

BUSINESS LAW

Name

Course

Tutor

Institution

Location

Date

Background facts

A properly constituted contract contains offer, acceptance, and consideration. Importantly, a contract is considered as a meeting of minds between the parties entering into such covenants. Despite a contract fulfilling these basic requirements, its enforceability and performance could be jeopardized by other factors that were not anticipated by either or both the contracting parties. These are referred to as vitiating factors, and in this scenario, we shall focus on the alleged misrepresentation on the contract concluded between Damian on behalf of Fitness Tracker Pty Ltd (FT) and Anne who is the event organiser for Worldwide Fitness Pty Ltd (WF).

Issue

As a matter of law, can Damian (on behalf of FT) insist upon the return of his \$5,500 and/or be compensated for his stolen equipment?

Rule

Legally, misrepresentation can be defined as a misstatement of law or fact with the potential of inducing a representee to enter into a contractual relationship as stated in *Edgington v. Fitzmaurice*.¹ Uniquely, not all false statements amount to misrepresentation, and therefore the courts have a responsibility of determining what constitutes misrepresentation.² For instance, the misstatement that qualifies as misrepresentation must be differentiated from an honest opinion as the latter cannot be construed as misrepresentation as declared in the case of *Bisset v. Wilkinson*.³ Similarly, in commercial setting an advertisement puff although false may not make the representor culpable under misrepresentation as posited in *Smith v. Land*

¹ (1885) 29 Ch D 459

² Phang, P., 'Vitiating Factors in Contract Law: Some Key Concepts and Developments' (2005) 17 *Singapore Academy of Law Journal* 148, 169

³ (1927) AC 177

*and House Property Corp.*⁴ Ideally, silence does not amount to misrepresentation unless if the contract necessitated full disclosure of material facts as put forward in the case of *Smith v Hughes*.⁵ In addition, exclusion clauses will also be rendered unenforceable if it is punctuated by misrepresentation as instanced in *Curtis v Chemical Cleaning Co.*⁶

Remarkably, a false statement of fact or law is not sufficient to make the representor culpable for misrepresentation. The representee must demonstrate that he/she acted upon that untrue statement and they were the basis of entering into the contract in the first place.⁷

Significantly, the representee must express that without the misrepresentation he/she would not have concluded the contract with those terms as submitted in the case of *Horsfall v.*

Thomas.⁸ Equally, if the representee carried out some form of inspection and unearthed the alleged false representation but proceeded to conclude the contract he/she will be estopped from alleging misrepresentation as exemplified in *Attwood v. Small*.⁹

A fraudulent misrepresentation occurs when a representor in the course of making a contract makes a false statement knowing full well that it is false and he/she has no beliefs that it is true or done carelessly without ascertaining the accuracy of such information as illustrated in *Derry v Peek*¹⁰. Correspondingly, the burden of proof for ascertaining a fraudulent misrepresentation is borne by the representee.¹¹

Negligent representation as exemplified by section 2(1) of the Misrepresentation Act 1967 is where a representor makes a false statement without rational grounds for beliefs in its

⁴ (1884) 28 ChD 7

⁵ (1871) LR 6 QB 597

⁶ [1951] 1 KB 805

⁷ Mulcahy, L., *Contract Law in Perspective* (5th Ed, 2008) 104

⁸ (1862) 1 H & C 90

⁹ (1838) 6 Cl & Fin 232 (HL)

¹⁰ (1889) 5 T.L.R. 625

¹¹ Jones, L., *Introduction to Business Law* (3rd Ed, 2015) 202

accuracy as demonstrated in *Hedley Byrne & Co v. Heller & Partners*.¹² Unlike in fraudulent misrepresentation, the burden of proof rests upon the representor to ascertain that they had logical grounds for harbouring beliefs that their statements were not false as depicted in *Howard Marine v Ogden*.¹³

Generally, remedies available for misrepresentation will depend on the type of misrepresentation perpetrated by the representor.¹⁴ Uniquely, the representee is enabled to rescind the contract either wholly or partly and further claim for damages incurred as a result of the misrepresentation as reasoned in *Doyle v Olby*.¹⁵ Comparatively, as deliberated in *Smith New Court Securities v Scrimgeour Vickers*¹⁶ there is no prerequisite the damage had to be predictable.

