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PRE-CONTRACTUAL STATEMENTS:

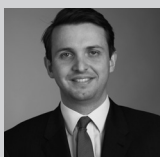
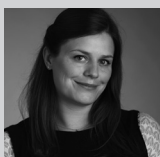
WHEN CAN THEY COME BACK TO BITE YOU?

CONTRACT DISPUTES PRACTICAL GUIDES ISSUE 3: SEPTEMBER 2019

This is the third in our series of contract disputes practical guides, designed to provide clients with practical guidance on some key issues that feature in disputes relating to commercial contracts under English law.

Parties may say all sorts of things when negotiating a contract. Where sophisticated commercial parties are involved, most pre-contractual statements will, no doubt, be both carefully considered and accurate. But as we all know, things can go wrong.

Where a pre-contractual statement turns out to be false, the implications can be serious. The counterparty may have a right to unwind the contract, or to claim damages, or both. In an extreme case, there may be criminal liability for fraud.



Harry Edwards, Ceri Morgan and David Coulling consider the circumstances in which parties may be liable for pre-contractual statements, the remedies that may be available to a counterparty, and some practical steps that can be taken to minimise the risks.

Top tips to make sure your pre-contractual statements don't come back to bite you:

- DO take care what you say when negotiating a contract
- DO ensure those negotiating on your behalf are aware of the risks
- DON'T assume a misrepresentation must be an express statement - it can also be implied from words or conduct
- DO ensure any information provided pre-contract is properly verified
- DON'T assume there can be no liability for statements of opinion or intention
- DO correct the position if you later realise any information provided is false or misleading
- DO include an appropriately worded entire agreement clause
- DON'T assume contractual protections will always be effective to avoid liability
- DO remember that a misrepresentation could result in the whole transaction being unwound

1. Misrepresentation

The most obvious risk, where a false statement is made in the course of negotiating a contract, is that the counterparty will be able to bring a claim in misrepresentation.

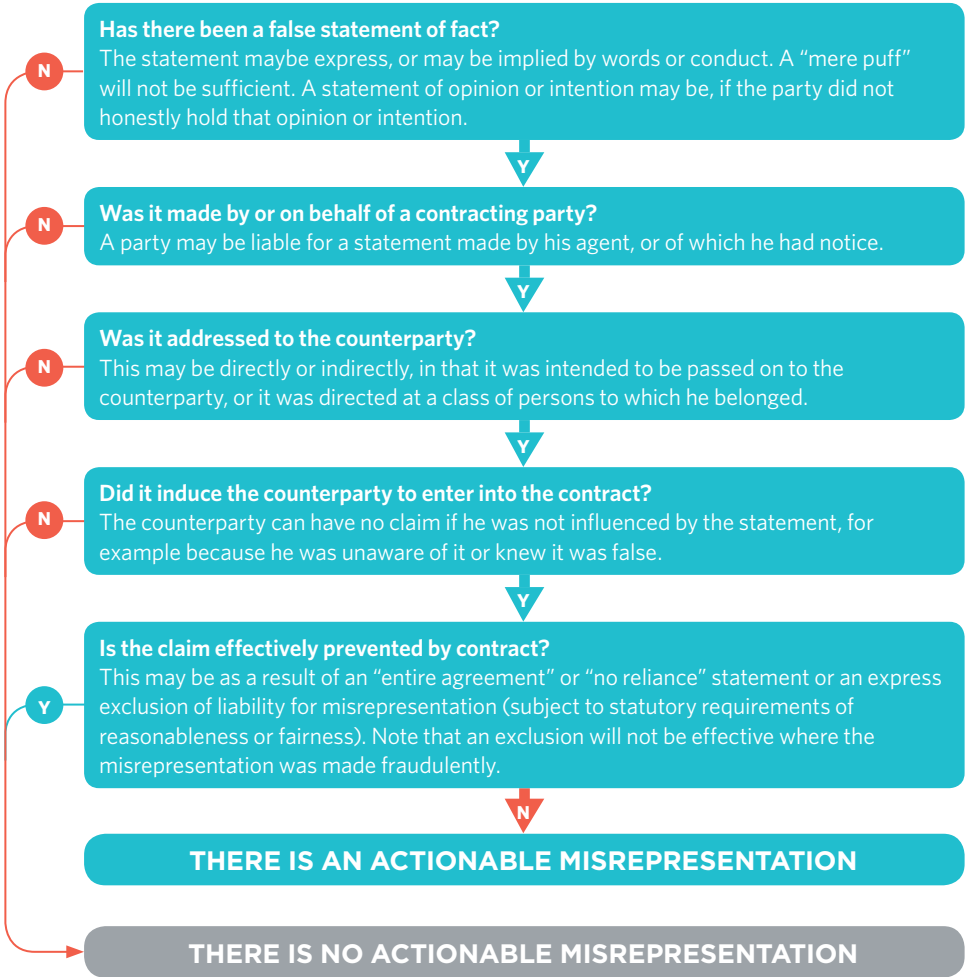
In essence, the counterparty will have a potential claim if it can show that it was induced by the false statement to enter into the contract. The test is both objective and subjective. The court will consider what a reasonable person would have understood from the relevant words and/or conduct in the relevant context. But it will also look at whether the counterparty in fact understood the statement in that sense and was influenced by it; if it played no part in the decision to enter into the contract, there will be no claim in misrepresentation.

