

Ian, an investment broker, was approached by Victor who asked him whether he should invest in Wonder Electronics Ltd. Ian said “ You certainly should, Lord Wellybob is a director. It is a very sound company. It is my view that it will go from strength to strength. In fact, I own 5,000 shares myself which I can let you have.’ Victor then bought the shares for £10,000 . The company went into liquidation a month later. The shares are now worthless. It now turns out

- (a) that Lord Wellybob resigned from his directorship a week after Ian’s statement was made.**

- (b) that Ian’s statement regarding the prospects of the company was based on a report in a financial journal which was intended to refer to Wonder Electronics Ltd but gave the name of Wander Electronics by a printing error.**

Advise Victor;

SUGGESTED ANSWER:

In advising Victor it has to be determined whether he can sue Ian for misrepresentation on breach of terms of contract. Victor will first be advised whether he can sue for misrepresentation.

Misrepresentation has not been defined as a statement of fact which is untrue and which induces the other to enter into the contract. To sue for misrepresentation Victor must prove that:-

- i) **the statement made by Ian were statement of fact**
- ii) **and the statement had induced him to enter into the contract.**

The following 3 statement made by Ian are relevant for an actionable misrepresentation

- i) that Lord Wellybob is a director
- ii) that the company is very sound
- iii) that in his view it would go from strength to strength

Victor will now be advised as to whether Ian's statement are statement of fact.

Statement 1

"Lord Wellybob is a director" is a statement falsified by later events. General rule is that there must be a statement and therefore silence or non-disclosure do not amount to misrepresentation *Keates v Cadogan (1951)*. Here if Victor entered into contract before Lord Wellybob's resignation, there would be no element of falsity. But if Victor enter into contract after the resignation then it would be regarded that Ian's statement as a continuing representation which will be falsified by the subsequent events. As such Ian is under a duty to disclose the new facts, *With v O' Flanagan (1936)*

Statement 2

"It is a very sound company" is a statement of opinion on belief incapable of actual proof then it is not actionable, *Bisset v Wilkinson (1927)*. Certainly Ian used the words "It is my view" which suggested that the statement is one of opinion not a fact. However there are exception to the rule. Firstly that the representor did not honestly hold the opinion, secondly that a reasonable man possessing his knowledge could not honestly have held the opinion and thirdly if the representor has better knowledge of the facts upon which his opinion is based i.e the facts not equally well known to both sides, *Smith v Lord & House Property (1884)*

Here Ian's opinion carries with it an implied representation of fact. Ian is an investment broker and might reasonably be assumed to know something about the health of Wender. And moreover Ian himself told that he in fact owns about £5,000 shares, which he willing to sell. These clearly shows that Ian gave Victor a false statement of fact.

Statement 3

"It will go from strength to strength" is a statement of opinion and generally is not actionable *Bisset v Wilkinson*. However there are exceptions to this as it is stated above, *Smith v Lord House Property (1884)*

Here Ian could fall within the exception as being an investment broker and own £5,000 share he would have verified his statement by getting the company's annual financial report.

Victor must next prove that he was induced in the contract by the above statements. As representor does not render a contract voidable unless if induced the representee to enter the contract. There are 2 requirement to this:-

- i) misrepresentation must be addressed to party mislead, *Peek v Gurney (1873)*
- ii) there must be reliance by P

This would be no problem as inducement is clear because it was addressed to Victor and misled and **secondly** the above statement sounded like a good investment as such there is reliance on Victor's part which induce him enter into contract with Ian. And in consequence Ian would be liable for the misrepresentation.

Next, one would advice Victor as to the nature of the misrepresentation in order to determine the available remedies. There are 3 types of misrepresentation:

- i) **Fraudulent misrepresentation**
- ii) **Negligent misrepresentation**
- iii) **Innocent misrepresentation**

Fraud was defined by *Lord Herschell* in *Derry v Peek* as meaning that the representor made the false representation:

- i) knowingly or
- ii) without belief in its truth or
- iv) recklessly, careless whether it be true or false.

