BOOK REVIEW

THE LAW OF ACTIONABLE MISREPRESENTATION, Original text by George Spencer Bower. Third edition by Sir Alexander Turner. London. Butterworths. 1974.

George Spencer Bower (1854-1928) wrote a series of legal texts which apparently have long been accepted as classics. With the advent of *The Law of Actionable Misrepresentation* in 1974, three of them have now been republished under the editorship of Sir Alexander Turner, until recently President of the New Zealand Court of Appeal. In appearance at least this latest effort is a text of the highest class, being magnificently bound and printed, which no doubt accounts for the price tag of £16.

In his preface, Sir Alexander Turner expresses the hope that he "may be able to administer to this book resuscitative treatment such as to give it a well-deserved further lease of useful life". This he has done in the sense that cases decided, and statutory provisions passed, since the second edition appeared in 1927 (particularly the English Misrepresentation Act 1967) are now included. However, apart from this and some resultant necessary rewriting, the approach of Spencer Bower to this subject remains. Indeed, the editor's aim was to preserve as much of the "stuff" of Spencer Bower as possible subject to recent developments in the law. To have done otherwise would have been to produce a different book.

In the writer's opinion, Spencer Bower's work did not warrant the attempted resuscitative treatment. Like many of the old text-books published in the late nineteenth and early twentieth centuries which one occasionally comes across tucked away in the furthermost corners of the law library, dusty and seemingly untouched in years, it ought to have been left to die. The decision not to write a new book has resulted not only in the preservation of Spencer Bower's convoluted and overly legalistic style, but also the retention of a number of misleading or doubtful propositions of law.

Law books should today be written in contemporary language and style. What was acceptable at the beginning of this century is not necessarily acceptable now. The days of text-books made up of tedious long-winded sentences, peppered with dependent clauses, parentheses and innumerable latin tags have gone. Students and practitioners now demand more concise and readily comprehensible texts than some of the painstaking efforts of the classical scholars. Many legal topics are difficult enough without one having to stop every few paragraphs and ponder — "what in fact is he saying here?" — which is often the case with *The Law of Actionable Misrepresentation.*

If a book on the law of actionable misrepresentation were required, then it should have been a fresh and modern look at the subject. Instead, this book perpetuates distinctions which are either of doubtful validity or no longer serve any useful purpose. It is a mine of the older

authorities but one may question what use their preservation serves, especially since many of them are pre-1850 decisions at which time the principles were far from settled. All they serve to do is to complicate unduly a restatement of this branch of the law, which, apart from the evolving action for negligent misrepresentation, is now reasonably certain and straightforward. Of the few other problem areas that do exist, little attempt is made by the editor to evaluate the opposing views expressed in texts written since Spencer Bower's work first appeared in 1911. For instance, as will be discussed later, the editor steadfastly adheres to the requirement of materiality. Although supported in this view by Treitel,[1] the requirement is doubted by Cheshire and Fifoot[2] and denied by Salmond and Williams,[3] Goff and Jones,[4] and Chitty.[5]

It is noteworthy that the most instructive and well written parts of this book are the few where the editor, because of recent developments in the law, was able to completely rewrite or add sections, freed from the shackles of Spencer Bower's views and style. Particularly is this so with regard to the final chapter on negligent misrepresentation where he traces and comments on the law as it has developed prior to and since *Hedley Byrne*. Although there is no discussion of the vexed question whether the action is available in respect of misstatements made in a pre-contractual situation, the explanation of how the action has become one for negligence, not misrepresentation, and the consequences of that, is very helpful. Overall, the clarity and conciseness of this chapter is a marked contrast to some of the early chapters which mostly repeat the original work of Spencer Bower. The following are some examples of the latter's views which struck the writer as requiring comment.

THE REPRESENTATION/PROMISE DISTINCTION

The writer's difficulties began right at the outset of the authors' introductory chapter. Under the heading of "Excluded topics", it is stated:[6]

> A representation, and a promise, are mutually exclusive of, and antithetical to, one another. In the case of a statement which has formed the inducement to another's alteration of position, there is no question of any contractual engagement having been violated: whereas in the case of a contract, or a term or condition of a contract, or a warranty, the sole question is, breach or no breach, and the application of the terms "false" or "true", to such breach or observations, is inapposite. There may be cases, of course, in which the same matter is made first the subject of a representation, and then, separately, the subject of a promise, being incorporated into the ultimate contract as a condition or warranty.

