

Chapter 16

Oxford Town FC is looking to relocate in order to increase the size and capacity of its football stadium. Oxford Town FC enters into negotiations with Easybuck Ltd, which owns a large plot of land. Easybuck Ltd currently runs a not very successful casino on the site. Oxford Town FC tells Easybuck Ltd that the site is particularly attractive since Oxford Town FC want to incorporate a casino into the stadium plans, and the site must already have a licence to be used for the purposes of gambling.

During the course of negotiations, Oxford Town FC asks Easybuck Ltd whether there are any rights of way over the land. Easybuck Ltd checks with its solicitor, Martha, and on the basis of her advice tells Oxford Town FC that there are no such rights.

Oxford Town FC and Easybuck Ltd later sign a formal contract for the sale of the land for £2 million. One of the terms of the contract provides that:

‘This contract constitutes the entire agreement of the parties, and supersedes all prior agreements and negotiations. The basis of the parties’ agreement can be found exclusively in this contract.’

Some months later, Oxford Town FC realises that there are in fact footpaths which run across the land, and that various neighbours do have rights of way over the land. This makes redevelopment impossible. At the same time, Oxford Town FC finds out that just before the contract was signed, Easybuck Ltd received a letter from the council to inform it that gambling was not permitted on the land.

The land would only have been valued at £1.2 million at the time of contracting, if the rights of way over it had been known. But since the contract was entered into, the property market has crashed, and the land is now only worth £750,000.

Advise Oxford Town FC.

Oxford Town FC has entered into a contract for the sale of land with Easybuck Ltd on the basis of incorrect information and if it wishes to obtain a remedy, it will need to prove that Easybuck’s provision – or omission – of said information qualifies as a **misrepresentation**. An actionable misrepresentation is essentially composed of two elements: (i) an unambiguous, false representation of fact or law made by words or conduct; (ii) which thereby induces the formation of a contract because of the representee’s reliance on its truth.

Comment [A1]: Or that there has been a breach of a term of the contract?

Rights of way

The existence of rights of way over the site is plainly a question of fact in response to which Easybuck gave an unequivocal and inaccurate answer, but Oxford will additionally need to show that this misrepresentation was an operative one. Generally, if the misrepresentation at issue would have prompted a reasonable person to make a contract, it is presumed to have had the same effect on the claimant and hence regarded as ‘material’ by the courts (*Smith v Chadwick [1884]*). It is submitted that an ordinary person contemplating the purchase of land would be expected to take rights of way into consideration, so a court is likely to infer that Easybuck’s statement did induce

Oxfield to act as it did – the onus is on Easybuck to prove otherwise. That this factor might not have been the main inducement is irrelevant: *Edgington v Maurice [1885]* is authority for the principle that a misrepresentation need not be the sole nor decisive reason for a representee's decision. Asking about rights of way during the course of negotiations suggests that Oxfield did attach some importance to the matter, and a court will in all likelihood be satisfied that Easybuck's response thus played a 'real and substantial' part in inducing the former to enter into the contract (as per *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc [2010]*). On the facts, it is therefore highly probable that Easybuck's statement here constitutes an actionable misrepresentation, notwithstanding the fact that it was made innocently.

Comment [A2]: Authority?

Comment [A3]: See also *Attwood v Small*?

Gambling permission

It is, however, more difficult to establish that Easybuck misrepresented the site's lack of a gambling licence to Oxfield as it is not apparent that it had expressly made an assurance to that effect. Simple reticence is not a legal fraud. Two types of situations in which a 'duty to disclose' would arise were provided: (i) where the parties are in a pre-existing confidential or fiduciary relationship, or (ii) the contract in question requires the utmost good faith (*uberrimae fidei*). Although Oxfield's circumstances do not fit into either of these exceptions, there is still hope. *With v O'Flanagan [1936]* recognised that one has a duty to correct an earlier representation if one discovers that it has been rendered untrue by a subsequent change of circumstances; a failure to disclose the new developments will lead to a finding of misrepresentation.

To successfully apply *O'Flanagan*, Oxfield will first have to argue that Easybuck had in actuality made a representation, albeit through conduct rather than words. Easybuck's operation of a casino on the land may be likened to a representation that the site was appropriately licenced for those activities. It was precisely this feature that made the land 'particularly attractive' to Oxfield and certainly factored into its eventual decision to buy the site.

Comment [A4]: Worth citing the *Spice Girls* case too here.