Since Ian made the statements recklessly, knowing that Victor was relying on his expertise. But the burden of proof is on Victor and standard is very high, it requires evidence to allege fraud against Ian because the error in company name is as a result of printing error, be such it is not advisable for Victor to allege fraudulent misrepresentation. Furthermore the remedies for negligence under **S2(1) M.A 1967** is more than the tortious measure (out of packet rule) ie to put P into a position he would have been in had the representation been true. *Watt v Spence, Roycot trust v Rogerson (1991)*

As to **Negligence**, it is defined as a false statement made honestly by a person who had no reasonable grounds for believing the statement to be true ie failure to take reasonable care to ensure that the representation is accurate.

Here the statement could amount to negligent misrepresentation as Ian being in investment broker could have verified his statement from the company financial report

and he knew that Victor was relying on his representation. Here Victor could bring on action under Common law misrepresentation or under the Misrepresentation Act 1967.

However it is not advisable for Victor to sue under negligent misrepresentation at common law because though there is a special relationship between him and Ian. But Victor bears the burden of proving the special relationship for liability of Ian under negligent misstatement, Hedley Byrne v Heller & Partners. This avenue is not a preferable approach, hence it may be easier for a plaintiff to succeed under **Statute M.A 1967** which puts the burden on the defendant to disprove negligent

So Victor can sue under **S2(1) MA 1967** where burden of proof is on Ian to prove that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true, Howend Marine v Ogden (1978). However from the fact of the case there are insufficient ground to conclude that Ian discharge the burden of proof and if he succeed it would still amount to an Innocent Misrepresentation.

Next Victor will be advised on the remedies available. Under rescission Victor has the choice whether to rescind the contract, therefore the contract remain valid until rescinded.

Rescission is actually available in all the type of misrepresentation and Leaf v International Galleries (1950) but there may not be a bar in cases of fraudulent. Furthermore Victor's rights to rescind is not subject to any of the bar such as lapse of time, affirmation, intervention of 3rd party rights and restitution. Therefore Victor can rescind the contract.

If Victor sues for negligent misrepresentation he can either rescind contract and sue for damages or affirm the contract and sue for damages. The measure for damages under **S2(1)MA 1967** is unclear however it was suggested as a tortious measure envisaged (out of the pocket rule). Here Victor must bear in mind that under **S2(2) M.A 1967** the court has discretion to award damages in lieu of rescission if it consider it equitable to do so.

If the statement by Ian amount to an Innocent misrepresentation, than plaintiff may rescind the contract and claim indemnity or be awarded damages in lieu of rescission, **Section 2(2) M.A 1967** which gives the courts the discretion. It's opinion that measure of damages under **S2(2)** may be lower than **S2(1)** and should be limited to an indemnity. **Treitel and Cheschires** views. But if the courts refuses to awarded damages then Victor may apply for an indemnity.

If Victor wishes to sue for fraudulent misrepresentation (which is not advised to) he can either affirm the contract and claim damages for the tort of deceit or rescind the contract and claim damages or plead fraud as defense in an action against him for breach of contract. In cases of fraudulent inducement it has given exemption of remoteness test Doyle v Olby (Ironongers Ltd), East v Nlourer (1991) but not in tort.

Advise to Victor could not be complete if he is not advised whether he can sue Ian for **breach of terms of contract**. Victor has to prove that the 3 statement made by Ian are term of the contract and not mere representation. The courts have formulated the following guideline for this :

- i) time lapse between representation and conclusion of the contract .
Routledge v Mckay (1954)
- ii) was the oral statement followed by a written contract
Birch v Paramount Estates
- iii) Did the representor have special knowledge or skill **Dick Bentley Production v Harold Smith (1965)**
- iv) Important of the statement **Bannerman v White**

The representation may also be treated as collateral contract, **Evans and Sons Ltd v Andrea Mezario** . The act may regards Ian's statement as mere representations and therefore it's advisable for Victor to sue for misrepresentation, further by virtue of **S1(a) M.A 1967** Victor can sue for misrepresentation even though the representation is a term of the contract.