Misrepresentation in Land Transactions

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Available remedies expanded

It may be of the utmost importance to a purchaser of land that it has the attributes he or she wishes. Assume that one of those is that the land be flood free. If the vendor represents to the purchaser that the land is not prone to flooding, this might be an important factor in enabling the purchaser to finally decide to purchase the property. If it transpires later through answers to various inquiries that the land is prone to flooding, what are the purchaser's remedies? What would the purchaser have to prove to get them? And could the purchaser be disentitled from obtaining those remedies?

Misrepresentations are generally categorised into three types, innocent, negligent and fraudulent. The representee's remedies may differ depending on the type of misrepresentation involved. Again, the representee's remedies may be expanded if the misrepresentation falls within the provisions of either the Trade Practices Act 1975 (TPA) or the Fair Trading Act 1987 (FTA).

Sometimes a misrepresentation is made within the four corners of the contract. This could also be an error or misdescription entitling the purchaser to compensation. The distinction could be important in terms of the remedy.

Also, the right to rescind for misrepresentation could be lost by the operation of the doctrine of election which applies with equal force to the right to rescind for a misrepresentation as it does to the right to rescind for any other reason.

Actionable misrepresentation

If the vendor or someone acting on the vendor's behalf induces the purchaser to enter into the contract by making a representation about the property upon which the purchaser relies and it turns out later that the representation was wrong, the purchaser would acquire certain rights based on the misrepresentation. Generally, the representation must be one of fact. But other kinds of assertions have satisfied this requirement because of the particular circumstances of the case.

An expression of opinion is generally not regarded as a statement of fact. But in some cases it could be viewed as such. Thus, in Smith v Land and House Property Corporation (1884) 28 Ch. D. 7 a statement made on behalf of the vendor of a hotel that it was "let to a most desirable tenant" was held to be a statement of fact because it contained an implied assertion that the vendor knew of no facts leading to the conclusion that it was not.

An expression of an intention or promise to do something in the future is also not a statement of fact unless it can be proved the statement was made as a warranty or negligently or fraudulently. There can be a misrepresentation of intention if it can be shown that no such intention existed at the time of the representation. Bowen LJ expressed his opinion on this point in Edgington v Fitzmaurice (1885) 29 Ch D 459 at p. 483 in the following terms:

"But when we come to the third alleged misstatement I feel that the plaintiff's case is made out. I mean the statement of the objects for which the money was to be raised...A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action in deceit. There must be a statement of an existing fact: but the state of a man's mind is as much a fact as is the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact."

Unless the misrepresentation was material and induced the purchaser to enter into the contract, it is not actionable. It appears that materiality has become so closely tied up with inducement as to be virtually
indistinguishable as a separate element. In Field v Shoalhaven Transport Pty Ltd (1970) 3 NSWLR 96 at p. 100 it was said that the test of material inducement was not whether the plaintiff's action would but whether it might have been different if the misrepresentation had not been made. Holland J suggested in Simons v Zartom Investments Pty Ltd (1975) 2 NSWLR 30 at p. 34 that a misrepresentation was material if it would affect the mind of an ordinary person and did in fact affect the mind of the purchaser. A similar approach was taken earlier by McGregor J in Root v Bradley (1960) NZLR 756 where his Honour held that the representation was both material and inducing because it was calculated to influence a purchaser and was relied on by him as an inducement.

Thus, if it can be established that a misrepresentation was calculated to affect the mind of a reasonable purchaser and did in fact affect the judgment of the instant purchaser, the requirement of a material inducement has been satisfied.

The inducement need not have been the sole inducement. It is sufficient that it was one of the factors which led the purchaser to enter into the contract: Edginton v Fitzmaurice.

Whether a third party could rely on a misrepresentation not directly made to him would depend upon whether he could show some direct connection between the representor and himself or whether he was within the class of persons to whom the representation was made: Cross v Lewis Hillman Ltd (1970) Ch 445 at 461.

Where there is no duty to disclose, silence will not amount to a misrepresentation at common law: Turner v Green (1895) 2 Ch 205. In contracts relating to the sale of land the general rule is that the vendor is only obliged to disclose presently existing material defects in title. The vendor is not obliged to disclose defects in quality or defects in title that might spring up in the future. Holland J made this very clear in Dormer v Solo Investments Pty Ltd (1974) 1 NSWLR 428 when, after observing that the undoubted rule in land contracts was still caveat emptor, he said at p. 433:

"No doubt there is a duty on the vendor to disclose presently existing latent defects of title, that is to say matters within his knowledge which detract from his right to convey the estate he has agreed to sell or which prevent him from conveying his title free of encumbrances."

His Honour went on to observe that a vendor who had not disclosed latent defects in quality might be refused the remedy of specific performance.

Clearly, the vendor's failure to disclose a presently existing material latent defect in title could have been seen as a misrepresentation by silence, as there was a duty upon him to disclose such a matter. But there would be no need for the purchaser to rely on that as the purchaser may be entitled to rescind the contract or resist specific performance upon the basis of the non-disclosure itself: Carlish v Salt (1900) 1 Ch 335.