1. *The Law of Contract* (3rd ed. 1970) 280.
2. *The Law of Contract* (8th ed. 1972) 251.
3. *The Law of Contracts* (1945) 258.
4. *The Law of Restitution* (1966) 113.
5. *Contracts* (23rd ed. 1968) i, para. 275.
6. Ch. 1, para. 2.

The vital distinction is not between representations and promises but *mere representations* and *terms of the contract*. For instance, the bald statement that a certain state of affairs exists, unaccompanied by promissory words such as "I promise" or "I assure", has sometimes been treated as one for which the representor must accept contractual responsibility, i.e. a term of the contract. Although it is more likely that a statement accompanied by such promissory words will be held to be a term, their presence is not decisive one way or the other. Indeed, promissory statements have often been held mere representations; e.g. as a result of the operation of the parol evidence rule or other circumstances showing that they were not "intended" as terms.

It is suggested that where the alteration of position induced by a misstatement is the entry into a contract with the representor, there may well be a question of a contractual engagement having been violated. The very fact of inducement may indicate a term or a collateral contract. Basically, the distinction between a mere representation and a term is one of degree — the more clear cut the inducement, the more likely it is to be a term. Incidentally, where the term consists of an assertion as to an existing state of affairs, it is not inapposite to talk in terms of falsity. If the statement is false then there is a breach.

Overall the quoted passage assumes that a clear distinction can be drawn between representations and promises. Presumably, in the authors' view, a statement by the vendor of a house in the course of negotiations simply that "it is sound" has different legal consequences than the statement "I promise you it is sound". Depending on the circumstances, either statement may be a term, whether part of the main contract of purchase or a collateral contract.

In the final sentence the authors acknowledge that a representation may amount to a term but only when it is made *separately* the subject of a promise. In other words, it must be subsequently repeated as a promise or incorporated in the written contract (if any). The cases indicate otherwise, although the failure to use promissory words or to repeat the representation at the time of concluding the contract will be factors adverse to the actual finding of a term.

The reader might think that these fundamental points must surely have been familiar to the authors and that their only sin is loose expression. However, it is not apparent from some of their later discussion.

Statements of Intention as Representations

It is settled law that a statement of intention to do or abstain from doing something in the future is prima facie not a representation since it is not a statement of *fact*. This is subject to the important qualification that generally such statements do carry with them an implied statement of fact that the speaker does presently have that intention. If it can be proved that he never had that intention, there is an actionable misrepresentation.

The authors contend, however, that statements which can be construed as promises only are not within this principle. They state that in such cases[7]

> . . . the words amount either to a promise or to nothing at all which entails any legal liability. If a promise is made out, then, as in any other case of contract, if it is legally binding upon the promisor the only questions are whether it has been performed or broken, and, in the latter event, whether there is any obstacle by statute or at common law to its enforcement . . . There is a clear psychological distinction between a statement of a present intention to act in a certain manner and an undertaking or engagement so to act.

It is doubtful whether any such clear distinction can be sustained or drawn in practice. There is no reason why in this context a statement "I promise to do X" should be treated differently from "I will do X" or "I intend to do X". It is suggested that even when the statement of future intention is couched in promissory language it will carry with it an implied representation of fact that there is a then existing intention to fulfil the promise. As mentioned earlier, not all promises are necessarily terms of the contract. The parol evidence rule might apply or the promise might have been intended to be binding in honour only. Consider the following situation. Borrower says to Lender, in order to induce him to make a loan, "I promise not to borrow from any other sources until your loan has been repaid". For one reason or another, Lender cannot establish that this statement was a term of the ensuing loan contract. It is suggested that Lender could rescind the contract upon proof that Borrower never intended to cease his other borrowing activities. It is noteworthy that other text writers either do not mention the suggested distinction or expressly apply the implied representation of fact principle to promises and other statements as to future conduct.[8]

