

The consequences of making a misrepresentation
Rachel Barnes, February 2010

Many statements can be made in the course of trying to win work and there can be a temptation to overstate facts. Whether this could result in a misrepresentation is explained below together with the possible consequences.

Representations are statements of fact – not opinions or intentions. Misrepresentations are untrue representations. In order to be able to sue in respect of a misrepresentation, the injured party must show the statement induced it to enter into a contract and that it would not have done so but for the misrepresentation. If it knew the statement was untrue or only learned about the statement after making the contract, no action could be taken.

Misrepresentations can be fraudulent, negligent or innocent. A fraudulent misrepresentation is made when the person making it knows or believes it to be untrue. A negligent misrepresentation is made when the person making it is careless as to whether it is true or false. An innocent misrepresentation is made when the person making it honestly believes it to be true.

The distinction is important because the remedies and the level of damages will depend on the nature of the misrepresentation. For fraudulent misrepresentation the injured party can claim compensation for all losses resulting from the misrepresentation, whereas losses resulting from a negligent misrepresentation will usually be restricted to those reasonably foreseeable. (If the claim is under the Misrepresentation Act 1967, rather than the common law, the assessment of damages and burden of proof is treated somewhat differently.)

As to the contract itself, the effect of a misrepresentation is to make it voidable by the injured party who can then choose (subject to some qualifications) whether to set it aside and treat it as if it had never been made (this is called rescission) or to continue with it.

At common law, the remedy for innocent misrepresentation is rescission of the contract with no damages being awarded, but under the 1967 Misrepresentation Act the court has power to award damages in lieu of rescission.

The BSkyB v EDS case in which judgment was given on 26 January 2010 is a useful reminder of the consequences of making a fraudulent misrepresentation. The judge found that EDS had made fraudulent misrepresentations as to its ability to deliver a project within a certain timetable and in

particular that it had carried out a proper analysis to enable it to make this statement. The judge also found that it was a result of these misrepresentations that BSKyB had been induced to enter into the contract with EDS. The damages that could be payable as a result have been estimated at £200 million or more. There was a limit of liability in the contract to £30 million but both parties have accepted that such a limit is not effective to limit liability for fraudulent misrepresentation.

[Note: this was always understood to be the position, even if limitation of liability clauses do not expressly exclude fraudulent misrepresentation. If the limitation clause is drafted widely enough, for example to refer to claims or liability *'arising under or in connection with the contract'*, then such a limit should apply to the damages payable for negligent and innocent misrepresentations, subject of course to the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contract Regulations 1994 if either applies.]

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