Even where the counterparty was induced by the statement, the party who has made the misrepresentation may escape liability if it has included appropriate contractual protections. These are considered in sections 3-5 below.

Where there is a claim in misrepresentation, the counterparty may be able to unwind (or "rescind") the contract. It may also be entitled to damages, either in place of or in addition to rescission. The available remedies depend in part on whether the false statement was made fraudulently, negligently or innocently. This is discussed further in sections 6-7 below.

There may also be a claim in negligent misstatement, if the party who made the representation is in breach of a duty to use reasonable care, or a claim in damages if the representation has become a term of the contract. These are considered in sections 8-9 below.

Is there an actionable misrepresentation?



2. No false statements

At the risk of stating the obvious, one way to avoid liability for misrepresentation is, simply, not to make any false statements when negotiating a contract.

With this in mind, it is important to ensure that all those conducting the negotiations are briefed as to what they can, and cannot, say and do. Remember that a misrepresentation does not have to be made expressly. It can be implied from words or conduct. So, in the right circumstances, a nod and a wink might be just as actionable as a formal statement.

Care must be taken to ensure that any information provided pre-contract is verified to ensure that it is accurate and not misleading. Depending on the nature of the transaction, that may be a more or a less formal process, but it is important to get it right.

Parties may assume they can't be held responsible for statements of opinion or intention, but that is not necessarily the case. A statement of opinion or intention may be an actionable misrepresentation if the opinion or intention was not honestly held. Similarly, in some circumstances, a statement of opinion may imply there were reasonable grounds for the opinion; a statement of intention may imply there was no reason to believe the intention could not be carried out.

Liability may also arise if a statement is not corrected when circumstances change, to the knowledge of the party making the statement.

“Make sure those acting on your behalf understand the importance of sticking to the facts. Overenthusiastic salesmanship can come back to haunt you.”

The Court of Appeal decision in *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15 provides an example of a misrepresentation implied by conduct in a commercial setting.

AWS, a manufacturer of motor scooters, entered into a 12 month sponsorship agreement with SGL, the corporate vehicle of the Spice Girls pop group, relating to the group's 1998 European and US tours. Before the agreement was signed, one of the five group members (Geri Halliwell) had declared her intention to leave the Spice Girls before the end of the sponsorship period, but this was not communicated to AWS.

The Court of Appeal found that SGL's conduct throughout the negotiations leading up to the agreement gave rise to an implied representation that SGL did not know, and had no reasonable grounds to believe, that any of the Spice Girls had an existing declared intention to leave the group during the minimum term of the agreement. That representation was either false when made, or became false when Ms Halliwell declared her intention to leave.

