

UNDERGRADUATE PROGRAMME IN LAW

LL4002 – CONTRACT LAW

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Issues

The scenario presents a question of the operation and effect of misrepresentation as a vitiating factor in contract law. Accordingly, the issues for determination are;

- i. Whether Paul can have a claim even where he had the chance to verify the inaccurate statement but failed to do so;
- ii. Whether Sam had the duty to disclose the change in weekly income after he fell ill;
- iii. Whether the inaccurate statements can vitiate the contract of purchase;
- iv. Whether Paul is entitled to any remedy.

Law

A statement made during negotiations for a contract is known as a representation. Therefore, where the statement is not true, it is a misrepresentation. Consequently, misrepresentation is an untrue factual statement, which is intended to, and in fact influences or induces the party to which it is made to enter the contract. However, such statement is not a contractual term. Also, it can include conduct.¹ Misrepresentation has the effect of making a contract voidable if the injured party so desires. Such injured party may be entitled to rescind the contract and perhaps damages. To be actionable, a statement amounting to misrepresentation must fulfill certain criteria.

This criterion comprises two elements that are cumulative in nature hence must all be present for a claim to succeed. First, a party to the contract must have made a false of a fact. Second, the statement must influence a party in making the decision of whether or not to enter

¹ *Spice Girls Ltd v Aprilia World Service BV* [2002] EWHC Ch 140.

the contract. The false statement of fact should be about a current fact or past event, and it must be substantially false to be actionable.² Accordingly, a statement on future conduct or intention will not qualify unless the one making that statement did not have such intention at that time.³ In the same way, a statement of opinion will not qualify as misrepresentation unless the maker did not actually hold that opinion, or lacked reasonable basis on which to justify the opinion, or he was in a position of special knowledge.⁴ Mere puffs⁵ and statements of law do not qualify as misrepresentation.⁶

Silence cannot be misrepresentation because no duty to unveil any information that has the potential to influence an adversary's choice to contract exists.⁷ However, exceptions to the rule do exist where silence can amount to misrepresentation. These are where one misleadingly tells part of the truth such that the statement becomes misleading.⁸ If a true statement is rendered false by a change of circumstances, failure to inform the other party of the change amounts to misrepresentation.⁹ Contracts of utmost good faith carry with them a duty to disclose all material facts. This is necessary because one party is always more knowledgeable than the other.¹⁰ Further, fiduciary relationships between contracting parties levy a duty to disclose material facts. In such circumstances, silence would amount to misrepresentation. The active concealment of a defect can also be a misrepresentation.

² *Avon Insurance Plc v Swire Fracer Ltd* [2000] 1 ALL ER 573.

³ *Edgington v Fitzmaurice* (1885) 29 Ch D 459.

⁴ *Bisset v Wilkinson* [1927] AC 177; *Smith v Land and House Corp* (1884) 28 Ch D 7.

⁵ *Dimmock v Hallet* (1866) 2 Ch App 21.

⁶ *Pankhania v London Borough of Hackney* [2002] EWHC 2441.

⁷ *Smith v Hughes* (1871) LR 6 QB 597.

⁸ *Nottingham Brick and Tile Co v Butler* (1889) 16 QBD 778.

⁹ *With v O'Flanagan* [1936] Ch 575.

¹⁰ *Lambert v Co-operative Insurance Society* [1975] 2 Lloyd's Rep 485.

Establishing that a false statement has been made is not sufficient. One must also prove that the false statement was influential to the decision whether to enter the contract or not and that it was relied in fact relied upon. It is not necessary that the statement is the only incentive.¹¹ It is satisfactory if it is among the reasons for entering the contract. Conditions necessary to establish inducement are materiality and reliance. Materiality means that the statement represents a fact relied upon to enter the contract. Reliance means that the maker of the statement must have intended that it is acted upon and that it was acted upon. Consequently, reliance will not be proved where the misrepresentee is unaware of the misrepresentation¹² or where he relies on his judgment or investigation.¹³ Conversely, reliance will be established where a person is given the opportunity to discover or verify the accuracy of that statement but does not take up that offer.¹⁴

It is imperative to establish the type of misrepresentation for the purpose of determining which remedy would be available to an injured party. Misrepresentation is classified into fraudulent, negligent or innocent. Fraudulent misrepresentation is a “false statement made knowingly, or without belief in its truth, or recklessly, careless about whether it is true or false.”¹⁵ Negligent misrepresentation is a careless statement made without reasonable basis or belief in its veracity while innocent representation is one made by a party who reasonably believes it to be true. Remedies available to an injured party are rescission, indemnity, and damages. A suitable remedy is dependent upon the nature of misrepresentation.

Rescission is available for all three classes of misrepresentation. Its objective is to return the parties to their original pre-contractual status. However, the right to rescind a contract may be

¹¹ *Edgington v Fitzmaurice* (1885) 29 Ch D 459.

¹² *Horsfall v Thomas* [1862] 1 H&C 90.

¹³ *Attwood v Small* (1838) 6 Cl&F 232.

¹⁴ *Redgrave v Hurd* (1881) 20 Ch D 1.

¹⁵ *Derry v Peek* (1889) 5 TLR 625.

lost in various situations. First, if one affirms the contract;¹⁶ second, if one does not act to rescind the contract within a reasonable time;¹⁷ third, if a third party has already acquired legal rights arising from the contract;¹⁸ or fourth, if it becomes impossible to return parties back to their original position. Indemnity entails a court order for payment of expenses that have been incurred in order to comply with the terms of a contract. Damages are awarded according to the type of misrepresentation. There is an outright right to damages for fraudulent and negligent misrepresentation.¹⁹ Award of damages for innocent misrepresentation is discretionary, and they may be awarded in lieu of rescission.

Application

Sam's advertisement comprised of statements of fact. These statements turned out to be inaccurate hence false. Accordingly, they constitute misrepresentations. Following *Avon Insurance Plc v Swire Fracer Ltd*, these statements must be substantially false to be actionable. Accordingly, the statements of the ladder length and the nature of the customers are arguably below the required threshold but still inaccurate hence false. Concerning the statement of weekly income, Sam failed to disclose the change of circumstances to Paul before the contract was made. Following *With v O'Flanagan*, non-disclosure amounts to misrepresentation. It was on the strength of the advertisement that Paul developed an interest in the business that led to the purchase. Therefore, he did rely on those statements in deciding to buy the business. The fact that he did not utilize the opportunity to verify the length of the ladder does not negate reliance on his part. These factors may vitiate the contract entitling Paul to rescission and damages.

¹⁶ *Long v Lloyd* [1958] 1 WLR 753.

¹⁷ *Leaf v International Galleries* [1950] 2 KB 86.

¹⁸ *Car & Universal Finance Co. Ltd v Caldwell* [1964] 2 WLR 600.

¹⁹ *Rotscott Trust v Rogerson* [1991] 2 QB 297.

However, he is barred from rescinding it owing to his actions of continuing with the business hence affirming the contract.

Conclusion

Pertinent issues arising from the problem question have been addressed. The relevant principles of contract law applicable have been explained, and those principles have been applied to the relevant facts. Paul can bring a claim against Sam for misrepresentation. Accordingly, the contract for the purchase of the business is voidable at Paul's option. The remedy of rescission was available to him, but he acted in affirmation of the contract by continuing with the business. Damages may be available if Sam's statements are found to be negligently made.

Bibliography

- Attwood v Small* (1838) 6 CI&F 232.
- Avon Insurance Plc v Swire Fracer Ltd* [2000] 1 ALL ER 573.
- Bisset v Wilkinson* [1927] AC 177.
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