

Misrepresentation and unfair commercial practices

OVERVIEW OF CURRENT SCOTS LAW

Misrepresentation

1. The remedies available to the victim of a misrepresentation are dependent upon a number of factors: in particular, whether the misrepresentation is innocent, negligent or fraudulent; and whether the representation has become a warranty.

Innocent, negligent and fraudulent misrepresentations

2. A consumer seeking to establish a cause of action founded on misrepresentation – whether innocent, negligent or fraudulent – must fulfil the following criteria:

- There must have been a misrepresentation of fact made prior to conclusion of the contract; either by inaccurate statement or by positive act. In the limited circumstances in which a duty to disclose exists, non-disclosure may also amount to a misrepresentation.¹ Statements of opinion, *verba jactantia* (eg invitations to treat or "trade puffs") or statements of future intention will not suffice.
- The misrepresentation must have been made by the trader or by another party acting on behalf of the trader.
- The misrepresentation must be shown to be material in the sense that it was a factor which would have induced a reasonable person to enter into the contract.²
- The misrepresentation was a factor which actually induced the consumer to enter the contract; although it need not be the sole factor.

Where the above criteria are met, the misrepresentation is said to be operative and, in the absence of further averments, the ensuing contract may be challenged on the ground that it was induced by innocent, ie non-fraudulent, misrepresentation. It is unnecessary to show fault on the part of the trader because at the time when the concept of error induced by non-fraudulent misrepresentation was introduced into Scots law, no distinction was drawn between negligent and non-negligent representations.³

3. A consumer who has been induced to enter into a contract by an innocent misrepresentation by a trader is entitled to seek reduction of the contract. Unless and until the contract is reduced, a valid, albeit voidable, contract subsists between the parties.⁴

¹ Such a duty exists where the parties are in a fiduciary or quasi-fiduciary relationship; the contract is *uberimae fides*; a person tells a half-truth; or a person fraudulently conceals the true state of affairs.

² *Menzies v Menzies* (1893) 20R 108, following the House of Lords' decision in the English case of *Adam v Lindsell* (1817) 106 ER 142.

³ This remains the case except in relation to the availability of damages as a remedy (see below).

⁴ The fraudulent misrepresentation by a trader may, however, be apt to prevent *consensus in idem* arising. In such circumstances the contract is void *ab initio* rather than voidable. As the test for *consensus* is objective, the

There is no equivalent in Scots law of the power of the court in England and Wales under the Misrepresentation Act 1967, section 2(2) to order the payment of damages in place of reduction. Furthermore, reduction of the contract will be denied where *restitutio in integrum* is not possible.⁵ However, it follows that where granted reduction will be accompanied by restitution, putting the parties back in the position they were in before the contract was made. It should be noted that Scots law draws a distinction between reduction on the one hand, and rescission on the other. Whereas reduction seeks to put the parties in the position in which they would have been had the contract never existed, rescission absolves the parties of the future performance of primary obligations but has no effect on accrued rights.⁶ The extent to which an aggrieved party may annul a contract for misrepresentation or induced error, without seeking a decree of reduction, is uncertain in Scots law.⁷

4. In the case of fraudulent misrepresentations, however, a consumer is entitled to seek reparation by way of damages in addition, or as an alternative, to reduction of the contract; fraudulent misrepresentation is regarded by Scots law as a delict.⁸ In addition to the criteria, detailed above, the consumer must show that the trader against whom fraud is averred had the requisite *mens rea*. The test for proving fraud, with regard to fraudulent statements, is as set out by Lord Herschell in *Derry v Peek*.⁹ Notwithstanding the test in *Derry v Peek*, a misrepresentation of fact may be deemed fraudulent although made with belief in its truth if that belief was devoid of any reasonable basis.¹⁰

5. At common law, damages were available only where the misrepresentation was fraudulent. Where, however, fraud could not be proved, the representee's only remedy was reduction.¹¹ The rule in *Manners v Whitehead*¹² which barred entitlement to damages for misrepresentation, other than for those which were fraudulent, was removed by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. Section 10(1) provides as follows:

A party to a contract who has been induced to enter into it by negligent misrepresentation made by or on behalf of another party to the contract shall not be disentitled, by reason only that the misrepresentation is not fraudulent, from recovering damages from the other party in respect of any loss or damage he has suffered as a result of the misrepresentation, and any rule of law that such damages cannot be recovered unless fraud is proved shall cease to have effect.