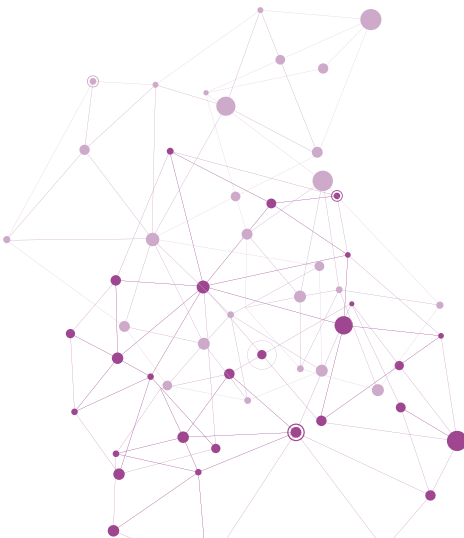
The conduct in question included supplying promotional materials to AWS depicting all five group members, and all five group members participating in the filming of a TV commercial for the scooters. It also included circulating a draft agreement referring to the Spice Girls as “currently comprising” the five named individuals, without going on to say that one of them was going to leave within the period of the agreement. That omission rendered what was actually stated false or misleading in the context in which it was made.

3. Contractual protections

Clauses aimed at protecting against liability for misrepresentation are often referred to as entire agreement clauses, though in fact the “entire agreement” element is only part of the protection provided by the clause. These clauses commonly have three elements:

- 1. Entire agreement:** A statement that the only terms of the contract are those set out in the document (or incorporated by reference). This aims to avoid any pre-contractual representations that are not included in the document becoming terms of the contract. On its own, it will not prevent a claim in misrepresentation.
- 2. Non-reliance:** A statement that the parties have not relied on any representations. This aims to prevent any party alleging that it was induced to enter into the agreement by a pre-contractual representation, so as to avoid claims in misrepresentation arising.
- 3. Exclusion of liability/remedies:** Expressly excludes any liability that would otherwise arise in respect of any pre-contractual representations and/or limits the remedies available (for example to exclude or restrict the right to rescind).

In a commercial contract, a clause excluding or restricting liability for misrepresentation is subject to section 3 of the Misrepresentation Act 1967, and therefore will be effective only to the extent that it satisfies a statutory test of “reasonableness” (see section 5 below). This is true for non-reliance statements as well as express exclusions of liability, if the effect of the statement is to exclude liability for misrepresentation (see section 4).



An exclusion or limitation of liability will not be effective if it is established that a misrepresentation was made fraudulently (ie knowing it was untrue or reckless as to its truth).

Consumer contracts are subject to section 62 of the Consumer Rights Act 2015. This provides that a consumer is not bound by a term which is “unfair”, meaning that it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer. Consumer contracts are not considered further in this briefing.

“An entire agreement clause should be carefully considered to make sure it gives maximum protection in your specific circumstances. Don’t just throw it in with the boilerplate.”

Misrepresentation Act 1967 – section 3(1):

“If a contract contains a term which would exclude or restrict—

a. any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

b. any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.”

4. Non-reliance statements

These are, in essence, statements that the parties have not relied on any representations in entering into the contract.

It used to be thought that such a statement could not prevent a claim for misrepresentation if the party who made the misrepresentation knew that the counterparty would in fact rely on it, contrary to the non-reliance statement. That is no longer the case. The Court of Appeal in *Springwell v JP Morgan Chase Bank* [2010] EWCA Civ 1221 (considered in this [post](#) on our FSR and Corporate Crime Notes blog) held that parties may contract on the basis of a particular state of affairs, even if they both know that that is not in fact the reality. Such an agreement may give rise to a contractual estoppel, meaning that neither party will be permitted to go back on the statement and contend that the true state of affairs was different.

Such a statement will, however, fall within section 3 of the Misrepresentation Act, so that it must meet the requirement of “reasonableness” in order to be effective (see section 5 below), as confirmed in *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396 (considered in this [post](#) on our Litigation Notes blog).