Representation distinguished from warranty

Much of the confusion noted above is continued in the authors' brief and very obscure discussion of the representation/warranty distinction.[9] Again they apparently fail to perceive that a statement which is assertive rather than promissory may be contractually binding. They also suggest that inducement and materiality do not have "the slightest relevance to any issue in an action for breach of warranty".[10] In fact, both are very important. As noted earlier, the more clear cut the inducement the more ready the courts will be to treat the statement as a term. Materiality, i.e. importance of the subject represented, will also be a significant factor. An analysis of the cases on terms of the contract

7. Paras. 19-20.
8. E.g. Atiyah, *Introduction to the Law of Contract*, 157.
9. Paras. 22-23.
10. Para. 22.

indicates that the more important the topic on which the statement is made the greater chance there is that it will be a term.[10a]
In the context of the relevance of inducement in an action for breach of warranty, the editor criticises the following views of Lord Denning on the representation/warranty distinction expressed in *Dick Bentley Productions Ltd.* v. *Harold Smith (Motors) Ltd.*:[11]

> . . . it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty . . . Suffice it that the representation was intended to be acted on and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it.

This passage is certainly open to criticism in that the notion of inducement does not serve to distinguish a representation from a warranty. However, it is wrong to suggest that inducement is irrelevant. Inducement is essential to both of them. A statement cannot be actionable as a mere representation or a warranty unless it induces entry into the contract.

The true position is that the difference between a representation and a term is one of degree and that the stronger the inducement which a statement provides the more ready the courts will be to treat it as a term. It seems that Lord Denning might in fact have been hinting at this question of degree when he referred to the representation being made "*for the very purpose* of inducing the other party to act on it". A casual remark in passing may be an actionable representation, but it is far less likely to be a term than a statement more specifically aimed at inducing the contract.

The aspect of Lord Denning's views which did require comment was his qualification that the inference of warranty can be rebutted by the representor proving absence of fault in making the representation. The accepted test for whether there is a warranty is the intention of the parties at the time when the contract is formed. How then can a subsequent finding that the representor was without fault be relevant? It cannot change the supposed intention which the parties possessed at the time of making the contract. It relates to an entirely different issue.

The writer's difficulties with this section of the book were further enhanced by a misleading reference to the House of Lords' decision in *Heilbut Symons & Co.* v. *Buckleton*.[12] In a footnote to the previously

10a. See Treitel, n. 1, 295.
11. [1965] 2 All E.R. 65, 67.
12. [1913] A.C. 30.

criticised proposition that "he who sues on a representation, as if it were a promise or warranty, cannot succeed,"[13] it is stated that in this case "the jury negatived misrepresentation, and the House of Lords, reversing the courts below, held that there was no evidence of a warranty."[14] In fact, the jury found that there *was* a misrepresentation which, furthermore, amounted to a breach of warranty. All that was negatived by the jury was *fraudulent* misrepresentation. If there had been no misrepresentation the claim for breach of warranty would never have got off the ground.

Representation repeated as a promise

In para. 24 the authors reiterate the view, already criticised, that a representation must be made separately the subject of a promise before it is contractually binding. They then go on to state that, prior to the Misrepresentation Act 1967, it was

> clearly the law . . . that where this happens the earlier misrepresentation merges in the subsequent contract of the parties; and that, if shown to be a misrepresentation, it will not in such a case give rise to a right in the representee to rescind for misrepresentation, he being left only with such rights as may be available to him under his contract.

In principle, this view would seem to be correct. It is difficult to see how a representation can be incorporated in the contract and still retain an independent existence outside of it. If the position were otherwise, it would be contrary to the spirit of Equity's decision to allow rescission for mere innocent misrepresentation. A right to rescind was conferred in order to remedy the deficiencies of the common law which provided no remedy unless the representation was a term of the contract.

However, the position is certainly not as clear cut as the authors suggest. They do not advert to the contrary authorities of *Cie Francaise des Chemins de Fer Paris-Orleans* v. *Leeston Shipping Co. Ltd.*[15] and *Alati* v. *Kruger*.[16]

It is interesting to note that the former case was followed recently by the Supreme Court of Victoria in *Academy of Health and Fitness Pty. Ltd.* v. *Power*,[17] unfortunately reported too late to be referred to by the editor. The defendant was induced by an innocent misrepresentation to enter into a contract with the plaintiff. It was held by Crockett J. that the right to rescind was not lost by virtue of the representation being a term of the parties' written contract which could be classified as a warranty only.

