

### **Contract (1)**

Jane has decided to buy a dinner service. A neighbour tells her that a sister-in-law, Carolyn, is planning to sell her valuable Coalport service. Jane telephones Carolyn who tells her that the Coalport is a full service, in immaculate condition and completely original. Jane inquires whether the Coalport is in 'athlone blue', knowing that this is particularly valuable. Carolyn replies, "It must be, it's the proper Coalport blue colour". Jane further inquires whether replacement Coalport can still be purchased in the event of breakages. Carolyn tells her, "Well I broke a dinner plate a year or two ago and had no trouble buying another one". Jane agrees to send Carolyn a cheque in the sum of £350, on clearance of which Carolyn will dispatch the Coalport.

Jane receives the service a month later. She is disappointed and angry to discover that:

the Coalport is deficient in two items, namely one tureen and one small plate'

there are faint cracks on the underside of the gravy boat;

the Coalport is blue, but not 'athlone blue'; and

this particular dinner service is no longer available, Coalport having recently been taken over by Wedgwood.

**Advise Jane.**

Jane requires advice on misrepresentation and also a possible action for damages in breach of contract.

A misrepresentation is a false statement of fact, made contractually which is intended to induce the contract and which has that effect. So, in order to establish if any of Carolyn's statements will constitute a misrepresentation, it must be examined if they constitute statements of fact. First of all, with regard to the statement concerning the condition of the dinner service, Carolyn states quite clearly and unequivocal that the service is immaculate and completely original. This is not vague or ambiguous as in **Dimmock v Hallet (1866)**; and as such will amount to a statement of fact. As such, it satisfies the first requirement for an actionable misrepresentation.

With regard to the query as to the colour of the service, C would probably argue that this was merely an opinion. The general rule, as stated, in **Bisset v Wilkinson (1927)** is that a statement of opinion, from a person who is not an expert, will not form an actionable misrepresentation. However, in **Smith v Land & House Property Corporation (1884)**, it was stated that an opinion may amount to a statement of fact when it is made by one who knows best as it carries implicit assertion that facts are known to support the opinion. This, the expertise and knowledge that C possesses in respect of Coalport goods will be important as to whether this constitutes a statement of fact. Finally in **Brown v Raphael (1958)**, it was stated that a statement of fact will often be found if the representor is in a far stronger position to know the facts than the representee.

Obviously, this is the case here because Carolyn actually owns the goods in question so presumably knows them, and also Jane is not at the liberty to inspect the service herself. With regard to the statement about obtaining a replacement, it is questionable as to whether this will constitute a statement of fact. Carolyn is commenting on her experience some time ago, and may have been true at the time, but may have changed currently. Thus, it is not a statement of existing fact. Conversely, if Carolyn knew of the take over whilst speaking to Jane, the statement may amount to a half truth, that is a representation which is true in so far as it goes, although does not reveal the full facts. As such, it would form an actionable misrepresentation. Furthermore, **With v O'Flanagan (1936)** demonstrates that any change in circumstances which falsify an existing statement, must be disclosed to the representee.

Thus, assuming the presence of at least one false statement of existing fact, in order for a misrepresentation to be actionable, it must be shown that it induced the contract. To do this, the statement does not have to be the sole inducement or even the primary one (**Edgington v Fitzmaurice (1885)**). It is only necessary that it is a material factor, that is one which would affect the judgment of a reasonable person in deciding whether to enter into the contract. Where this is the case, it is not difficult to imply inducement (**Smith v Chadwick (1884)**). It would appear that the material factor is test is satisfied here as obviously the condition, number of pieces and colour of the service would affect the price and desirability of it.

Finally, is there evidence that Jane relied on the statements? It is submitted that she did as she did not send in her own expert to view the service (**Attwood v Small**), and she concluded the contract immediately after being reassured as to her queries.

Consequently, it is submitted that all the requirements for an actionable misrepresentation has been established. As such, Jane may be able to seek damages, the measure of which is dependent on the type of misrepresentation claimed.

Firstly, under fraudulently misrepresentation, Jane must prove that Carolyn made the statement knowingly, without belief in its truth or recklessly as to its truth (**Derry v Peek (1889)**). If successful, damages are assessed in the tort of deceit and Jane will be compensated for all loss which is a direct consequence of the statement (**Doyle v Olby Ltd (1969)**). However, it is submitted that Jane would be better advised to pursue her claim under s.2 (1) of the Misrepresentation Act (1967), for several reasons. Primarily, under this burden of proof is reversed, and as such Carolyn will be expected to prove she had reasonable grounds for believing and did believe up until the time of contracting that the facts represented were true. Furthermore, as illustrated in **Howard v Marine Dredging Ltd v Ogden Sons Ltd (1978)**, this is not easy as establishing an honest belief is not sufficient – reasonable grounds must be shown.

Secondly, in **Roycott Trust v Rogerson (1991)** s.2 (1) was interpreted to mean the same measures of damages as for fraud will apply. Thus, Jane would recover all loss flowing from the statement. Remedies under negligent misstatement won't apply here as there is no special relationship between parties (**Esso Petrol v Mardon (1976)**). In addition to damages, Jane may seek to rescind the contract. This is available with all types of misrepresentation. Misrepresentation renders the contract voidable. An action for rescission puts parties back into their original positions, and so Jane will be able to return the service and obtain a refund.

Alternatively, Jane possibly has a remedy in breach of contract if she can establish that the representations were actually terms of the contract. This depends on parties intentions (**Heilbut, Symons v Buckleton (1913)**). For instance, the time between the making of statement and conclusion of contract is important (**Routledge v McKay (1954)**). Here, there is no gap at all implying it could be a term. Secondly, the expenses of the parties are important. Obviously, the seller is expected to know his own goods (**Harling v Eddy (1951)**), but if the buyer has expert knowledge, they may be expected to check the facts (**Oscar Chess v Williams (1957)**). Additionally, it would depend if the factor was central to the contract (**Bannerman v White (1861); Schawel v Reade (1913)**). However, Carolyn will argue the statements were never put into writing. If it is decided the statements are terms, Jane can seek damages for breach of contract.

However, considering the facts and favourable measures of damages available for misrepresentation, it is submitted that Jane should take her action in that area.