In contrast, a term will fall outside section 3 if it goes merely to the factual question of whether a representation was made (or was intended to be understood and acted upon as a representation) rather than attempting to exclude or restrict liability for misrepresentation.

In *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), the court gave an illustration of the distinction between a term which excludes liability for misrepresentation (and is therefore subject to section 3 of the Misrepresentation Act) and one which goes to the question of whether the alleged representation was made at all (and therefore falls outside section 3). The question, the court said, is one of substance and not form.

If a seller of a car said to a buyer, "I have serviced the car since it was new, it has had only one owner and the clock reading is accurate", those statements would be representations. They would continue to be representations even if the seller added the words "but those statements are not representations on which you can rely". Any such non-reliance statement would therefore be subject to section 3 and the statutory requirement of reasonableness.

On the other hand, if the seller of the car said, "the clock reading is 20,000 miles, but I have no knowledge whether the reading is true or false", the position would be different. In that example, the statement as to the seller's lack of knowledge could not fairly be regarded as an attempt to exclude liability for a false representation arising from the first half of the sentence. It would instead go to the question of what representations (if any) were being made.

Springwell (referred to above) provides another illustration. In that case the Court of Appeal held that a bank's contractual documentation would have protected it from liability to an investor for alleged misrepresentations in relation to poorly performing investments (if the representations had in fact been made).

The court's reasoning on the extent to which the relevant provisions fell within the scope of section 3 is brief and not entirely clear. However, the court held that certain terms fell outside section 3, apparently on the basis that they went merely to whether an investor would have understood the bank to be making representations at all, rather than seeking to exclude or restrict liability for misrepresentation - eg statements that the bank had taken no independent steps to verify information provided to the investor.

Certain other terms clearly were exemption clauses and fell within section 3 - eg a term that the bank would not be liable for the fairness, accuracy or completeness of any information provided.

A statement that the bank made no representation or warranty in relation to the information provided was more difficult to classify. However, the court concluded, if representations had in fact been made, this clause would represent an attempt retrospectively to alter the character and effect of what had occurred. It was therefore, in substance, an attempt to exclude or restrict liability.

In *First Tower* (referred to above) the court considered whether a landlord was liable to its tenant for misrepresentation resulting from the landlord's failure to disclose asbestos contamination in response to pre-contract enquiries. The landlord relied on clause 5.8 of the lease, which stated:

"The tenant acknowledges that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord."

Both the High Court and the Court of Appeal found that this "non-reliance" clause was a term that excluded or restricted liability for misrepresentation, and therefore fell within section 3 of the Misrepresentation Act and was subject to the reasonableness test. The court referred with approval to its previous decision in *Springwell*.

On the court's analysis, a non-reliance clause is a clause seeking to prevent liability arising in misrepresentation by stating that no representations have been made or, if made, have not been relied on, and therefore setting up a contractual estoppel. Such clauses, it held, are within section 3.

In contrast, where a clause simply delimits the parties' primary obligations, or goes to whether a communication would reasonably be understood to be making a representation, it is not an exclusion clause and therefore the reasonableness test in the Unfair Contract Terms Act 1977 (UCTA) will not apply. Such clauses may be said to define the basis on which the parties are contracting. The court suggested that this is how the label "basis clause" in some of the cases should be understood, though it suggested that the term is best avoided in the interests of clarity.

"A non-reliance statement which attempts to exclude or restrict liability for misrepresentation will not be effective unless reasonable."



5. Reasonableness

As noted above, a term that excludes or restricts liability for a misrepresentation made before the contract was entered into (or any remedy that would otherwise be available to the counterparty in respect of such a misrepresentation) is subject to section 3 of the Misrepresentation Act.

Under section 3, such a term will be effective only to the extent that it satisfies the test of “reasonableness” under section 11(1) of UCTA. This requires that it was fair and reasonable to include the term having regard to the circumstances which were (or ought reasonably to have been) known to or in the contemplation of the parties when the contract was made.

