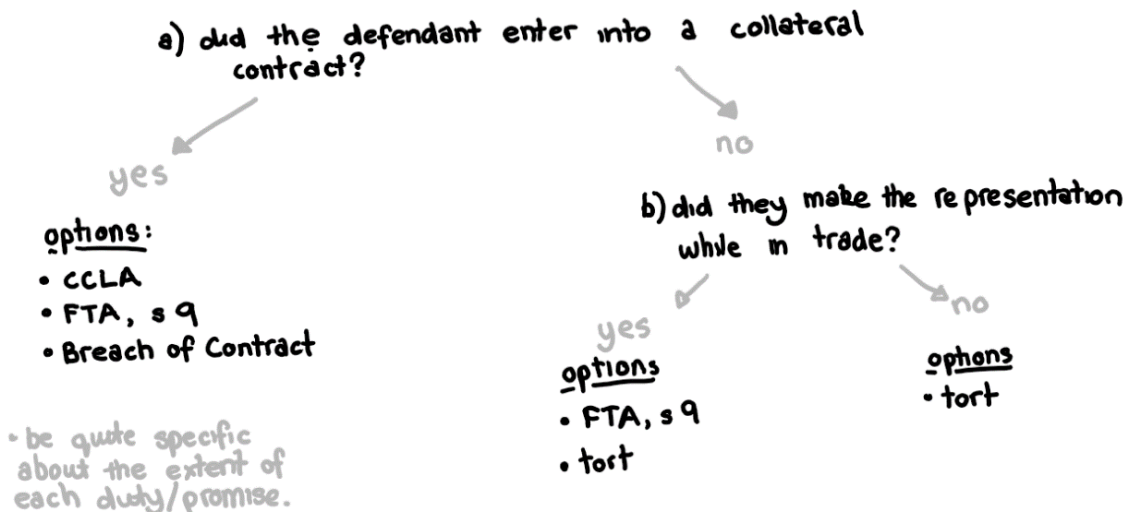
2. Are any of the causes of action made out? **[Offence Structures]**
3. What damages are available? Which would be a better measure? **[Damage Structures]**
4. Is there anything else to be said about this? **[David's Reckons]**

What causes of Action are Available?

Suing a Party to the Contract



Suing a defendant - not party to contract



Bare Offence Structures

Vendor - Section 35, CCLA

Section 9 of the CCLA:

1. Was there a misrepresentation made to the plaintiff?
2. Was it made by or on behalf of the plaintiff?
It doesn't matter if the plaintiff did not make the misrepresentation themselves if someone made it on their behalf - such as a real estate agent.
3. Did it induce the plaintiff to enter into the contract?

Prima facie, any representation, including innocent representation, that was relied upon will be actionable.

Common Law Additions:

3. Was it reasonable, in the circumstances, for the plaintiff to rely on the representation?
4. Was the misrepresentation made with the intention of inducing entry into the contract?

Damages:

5. Damages are to be assessed according to the Contract measure of damages (CCLA, s 35(1)(a))

Vendor or Agent - Fair Trading Act, s 9, only.

When the defendant made the misrepresentation.

Section 9 - Offence

1. Was the defendant in trade?
2. Did the defendant engage in misleading or deceptive conduct?

No need for negligent or fraudulent mindsets - this is statutory strict liability.

Section 43 - Remedies

3. What remedies are available?
 - a. The contract can be declared void, as from a specific date - (s 43(3)(a)).
 - b. There can be an order for damages - (s 43(3)(f)).

That order is to be assessed by analogy to the tort measure - *Cox & Coxon Ltd.*

Vendor or Agent - Fair Trading Act, ss 9 & 45(4)

When the defendant was not the individual who made the misrepresentation, and the defendant is in trade.

Section 9 - Basic Offence

1. Was the defendant in trade?
2. If it was not the defendant who made the misrepresentation, was it an "agent or servant" acting within the scope of their actual or apparent authority?

If so, then s 45(4) applies - the behaviour of the agent or servant will be attributed to the principle.

Note, however, that this will only bring liability if the principle would have been liable if they had engaged in the behaviour themselves. If they are not in trade, then even when the behaviour is attributed to them, they will not be liable.

Section 43 - Remedies

3. What remedies are available?

- a. The contract can be declared void, as from a specific date - (s 43(3)(a)).
- b. There can be an order for damages - (s 43(3)(f)).

That order is to be assessed by analogy to the tort measure - *Cox & Coxon Ltd.*

Vendor or Agent - Fair Trading Act, ss 9 & s 43(1)(d)

When the defendant is not in trade and is not the individual who made the misrepresentation.

