

Diagram 5A shows that when a statement made during negotiations turns out to be false, the remedies available depend on how that statement is classified.

1. Starting at the left hand side: The 1st question is: 'Did the false statement induce the claimant to enter a contract with the maker of the statement?' The answer may be 'No'. For example, I say something that induces you to contract (not with me), but rather, with someone else, as in *Hedley Byrne v Heller*. In that case, in order to sue me, you can only rely on the common law tort actions for:
2. **fraud** - The measure of damages for fraud is *not* limited by the remoteness test
3. or for **negligent** misrepresentation- where damages are limited by remoteness of loss.
4. If the misrepresentation was made **innocently**, then you have no claim to damages.
5. The contract can be rescinded for any type of misrepresentation
6. Since there is no valid contract- there is none that can be enforced by an action for specific performance.
7. If my untrue statement *does* induce you into a contract with me, then the remedies available to you depend on whether the statement I made is

classified as a term *inside* the contract or a mere representation *outside* the contract:

8. A **term** is an enforceable promise to do something or to guarantee the truth of something. If the statement is classified as a *term inside* the contract, then the claimant's remedies for the statement being false are those for a breach of *contract action*.
9. Where a term is breached, the remedies are, broadly speaking, '*forward looking*'. The claimant can sue for damages aimed at putting her in the position she would be in if the contract had been performed.
10. The claimant may also be able to terminate the contract (that is, bring the contract to an end, if the breach is *sufficiently serious*). Or
11. The claimant may be able to bring a claim for *specific performance* to compel the contract-breaker to perform, if her claim is not barred.
12. If there is an exemption of liability for breach of contract in a B2B contract, then the validity of the exemption is determined by section 3 of the Unfair Contract Terms Act 1977. In general, such terms are only effective if they pass the test of reasonableness.
13. If the exemption of liability for breach of contract is in a B2C contract, then its validity depends on Part 2 of the Consumer Rights Act 2015. The test is one of fairness.
14. The false statement may not be a term inside the contract, but rather a *representation outside* the contract. A representation is a statement which

merely asserts the truth of a given state of affairs and invites reliance upon it, but does not give *a guarantee of its truth*. The textbook discusses how the term-representation distinction is made at 5.1.1.2.

- 15.** If the representation is false and is *actionable*, the remedies are, broadly speaking, '*backward looking*'. The claimant can sue for damages under the Misrepresentation Act 1967, which is aimed at putting her in the position that she would have been in, had she not relied on the misrepresentation and had not entered the contract. The damages claim under the Misrepresentation Act confers two distinct advantages over the common law actions for fraud and negligent misrepresentation:
- first, it lowers the qualifying threshold, the claimant only needs to show that the representation is untrue and she will succeed unless the defendant can show he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true'.
 - second, the action under the Misrepresentation Act gives the most generous measure of damages by reference to what is known as the 'fiction of fraud' (damages are given *as if for fraud*, and hence is not subject to reduction for being too remote); this is so even if there is no fraud.
- 16.** The claimant may also be able to rescind the contract (that is, treat the contract as if it had never come into being, and give back as well as get back anything transferred under the contract).
- 17.** Where the statement is not classified as a term of the contract, it cannot be the subject of an action for specific performance.

18. If there is an exemption of liability for misrepresentation in a B2B contract, then the validity of the exemption is determined by section 3 of the Misrepresentation Act 1977 and, in general, is only effective if it passes the test of reasonableness.
19. If the exemption of liability for misrepresentation is in a B2C contract, then its validity depends on Part 2 of the Consumer Rights Act 2015. The test is one of fairness.
20. A statement made in the course of contractual negotiations may be neither a term, nor a representation, but rather be classified as a mere 'puff'. These are vague and exaggerated laudatory statements about the subject matter of the contract which it would be *unreasonable for the claimant to rely* on. For example, a statement that a deodorant will make you completely irresistible to the opposite sex.
21. These statements have no legal effect; the claimant has no action.
22. What if the claimant can prove that the false statement made to him is *both* a misrepresentation and a contractual term? A statement may both induce the contract *and* become incorporated as a term of the contract (eg by being written into the contract after the statement is made). Before the Misrepresentation Act, the claimant in this situation was limited to the remedies for breach of contract. But the threshold for termination for breach is very high and the claimant may not be able to satisfy it; while the threshold for rescission for misrepresentation is relatively low. This could lead to the perverse result that the claimant is worse off when the false statement is classified as a term, rather than a mere representation. So,

the claimant may prefer to bring an action for misrepresentation in order to get out of the contract.

As for damages, the claimant will be entitled to the expectation measure for breach, but the reliance measure for misrepresentation. Which measure yields a greater sum will depend on the facts of the particular case. So, again the claimant may want to be able to choose the action.

- 23.** Section 1(a) of the Misrepresentation Act now gives the representee that *option* to choose. She can treat the false statement as either a misrepresentation or a term that has been breached. The claimant can choose the cause of action which gives the most advantageous remedies in the particular circumstances of the case.