In assessing reasonableness, the court must have regard to the factors set out in schedule 2 to UCTA. Probably the most important of these is the relative strengths of the parties’ bargaining positions. Other factors in schedule 2 include whether the customer received some inducement to agree to the term, or could have avoided the term by contracting with a different party, and whether the customer knew or should have known of the existence and the extent of the term.

It used to be thought that a term would be unreasonable if it did not include an express carve-out for fraudulent misrepresentation. That may no longer be necessary in light of the House of Lords decision in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6. However, it remains common practice.

In *FoodCo UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), tenants of a motorway service area which had been developed by the defendant alleged that they were induced to enter into agreements for lease by misrepresentations in the defendant’s marketing material.

Each agreement for lease contained an entire agreement clause which included an acknowledgement by the tenant that it was not relying on any representation or warranty made by or on behalf of the developer, save for written replies given by the developer’s solicitors to the enquiries raised by the tenant’s solicitors.

The court held that the clause satisfied the requirement of reasonableness, including because there was no substantial imbalance of bargaining power between the parties, each of the tenants was advised by solicitors, and the term was open to negotiation. It was also important that the clause expressly permitted reliance on any reply given by the developer’s solicitors to the tenant’s solicitors. So if the tenant wished to rely on something said in the course of negotiations, the judge pointed out, its solicitors only had to ask the defendant’s solicitors for an answer to a question. That would have revealed whether the defendant was prepared to formalise the statement so that the tenant could rely on it or whether the tenant would have to undertake its own due diligence.

6. Rescission

Where a party enters into a contract in reliance on a misrepresentation, the remedies available depend on whether the misrepresentation was fraudulent, negligent or innocent.

In all cases, the innocent party may seek to unwind, or “rescind”, the contract, meaning that the contract is set aside and the parties are restored to the position they were in before contracting. For example, in a contract for the sale of a race horse, this would mean returning the horse and getting back the money paid.

This will be particularly attractive where a party wishes to get out of the bargain it has made – potentially for reasons that have nothing to do with the misrepresentation itself. As a result of the financial crisis, for example, many investors found that investments they had made were poorly performing. If the investor could establish that it was induced to enter into the investment by an express or implied misrepresentation made by or on behalf of the financial institution, this could be highly advantageous:

- The investor might be able to rescind the transaction, so that it would be as if the bad bargain had never occurred.
- Alternatively, depending on the nature of the misrepresentation, it might receive damages aimed at putting it in that position in financial terms.

This is in contrast to damages for breach of contract, which are aimed at putting the innocent party in the same position as if the contract had been properly performed (see section 9). That may not be much help if the bargain has turned out to be a bad one.

Unless a misrepresentation has been made fraudulently, however, the court may declare the contract subsisting and award damages in lieu of rescission under section 2(2) of the Misrepresentation Act. The court may exercise this power if it considers it would be equitable to do so, having regard to the nature of the misrepresentation and the losses that would be caused to the respective parties if the contract were upheld or, alternatively, set aside. There is some uncertainty as to the proper measure of damages (whether the contract or tort measure) where the court awards damages in lieu of rescission under section 2(2).

Rescission is not available in certain circumstances, listed below, known as the equitable bars to rescission. In such circumstances, the court also has no power to award damages in lieu of rescission under section 2(2).

- Where the innocent party has affirmed the contract after it has discovered the misrepresentation, by acting in a way that is inconsistent with a decision to rescind (eg by paying for the goods).
- Where it is not possible to restore the parties to their original positions (eg if the subject matter of the contract has been destroyed).
- Where the rights of a third party would be prejudiced (eg if goods purchased under the contract have been on-sold to a third party).
- Where there has been undue delay before exercising the right to rescind.