Next, Fry J in *Davies v London and Provincial Marine Insurance Co [1878]* warned that a contracting party who 'has made a statement which is false in fact, but which he believes to be true and which is material to the contract', is duty-bound to correct that representation if he subsequently learns that it is erroneous. Following the decision in *Spice Girls Ltd v Aprilla World Service BV [2002]*, it seems clear that this rule also applies to prior representations made by conduct and produces the same desirable outcome for the representee, i.e. successful establishment of a misrepresentation. Interestingly enough, the result in such cases can be explained via two distinct modes of analysis as Lord Wright MR in *O'Flanagan* opined. If a party knows that the meaning conveyed by his behaviour is no longer true but nonetheless does not act any differently to correct that impression right up to the point when the contract is formed, he has (i) patently breached his 'duty to communicate the change of circumstances', but (ii) his initially faultless conduct may also be treated as a 'continuing representation' which can be held in itself to have fraudulently induced the claimant to enter into the contract. Here, it seems safe to assume that Oxfield can rely on either approach to show that there was an actionable misrepresentation made by Easybuck in respect of the viability of a casino on the site – however, it is important to note that basing a decision on one ground or the other will have implications for the availability of remedies.

Comment [A5]: This is just repeating *With* isn't it?

Comment [A6]: But *Spice Girls* slightly different because they knew that Geri had already decided to leave the group.

Comment [A7]: But which do you prefer? Why does it matter?

Remedies

In cases involving misrepresentation, the primary remedy is rescission of contract which entails setting aside the whole transaction and restoring the parties to the positions they were in before the contract was made. A misrepresentee is entitled to a right to rescind regardless of whether the

Comment [A8]: The start of this section is a bit abstract – keep the facts of the problem at the forefront of your answer.

misrepresentation in question was made fraudulently, negligently, or innocently, but rescission will be barred if: (i) *restitutio in integrum* is impossible; (ii) the misrepresentee knows of the misrepresentation and affirms the contract anyway; (iii) too much time has elapsed; or (iv) it would prejudice the rights of an innocent third party who had acquired them in good faith. Rescinding the contract would allow Oxfield to regain the £2 million it paid for the land, but it may seek further redress in the form of damages if the equitable remedy alone is not enough to satisfy it.

Comment [A9]: But see recently *Salt v Stratstone*.

Unlike rescission, a claimant's entitlement to damages varies depending on the type of misrepresentation which has been established – at common law, only fraudulent or negligent misrepresentations may underpin an award of damages for tortious liability, but the current statutory regime in the form of the Misrepresentation Act 1967 (MA 1967) allows damages to be recoverable even for non-fraudulent misrepresentations. Furthermore, *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990]* held that failing to discharge a duty of disclosure triggers rescission but not damages; although that case was concerned only with insurance contracts, it is submitted that the same principle should apply to any other non-disclosure regardless of context because it is sound to differentiate pure omissions from positive actions. Thus, it is preferable for Oxfield to opt for analysis (ii) in respect of the gambling permission representation because this will make it eligible for a broader range of remedies. Assessment of remedies will therefore proceed on the basis that Easybuck is liable for an innocent and a fraudulent misrepresentation.

Comment [A10]: This is not obviously convincing – insurance contracts have always raised particular issues.

Rescission

Comment [A11]: Which you have already raised!

Given the significant drop in value of the land, Easybuck will be desperate to avoid rescission because grant of that remedy will require it to repay Oxfield £2 million in exchange for a property which is now only worth much less. To this end, it may contend that rescission is barred. If the nature of a purchased item has changed, it cannot be returned and a claimant loses the right to rescind because *restitutio in integrum* cannot be achieved. Significant changes in the value of a thing – as Easybuck will no doubt argue – are equivalent to alterations of its very nature, but it is exceedingly improbable that this argument will go far in light of the recent Court of Appeal decision in *Salt v Stratstone Specialist Ltd [2015]*. A claimant who had been sold a 'brand new' car under a misrepresentation could rescind the contract and regain the original price he paid for it, notwithstanding the fact that he had used it for some time and its worth had naturally diminished over that period. There, much emphasis was placed on the need for 'practical justice': Longmore LJ observed that 'neither depreciation nor intermittent enjoyment should...be regarded as reasons for saying restitution is impossible.' Drawing a parallel between the facts of *Salt* and those here, Oxfield regarded a licence for gambling as a 'must' for its new site much like how the claimant there had only wanted an unused car; the misrepresentors had fraudulently misled them about the existence of those features *ab initio* and so should not be allowed to escape restitution in full. Lapse of time is unlikely to bar rescission too since the sale was only completed a few months ago; the claimant in *Salt* was able to rescind even after a number of years had elapsed.

Comment [A12]: The key question now is whether laches has been established.

