

## CONTRACTUAL REMEDIES ACT.

Attempted to rationalise and simplify the law of K by giving substantially same remedies for misrepresentation, breach of K & inducement. **no longer distinction between:**

- breach of K & misrepresentation
- statements IN the K & statements ABOUT the K
- culpability of representor (innocence v fraudulent)

### Section 6 CRA / s 35 CCLA:

- inducement to enter
- liability for other party only (c.f. Agents not under Act)
- damages assessed on the basis representation were true (was a term)
- cannot sue other party under tort

**ISSUE:** Stipulating loss of bargain only polarises damages as either unfair on representee or places to great a burden on vendor. conflation of misrepresentation = breach

- **representee: when matter is collateral and does not relate to benefit of K**  
e.g. Y induced to buy shares on misrepresentation X has invested. Company collapses, shares valueless. **evidence shows company would have collapsed even if X had invested.** Loss of bargain = no damages.
- **vendor: assumes any representation an enforceable term – even if did not intend to be contractually bound by it, or if agent made representation without your knowledge (c.f. orthodox agency law).**

**ISSUE:** complaint of misrepresentation is not always: 'you broke my promise, give \$\$ to enable truth of misrepresentation' but: 'I would not have entered into this contract'

- **manifested in implied representation cases when the relevant representation is that there were reasonable grounds.** if reasonable grounds, promisee has STILL suffered a loss
- e.g. Art dealer RG opinion, no damages? solution? damages but abated to acknowledge that sufficient connection between promisee loss & statement.

**ss 7 & CRA / ss 36 – 42 CCLA: c.f rescission - \$\$ back not inherent in relief.**

Governance of cancellation for misrepresentation. can only **cancel** if:

- essential performance (a)
  - **highly problematic:** how can it be established that the performance of the term is essential to representee, trying to hold something was expressly said or implied which is hard to do
- reduces benefit / increase burden to vendor (b)
- benefit or burden substantially different from that rep or K'd for (b)
  - **this is equally problematic, especially in relation to opinion / representation that there were reasonable grounds for the belief:** no representation in those cases that the opinion is true, **it is the inaccuracy of the opinion itself that increases burden / decreases benefit** – does not follow that if there were reasonable grounds, P would have received the benefit that was the subject of the stated opinion.

**ISSUE:** makes it difficult to prove cancelling a K justified. Damages not adequate when promisee's complaint is: 'I would not have entered into this contract'

### Hypothetical illustrations.

**Loss of bargain inadequate in when complaint is 'I would not have entered into this':**

**Example 1:** P: buys D house for 500k, relying on statement it was in zone for a school  
AV: 450k **but the actual value is not affected by zoning for schools**

→ collateral matter, thus K damages will not award (tort would).

**Example 2:** P: buys block of land, relying on statement ½ of land millable timber  
PP: 100K

AV: 60K (1/4 land millable timber)

**However, evidence:** IF true, only worth 80k

→ K = 20k only. (tort would have been 40k).

**Liability for agent's negligence:**

**Example 3:** P: buys block of land, relying on negligent statements by D's REA (**now insolvent**), ½ of land millable timber. Actually only ¼.

PP = AV: 100K

RV: 200K

→ Under CMA, D now liable for 100k. cannot indemnify agent because agent is insolvent. Under common law: only would have been able to get rescission, or alternatively sue Agent in tort (but = nothing).

### District Council v Altmarloch –

- Altmarloch purchased block of land in Marlborough (2.675m)
- Induced by Vendor's REA negligent statement: land had RC enabling X amount of water extraction
- RC in fact only allowed for ½ of X extraction – everyone aside from vendors had forgotten land for sale was ½ of a subdivision (other had been sold already)
- AV: 2.55m; PP: 2.675m; RV: 2.950m

After purchase completed, planted grapes & consequently discovered water shortness. SC held 3:2 award of more than 1mil in damages = **cost of cure**: purchasing additional water rights & building a dam to store water. **diminution in value = 400k.**

cost of cure & diminution in value are simply 2 means of calculating for loss of B. despite courts (**Ruxley Electronics – swimming pool**) holding can't recover cost of cure when out of proportion to benefit gained / when unreasonable, SC awarded cost of cure despite 600k difference in 2 measures.