Section 9 - Basic Offence

1. Did the defendant provide false information to the agent, who subsequently engaged in misleading conduct?

If so, then s 43(1)(d) applies. This brings liability where the defendant was "in any way, directly or indirectly, knowingly concerned in or party to a contravention of a relevant provision".

Section 43 - Remedies

2. What remedies are available?
 - a. The contract can be declared void, as from a specific date - (s 43(3)(a)).
 - b. There can be an order for damages - (s 43(3)(f)).

That order is to be assessed by analogy to the tort measure - *Cox & Coxon Ltd.*

Tort - Misrepresentation

When you are not suing a party to the contract.

1. Are they are a party to the contract?

If they are a party, then tortious claims are prohibited by the statutory bar in s 35(1)(b) - "A is **not**, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, **entitled to damages from B for deceit or negligence in respect of the misrepresentation.**"

2. Was there a statement of existing or past fact?
3. Did that statement induce a party to enter into the contract?
4. Was that statement false?

5. Can that representation be shown to be a term?

If not a term...

Which type of misrepresentation? Which remedies?

6. Fraudulent
Was the representation made intentionally false, and made with the intention to deceive?

If so, this is fraudulent misrepresentation and gives rise to any combination of:

- a. Equitable Remedy of Rescission
- b. Common Law Damages - assessed by the Tort Measure

7. Negligent - Hedley Byrne
 - a. Was the representation made without reasonable grounds to believe that was true?
 - b. Was there a duty to make an accurate representation?

Note: *Esso Petroleum v Mardon* (1976) established that there can be a duty of care or special relationship owed from one party to the other while negotiating a contract.

For our purposes, it is probably sufficient to assert a duty exists and move from there.

If so, this is negligent misrepresentation under *Hedley Byrne* and gives rise to any combination of:

- a. Equitable Remedy of Rescission
- b. Common Law Damages - assessed by the Tort Measure

8. Innocent

If it does not fit into either of the other categories, but there was still a misrepresentation, then it will establish innocent misrepresentation.

This gives rise to the equitable remedy of rescission.

Breach of Contract

Note: in demonstrating this, regard must be had for the Parol Evidence Rule

1. Was there a statement of existing or past fact?
2. Did it induce the other party to enter into the contract?
3. Was that statement false?

4. Can that statement be shown to be a term of the contract?
 - a. Was it included as a written part of the contract?
 - b. Consider the Parol Evidence Rule:
 - a. Part Written, Part Oral Contract
 - b. A Collateral Contract
 - c. Rectification
 - d. Effect of any Entire Agreement Clauses

If yes...

What type of term is it?

5. Minor Term

Was the term peripheral to the contract, on a peripheral matter, or non-essential.
e.g. does it go to an additional benefit, that is not at the heart of the contract?

If so, then it is a minor term, that gives rise to common law damages in contract.

6. Condition/Essential Term

- a. Does the term go to the heart of the contract?
Or
- b. Is it a term, without which, the contract would never have existed?

If so, it is an essential term, that gives rise to:

- a. Common law damages in contract; and/or
- b. Equitable Remedy of Rescission.

7. Innominate Term

This is a term that, on the face of it, is neither essential or minor.

Instead, it is a term which, if breached and depending on the manner of the breach, could have either substantial or minor effects.

- a. Did the breach of the term have substantial effects, such that it would be justified to rescind the contract?

If so, breach of contract gives rise to:

- a. Common law damages in contract; and/or
- b. Equitable Remedy of Rescission.

- b. Did the breach of the term have relatively minor effects?

If so, the breach of contract gives rise to common law damages in contract.

Measure of Damages

Contract Measure of Damages

The principle behind the contract measure of damages is that you are entitled to be in the position that was promised to you, and so the damages aim to put you in the position that you would have been in had the misrepresentation been true.

1. What was the promised position?

"Value had the representation been true="

2. What is the actual position?

"Actual price="

3. What is the difference?

Note: the difference between the "actual position" and the "promised position" might be such that the plaintiff is still left out of profit (if the plaintiff entered into a losing bargain where they entered into a contract paying a price that would have been over value, even had the representation been true).

Tort Damages

The principled underpinnings of tortious damages are that you are entitled to be put into the position that you would have been in, had it not been for the misrepresentation that occurred. That is, you are entitled to be compensated for the harm that flows from the misrepresentation itself.

What would have occurred had it not been for the misrepresentation?

- a. Would no contract have been entered into.
If so, assess the damages ordinarily.
- b. Would another contract have been entered into?
If so, assess the damages according to the Loss of Bargain measure, or *Yam Seng*, depending on the nature of the other contract.

Basic Measure:

Where there is no alternative bargain.

1. What price was paid under the contract?

This is the position that they would have been in, had they not entered into the contract. That is to say, had it not been for the contract, they would never have spent that money.