Of course, it would be fraud for the vendor to actively conceal defects in quality. In Anderson v Daniels (1983) NSW Conv R 55-144 the purchaser recovered damages from the vendor for the vendor's fraud in hiding cracks in the walls of the building by plastering over them.

It should also be remembered that if a person makes a representation believing it to be true at the time it was made but subsequently discovers it to be untrue, it is that person's duty to disabuse the other party of the error and if the person fails to do so, he or she would be guilty of fraud: Kahlbetzer v Cinicotta (1983) NSW Conv R 55-105.

Types of misrepresentation

Fraudulent

A fraudulent misrepresentation is one where a statement is made about the property either knowing that it is false, or without belief in its truth, or made recklessly - that is without care whether it is true or false, and with the intent that it should be acted upon: Derry v Peek (1889) 14 AC 337.

This is lucidly expanded in Stonham's Vendor and Purchaser at pp. 803 and 804 in the following words:

"It does not have to be knowingly false, but, if so, actual and present belief in the truth of the representation is essential to avoid fraud. Where a person asserts as true what he then does not believe to be true, and which is, in fact untrue, this is fraudulent misrepresentation, notwithstanding he does not actually know that it is untrue. But, if it is believed to be true it is not a fraudulent misrepresentation, no matter how feeble the grounds for the defendant's belief, or how negligent he was in collecting his information, though absence of reasonable grounds for belief may be evidence that the belief was not, in fact, genuinely and honestly held."

The party who enters into the contract due to the fraudulent misrepresentation of the other is entitled to rescind the contract and recover tortious damages. He can also resist specific performance. Rescission is always subject to restitution and in the case of fraud, provided the parties could be restored to the original position, the contract could be rescinded even after completion: see generally Voumard, The Sale of Land, 4th Ed at p. 41 and CCH, NSW Conveyancing Law and Practice, Vol 1 at paragraphs 3-904 to 3906.

Negligent

The principles relating to negligent misrepresentation in the field of vendor and purchaser are probably the most complex and controversial. However since the High Court decision in L. Shaddock & Associates Pty Ltd v Parramatta Council (1981) 150 CLR 225 it is clear that the giving of information attracts a duty of care in the same way as does the giving of advice. Further, liability is not limited to persons claiming to have special skills or competence. Therefore, there would appear to be no reason why a vendor could not be held to be guilty of negligent misrepresentation for a statement made carelessly within the normal principles of the law of negligence and which induced the purchaser to enter into the contract.

While the remedy for a negligent misrepresentation is damages it may also entitle rescission if it could be shown that the misrepresentation was also innocent: Ellul v Oakes (1972) 3 SASR 377. Further, as Andrew Lang makes the point with which the writer agrees, negligent misrepresentation ought to be a ground for the refusal of specific performance to the vendor: at paragraph 3-925 of CCH, NSW Conveyancing Law and Practice, Vol 1.
Innocent

An innocent misrepresentation is one which is made honestly, that is without knowing it to be false, believing it to be true and without reckless indifference as to its truth: see Stonham at p. 805. An illustration of an innocent misrepresentation is Simons v Zartom Investments Pty Ltd where it was represented in a brochure that the subject unit would have a lock-up garage. This was a retired artistic painter and wished to store his furniture and items associated with his art there. The representation induced him to enter into the contract for which he was held to be liable for the misrepresentation of its agent, both under the

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Holland J held that the purchaser was entitled to rescind the contract by reason of the vendor’s misrepresentation. It is probable that the purchaser was also entitled to rescind on the ground of breach of a material term of the contract (in the brochure incorporated in the contract). In the course of his judgment, his Honour said at p.34:

“If a vendor makes a material false representation which is calculated to induce a purchaser to enter into a contract for the sale of land and the purchaser does so, the vendor cannot hold the purchaser to performance of the contract in equity and the purchaser may elect to rescind and approach the equity court for an order declaring the contract rescinded. Such an order is one affirming by judicial determination that the act of the purchaser in electing to rescind was justified, effective, and put the contract to an end.”

Misrepresentation in the contract

A misrepresentation in the contract could also be an error or misdescription. Take the example where the property has been described as having an area of 300 square metres and it transpires that it has an area of only 275 square metres in fact. There is both a misrepresentation and an error or misdescription. It appears from Simons v Zartom Investments Pty Ltd where the innocent misrepresentation had become a term of the contract that the purchaser could rescind if he could establish the necessary material inducement. If he cannot, he is still entitled to compensation under the contract and might still be able to rescind if he could establish that the rule in Flight v Booth (1834) 131 ER 1160 applied. In that case Tindal CJ enunciated the rule in the following terms:

“Where the misstatement, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misstatement, the purchaser might never have entered into the contract at all, in such cases the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation.”