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13. Para. 22.
14. Page 44.
15. (1919) 1 Ll.L.R. 235.
16. (1955) 94 C.L.R. 216, 222.
17. [1973] V.R. 254.

STATEMENTS OF OPINION

One of the most disappointing sections in this book is that dealing with statements of opinion.[18] The distinction between statements of fact and statements of opinion is often a difficult one to draw in practice and the authors shed little light on the problem. Indeed, for the most part they assume some clear distinction.

The leading case of *Bisset* v. *Wilkinson*,[19] one of the few modern contract cases in which a statement was held to be purely one of opinion and therefore not actionable, rates no more than a brief footnote.[20] No attempt is made to contrast this decision with *Brown* v. *Raphael*,[21] where the statement of opinion was held to carry with it an implied statement of fact that there were reasonable grounds for the opinion. The latter case is discussed but the authors do not advert to some of the difficulties with it, which one would expect from a specialist text. For instance, it was held that the representor did not have reasonable grounds for his opinion although he employed "a well-known firm of solicitors of standing and repute" to check the matter out for him. If the taking of professional advice does not supply reasonable grounds, one may wonder what does?

It is difficult to follow some parts of the authors' treatment of this topic. First, there is the citation[22] of the statements held actionable in some of the negligent misrepresentation cases as illustrations of statements of fact. The courts in these cases have simply not been concerned with distinguishing fact from opinion. The many formulations of the *Hedley Byrne* principle all accommodate statements of information, advice, opinion or fact. Indeed, the editor himself later points out in his chapter on negligent misrepresentation[23] that the *Hedley Byrne* action is not an action for misrepresentation at all, but an action for negligence, and that the breach of duty may involve the giving of advice containing no factual element.

Secondly, there is the statement that[24]

> a representation as to a matter strictly to be regarded as a matter of *fact* does not lose its quality because of being stated either in the form of an opinion, or in a form which is susceptible of being so construed . . . A statement, for instance, as to the credit, character, or reputation of another, relates to a matter of fact, however plausibly it may be suggested afterwards, when responsibility is sought to be affixed to the statement, that the language used must be taken to have pointed to mere belief . . .

18. Paras. 29-35.
19. [1927] A.C. 177.
20. On p. 49.
21. [1958] Ch. 636.
22. On p. 52.
23. At p. 431.
24. At p. 53.

This passage is particularly mystifying. The subject matter of the statement alone cannot determine whether the statement is expressed as fact or opinion. What is strictly a matter of fact? Why is it decisive that the statement "relates to a matter of fact"? These questions are glossed over. The writer has always understood that the form of the statement as well as the circumstances in which it is spoken are the most important factors to be considered in deciding whether it is opinion. The question is — "what meaning was actually conveyed to the party complaining?"[25] The court must consider not only the subject matter spoken of, but also the material facts of the transaction, the knowledge of the parties respectively, their relative positions and the words used.[26]

Many statements of opinion will "relate to a matter of fact" but that cannot alter their prima facie status as statements of opinion. It is not the law that a statement of opinion which relates to a matter of fact, in the sense that it is not a prediction of the future and its correctness or otherwise can be tested at the time it is made, is actionable. Suppose that Vendor says to Purchaser, "I believe this horse to be sound". This is a statement of opinion which prima facie is not actionable even though it relates to a matter of fact. Even if the words "I believe" are not used, the statement could still be one of opinion only. Thus, in *Bisset* v. *Wilkinson,* although the exact words are not clear from the report, the vendor of a farm stated that it had a carrying capacity of 2000 sheep. The land had never been used as a sheep farm before and the buyers knew this. The facts were equally well known to both parties and accordingly the buyers were not entitled to regard the vendor as having done anything more than express an opinion. Not only did the circumstances point to the actual statement being opinion, but also they ruled out any possibility of the opinion carrying with it an *implied* statement of fact that the vendor possessed reasonable grounds for his opinion.

