

## Chapter 13: Misrepresentation

### The question

Edward saw a painting in the window of Frank's gallery of an early loom being used. Edward's business is the production of very high quality cloth used by designers. He thought the painting might be suitable for the board room of his corporate headquarters. He went into Frank's gallery and was told by Frank that in his, Frank's, opinion the painting was by the famous painter Goffen. Edward became very enthusiastic at the idea of purchasing a Goffen, and bought the painting.

Four years later, when he needed money for his business, Edward decided to sell the painting, only to discover that it was a poor copy, which was only worth one hundredth of what he paid for it.

Frank had not taken reasonable care in making his assessment of the painting.

Advise Edward as to whether or not he has an action for misrepresentation and, if so, what remedy, or remedies, he should seek for misrepresentation.

### Guidance on how to answer

#### **Before you begin**

You should always familiarise yourself with the relevant area of law before attempting to answer a question. Here it is misrepresentation, and chapter 13 of *Koffman & Macdonald* should be digested. You need to be familiar with the whole area, or you will miss issues. You should not simply try to spot the relevant parts of the chapter without reading the whole, or you may well miss the true significance of some of the facts, and omit relevant issues.

Obviously if a question is coursework, then you can read chapter 13 immediately before embarking upon it. If it is a question in an exam, you have to have undertaken sufficient revision in the area, to have the principles or rules, and the authority for them in your memory. Even if it is an open book exam, you need to have most of it in your memory, in order to be able to spot the relevant issues and construct your basic answer. When the exam is open book, it is generally impractical (unless the exam is over a very extended time period) to use the materials available to you as more than a 'security blanket', to relieve some of the stress of exams, and as a 'safety net' in relation to the odd case name you have forgotten.

#### **Writing your answer**

In a coursework answer you would need to footnote the references for the cases, and any other type of material, such as an article or textbook, but find out what your institution will

regard as acceptable in an exam: it may be that you just need to use a shortened, but identifiable version of the case name, or author and title of book, or author of an article (just enough for the examiner to recognise what you are referring to).

A question which students sometimes ask is: 'should I state the facts of cases?' The answer is: it will depend upon how much they will help you to answer the question. If they are merely authority for a well-established basic principle or rule which you are going to apply, they probably will help little. However, if they closely resemble the facts of a problem, you may well need to go through them, and state the facts which are relevant for you to use to show, for example, why the problem leads to a different conclusion, or the same conclusion despite some differences. It may be particularly relevant to state the facts of a case where it is in doubt as to what the case is authority for, and which of its facts are crucial to the application of the same approach.

In answering any question, you need a beginning, a middle and an end or, as it would normally be put: an introduction, the substance of your answer, and a conclusion. In other words, say what you are going to say in broad terms, say it, sum up what you have said.

After your introduction, work logically through the problem, dealing with each issue in turn. You must use authority in relation to each of the points made. You have been told to advise Edward, but do not write as if you are speaking or writing to Edward. It is simply that each of your points should be made with reference to the impact of the law on Edward, whether it is what he would want to read or not. You do not just set out the points which might help Edward. You must set out the whole of the legal position in relation to each of the issues raised.

Identify each legal issue then go on to deal with it, setting out the principle, or rule, and authority, and then applying it. Consider viable alternatives, otherwise you may cut yourself off from answering part of the question. When you are considering an alternative, make that clear. Do not simply appear to be contradicting yourself eg. saying definitively that a particular communication is an invitation to treat one moment, and then treating it as an offer the next. Explain that you are dealing with a different possibility eg. 'However, if that communication was an offer, then we should consider the impact of that ....' (It does not impress the examiner when students simply contradict themselves, or appear to do so. The examiner can only mark what is there, not what students might have intended).

Do not label your paragraphs as has been done here: that is just to make clear the need to divide your text sensibly, into paragraphs.

## **Introduction**

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Set out the basic legal issues which arise in relation to the particular problem. Do not start with some very general statements about contract law. Do not include some statement as to the outcome for Edward in your introduction. That is for your conclusion, after you have reasoned your way to it. (Any statement as to the outcome at this point, particularly in an exam, will simply be your initial 'gut reaction' and you may well end up contradicting yourself by the time you have reasoned your way through the problem, and it does not impress the examiner when students contradict themselves.)

Keep your introduction brief. Do not start to provide a lengthy answer to the points identified. That is for the body of the essay, and you will start repeating yourself, wasting words in a coursework, or valuable time in an exam.

Here a brief introduction might say:

**Advising Edward requires two broad areas to be addressed. First it is necessary to look at what amounts to an operative misrepresentation. Secondly, if there is an operative misrepresentation present, it must be decided what remedy Edward should seek.**

Alternatively, a slightly longer, but still brief, introduction could give some further indication of what the body of your essay will address, and immediately show the examiner that you know this. It might say:

**Advising Edward requires two broad areas to be addressed. First, it will be necessary to look at what amounts to an operative misrepresentation. It is generally stated that an operative misrepresentation requires a material statement of fact by one party to the other, before or at the time of contracting, on which the other relied in contracting. (A statement of law should now suffice as an alternative to one of fact, as indicated by *Pankhania v London Borough of Hackney* [2002] EWHC 2441). These elements will need to be addressed to see if an operative misrepresentation was made to Edward. Secondly, if there was an operative misrepresentation present, the remedies for misrepresentation, rescission and the different ways of claiming damages, must be considered to decide what remedy Edward should seek.**

If you choose a slightly longer, more detailed, introduction, you should avoid repeating those additional points in the body of your answer. You can refer back to what you have stated in your introduction.