6. Unlike the Misrepresentation Act 1967, however, section 10 does not create a legal fiction whereby misrepresentations which are negligent are equated with those which are

occurrence of such *dissensus* is rare. See *The Laws of Scotland (Stair Memorial Encyclopaedia)* vol 15, para 680.

⁵ William W McBryde, *The Law of Contract in Scotland* (3rd Ed, 2007), para 15-72 *et seq*.

⁶ For further on the effect of rescission, see *Lloyd's Bank plc v Bamberger* 1993 SC 570 at 573 (Lord Justice Clerk (Ross)).

⁷ See, for example, *MacLeod v Kerr* 1965 SC 253. See also Hector L MacQueen and Joe Thomson, *Contract Law in Scotland* (2nd Ed, 2007), para 4.8.

⁸ *Bryson & Co Ltd v Bryson* 1916 1 SLT 361; *Smith v Sim* 1954 SC 357.

⁹ This test was adopted into Scots law in *Boyd & Forrest v Glasgow & South Western Railway Co* 1912 SC (HL) 93. See also *Robinson v National Bank of Scotland* 1916 SC (HL) 154.

¹⁰ *Western Bank of Scotland v Addie* (1867) 5 M (HL) 80 at 87 (Lord Chelmsford LC).

¹¹ For a discussion, see the Scottish Law Commission's *Report on Negligent Misrepresentation*, Scot Law Com No 92 (1985).

¹² (1898) 1 F 171, 6 SLT 199.

fraudulent thus dispensing with the requirement of a "special relationship". As Thomson observes:¹³

... the misrepresentee pursuer must still establish his case in negligence: and it is a fundamental principle of delictual liability for negligence that the misrepresenter defender has breached a pre-existing duty of care which he owed the pursuer.

7. It is suggested, however, that where the misrepresenter and misrepresentee are parties to the same contract, the establishment of such a "special relationship" should not be problematic.¹⁴

8. Although section 10(1) applies only to misrepresentations made by a party to the contract, a negligent misrepresentation made by some other person may be actionable under the *Hedley Byrne* principle.¹⁵

9. The measure of damages in the case of both fraudulent and negligent misrepresentation is the usual measure for delictual damages: ie (subject to issues of remoteness) to put the consumer in the position in which he or she would have been if the representation had not been made. That is not to say, however, that the damages which may be recovered will be the same.

10. If the misrepresentation is fraudulent, the consumer may recover all losses arising directly from the transaction irrespective of foreseeability.¹⁶ In such circumstances, an award of damages may include the losses which the consumer has incurred as a result in a drop in market value of the asset involved in the transaction.¹⁷

11. On the other hand, if the misrepresentation is negligent the measure of damages is dependent upon whether the misrepresentation took the form of advice or the provision of information.¹⁸ If the misrepresenter advised the misrepresentee to take a course of action, liability is for all foreseeable loss incurred as a result of that course of action; such liability may include losses incurred as a result of external factors. Whereas if the misrepresenter merely provided information, liability is limited to the foreseeable consequences of that information being wrong.¹⁹

12. A useful illustration of these principles is to be found in *Preferred Mortgages v Shanks*²⁰ which involved both the provision of negligent information and negligent advice. In this case, the pursuer had provided loan facilities to property developers with standard securities securing the debt. In quantifying the loan amount, the pursuer had relied upon the surveyor's valuation of the properties over which security was taken and the advice of the

¹³ Joe Thomson, "Misrepresentation" 2001 SLT (News) 279 at 281.

¹⁴ Joe Thomson, *Delictual Liability* (4th Edition, 2009), para 4.14.

¹⁵ *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465.