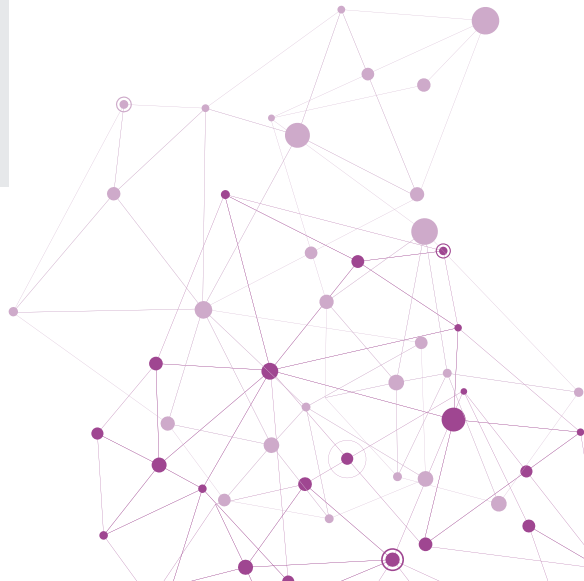
“The possibility of unwinding a bad bargain can make a misrepresentation claim highly attractive.”

In *Salt v Stratstone Specialist Limited* [2015] EWCA Civ 745 (considered in this [post](#) on our Litigation Notes blog) the claimant had purchased a car following the defendant’s representation that it was “brand new”. In fact the car was two years old, had had various repairs and had been damaged in a collision.

The District Judge refused rescission because he could not put the parties back in their original positions. As a car is a depreciating asset, the delay had prejudiced the defendant, and the claimant had had the benefit of using the car in the interim. Instead he awarded damages assessed at £3,250 (the difference between the value of the car if new and its actual value at the time of purchase, plus a small sum for inconvenience). The Circuit Judge reversed that decision and ordered rescission and the Court of Appeal dismissed the appeal.

The Court of Appeal found that neither depreciation nor intermittent enjoyment meant that it was impossible to restore the parties to their original positions. Rescission is, the court said, *prima facie* available if “practical justice” can be done. Such “practical justice” might require a defendant to be compensated for depreciation, or for the use enjoyed by the claimant, but that would be for the defendant to assert and prove.

The Court of Appeal also confirmed that if rescission is not available as a matter of law, a court will have no discretion to award damages under section 2(2) of the Misrepresentation Act – a point on which there had been conflicting first instance decisions.



7. Damages

In a case of a fraudulent or negligent misrepresentation, the counterparty may seek damages instead of or in addition to rescission. Section 2(1) of the Misrepresentation Act provides liability for damages unless the defendant proves that it had reasonable grounds to believe, and did believe, that the facts represented were true. Alternatively, if the counterparty can prove that the representation was made fraudulently, damages may be awarded at common law for the tort of deceit.

A claim under section 2(1) may be more straightforward than a claim in deceit, as there is no need to prove fraud. And the measure of damages under section 2(1) is the fraud measure, so that the defendant will be liable for all the consequences of the misrepresentation, however unforeseeable.

Establishing fraud may, however, have other advantages, including invalidating any contractual disclaimers that would otherwise protect the defendant, negating any defence of contributory negligence, and potentially extending the applicable limitation period. As noted above, it also means there is an absolute right to rescission (subject to the equitable bars); damages cannot be awarded in lieu under section 2(2).

Where the misrepresentation is innocent, so that section 2(1) does not apply, there is no entitlement to damages (though the court may award damages in lieu of rescission under section 2(2)). However, the burden is on the defendant to prove the absence of fraud or negligence, ie that it reasonably believed the representation was true.

The decision in *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC) illustrates the impact a finding of deceit can have on a party's liability for pre-contractual statements.