(See *Koffman & Macdonald* 13.1 – 13.7).

### **Second paragraph**

If you chose the briefest introduction, then your second paragraph might start by saying:

**It is necessary to look at what amounts to an operative misrepresentation. It is generally stated that an operative misrepresentation requires a material statement of fact by one**

party to the other, before or at the time of contracting, on which the other relied in contracting. (A statement of law should now suffice as an alternative to one of fact, as indicated by *Pankhania v London Borough of Hackney* [2002] EWHC 2441).

With the longer introduction, it might start, by simply referring to that:

**It has already been indicated what is generally stated as required for an operative misrepresentation.**

In either case, it might then continue:

**What must first be considered here is whether Frank's statement qualifies as a misrepresentation. It was shown in the case of *Bisset v Wilkinson* [1927] AC 177 that a mere statement of opinion does not constitute a misrepresentation and, prima facie, what Frank said was a statement of opinion. However, in some circumstances the courts have been willing to find statements of fact and misrepresentations when prima facie there is only a statement of opinion. In *Smith v Land and House Property Corporation* (1884) 28 Ch D 7 Bowen LJ took the line that if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of material fact. The idea is that the person in the best position to know the facts impliedly states that he or she knows facts that justify his opinion. This type of approach was extended in *Esso Petroleum v Mardon* [1976] QB 801 to statements made by experts and implied statements that they have used reasonable care and skill. The argument that there are implied statements of fact in such a situation is strained, but the courts are willing to find implied statements that they will regard as misrepresentations in this situation, and it would therefore seem that a misrepresentation would be found here, where a gallery owner, who would seem, at least relatively, to have expertise, has not taken reasonable care in stating the provenance of a painting.**

(See *Koffman & Macdonald* 13.11 – 13.18)

In a coursework, you might insert relevant quotes eg.

**In *Smith v Land and House Property Corporation* Bowen LJ stated (at p 15)**

**'[I]f the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of material fact, for he impliedly states that he knows facts that justify his opinion'.**

### **Third paragraph**

The third paragraph needs to address reliance and materiality in relation to Frank's implied statement. Remember to consider alternatives, so even if you decided that there was no

statement that the court would view as a misrepresentation, look at what the situation would be, if there was. The third paragraph might state:

**If there was an implied statement that the court would be willing to regard as capable of being a misrepresentation, then the questions of reliance and materiality arise, to determine if it is an operative misrepresentation. The relevant statement needs to have induced the contract in order for it to be a misrepresentation as was shown in *Smith v Chadwick* (1884) 9 App Cas 187. Here there is no difficulty with this, as Edward entered the shop thinking the painting might be suitable, but only decided to buy it after Frank's statement. There is, however, also the issue of materiality and the idea that the statement must have been such that it would have influenced the reasonable person to contract. Obviously, in those rare situations in which silence can constitute a misrepresentation, as in contracts of insurance, a test of materiality is required to determine what should be disclosed. Outside of those situations, the requirement is less clear. It is not needed in relation to fraud, and *Chitty on Contracts* (31<sup>st</sup> ed, 6-040) sees that as extending to cases 'where the representor knows or ought to know that the representee is likely to act on the representation'. That would certainly seem to be the case here. An art gallery owner ought to realise that a potential purchaser is likely to be influenced by whether a painting is by a well-known painter, and whether any such conclusion was arrived at with reasonable care. In any event, the reasonable person would be so influenced, so there should be no difficulty with any requirement of materiality here, however far it extends.**

(See Koffman & Macdonald 13.28 – 13.41)

#### **Fourth Paragraph**

Again, if you arrived at the conclusion that there was no misrepresentation, do not cut yourself off from addressing the rest of the question. Deal with the alternative, and make it clear that is what you are doing.

The fourth paragraph might say:

**If there was an operative misrepresentation, then what needs to be addressed is what remedy Edward should seek. At present he has a painting which is worth only one hundredth of what he paid for it. As misrepresentation renders a contract voidable, prima facie Edward could rescind. That would mean that he would return the painting to Frank, and recover the money he paid for it. However, a merely voidable contract may cease to be capable of being rescinded. There are bars to rescission, and two of those should be addressed here. Significantly, it has been four years since Edward bought the painting. One bar is affirmation: a contract cannot be rescinded once the misrepresentee has affirmed it (ie once they have expressly or impliedly shown the intention not for the contract to remain in existence). Of course, lapse of time can only constitute evidence of affirmation after the misrepresentation is discovered by the representee, so that does not arise here, but the delay, in itself, does. In *Leaf v International Galleries* [1950] 2 KB 86 Mr**

Leaf bought a painting misrepresented to him to be by John Constable. Five years later, when he attempted to sell it, and discovered that it was not a Constable, the Court of Appeal said that rescission was barred just by that time delay. The view was taken that, at least in relation to non-fraudulent misrepresentations, contracts could not be left open to the potential for rescission indefinitely. The purchaser should verify or disprove the representation within a reasonable time. Five years was viewed as too long in *Leaf*, and it would equally seem that four years would be too long here. Certainly Edward had ample time, long before then, to have its authenticity assessed.