¹⁶ *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254. Lord Eassie accepted the principles outlined in *Smith New Court* as applicable to Scots law in *Barry v Sutherland* 2002 SLT 413 at 417-418.

¹⁷ Joe Thomson, *Delictual Liability*, para 16.8.

¹⁸ *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191. This case is often referred to as "SAAMCo". For discussion of the decision in SAAMCo in Scots law, see *Bristol & West Building Society v Rollo Steven & Bond* 1998 SLT 9 at 11 (Lord Maclean) and *Preferred Mortgages Ltd v Shanks* [2008] CSOH 23; [2008] PNLR 20 at paras 19 – 21 (Lord Drummond Young).

¹⁹ SAAMCo at 214 (Lord Hoffman).

²⁰ [2008] CSOH 23; [2008] PNLR 20.

solicitor as to title thereof. The surveyor had, however, negligently declared the open market value of the properties to be £1,240,000; when in fact the properties were worth only £924,000. The solicitor had been negligent in the advice given regarding the adequacy of the title to the subjects over which security was taken; in particular, title as to rights of access. By the time the standard securities were called up and a buyer found, the sale price was only £600,000. Although only called upon to decide upon the liability of the solicitor, Lord Drummond Young accepted that the surveyor's liability would have been capped at £316,000; that is, the difference between the negligent valuation and the actual value at the time the security was taken.²¹ On the other hand, he held that, as the solicitor had provided negligent advice, liability would extend to the whole of the pursuer's loss in entering the loan transaction, including the decrease in value.²²

Representations as warranties

13. In addition to the above, a statement of fact made in pre-contractual negotiations may be also considered to be a contractual term (warranty).²³ Whether a representation constitutes a warranty is dependent upon the intention and understanding of the parties, no specific form of words is required.²⁴ A relevant factor in determining the intention of the parties is the time at which the representation was made; for example, an utterance made weeks or months in advance of conclusion of the contract is unlikely to form part of the contract (unless the contract makes reference to it).²⁵

14. When a representation is deemed to be a term of the contract, the consumer may claim damages for breach of contract if it is wrong.²⁶ An award of damages would seek to put the consumer in the same position in which he or she would have been had the contract been performed; ie if the representation had been correct.²⁷ If the breach is material,²⁸ the consumer may also rescind the contract.

²¹ *Ibid* at para 16.

²² *Ibid* at para 25.

²³ Note that the word "warranty" is not a term of art in Scots law: McBryde, *Contract*, para 20-93.

²⁴ *Hyslop v Shirlaw* (1905) 7 F 875 at 881 (Lord Kyllachy).

²⁵ *Paul & Co v Corporation of Glasgow* (1900) 3 F 119 at 124-125 (Lord Justice-Clerk (Macdonald)). See also McBryde, *Contract*, paras 5-45 to 5-47.

²⁶ Hector L MacQueen and Joe Thomson, *Contract Law in Scotland* (2nd Ed, 2007), para 3.15.

²⁷ McBryde, *Contract*, para 22-91 *et seq*.

²⁸ On materiality of breach justifying rescission, see McBryde, *Contract*, paras 20-91 to 20-94.

A summary of causes of action and remedies in Scots law

15. In summary, a consumer who enters into a contract following a misleading statement may be able to rely upon one or more of the following remedies:

Cause of action	Remedy
Breach of contract	Rescission, if the breach is material, and contractual damages.
Fraudulent misrepresentation	Reduction of the contract; delictual damages in respect of all losses arising directly from the transaction irrespective of foreseeability; or both.
Negligent misrepresentation	Reduction of the contract and: in the case of negligent advice, delictual damages in respect of all foreseeable losses incurred as a result of the advice; or in the case of negligent information, delictual damages in respect of all foreseeable losses incurred as a result of the information being wrong.
Innocent misrepresentation	Reduction of the contract and <i>restitutio in integrum</i> . (There is no scope for the court to award damages in lieu of reduction).