Identically, the right of the representee to rescind and demand damages is also available for negligent misrepresentation as illustrated in section 2 (1) of Misrepresentation Act of 1967. In the case of *Royscott Trust v Rogerson*,¹⁷ it was decided that the principles of fraudulent misrepresentation must also be applied in negligent misrepresentation.

Application

Following the contractual agreement between FT and WF, the former was promised a policy of insurance and was expressly stated that the \$5,500 paid by FT included that insurance. However, during the conclusion of the contract WF inserted an exclusion of liability clauses limiting the liability of WF in the case of theft, loss or damage of property. FT queried further, but he was assured that that his goods will be safe before signing the contract.

¹² (1963) 2 All ER 575 (HL)

¹³ [1978] QB 574

¹⁴ Kuhnel-Fitchen, K. and Tracey Hough, *Optimize Contract Law* (2014) 202

¹⁵ [1969] 2 QB 158

¹⁶ [1996] 3 WLR 1051

¹⁷ [1991] 2 QB 297

Nonetheless, this statement was false as WF did not organise for any insurance policy and when boxes full of wristbands were stolen the insurer stated that he had no right to claim.

Moreover, during contractual negotiations, Damian was told that only one stand was available. Even though this statement was not accurate, it does not amount to misrepresentation as it is considered as an advertising puff and it is unlikely that it influenced Damian's decision making to enter into the contract. However, the exclusion clauses contained in the written contract at clause 11 and 23 are ineffective because they are perpetrating a misrepresentation.

In regard to the contract between FT and WT, Damian opted to pay the sum of \$5,500 with the belief that it included the policy of insurance. More so the assurances by Anne made Damian not to organise for any other form of insurance to cover for loss, theft or damage. In addition, when he stumbled upon the exclusion clauses contained in the contract he inquired further and was told that there were no changes regarding insurance cover and security will be guaranteed. In spite of Damian relying on these assurances, neither insurance cover nor security was provided for, which led to the loss of a box full of wristbands.

The representor in the form of Anna informs and assures Damian that loss, damage and theft will be covered and the sum of \$5,500 paid per store also included insurance policy which catered for damage, loss or theft of property during the expo. In making these representations, Anna was aware that the \$5,500 paid did not include insurance cover yet she continued to give Damian assurances knowing full well that security will not be provided and there was no insurance cover despite \$5,500 being paid by the exhibitors.

Correspondingly, Anna was culpable for negligent misrepresentation because the statement she made to Damian concerning the inclusion of insurance policy subject to payment of \$5,500. This turned out to be a negligent misrepresentation as Anna did not confirm with the

insurance provider that the exhibitors were included. Further, Anna assured Damian that his goods were safe yet they did not provide adequate security leading to the loss of box full of wristbands. Further, WF incorporated exclusion clauses limiting liability whereas assuring Damian of safety and insurance.

Following the unfortunate loss of box full of wristbands and the untruth stated by WF through Anna, Damian is entitled to the remedies available for both fraudulent and negligent misrepresentation. Firstly, Damian can rescind the contract which will compel the parties to be restored to pre-contractual time. This will mean WF will be compelled to reimburse the \$5,500 paid by Damian. Likewise, Damian can claim damages due to the loss occasioned by the representor. WF had assured Damian of both security and insurance cover. Nonetheless, these two were not provided for, and it resulted in the loss of box full of wristbands and prevented the possibility of recovery. Ideally, WF would not have reasonably predicted that goods belonging to FT would be stolen, but the assurances of safety and false statements on insurance cover would not be sufficient to excuse WF from culpability under misrepresentation.

Conclusion

In regard to the contract entered into by FT and WF, the latter had promised to provide an insurance policy subject to the latter paying a sum of \$5,500 to exhibit his wares. In reliance on this information Damian did not seek to organise for his own security or insurance during the expo. Furthermore, Damian was induced by the statements made by Anne. In doing so, Anne did not only fraudulently misrepresent but also she negligently misrepresented FT.

Unfortunately, WF incurred damage through the loss of a box full of wristbands as a direct effect of WF misrepresentation. Consequently, Damian is within his legal right to rescind the

contract which will compel WF to refund the \$5,500. Correspondingly, FT has the *locus standi* to claim for damages following the mysterious loss of a box full of wristbands.

Reference List

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