(Koffman & Macdonald 13.75 – 13.86).

### Fifth Paragraph

The fifth paragraph might say:

If rescission is barred then what must be looked at is a claim in damages. It is stated that Frank failed to take reasonable care in assessing the painting. Edward should consider a claim under s2(1) of the Misrepresentation Act 1967. There are considerable advantages to this claim over those at common law for deceit, or negligent misstatement. A claim for deceit requires proof of fraud – that Frank did not believe in the truth of what he was asserting, as shown in *Derry v Peek* (1889) 14 App Cas - which is obviously difficult. Negligent misstatement requires not only proof of a failure to take reasonable care, but also of the existence of a duty of care. S2(1) would only require Edward to establish the operative misrepresentation. Frank would then be liable unless he could establish that he believed, and had reasonable grounds to believe, that his statement was true, up until the time of the contract. *Howard Marine & Dredging v Ogden* [1978] QB 574 well illustrates the benefits of the action under s2(1). The misrepresentee won in that case, in the Court of Appeal, under s2(1), but would have lost had he had to rely upon the common law action for negligent misstatement. He had not established the duty of care, or proved that the misrepresenter had failed to act with due care, but equally the misrepresenter could not prove that he had taken reasonable care, and the misrepresentee thus succeeded under s2(1). Here it states that Frank had not made his assessment of the painting with reasonable care, we should, of course, remember that it is not the statement as to the painter as such which is in question, but the implied statement that Frank used reasonable care and skill in making that assessment. Nevertheless, it would seem that he would equally be seen to have failed to take reasonable care in making any such implied statement, and Frank would be unable to defend the action under s2(1). It can be noted that that action may even have at least some of the advantages of the action for fraud. In *Royscott Trust v Rogerson* [1991] 2 QB 297, because of the ‘fiction of fraud’ in s2(1), the line was taken that the laxer test of remoteness for fraud, rather than the stricter negligence test, should apply. However, the main further point to make here about s2(1), which was clarified in *Royscott*, is that the damages recovered will be based on the tort, not the contract, measure. Edward would recover the difference between what the picture’s value is now, and what he paid for it. He would not recover any increase there would have been in its value, had it been genuine, although tort damages may encompass

**opportunity cost: the loss of the opportunity to have invested his money in a painting which had been assessed with reasonable care as being genuine, in those years, as in cases such as *Swingcastle v Gibson* [1991] 2 AC 223 and *East v Maurer* [1991] 1 WLR 461.**

(See Koffman & Macdonald 13.43 – 13.64).

### Conclusion

Just as every answer needs an introduction, it also needs a conclusion, summarising the points made and how they impact on the person to be advised. The conclusion might state:

**Prima facie a statement of opinion does not constitute a misrepresentation. However, as has been indicated, the courts have been willing to find implied statements of fact, where the statements of opinion are by those best placed to know the facts, and they have extended that to find implied statements which they will regard as misrepresentations where it is the opinion of an expert which is in question. The courts should be willing to find an implied statement which will suffice as a misrepresentation when a gallery owner, such as Frank, gives his opinion as to the provenance of a painting without taking reasonable care. Of course, a misrepresentation must also have induced the contract and may need to be material, but plainly Edward decided to contract on the basis of what Frank stated, and would be taken to have implied, and plainly it would have been relied upon by the reasonable person. The misrepresentation was relied upon, and was material. It seems very unlikely that Edward could succeed in rescinding after four years, but he should be able to claim damages under s2(1) of the Misrepresentation Act 1967. Under that section, Edward will merely have to establish that there was a misrepresentation, and his claim will then succeed unless Frank can prove that he had reasonable grounds to believe, and did so believe up until the time of contracting, in the truth of what he was, impliedly, asserting. His claim will be for damages based on the tort measure: putting him back to the position before the contract was made. He should recover the difference between the value of the painting and what he paid for it, and he might also recover a sum for his opportunity cost, but there is obviously considerable uncertainty in the latter.**

### Other points

This question specifically directed you to advise in relation to misrepresentation. However, it could also easily have been about whether it became a term of the contract that the painting was by Goffen. Problem questions can easily give rise to the need to discuss both the possibility that a pre-contractual statement became a term and that it was a misrepresentation. It might then be necessary to decide which claim would provide the better damages, and show the working of the different bases for an award of damages for a breach and for a misrepresentation. Of course, problem questions might also give rise to issues of mistake alongside misrepresentation. Be careful to consider what a question is about.

In relation to pre-contractual statements becoming terms see *Koffman & Macdonald* 7.2 - 7.14.

On the basic contractual measure of damages for breach see *Koffman & Macdonald* 20.2 - 20.8.

On mistake see *Koffman & Macdonald* Chapter 12.