Usually: "Price Paid"

2. What is the position as a result of the contract?

What was the actual value that they received as a result of contract?

Usually: "Actual value"

3. What is the difference?

This is the measure of damages.

The amount required to put the "actual value/position" into the "position they would have been".

Fill in:

Price Paid =

Actual Value =

What is the difference?

Alternative Bargain where Better Off - Loss of Opportunity

Where it can be demonstrated on the facts that an alternative bargain, or a bargain in an alternative form, would have been entered into.

1. What was the price paid under the contract?
2. What is the position as a result of the contract?
3. Would the alternative bargain be more profitable or beneficial than the present contract?

If so, this is a "lost opportunity claim", as allowed under *Clef Aquitaine, East v Maurer*, and examined within *Yam Seng*.

- a. What is the position that they would have been in had it not been for the misrepresentation?

What is the price that they would have secured in the other contract?

Often: "Price would have paid".

- b. What is required to put them in the position that they would have been in as a result of that alternate bargain?

Add that difference between "price paid" and "price would have paid" to the general assessment of damages. That is money that they would have had in their pocket to employ for other bargains or other ends had it not been for the misrepresentation.

Think - the position that they would have been in had it not been for the misrepresentation is "the benefit of the contract" AND "the benefit of extra money in their pocket".

The overall assessment requires:

Price Paid =

Actual Value =

Price would have paid =

Then calculate:

Damages According to Ordinary Tort Measure =

Adjust it (increase) by the difference between "price would have paid" and "price actually paid" =

Alternative Bargain where Worse Off - Loss of Opportunity

Where it can be demonstrated on the facts that an alternative bargain, or a bargain in an alternative form, would have been entered into.

1. What was the price paid under the contract?
2. What is the position as a result of the contract?
3. Would the alternative bargain be less profitable or beneficial than the present contract?

If so, this is the other side of the coin of a "lost opportunity claim" that was recognised under *Yam Seng*.

The rationale for this can be articulated as either:

- The role of tort damages is to put them in the position that they would have been in, had it not been for the misrepresentation, and that position includes some loss.

or

- The role of tort damages is to remedy the harm that flows from the tortious behaviour, and that loss that would have been incurred anyway is loss that does not flow from the tortious behaviour.

- a. What is the position that they would have been in had it not been for the misrepresentation?

What losses would they have incurred in the other bargain, had it not been for the misrepresentation?

- b. What is required to put them in the position that they would have been in as a result of that alternate bargain?

Think - the position that they would have been in had it not been for the misrepresentation is "the benefit of the contract" AND "the benefit of extra money in their pocket".

So the overall assessment requires:

Price Paid =
Actual Value =

Losses that would have been incurred =

Then calculate:

Damages According to Ordinary Tort Measure =
Adjust it (decrease) by the difference between "price would have paid" and "price actually paid" =

Alternative Structures for *Yam Seng* damages:

1. Is there an alternative bargain that would have been entered into had the misrepresentation not been made?
2. Would there have been a loss in that alternative bargain, had the misrepresentation not been made?
3. What would the loss have been?
4. Calculate the damages as required?
5. Take away the loss that would have been occurred anyway.

Alternative for any alternative bargain:

1. Is there an alternative bargain that would have been entered into had the misrepresentation not been made?
2. What would the plaintiff's position have been, had that alternate bargain been entered into?
3. What is their current position as a result of the misrepresentation?
4. What is required to restore them to the position that they would have been in, after that alternate bargain?

Less Relevant Structures

Structure – Representations or Terms, and Remedies

Is the statement an actionable misrepresentation?

4. Was it a statement of existing or past fact?
5. Did the statement induce the other party to enter into the contract?

What type of misrepresentation is it?

6. What type of misrepresentation is it?

- a. A term of the contract?

The overarching inquiry is whether the parties intended to be bound to this promise and to make it a warranty.

- c. Was it included as a written part of the contract?
- d. Consider the Parol Evidence Rule:
 - a. Part Written, Part Oral Contract
 - b. A Collateral Contract
 - c. Rectification
 - d. Effect of any Entire Agreement Clauses

- b. If it was a term of the contract, is it:
 - d. A warranty = damages
 - e. A condition = rescission and damages.
 - f. An innominate term: if serious = rescission and damages; if minor = damages.

- c. A mere representation?

If it is not a term, then it will be a "mere representation".

The plaintiff is entitled to the equitable remedy of rescission no matter what type of representation it is.

- a. Was it a negligent or fraudulent misrepresentation?
Negligent:
 - a. A representation made without belief on reasonable grounds, where there was a duty to take reasonable care.

- Fraudulent:
- b. A representation made that was knowingly false.

If it is either negligent or fraudulent, the party is entitled to common law damages in addition to rescission.