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| December Newsletter https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/9595d7e8-97e7-4398-be36-67e89f961785.jpgHappy Holidays from Clive Mills & Associates.We would like to thank all of our clients and friends for their support in 2015 and to wish you all a very happy Christmas and a prosperous 2016! Our office will be closed from 5 pm on Thursday 24th December and will re-open at 9 am on Monday 4th January 2016. Clive Mills will be travelling overseas in England, Scotland and Thailand over the period from Saturday 19thDecember and will return on Monday 11thJanuary 2016.https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/96f2f818-359c-431e-8f4c-730fc20f0bf3.jpg***Misrepresentations in Contract: The Basics*** **Introduction** Difficulties can arise for a person where they enter into a contract based on a fact which they believe to be true, which later turns out to have been false.In these circumstances, it may be possible to escape the contract based on a “misrepresentation” having been made by another party. This article briefly discusses the basic elements of a *misrepresentation*, what can amount to a misrepresentation, and the remedies that may be available where a misrepresentation has been made. **“*Innocent*” and “*Fraudulent*” misrepresentations** Where the representor is not aware that a statement of fact is untrue this is called an “innocent” misrepresentation. The basic elements of a misrepresentation are as follows: 1. one party, “*the representor*”, made a statement of *material fact*(this must usually be a positive statement, or it may implied from the representor’s conduct);

 1. this statement is false;

 1. the representor intended that the other party, “*the representee”*, would rely upon this statement in entering into the contract; and

 1. the representee did in fact rely on that statement in entering into the contract.[[1]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn1" \o ")

 A misrepresentation can, normally, only be made in relation to *past*or *present*facts. Statements of an intention or an opinion, or a promise or an assurance as to a *future state of affairs* do not normally amount to misrepresentations as they are not untrue in the present.[[2]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn2" \o ") If the *contract* states that there will be a particular end result, and this does not eventuate, then depending upon the terms of the contract a representee would take action against the representor of a future fact for breach of contract instead.[[3]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn3" \o ") Where the representor is unaware that their statement is false, this is called an “*innocent misrepresentation*”. Innocent misrepresentations also include any misrepresentation that is*not*a “*fraudulent misrepresentation*”.[[4]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn4" \o ") A fraudulent misrepresentation is made where, in addition to the above elements, the representor either: 1. *knew* that the statement was untrue; or

 1. *did not believe* that the statement was true; or

 1. was *reckless* as to whether or not the statement was true or not.[[5]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn5" \o ")

 Also keep in mind that a statement is *not* likely to be considered fraudulent where: 1. there is no element of moral culpability in making the statement. For example, where the representor was careless in what they said or did, but not deliberately reckless;[[6]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn6" \o ") and

 1. the meaning of the representation is ambiguous, and although the representee may have taken it to have one meaning that is untrue, the representation *is*true in the sense in which the representor understood it.[[7]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn7" \o ")

 Note that there can also be “*negligent misrepresentations*”, where a party fails to comply with a *duty*to represent the facts accurately. **What is a “material fact”?** Generally, a statement must be made regarding a *fact*in order for it to be a misrepresentation. This is because a statement regarding the *law* is, generally, only an*opinion* of the law, unless that statement is made by a court.[[8]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn8" \o ") The process for determining whether a fact is “material” is much more vague. Depending on the circumstances, whether it is “material” may be assessed either subjectively, based on what the parties would consider material to the contract, or objectively, based on what facts or statements could be considered to be ‘calculated to induce’ a person such as the representee to enter into the contract.[[9]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn9" \o ") **How do you establish “reliance”?** A representee is considered to have *relied* upon a statement by the representor where they have, as a matter of fact, used the statement as a basis for entering into the contract.[[10]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn10" \o ") However, in order to establish reliance, it is *not*necessary that the false statement be the only reason that the representee entered into the contract.[[11]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn11" \o ") A representee can still be considered to have relied upon the statement of the representor where they had an opportunity to verify the statement and did not do so, or where they were suspicious or knew that the statement was untrue in some respect, but did not know how or to what extent it was untrue.[[12]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn12" \o ")  **Can silence be a misrepresentation?** Contracting parties are generally not obliged to disclose information to each other, silence will only act as a misrepresentation in very particular circumstances, such as: 1. where the representor is under a *fiduciary*obligation to truthfully disclose all material facts to the representee, which may arise where one party to the contract is especially vulnerable;

 1. where the representor makes a representation which is *partially true*, and a failure to reveal the whole trust creates a misleading impression;

 1. where a representation made in the negotiations for a contract *becomes*untrue*prior* to the contract being entered into due to a change in circumstances, and the representor does not inform the representee of the new circumstances before they enter into the contract. This will be an innocent misrepresentation where the representor is also unaware that circumstances have changed so as to make their representation untrue.[[13]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn13" \o ")

 **What remedies are available for an innocent or fraudulent misrepresentation?** As noted above, a representee may *rescind* a contract when they become aware that a misrepresentation, whether innocent or fraudulent, has been made, which they have relied upon in entering into the contract.[[14]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn14" \o ") A representee *cannot* rescind the contract if they have accepted or affirmed the misrepresentation. This will occur where, after having become aware of the misrepresentation and the true state of the facts, the representee either expressly agrees to continue with the contract or, alternatively, impliedly agrees to continue with the contract by acting in a way which can only be consistent with the contract continuing.[[15]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn15" \o ") In the case of fraudulent misrepresentations, an action can lie against the representor for the tort of “*deceit*”.[[16]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftn16" \o ") Under such an action, the representee may be entitled to damages for any loss suffered by them as a result of relying on the misrepresentation and entering into the contract. *Ashley Rihak*[[1]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref1" \o ") Bibi Sangha, 2014, “IV Vitiating Factors” in *Contract*,*Halsbury’s Laws of Australia*, [110-5025].[[2]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref2" \o ") Ibid [110-5055]-[110-5060].[[3]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref3" \o ") Ibid.[[4]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref4" \o ") Ibid [110-5030].[[5]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref5" \o ") *Derry v Peek* (1889) LR 14 App Cas 337; Paul Brennan, 2014, “II: Building Contracts” in *Building and Construction, Halsbury’s Laws of Australia*, [65-675].[[6]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref6" \o ") *Derry v Peek* (1889) 14 App Cas 337; Sangha, above n 1, [110-5140].[[7]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref7" \o ") Sangha, above n 1, [110-5145].[[8]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref8" \o ") Ibid [110-5065].[[9]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref9" \o ") Ibid [110-5135].[[10]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref10" \o ") *Commercial Banking Co of Sydney Ltd v RH Brown & Co* (1972) 126 CLR 337, 350.[[11]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref11" \o ") Sangha, above n 1, [110-5115].[[12]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref12" \o ") Ibid [110-5125].[[13]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref13" \o ") Ibid [110-5090]-[110-5100].[[14]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref14" \o ") Brennan, above n 5, [65-370].[[15]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref15" \o ") *Brown v Smitt* (1924) 34 CLR 160, 167-8.[[16]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=8fadf4d311" \l "_ftnref16" \o ") Brennan, above n 5, [65-675]; *TJ Larkins & Sons v Chelmer Holdings Pty Ltd* [1965] Qd R 68. |

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