Force and fear²⁹

16. A consumer may seek to be relieved of performance under a contract on the ground that his or her consent was obtained through the use of improper or illegitimate pressure, or that on account of such pressure, no consent was given. In the case of the former, the consumer must show that although consent was given, it was not free and untrammelled; if successful, the contract may be reduced at the instance of the consumer.³⁰ In the case of the latter, however, the consumer must show that the pressure was such that it deprived him or her of the rational exercise of will; in such circumstances, the contract is void *ab initio*.³¹ It has been suggested that Scots law should distinguish between cases where a person is physically compelled to enter a contract (in which case the contract is void) and other cases

²⁹ Referred to variously as "extortion", "duress", "threats" or "coercion". The equivalent term in English law is "duress".

³⁰ *The Laws of Scotland (Stair Memorial Encyclopaedia)* vol 15, para 675.

³¹ *Ibid* para 674.

where there is merely fear and therefore consent, albeit tainted (in which case the contract is voidable).³²

17. There is institutional authority to suggest that the use of force and fear gives rise to an obligation to redress loss and damage caused thereby.³³ McBryde notes, however, that, with the exception of *Stair*, force and fear has not been treated as if it were a delict.³⁴ On the other hand, Professor du Plessis has observed that:³⁵

There is no modern case law which deals with force and fear ... as a delict. Neither do textbooks display much enthusiasm for doing so ... However, this does not mean that a delictual claim cannot lie.

Facility and circumvention

18. Contracts with consumers may also be subject to challenge on the ground of facility and circumvention; a concept which has its origins in the common law of fraud. It would be for the consumer to show that, at the time of the transaction, he or she was in state of mental weakness (be it from mental illness (short of insanity), age, bodily infirmity, timidity, bereavement or otherwise) and that this resulted in an inability to exercise independent and balanced judgment.³⁶ In addition, the consumer would have to prove fraud or circumvention on the part of the trader; that is to say, that the trader took dishonest advantage of the consumer's weakened mental state and induced him or her to enter into a disadvantageous contract.³⁷ Where facility and circumvention is established as a ground of challenge, the transaction is voidable and may be reduced at the instance of the consumer.³⁸

Undue influence

19. A contract may be challenged on the ground of undue influence where, put shortly, "one party has assumed a position of dominant or ascendant influence over the other and has abused this position of confidence and trust by entering into a contract with the subservient party."³⁹ It should be noted, however, that unfair influence must always be established, Scots law does not entertain presumptions of undue influence arising from certain relationships.⁴⁰ It is submitted that undue influence might be applicable as a ground of challenge for unfair commercial practices only in a limited number of circumstances; for example; where:⁴¹

... a person, in pursuance of his profession or calling, undertakes the giving of advice to another and where, as a result, there develops a relationship between the adviser and the advised in which, as matter of fact, the latter places trust and confidence in the former then the law recognises a moral duty on the adviser not to take advantage

³² McBryde, *Contract*, para 17-11.

³³ *Stair*, I, ix, 8.

³⁴ McBryde, *Contract*, para 17-01.

³⁵ J E du Plessis, *Compulsion and Restitution*, para 4.4.

³⁶ *The Laws of Scotland (Stair Memorial Encyclopaedia)* vol 11, para 733.

³⁷ MacQueen and Thomson, *Contract Law in Scotland*, para 4.28.

³⁸ *Gall v Bird* (1855) 17 D 1220.

³⁹ MacQueen and Thomson, *Contract Law in Scotland*, para 4.29. See also, McBryde, *Contract*, para 16-25 *et seq.*

⁴⁰ McBryde, *Contract*, para 16-29.

⁴¹ *Honeyman's Executors v Sharp* 1978 SC 223 at 228 (Lord Maxwell). The advisers referred to in the above quotation were art dealers.

of the advised at least in relation to matters connected with the area to which the advice relates, and gives legal effect to that moral duty by applying the principle of “undue influence” in appropriate cases.

20. For a challenge to be successful, it must also be shown that the party in the position of confidence and trust received a material or gratuitous benefit.⁴² Where undue influence is established, the contract can be reduced.

⁴² *The Laws of Scotland (Stair Memorial Encyclopaedia)* vol 11, para 740.