

Diagram 5E

- 1 If you've been induced to enter a contract with me by my false statement, you have a number of ways to pursue a claim for damages. Diagram 5E sets them out and show how they relates to each other. Your easiest route is damages under **section 2(1) of the Misrepresentation Act 1967**. What complicates matters is that the *measure* of reliance damages under the Act is linked to the damages available for common law fraud (also known as 'deceit' or 'fraudulent misrepresentation').
- 2 This means that we can't avoid making reference to the **common law** action for damages that anyway, continues to be available after the Misrepresentation Act.
- 3 The crucial point is that it's very difficult to prove CL **fraud**. You must show that I made my false statement: knowingly, recklessly or without belief in its truth. But, your reward for clearing this high hurdle, is access to the **very generous measure of damages for fraud**. And this includes 'loss of opportunity' to make other profitable contracts, and no reduction for contributory negligence or for loss being too remote.
- 4 In contrast, common law damages for **negligent** misrepresentations *can* be reduced for being too remote or for your contributory negligence, and there is no damages for 'loss of opportunity'. Even so, the *Hedley Byrne v Heller* line of cases shows that negligent misrepresentation can also be quite hard to prove; You must show that I owes you a 'duty of care' arising out of our 'special relationship'.
- 5 At common law, if you can't prove that I made my statement fraudulently or negligently, my misrepresentation is regarded as **innocent**. You are *not* entitled to any damages. The Misrepresentation Act 1967 does not get rid of these actions but it adds a much much easier route to damages.
- 6 You can claim damages, and the generous 'fraud measure', if I (the *misrepresentor*) cannot prove my honest and reasonable belief in the truth of my statement. This is *very* favourable to you, the misrepresentee for three reasons:

- First, the burden of proof is reversed, from the misrepresentee to the misrepresentor
 - Second, the measure of damages is very generous - the same as for fraud, even if there is no fraud: this is called the 'fiction of fraud'.
 - Third, the qualifying standard is lower – under the common law, you get nothing if you can't prove my fraud or negligence. But under the Misrepresentation Act, if I can't prove my honesty or reasonableness, then you are still entitled to fraud damages. That is to say, you can now get *fraud* damages for what might have been regarded as *innocent* misrepresentation as common law.
- 7 You are only denied damages under the Misrepresentation Act if I *can* prove my honesty and reasonableness in making the statement. This can be contrasted with common law innocent misrepresentation by calling it '**purely innocent**' misrepresentation.
- 8 Another way for you to claim damages is to argue that my false statement, whether oral or written, has **contractual status**. I would then be in breach of a contractual term, entitling you to damages on the *expectation* measure.
- 9 This would be available regardless of whether my state of mind was fraudulent, negligent or innocent when I made the statement, because I will be taken to have promised the truth of it. Where you can argue your case as either a misrepresentation or a breach of contract, you will prefer the one that gives you the greatest amount in damages. And, *that* will depend on whether you made a good bargain or a bad one. If you made a *good bargain* you will prefer to go *forward* to your expectation position, so a breach of contract action is better. But if you made a *bad bargain*, then it would be better for you to go *backwards* to your reliance position, and an action for misrepresentation is preferable. Note that where a representation has become a term, you have a choice as to what action you elect under section 1(a) Misrepresentation Act 1967.

- 10** Another way for you to make a money claim is to ask for **restitution**. A contract induced by misrepresentation is *voidable*; you can set it aside - this is called rescission of the contract and it is subject to certain 'bars to rescission' such as affirmation, delay and third party rights. One condition of rescission is that each party must give back anything received from the other under the contract. So you can recover any payments you made, while giving back what you got under the contract. You can also recover any payment you were *required* to make as a result of the contract; e.g. in setting aside a house purchase you can reclaim the Council Tax. This is called an *indemnity* - it's just what I would have had to pay had I not induced the sale by misrepresentation.
- 11** Rescission and indemnity are available for any misrepresentation; the misrepresentor's state of mind is irrelevant.
- 12** Lastly, damages may be available if the court exercises its discretion under section 2(2) of the Misrepresentation Act to bar your attempt to rescind the contract. This is most likely to happen if my representation is relatively trivial, if your loss is relatively small or if I stands to lose a lot if the contract is rescinded.
- 13** **Damages in lieu of rescission** is not available for *fraudulent* misrepresentations - the court can't take away your right to rescission if there has been fraud on my part.
- 14** It's only when the misrepresentation is *non-fraudulent* (i.e. negligent or innocent) that the court can exercise its discretion to deny your claim to set aside the contract and instead award you some money. How this is measured is the subject of controversy.