

MISREPRESENTATIONS IN PROPERTY TRANSACTIONS

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by Daniel Hochberg
Wilberforce Chambers

Daniel has considerable experience of property litigation, which he uses to give pragmatic, commercial advice to clients and to achieve the best results in litigation. His practice covers a wide range of property disputes, and he also has particular expertise in conducting litigation on behalf of, and affecting trustees.

He is an editor of Phipson on Evidence and of Spencer-Bower on Estoppel by Representation.

dhochberg@wilberforce.co.uk

1. A misrepresentation is an untrue statement.¹ If it is relied upon by a party to a contract for the sale or other disposition of an interest in land, and, as a result, he suffers loss, it may give rise to a legal remedy. If it becomes a term of the contract, it becomes a misdescription.
2. The importance of misrepresentation in the context of the creation or assignment of interests in land is due to:
 - 2.1 The need to define the subject matter of the transaction, physically and legally, which is fundamental when the vendor complies with his obligation to make title;
 - 2.2 The vendor's wish to alert the purchaser to the particular attributes of the land which is the subject matter of the contract: a parcel of land is "unique";
 - 2.3 The purchaser's wish to obtain accurate responses, "warts and all" to enquiries about the property from the vendor, who is more familiar with the land than is the purchaser.

We are largely, but not only, going to be concerned with a prospective purchaser "fresh from the recurrent joy of comparing the realities of some property with the benign description in the estate agent's "particulars""²

¹But see *post* as to whether it need be a misstatement of fact.

²*Goding v Frazer* [1967] 1 WLR 286.

The need to define the subject matter of the transaction

3. The subject matter of the transaction needs to be defined in the following respects:
 - 3.1 Its physical extent, which can be defined in words and/or numbers and/or by reference to a plan;
 - 3.2 The estate or interest in the land;
 - 3.3 The rights the benefit of which pass with the estate or interest in the land being transferred;
 - 3.4 The rights of others (third parties, or rights being reserved by the transferor) subject to which the land is being transferred.
4. If the description of the property does not correspond with what the vendor is able to convey, then there has been a *misdescription*. A misdescription occurs where a misrepresentation has been made a term of the contract. In that case the vendor is accordingly in breach of contract.

Is the misdescription substantial?

5. A substantial misdescription means that the vendor will be unable to enforce the contract, whether at law or in equity. A misdescription is substantial if it affects the subject matter in such a way that, but for the misdescription, it might reasonably be supposed that the purchaser would never have entered into the contract.³ Standard condition 7.1.3 (b) requires that there can only be rescission if the innocent party is “prejudiced” by the error.
6. Examples of material and substantial errors include the following:
 - 6.1 an omission to mention in auction particulars concerning a leasehold shop of most of the types of trade prohibited by the lease.⁴
 - 6.2 to describe a freehold as being 5 acres 0 rods 26 perches when good title could be shown only to 4 acres 3 rods, the remainder having possessory

³*Flight v Booth* (1834) 1 Bing NC 370; *Re Weston & Thomas’s Contract* [1907] 1 Ch 244.

⁴*Flight v Booth, above.*

title.⁵

6.3 to contract to grant for 15 years a lease of “offices” without mentioning that planning permission for office use extended only to part of the premises proposed to be demised.⁶

In these cases, the purchaser was able to rescind the contract, notwithstanding a contractual provision that an “error” shall not annul the sale.

7. A misdescription which is immaterial does not allow the purchaser to rescind the contract. An immaterial misdescription which adversely affects the value of the property will give rise to an abatement of the purchase price by way of compensation for the reduction in value of the property.

8. Examples of misdescriptions held not to be material include the following:

8.1 Contract to sell house, builders’ yard and stables containing 1,372 square yards. In fact the area was 1,033 square yards, but the whole was fenced and defined, so that the purchaser could see what he was bidding for.⁷

8.2 Contract for the sale of a house failed to disclose two local authority sewers running under the land. The land was not sold for development and its enjoyment was not hindered by the presence of the sewers.⁸

8.3 Contract for property described as producing net annual rent of £39, when this sum was in fact the gross rent, and the net rent was somewhat less. Compensation allowed even after completion.⁹

The purchaser was not able to rescind in these cases but able to claim compensation. If the misdescription does not give rise to a reduction in the value of the property, however, then there is no loss to be compensated and there can

⁵*Jacobs v Revell* [1900] 2 Ch 858.

⁶*Laurence v Lexcourt Holdings* [1978] 1 WLR 1128.