- side issue: figures had been valued by HC couple years prior, likely out of date / prices had increased.

Minority (Elias): **flaw in s 6 – leads to exorbitant and unfair awards being placed on defendants.** would have held unreasonable to award of cure due to disparity between 2 note: agents were indemnified by vendors, so agents did pay. but what if they had been insolvent / not worth suing?

**FAIR TRADING ACT, STRICT LIABILITY**

Copied Australian legislation & failed to consider inevitable interplay with the CMA & the objectives that contractual reform had had in simplifying by only allowing one measure.

**s 9:**

- misleading or deceptive conduct
  - strict liability – why preferable to traditional tort.
- in trade
  - must be in business / commercial context. i.e. private individual selling personal item likely not covered (but agent would be).

**s 43(1)(d) – accessory liability**

- if any way directly or indirectly knowingly concerned in, or party to, can be liable e.g. owner of house passes on incorrect information

**s 43 (3): broad discretion to make variety of orders**

- void the K – 3(a) – CAN RESCIND
- refund money / property – 3(e)
- pay amount of loss / damage – 3(f)

why would a promisee sue in tort as opposed to under the FTA?  
why is breach of a collateral K no longer that relevant unless sale of land?

**s 45: agency – actual or apparent authority**

- conduct of agent of body corporate – 2(a)
- any conduct on behalf of another person 4(a) or (b)

**ISSUES:**

**no statutory right to damages in the Act** – parliament accidentally delated a clause conferring statutory right to damages (i.e. if Act made out = damages). misread a textbook thinking it said it was superfluous.

→ **Goldsbro v Walker**: full discretion under s 43 to both fact of award and amount (c.f traditional tort)

**no attempt was made to harmonise the FTA with the CRA** – can get different award of damages which may give more, can rescind the contract.



Causes of Action	Vendor	Agent
<b>S 6 CRA / s 35 CCLA</b>	“made by or on behalf of another party”	“another party” – privity of K
<b>S9 FTA</b>	If in trade – private v public <b>S 43(1)(d)</b> – knowing accessory	While SL = easier to make out than tort, discretion to not order all \$means...
Tort (deceit, negligent misstatement)	<b>S 6(b)</b> – statutory bar	Duty + breach – once established = all damages
Breach of term- collateral K	But somewhat irrelevant, only if <b>Property Law Act</b> as CRA ensures same \$c.f. CL	Not a party

**CALCULATING DAMAGES.**

**Contract:** rationalised on upholding sanctity of contract. Thus calculated on the basis that the misrepresentation was a term of the contract that had not been breached (c.f. common law in v about K). **The amount therefore corresponds between the position the promisee is currently in (breach) and the position the promisee would have been in if the representation been true (non-breach).**

**Breach – non-breach (total yield - purchase price – expenses)**

**Two means of calculating this -**

- **Diminution in value:** *represented value – actual value*
- **Cost of cure:** \$\$ to ensure you are the position you ought to have been in Best measure for when bargain was still good – does not matter what PP.

**Tort:** rationalised on compensating for harm done. Thus calculated on the basis that the misrepresentation had not happened – this includes **any alteration of the promisee’s position as a result of the statement: but for the statement, what position would the plaintiff be in – consequential loss**

- PF: actual value – price paid

Hence, best measure for when bargain was bad.

However, **if evidence allows**, can make loss of opportunity award on basis that **promisee’s position was still altered, from which loss directly flowed**, notwithstanding the quality of the bargain.

- **Clef Aq:** would have been able to negotiate a better price for same K
- **Harvey Corp v Barker** applied **Clef Aq** in NZ under the **FTA**
- **East v Maurer:** would have bought a different salon, in the same area that would have made significant profits

**THIS IS NOT LOSS OF PROFIT** – it still encompasses tort’s basic objective in returning the plaintiff to their pre-harm position.