Two separate questions must be asked in each case. First, is the statement, on its face, one of fact or opinion? Secondly, if it is opinion, are the circumstances such that there is an implied assertion that the speaker knows facts which reasonably justify his opinion? Unfortunately, the authors run the two separate issues together. In the course of the same paragraph in which the above quoted passage appears, they consider the case of *Smith* v. *Land and House Property Corporation*[27] (the "most desirable tenant" representation). As the authors themselves point out, the statement *was* one of opinion, but one which carried with it an implied statement of fact that the speaker was aware of grounds reasonably justifying his opinion. The distinction is important because if the statement is one of fact simpliciter, then, apart from the other ingredients of actionable misrepresentation, all the representee has to show is that the statement is false. The fact that the representor had

25. *Bisset* v. *Wilkinson,* n. 19, at p. 183.
26. Idem.
27. (1884) 28 Ch. D. 7.

reasonable grounds for making the statement is irrelevant. Whereas, if the statement is opinion involving an implied statement of fact that he has reasonable grounds for supporting his opinion, then the representee must prove that this implied statement was false, a much harder task.

MERE PUFFS

In common with other textbook discussions on misrepresentation, the authors use the heading of "Exaggeration, puffing, etc." as providing a further category of non-actionable statements and, of course, they use the latin tag *simplex commendatio non obligat* to describe its obvious utility.[28] As they point out, no person is usually deceived by the salesman's vague laudatory statements or the advertiser's gimmicks. They are not usually intended to be taken seriously and cannot be. So a person cannot complain if certain toothpaste does not give "a ring of confidence", if soap does not "put a tingle in your shower" or if soap powder does not result in "hungry enzymes" leaping about in the wash. However, it is another matter to elevate all cases of exaggerated commendation into a separate category of non-actionable statements.

There have in fact been indications recently that there is no such separate category and that the real question in each case is one of reliance. Thus, in *Senanayake* v. *Cheng*,[29] a decision of the Privy Council which is surprisingly not mentioned at all in this context by the authors, the plaintiff was told that a partnership was a "gold mine: that the business was a flourishing one and that she ought not to miss a golden opportunity".[30] It was never questioned that this was an actionable representation.

The true principle in this area would seem to be that laudatory statements will often not be actionable because the language is so patently exaggerated or so vague that nobody would rely on it. In other less extreme cases, the eulogistic statement will usually not be actionable because the other party relies upon his own assessment or inspection of the subject matter and not upon the statement. Take the case of *Magennis* v. *Fallon*,[31] cited by the authors,[32] where a second-rate house was described as "a desirable residence for a family of distinction". Such a statement to a prospective purchaser would normally not be actionable because he makes his own assessment of its desirability. However, it would be wrong to suggest that the statement could never be actionable. There are situations where a person might well rely on the eulogistic claim that a house is a desirable residence fit for a family of distinction. Take the case of the university professor about to come to New Zealand to take up a position who wants to rent a house ready for his arrival; or the Wellington man who wants to rent a beach house

28. Paras. 49-51.
29. [1966] A.C. 63.
30. Ibid., at p. 67.
31. (1828) 2 Mol. 561.
32. At p. 67.

in the Bay of Islands for his long summer vacation. He signs a lease after being informed by the owner that "the house is a desirable residence for a family of distinction".In most such cases, there is no prior opportunity to inspect the premises. Therefore, it is more than likely that the owner's statement will be relied on. If the lease specifies the high rental appropriate for a "posh" house, can there be any doubt that he is entitled to rescind, even in the absence of fraud, if it turns out that the house is second-rate?

It is also worth noting that in *Smith* v. *Land and House Property Corporation*[33] the highly commendatory phrase "a most desirable tenant" was held to be actionable in the sense mentioned earlier. The circumstances of the case were such that the purchaser would rely on the statement, not being in a position to check the matter out for himself.

The position is similar with respect to some of the other examples of mere puffs cited by the authors. In appropriate circumstances, they too would be actionable. First, there is the statement that land is "uncommonly rich water meadow" held to be non-actionable in *Scott* v. *Hanson*.[34] That statement does not seem to be one so obviously exaggerated and vague as to preclude reliance. Furthermore, a reading of the rather obscure judgment of Lord Lyndhurst L.C. does not disclose this as the actual ground for the decision.

Another example cited by the authors is the description of land in *Dimmock* v. *Hallett*[35] as "fertile and improvable". That statement too, if relied upon, ought to be actionable. It is noteworthy that only one of the two judges took the view that this was mere puffery.