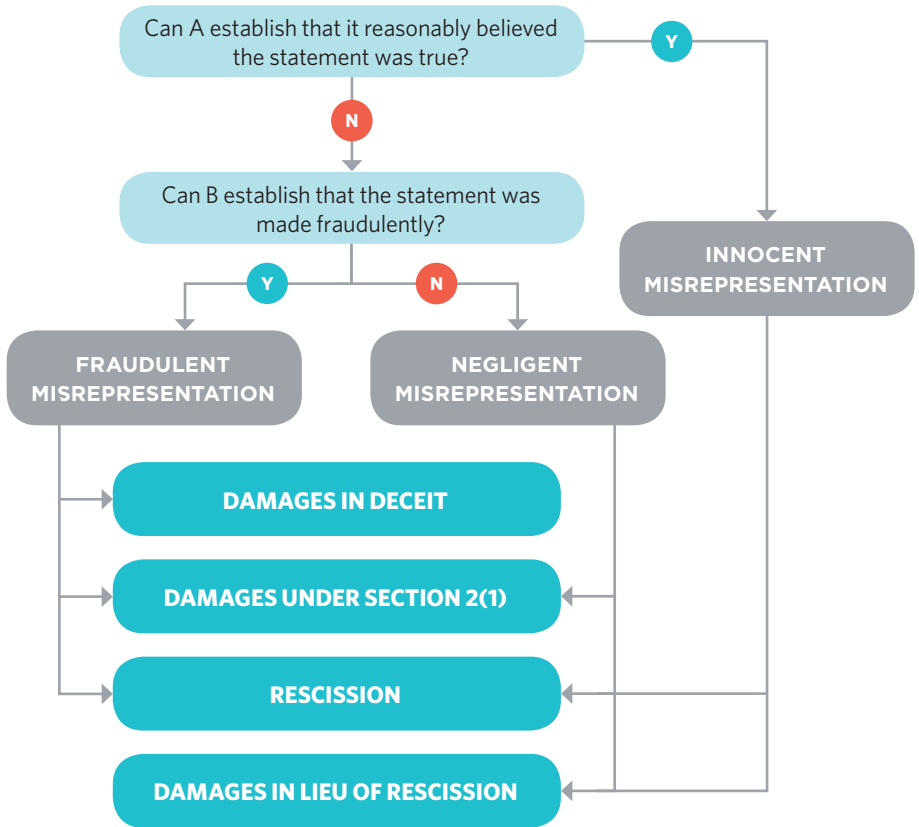
The defendant successfully bid for a project to design and build a customer relationship management (CRM) system at the claimant's customer contact centres. However, it failed to implement the new system and the claimant ultimately went on to complete the project itself. The claimant brought a claim in deceit, alleging that key personnel leading the defendant's bid dishonestly made false representations as to the company's ability to design and build the CRM system within the anticipated budget and timeframe, which induced the claimant to award the contract to the defendant.

The court found that the defendant had acted dishonestly. It had falsely represented that it had carried out a proper analysis of the time needed to complete an initial delivery and go-live of the new system and that it held the opinion, and had reasonable grounds for holding the opinion, that it would deliver the system within nine months. In fact there had been no proper analysis carried out and there were no reasonable grounds for believing that the project could be completed in time.

Whilst the contract contained a cap on liabilities of £30 million, this was not effective to limit the defendant's liability for fraudulent misrepresentation. The claim was ultimately settled for £318 million.

Remedies for misrepresentation

In relation to a misrepresentation made by A to B, which induced B to enter into a contract with A ...



Unless it is a case of fraudulent misrepresentation, any of these remedies may be prevented by effective contractual protections. In addition, neither rescission nor damages in lieu of rescission will be available if any of the equitable bars to rescission apply - see sections 6-7 above.

There may be alternative remedies in negligent misstatement or contract - see sections 8-9 below. Where a representation is made fraudulently, there may also be criminal liability under the Fraud Act 2006 - such liability is not considered further in this briefing.

8. Negligent misstatement

For liability to arise in the tort of negligent misstatement, the party that has made the representation must owe the claimant a duty to use reasonable care. This is in contrast to liability for what we have referred to as negligent misrepresentation under section 2(1) of the Misrepresentation Act, where there is no requirement for a duty of care.

In general, a claim under section 2(1) will be preferable to a claim in tort: there is no need to establish a special relationship giving rise to a duty of care; the burden is on the defendant to prove, in effect, the absence of negligence (ie a reasonable belief in the truth of the statement); rescission may be available; and the measure of damages is the more favourable fraud measure. With a claim in negligent misstatement, the defendant will not necessarily be liable for all loss flowing from the false statement – damages will be limited to loss which was foreseeable and which falls within the defendant’s duty of care.

