

ANSWERING A PROBLEM QUESTION ON MISREPRESENTATION

In setting about answering a problem question on misrepresentation, you should be aware of various stages that you need to work through to reach a fully reasoned conclusion and gain the full spectrum of marks that are available for a question falling within this topic.

First of all is good practice to analyse whether there is a contract. A one line answer will probably suffice here.

The next important factor that you need to turn your attention to is whether the statements that are the subject of the claim are terms or representations. At this point, please **do** take the time to discuss the difference between a term and a representation, citing the leading cases. You need to explain that if the statement turns out to be a term of the contract, the maker will be in breach of contract. If this is your conclusion you need to move to the remedies that are available for breach of contract and apply the most appropriate remedy to the circumstances.

If you conclude that the statement is a representation, you need to ascertain whether or not the claimant can prove misrepresentation. So how do we do this?

Well, the best place to start would be to identify the area of law in question, which of course is misrepresentation. You should cover each part of the definition to make sure it is satisfied. Remember, for an actionable misrepresentation there must be a statement of fact, not opinion, and it must induce the misrepresentee to enter into the contract. As you work through each part of the definition, do not forget to illustrate each point with case law. There are many cases in this area. For example on fact or opinion you may use *Bissett v Wilkinson*. Depending on the facts that are before you may draw upon further case law, for example on silence, or half-truths etc. Cases such as *Dimmock v Hallet*, *With v O'Flanagan* may assist here.

The next part of the definition requires that the statement induced the misrepresentee or indeed was one of the reasons for contractual consent. On checking whether the statements did indeed induce the misrepresentee to enter into the contract, such considerations as to whether or not the misrepresentee relied upon the statements or whether the misrepresentee made his or her own checks will be relevant here. Much will depend upon the facts before you as to which cases you use to support your points. Having worked through all of the representations and having cited the relevant case law, you must then draw a conclusion by applying the case law rules to the facts before you to decide upon whether there has been an actionable misrepresentation.

Do not stop here! The task is not over!

If you have concluded that there has been a misrepresentation, you can boost your marks further by stating what type of misrepresentation has taken place and you can provide an explanation of the remedies available. You do not have to go through all of the remedies, unless there is a question mark over what type of misrepresentation has occurred. If you are unsure, then detail both types that you feel could be appropriate stating your reasons, but do try to conclude one way or another.

So you may be defining fraudulent, negligent or innocent misrepresentation, you may even be dealing with negligent misstatement falling under the rules of *Hedley Byrne v Heller*. In defining the available remedies, define rescission and remember to point out whether or not damages are available. Also check that none of the bars to rescission will apply to the facts under discussion.

In cases of innocent misrepresentation, do not forget that damages are not available, but that sometimes they can be given in lieu of rescission under the Misrepresentation Act, or an indemnity can be granted to allow expenses can be recovered – you could refer here to the *Whittington v Seale-Hayne* case. It may be necessary if you are dealing with negligent misrepresentation to explain how the burden of proof shifts to the representor to show that he had reasonable grounds for believing that the statement was true – again you could support the statement with the precedent established in *Howard Marine & Dredging v Ogden*.