However, it follows that if evidence establishes that but for the misrepresentation the promisee would have entered into another loss-making bargain, **the promisee’s position was also altered.**

- **Yam Seng:** can minus from the award of PF damages the loss the promisee would have suffered in the alternate bad bargain  
e.g. X buys from Y a painting, relying on the statement it is a Picasso.  
*PP = 1m, RV = 2m, AV = 10\$.*  
PF damages = \$999,990. However, evidence establishes that X, if Y had not made statement, was going to buy from Z a manet for 1m only worth 500k.  
→ damages = \$999,990 – 500,000.

## DEFINING MISREPRESENTATION.

a **false** statement of **existing or past fact** that induces entry into a contract.

## EXPRESSION & PERCEIVED KNOWLEDGE OF REPRESENTOR.

There must be a statement.

- mere silence cannot be a misrepresentation *e.g. failure to disclose material fact nor tacit acquiescence*. except:
  - silence distorting positive representation – must be full & frank statement, not partial /fragmentary *e.g. half truth*
  - statement true at time but becomes untrue in course of negotiations – *must disclose change of circumstances*
  - where silent conduct can be construed as positively affirming misconception – *duty to speak*

Past or present fact.

- distinct from statement of intention
  - but: statement of intention implies alleged intention exists & if it does not = misrep of fact – *misrep as to state of man's mind is fact*
  - BUT not if at time, did in fact have intention (& later failed to perform)
- ostensibly about future may sometimes imply statement of present fact – *present fact justifying the future state*.
  - e.g. statement re: kiwifruit orchard would produce in 2 years would imply present state of orchard

Fact not opinion

- opinion = belief based on grounds incapable of proof held BUT
  - subjectively not held – *if representor did not hold opinion*
  - if representor has greater means of knowledge
    - are there reasonable grounds for the belief?
      - **did the speaker impliedly state he knew the facts which justified the opinion?**

**Smith v Land & House Property** – ‘most desirable tenant’ misrep as untrue assertion that nothing had occurred which could be regarded as rendering him an undesirable tenant.

→ “in a case where the facts are equally known to both parties, what one of them says will frequently be an expression of opinion ... but **if facts are not equally known, then a statement of opinion from one who knows the facts best very often involves a statement of material fact**, for he impliedly states he knows facts which justify his opinion”

Held Smith could not have held the opinion; or that as a previous landlord, had no RG.

**Esso Petroleum v Mardon** – 200,000 current annual turnover made by Esso employee who knew of limited road access. Held that **despite not being a term of the K, damages awarded as Esso had special knowledge & skill.**

Verifiability?

- ability to verify subject-matter NOT determinative – **expression paramount.**

**Oscar Chess v Williams 1957** –

- V sold P – a car dealer – 1948 model for \$290
- actually 1939 model worth \$175
- statement had been made in good faith, relying on car log book which itself was a forgery.
  - held to be opinion as P knew V not a car dealer and therefore would reasonably have been relying on some other information

**1860s Nickel case** -

- Defendants purchased from vendors a silver mine
- issued a prospectus encouraging public to invest, published statements of vendor
- Mine was worthless
  - held liable for misrepresentation, as despite innocence, **they had chosen to voice the accuracy of what they were told & affirm it as a fact of their knowledge.**

Mere conduit?

**Anderson v Pacific & Fire Insurance Company** –

- P (owner of ship) chartered to recover cargo of a ship sunk at Rendezvous Point
- Captain requested P to get insurance policy on freight, wrote letter which said ‘considered by the Pilot to be good & safe anchorage... I have been out and seen the place & consider it quite safe’
- P organised insurance, producing letter by Captain **and adding no statements of his own**
- ship lost
- evidence that conduct of captain innocent & in good faith

While held opinion (before law re RG) – **real issue was really whether P asserted that it was safe anchorage, or that only the pilot & captain thought so**

- in effect, by producing letter by Captain he was saying: ‘captain tells us it is a good & safe anchorage’
  - **able to exclude liability if say: ‘as told by X & Y [experts] ..’**

c.f. **Brown**: could have argued this (would likely not have been winning but still!)

- vendors / sale particulars: ‘solicitors have found she has no aggregable estate’