Misrepresentation remedies: Court of Appeal clarification

A recent case has provided welcome clarification on the remedies available for misrepresentation. Walker Morris’ Head of Commercial Dispute Resolution, Gwendoline Davies, highlights the key practical points arising out of this important cause of action.

Cutting through the confusion
When parties consider doing business together, a multitude of enquiries, discussions and negotiations take place before any deal is done. Marketing campaigns and promotional offers and communications have often been inadvertently leaving yourself open to legal challenge, it is important to understand what exactly is a legal misrepresentation; and what remedies flow when a misrepresentation occurs.

What is misrepresentation?
A misrepresentation is:

- an untrue statement of fact or law;
- upon which a party relies in being induced to enter a contract; and
- which thereby causes the relying party to suffer loss.

Misrepresentations can:

- be express written or oral statements
- be implied by words or by conduct
- be made when making plans or projections for the future
- arise via half-truths
- arise where a statement was true when made, but later becomes untrue if circumstances change. Here, the representing party has a duty to update/revise his or her statement.
occur more readily in relationships of utmost good faith (such as partnerships or contractual arrangements requiring full disclosure).

There are three different types of misrepresentation, each giving rise to different remedies for the party who has suffered loss.

Fraudulent misrepresentation is the most serious and requires the false representation to have been made knowingly, without belief in its truth or recklessly as to its truth. The threshold is high, but the claimant may have the contract set aside (or ‘rescinded’) and seek unlimited damages.

Where the parties have entered into a contract, a claim for negligent misrepresentation under section 2 (1) of the MA is available (in addition to any possible breach of contract claim) where the misrepresentation was made carelessly or without the representor having reasonable grounds for believing its truth. Here, the claimant may seek rescission and/or damages [2] (as well as any possible breach of contract damages).

An innocent misrepresentation occurs where a misrepresentation was made but the maker can show that he had reasonable grounds to believe its statement was true. In these circumstances, a claimant is not entitled to damages, but he or she may be entitled to rescind the contract or to obtain damages in lieu of rescission.

Where the claim relates to negligent or innocent misrepresentation, the court has a discretion under section 2 (2) of the MA to award rescission of the contract or damages in lieu. In Salt v Stratstone the Court of Appeal considered whether the court can exercise its discretion and award damages where the innocent party has, through circumstance, lost its right to rescind.

Salt v Stratstone - Court of Appeal clarification

The claimant had bought a car from the defendant in reliance on the defendant’s representation that the car was “brand new”. The claimant suffered various problems with the car and eventually issued court proceedings on the basis that it was not of merchantable quality and seeking compensation in damages. During those proceedings it became clear that the car had not, in fact, been brand new when the claimant had purchased the car. The claimant therefore amended the proceedings to claim misrepresentation and rescission.

The Court of Appeal confirmed that it was possible in this case to set aside the contract. The car was not exactly the same product now as it had been at the date of purchase (it had been registered in the interim and it had depreciated) and the claimant had had some intermittent enjoyment of the car, but neither of these facts prevented legal restitution [3]. Similarly, it would not be fair to allow the claimant’s delay in bringing a misrepresentation claim to preclude this remedy, as the claimant had only learned of the defendant’s misrepresentation as a result of the ongoing proceedings.

Delivering the first Court of Appeal authority on the subject, Longmore LJ made very clear, however, that the court’s discretion to award damages in lieu of rescission under section 2 (2) only applies where the innocent party is entitled to rescind the contract. If the right to rescind has been lost (for example because the innocent party has, in the meantime, affirmed continuation of the contract or because intervening circumstances have rendered rescission impossible), so too has the ability to recover damages in lieu.

WM Comment

There are a number of practical points and best-practice tips arising from this case, and from the law of misrepresentation generally, of which all businesses should be aware:

- Take care to ensure that marketing material and all forms of pre-contract communications are accurate...
- ...and that they are kept accurate and up to date on an ongoing basis.
- Prior to conclusion of any contract, check whether any circumstances or key terms have changed since communications and negotiations began. If they have, make sure that all parties are aware and remain happy to proceed before you complete.
- Educate sales staff and negotiators as to the dangers of misrepresenting facts or projections.
- If you think you may have suffered loss having relied on a misrepresentation, act quickly. Take specialist legal advice immediately to ensure that you do not prejudice your rights to claim any particular remedies.
- Any potential claimant must ensure that its claim is formulated correctly. Ask your legal advisor to consider which type or types of misrepresentation should found your action and whether there may also be any potential to bring a breach of contract or tortious negligent misstatement claim.
- When considering any negligent or innocent misrepresentation claim, assess whether or not the right to rescind the contract remains.
- Parties may also limit or exclude liability for misrepresentation by inserting appropriate exclusion or non-reliance clauses into their commercial contracts. (It should be noted, however, that any such provisions will be subject to the reasonableness test set out in the Unfair Contract Terms Act 1977 [4] and it is not possible in any event to exclude liability for misrepresentation resulting in death or personal injury caused by negligence nor for fraudulent misrepresentation).

For further advice or assistance, please contact Walker Morris’ Commercial Dispute Resolution team.

[2] The measure of damages in these cases will be the tortious measure – that is, to restore the claimant to its pre-misrepresentation position.
[3] Restitution is restoring the claimant to the position it was in before the defendant had been unjustly enriched at its expense. Here, restitution could be achieved by rescinding the contract: refunding the claimant and returning the car to the defendant.