SILENCE AS MISREPRESENTATION

On a few other occasions, the authors put forward wide propositions of law which are not supported by the cases cited. A notable instance occurs in the course of their discussion of the general rule that there is no duty on a contracting party to disclose facts known to him, even though he is aware that the other party is under a misapprehension:

> A misrepresentation may be made by silence, when either the representee, or a third person in his presence, or to his knowledge, states something false, which indicates to the representor that the representee either is being, or will be misled, unless the necessary correction be made. Silence, under such circumstances, is either a tacit adoption by the party of another's misrepresentation as his own, or a tacit confirmation of another's error as truth.[36]

33. Note 27.
34. (1829) 1 Russ. & M. 128, 39 E.R. 49, cited by the authors at p. 66.
35. (1866) 2 Ch. App. 21.
36. Para. 88

The authors then proceed to illustrate their point by discussing the facts of the well-known case of *Hardman* v. *Booth*.[37] This is a little hard to follow. That case not only involved actual misrepresentation and fraud, but also was primarily concerned with whether the contract was void for mistake so as to preclude title passing to a third party.

It is doubtful whether, in every case where a party states something which indicates that he is under a false impression, that there is a duty to disclose the true facts. Suppose, for example, that A has entered into a contract to sell his house to B. Whilst A was showing B and his friend C around the premises, C mentioned to B " . . . and it looks like a new roof too". B agreed. Although A heard this conversation he ignored it, neither saying or doing anything to indicate his assent. It turns out that the roof, although recently repainted, will need to be replaced in a year or two. It is at least questionable whether there has been misrepresentation by A. Certainly, there is no operative unilateral mistake to prevent the formation of a binding contract, the mistake being as to the quality of the subject matter.

Apart from the unilateral mistake cases, the authors also cite other instances of silence amounting to misrepresentation "where a person stands by and allows in silence an erroneous statement made by a third person to, or in the presence and hearing of, the representee". There is, however, an obvious distinction between the cases cited and the situation posed above. In *Pilmore* v. *Hood*[38] A made a fraudulent misrepresentation to B which, with A's knowledge, was repeated to C who was thereby induced to enter into a contract with A. Here the representor A was the originator of the representation and obviously liable. In the other cases cited, the representation was made by an associate (if not strictly an agent) of the deemed representor.

THE REQUIREMENT OF MATERIALITY

One of the most perplexing sections of this book is that dealing with the so-called requirement of materiality. In the course of a difficult 15 page discussion,[39] the authors repeatedly insist that, in addition to inducement, the representee must also prove that the representation was material, i.e. it must have a tendency to induce the particular representee to enter into the transaction that he did in fact enter into. Then, at the end of it all, after battling with all the refinements (too many to repeat here), it is conceded that the rule is now of "diminishing importance".

The whole discussion is rather pointless. To set up a requirement of materiality is unnecessary and misleading, serving only to complicate unduly a restatement of this branch of the law. Certainly there are plenty of cases mentioning a requirement of materiality. However, there

37. (1863) 1 H. & C. 803; 158 E.R. 1107.
38. (1838) 5 Bing. (N.C.) 97; 132 E.R. 1042.
39. Pp. 143-157.

do not seem to be any where the court, having clearly found as a fact that the representation was relied upon, nevertheless dismissed the action on the ground of immateriality.

A number of the cases clearly treat materiality as synonymous with reliance.[40] Others seem merely to be saying that if a representation is of such a nature as would be likely to induce a person to enter into the particular transaction, the court will draw the inference that it did in fact induce the representee.[41] In other words, materiality only affects the onus of proof. If the representation would have induced a reasonable person, the onus will be on the representor to show that the representee did not rely on it. If not, the onus will be on the representee. However, it is hard to imagine how, if a statement has no tendency to induce in the circumstances, a court could uphold an argument that it did induce.

The policy behind the suggested requirement of materiality is that representations relating to matters of trivial importance should not be actionable. It seems, however, that the courts are able to deal with such instances by finding that the representation was not relied upon, without having to invoke the authors' complicating requirement of materiality.

REMEDIES FOR FRAUDULENT MISREPRESENTATION

The authors suggest that rescission and damages are alternative, not cumulative, remedies for fraudulent misrepresentation.[42] Thus, if a representee claims and is granted rescission, damages are not recoverable.