However, a claim under section 2(1) can only be brought where the false statement was made by the counterparty (or his agent). If the false statement was made by a third party, and/or it caused some loss other than entering into a contract, a claim in negligent misstatement may be the only option. Further, under section 2(1) there is no liability for a statement of opinion, unless the opinion was not honestly held or there was an implied representation that there were reasonable grounds for the opinion. It may be easier to establish that a party was in breach of a duty to take care in formulating or expressing its opinion.

Where a claimant can establish that a statement was made in breach of a duty of care, questions of causation and loss are not always straightforward to determine.

The normal tort measure of damages is to put the claimant in the position as if the tort had not been committed. However, a claimant will not necessarily recover all losses it would not have suffered “but for” the negligent statement; the loss must have been within the scope of the defendant’s duty.

In *SAAMCO v York Montague Ltd* [1997] AC 191, Lord Hoffmann highlighted a distinction between a duty to provide information so as to enable the claimant to decide upon a course of action and a duty to advise the claimant as to what course of action he should take. He gave the example of a doctor consulted by a mountaineer who is concerned about his knee. The doctor negligently pronounces the knee fit. The mountaineer goes on an expedition and suffers an injury which is a foreseeable consequence of mountaineering but has nothing to do with his knee.

The doctor will not be liable, even if the mountaineer would not have gone on the expedition if he had been told the truth. On Lord Hoffmann’s analysis, the injury has not been caused by the doctor because it would have occurred even if the pronouncement as to the state of the knee had been correct.

This distinction has been applied in cases involving negligent information or advice in a commercial or investment context, including for example *Rubenstein v HSBC Bank Plc* [2012] EWCA Civ 1184 (see this [post](#) on our Litigation Notes blog) and *Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40 (see this [post](#) on our Banking Litigation Notes blog).

9. Breach of contract

A statement made in the run-up to entering into a contract may become a term of the contract if the court considers that, on the proper interpretation of the discussions or correspondence, it was intended to give rise to a contractual warranty. It may also give rise to a collateral contract, eg a warranty given in return for the counterparty entering into the main agreement.

In these circumstances, if the statement is false, the counterparty will have an alternative claim for breach of contract. In the usual way, damages for breach of contract will be aimed at putting the innocent party in the same position as if the contract had been properly performed – in other words, as if the representation were true. This may be advantageous where the contract would have been a profitable one had the representation been true; the claimant should be able to recover its loss of profits (subject to usual rules of mitigation, remoteness and so forth).

A claim for breach of contract may also be attractive if the claimant would be left without a remedy in misrepresentation, for example because the misrepresentation was innocent and one of the equitable bars to rescission applies.

As noted earlier, most formal written agreements will contain an entire agreement clause, designed to avoid any pre-contractual representations that are not included in the document (or incorporated by reference) having contractual effect.

“Where the bargain would have been a good one if the representation were true, a claim for breach of warranty may (if available) be more attractive than a claim in misrepresentation.”

10. Other statutory liability

In certain contexts, pre-contractual statements may also give rise to other sorts of statutory liability. The most obvious example is liability for information published in relation to securities under section 90 and section 90A of the Financial Services and Markets Act 2000.

Under section 90, an investor can bring a claim where it has suffered loss as a result of any untrue or misleading statement, or a failure to include information required by statute, in a prospectus or listing particulars relating to securities. The claim may be brought against any person responsible for the defective document, including the issuer of the securities

and its directors, among others. There are various defences, including where the defendant reasonably believed the contents of the document to be complete and accurate.

Section 90A relates to other information published to the market by issuers of securities, apart from a prospectus or listing particulars. Where the information contains a false or misleading statement or omission, or where there is a delay in publishing the information, the issuer will be liable if a director knowingly or recklessly caused the defect. A claim can be brought by anyone who reasonably relied on the information and suffered loss as a result.



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Notes

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