Similarly, Easybuck will have little luck getting a court to exercise its power under s. 2(2) of the MA 1967 to award damages in lieu of rescission. The facts of the leading decision on this matter bear a striking similarity to those of the instant case because the existence of burdens on the land was also at issue in that dispute – in *William Sindall plc v Cambridgeshire County Council [1994]*, obiter comments indicate that claimants who seek to escape bad bargains through rescission will not be allowed to do so where the cost of making good the misrepresentation is relatively trivial in the context of the contract as a whole. The court also suggested some guiding factors which judges would need to consider before the s. 2(2) discretion can be validly exercised, but it is submitted that a further examination of those questions is unnecessary, because they only apply where 'a

misrepresentation has been made...otherwise than fraudulently.' Once Oxfield can establish that there was a fraudulent misrepresentation, a court cannot insist on granting damages instead of rescission on the basis of the other, innocent, misrepresentation. Hence, there appears to be nothing that would prevent Oxfield from rescinding the contract, and it should do so by simply communicating its decision to Easybuck.

Comment [A13]: But you haven't established that the representation is fraudulent, and indeed fraud is very difficult to establish. I think you could do more with *Williams Sindall* here.

Damages

Historically, damages were only available to those who had suffered from fraudulent misrepresentations. If the maker of a false statement did know that it was untrue or had acted with a reckless disregard for the truth, his misrepresentation is fraudulent (*Derry v Peek [1889]*) and a misrepresentee who had relied on it to his detriment can sue him for the tort of deceit. Subsequently, *Hedley Byrne & Co v Heller & Partners [1964]* opened up the possibility of suing for negligence where there was a 'special relationship' between the parties. But the common law route to damages is not desirable in most cases, and Oxfield should be dissuaded from it too. For one, deceit is very difficult to prove, and for two, it will be equally arduous to show that a 'special relationship' existed as between Oxfield and Easybuck. Of course, Oxfield may wonder about the feasibility of suing its own solicitors in negligence for say, failing to investigate the land registry properly – it is trite that solicitor-client relationships are precisely of the kind envisioned by the *Hedley Byrne* doctrine. It should not do so, however: such an act would imply that Oxfield had relied on their solicitors' advice instead of Easybuck's misrepresentations in entering into the contract, and this has been held to negate liability on the part of the misrepresenter in *Attwood v Small [1838]*. Oxfield would then lose the right to rescission.

Comment [A14]: Surely for breach of contract?!

Comment [A15]: This should have come earlier. But can't Oxfield be relying upon both?

Choosing to make a claim under s. 2(1) of the MA 1967 is thus a better option: Oxfield only needs to prove that there had been a misrepresentation to be entitled to damages unless Easybuck can show that it had reasonable grounds to believe and did believe up to the time the contract was made that its representation was true. Clearly, the letter from the council informing the latter that gambling was not permitted on the site means it cannot satisfy this condition in respect of its fraudulent misrepresentation. Although it does seem reasonable for Easybuck to believe in Martha's professional advice about the rights of way, and it must have held that belief to be true when the contract was made, the decision in *Howard Marine & Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd [1978]* illustrates that the bar for reasonableness is set very high, such that the misrepresenter's burden of proof will not be easily discharged. If reference in good faith to something as authoritative as the 'Bible' of a particular industry is not enough to be 'reasonable', it is unfortunate but possible that reliance on one's solicitor may not be enough either.

Comment [A16]: But what arguments might be made for distinguishing *Howard Marine* here?

The last resort for Easybuck is to point to something which can exclude their liability for misrepresentation. S. 3 of the MA 1967 holds that any term that attempts to exclude liability for non-fraudulent misrepresentations will be effective unless the party seeking to rely on it cannot show that it is reasonable within the meaning of s. 11(1) of the Unfair Contract Terms Act 1977. Does the 'entire agreement clause' in their contract effectively restrict claims in misrepresentation? It was held in *AXA Sun Life Services v Campbell Martin [2011]* that such clauses preclude the parties from asserting the existence of collateral contracts, but do not bring it within the ambit of s. 3. Easybuck cannot therefore avoid liability, and in addition to having the contract rescinded, will probably be ordered to pay Oxfield damages in respect of all losses which flow directly from the established misrepresentations, regardless of whether or not those losses were reasonably foreseeable (*Doyle v Olby [1969]*).

Comment [A17]: It might be worth exploring this more fully.

Overall essay feedback: This is generally very good – clear, detailed, and well-supported. But sometimes you dot around the issues a little bit, and I think this might be partly because the answer is too long. You could be much more concise and focussed, and I think this would help to avoid repetition and superfluous material, and make sure that this answer gains a First Class mark.