This proposition came as rather a shock to the writer who has assumed in the past that, as stated by Cheshire and Fifoot,[43] "the representee can . . . take proceedings both for rescission and for damages". Upon researching the question it was comforting to find that there is a wealth of authority sanctioning this view which is not adverted to by the authors.

Apart from Cheshire and Fifoot, other writers such as Salmond and Williams,[44] Chitty,[45] Goff and Jones,[46] Treitel[47] and Halsbury[48] suggest that the remedies are cumulative. The cases supporting this view are also numerous. For instance, in *Newbigging* v. *Adam*,[49] one of the leading cases on rescission and its consequences, Bowen L.J. states:

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40. E.g. *Matthias* v. *Yetts* (1882) 46 L.T. 497, 502.
41. *Smith* v. *Chadwick* (1882) 20 Ch. D. 27, 45; (1884) 9 App. Cas. 187, 196.
42. See pp. 199-200, 223-224, 229 and 279n.
43. *Law of Contract* (3rd Aust. ed. 1974) 318.
44. Note 3, 269-270.
45. Note 5, para. 278.
46. Note 4, 102.
47. Note 1, 285.
48. *26 Laws of England* (3rd ed.) 818, 857. See also Stonham, *Vendor and Purchaser* (1964) 800.
49. (1886) 34 Ch. D. 582, 592.

> . . . the common law gave damages for deceit, and in my opinion gave them, not as an alternative remedy, but as an alternative or cumulative remedy as the case might be.[50]

The authors do accept the limited proposition that an election to rescind will not bar an action for damages against a co-representor not a party to the contract (e.g. the fraudulent agent), but they fail to point out that the cases cited actually go further and support the wider principle. One of the cases is *Sibley* v. *Grosvenor*[51] where Griffith C.J. said:

> . . . if rescission of the contract will not completely indemnify the purchaser, he is entitled to bring an action of deceit against any person who has knowingly made the false representation on which he acted. This remedy is entirely independent of and additional to the right to rescind. It may be against the vendor himself . . . or against the agent . . . or against both.[52]

There is nothing inconsistent about awarding both rescission and damages for fraudulent misrepresentation. The indemnity granted as part and parcel of rescission will not necessarily be enough to put the plaintiff in the position he would have been in if the contract had not been entered into, which is the object of tort damages. It is restricted to recovery in respect of obligations created by the contract[53] and is not designed to restore the plaintiff exactly to the status quo. Consequential losses can only be claimed, if at all, as damages. Accordingly, both damages and rescission should be available for fraudulent misrepresentation so long as the court, in awarding damages, is careful to avoid double recovery by taking into account what has been restored pursuant to rescission.

As the rationale for their suggested rule that damages and rescission are strictly alternative remedies, the authors cite the observation of Crompton J. in *Clarke* v. *Dickson*[54] that

> if you are fraudulently induced to buy a cake, you may return it and get back the price; but you cannot both eat your cake and return your cake.

This statement was made in a different context — the necessity for *restitutio in integrum*. It is the essence of the remedy of rescission that there be a giving back on both sides. Once the representee cannot return substantially what he received, the right to rescind is lost — thus, "you cannot eat your cake and return your cake". However, whether

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50. See also *O'Keefe* v. *Taylor Estates Co. Ltd.* [1916] St.R. Qd.301, 309-310; *Alati* v. *Kruger* (1955) 94 C.L.R. 216, 222; *Evans* v. *Benson & Co.* [1961] W.A.R. 12, 17.
51. (1916) 21 C.L.R. 469, 474-475.
52. See also *Ivanof* v. *Phillip M. Levy Ltd.* [1971] V.R. 167, 170, 171.
53. See the distinctions drawn in *Power* v. *Atkins* [1921] N.Z.L.R. 763.
54. (1858) E.B. & E. 148, 152.

having return the cake, you can recover in addition to the price *other* expenses incurred in the course of buying the cake is a different matter altogether.

CONCLUSION

The writer has attempted in the preceding discussion to highlight some of the major aspects in which *The Law of Actionable Misrepresentation* is considered to be unsatisfactory and unreliable. A new book, a modern style and a fresh approach would probably have eliminated most of them.

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