It is to be noted that the 1992 version of the jointly approved form of the printed contract only gives the vendor the express right to rescind under clause 7.1 if the claim for compensation exceeds five per cent of the purchase price unless the purchaser can show that the purchaser’s right to rescind under the rule in Flight v Booth is unaffected and he is free to exercise it in the appropriate circumstances.

Statutory remedies

Any misleading or deceptive conduct by a corporation within the meaning of ss. 52 and 53A of the TPA will attract the various remedies provided for by s. 87 including damages and rescission. Similar conduct by an individual will be caught by the provisions of s. 42 of the FTA with the same sort of remedies as provided for by the former Act. It is beyond the scope of this article to analyse the substantive operation of these statutes.

However, one matter ought to be noticed. That is, that unlike the common law, where an actionable misrepresentation could be made by silence only where there was a duty to speak out, it appears that under these statutes there can be misrepresentation by silence even if there was no such duty.

This is what the Full Federal Court held in Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31 where the vendor’s failure to inform the purchaser of a unit in a multi-storey complex yet to be constructed that the driveway was not part of the common property was held to constitute misleading and deceptive conduct in breach of s. 52 of the Trade Practices Act.

Gummow J, with whom Cooper J agreed, while recognising the common law principles relating to the requirements of disclosure by the vendor regarding defects in his title, went on to hold that the Act created new rights. Therefore the principles of common law on that topic could not be determinative of the issue of a breach of s. 52. Sounding a caution about elevating the concept of a misrepresentation arising from silence into a duty to disclose under the Act, his Honour expressed the view that whether silence was within the operation of s. 52 as misleading or deceptive conduct had to be judged by evaluating all the relevant circumstances.

His Honour said at p. 41: “But, consistently with regard to the natural meaning of the terms of s. 52, the question is whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is likely to be misleading or deceptive.”

The decision of the Full Court of the Supreme Court of Western Australia in Franich v Swannell (1993) 10 WAR 459 shows that there can be a misrepresentation by silence under the FTA. In that case the court expressed the opinion obiter dicta that the failure by the vendor and his agent to disclose the defect in the foundation of the building caused by subsidence was misleading and deceptive conduct by silence and in breach of s. 10 of the Fair Trading Act (WA).

These decisions show that a vendor who has not disclosed defects in quality may not be able to escape liability simply by relying on the principles of the common law.

Vendors must also be aware that they might be liable for the misrepresentation of their agent, both under the common law and statute: Petersen v Maloney (1950-51) 84 CLR 91; s.84 of the TPA and Trade Practices Commission v Queensland Aggregate Pty Ltd (1982) 61 FLR 52 where Morling J said that the common law principles relating to agency applied despite s. 84. There would appear to be no reason why an agent could not be independently liable under the TPA and the FTA if it was guilty of misleading and deceptive conduct on its own account: Aliota v Broadmeadows Bus Services Pty Ltd (1988) ATPR 40-873.
Loss of the right to rescind

It pays always to remember that the doctrine of election applies to the right to rescind the contract for a relevant misrepresentation as it does to rescission on any other ground. The principle is not in any doubt. When a party has the choice either to rescind the contract or to affirm it, he must elect between the two. But the party need not elect immediately it becomes aware of its position. The party can wait and see or obtain advice provided it does not delay to the extent of causing prejudice to the other party: Sargent v ASL Developments Ltd (1974) 131 CLR 534 and Champtoloup v Thomas (1976) 2 NSWLR 264.

Thus, in the case of misrepresentation, once a party learns of the error in what it was told about the property, assuming it to constitute a rescindable misrepresentation, he must be on guard from that moment because its right to elect would have commenced. If the party does anything to lead the other party to believe that it is proceeding with the contract, it runs the risk of an affirmation and the loss of the right to rescind.

Sometimes a purchaser suspects, say that the house was built on filled land contrary to the vendor's representation that it was not. But the purchaser has to await an expert's report to confirm this before it could rescind for an innocent misrepresentation. In the meantime does the purchaser risk an affirmation if it seeks more information from the vendor regarding that particular matter? Consistently with the principle expressed in Sargent v ASL Developments Pty Ltd clearly it would not, so long as the purchaser makes it clear that it suspects the vendor of misrepresenting the question of fill and reserves the right to rescind pending confirmation from an expert's report. However, the purchaser must not ask the vendor to take any step towards completion. That would certainly result in the loss of the right to rescind.

Conclusion

Misrepresentation can be a very potent tool in the hands of a purchaser. The available remedies have been expanded beyond the common law by the application of the relevant provisions of the TPA and the FTA. The critical factor in establishing liability for misrepresentation obviously is a material inducement. If the representee cannot establish reliance, there would be no nexus between the representation and its claimed consequence, either damages or a vitiating of consent. The vendor must guard against it and ensure that none is made on its behalf.

On the other hand, the purchaser should be vigilant about its rights arising from a misrepresentation. In particular, the purchaser must exercise care not to affirm the contract should the purchaser wish to rescind after becoming aware of the misrepresentation.