⁷*Re Fawcett & Holmes’ Contract* (1889) 42 Ch D 150.

⁸*Re Belcham & Gawley’s Contract* [1930] 1 Ch 56.

⁹*Palmer v Johnson* (1884) 13 QBD 351.

be no abatement in the purchase price.¹⁰

9. In cases of misdescription, the vendor's position is weak in two respects. First, at common law, misdescription which, if corrected, would mean that the property would attract a higher price gives the vendor no claim¹¹ for compensation, since the vendor is regarded as having being in a position to stipulate exactly what he is offering. Second, it is the purchaser who is in the position of being able to choose whether to complete in the case of a material and substantial misdescription. In the case of an immaterial misdescription which has caused loss or to complete, the vendor can compel the purchaser to complete but only at an abated price to reflect the loss, and not at the full price,.

The Standard Conditions

10. The Standard Conditions of Sale (4th edn. cl. 7.1) and the Standard Commercial Conditions (2nd edn. cl. 9.1) seek to regulate the position in cases of error or omission giving rise to a misleading or inaccurate plan, statement in the contract or in the negotiations. Thus, they apply both to misdescription and to misrepresentation. If there is a material difference between the description or value of the property as represented and as it in fact is, the buyer is entitled to damages. Only where the error or omission results from fraud or recklessness, or where the buyer would be obliged, to his prejudice, to accept property differing substantially in quantity, quality or tenure from what the error or omission had led him to expect may the buyer rescind. These provisions are subject to the "reasonableness" requirements of section 3 of the Misrepresentation Act 1967 as amended by section 8 of the Unfair Contract Terms Act 1977.¹² What if the conditions of sale stipulate that no reliance may be placed on any/certain

¹⁰See *Pagebar Ltd. v Derby Investments Ltd.* [1972] 1 WLR 1500 at p. 1505.

¹¹*Re Lindsay & Forder's Contract* (1895) 72 LT 832.

¹²*Cp. Walker v Boyle* [1982] 1 WLR 495.

representations? *Cremdean v Nash*¹³ suggested that section 3 of the Misrepresentation Act 1967 precluded a “no reliance” clause being effective where the evidence showed that the purchaser had relied on the representation. In *Witter v TBP Industries*¹⁴ Jacob J held that a clause under which the purchaser acknowledged that it had not been induced to enter the contract by any representation other than those contained in a particular Schedule was unreasonable, because it failed to distinguish between fraudulent, negligent and innocent misrepresentations. But in *Watford Electronics v Sanderson* [2001] EWCA Civ 317 Chadwick LJ declined to accept such a broad brush approach, because, in the commercial context, he pointed out that the price paid under a contract would be expected to be negotiated in the context of the extent of the warranties given, and that if the parties agreed in the contract that neither of them had relied on any pre-contract representation, then it was reasonable for liability for negligent pre-contractual liability for misrepresentation to be excluded. In any event, standard form contractual provisions attempting to shore up the vendor’s position to a significantly greater extent than the Standard Conditions (for example, “... no error or misdescription shall annul the sale ...”) have never operated to defeat reliance on the rule that a substantial and material misdescription will give rise to the right for the purchaser to rescind.

11. The result is that under condition 7.1.2 the buyer (or the seller¹⁵: the reference is to the “injured party”) is entitled to damages, but not rescission, for any material

¹³(1977) 241 EG 837.

¹⁴[1996] 2 All ER 573.

¹⁵As in *Goldsmith v Roger* [1962] 2 Lloyd’s Rep 249 where the purchaser made a misrepresentation that he had discovered a defect in the property (a boat), which induced the seller to lower to price. The seller was held entitled to rescind the contract. In *Mayer v Pluck* (1971) 223 EG 33, 219 a prospective purchaser at an auction asked publicly whether the auctioneer was aware that the property was built over an underground stream and had a flooded cellar. The property did not sell. The seller successfully sued the prospective purchaser for damages for malicious falsehood. Thus, the standard conditions reflect a difference from the common law position.

misrepresentation affecting the description or value of the property, whether in the contract, the plan, or the negotiations. The right to rescind is preserved where a misrepresentation is made recklessly or fraudulently, or in a case in which, as a result of the misrepresentation, the buyer is prevented from getting substantially what he contracted to buy, or the seller is forced to sell something substantially different from what he expected to sell.

12. In *St James Group Ltd v Powell*¹⁶ a custom-drawn special condition in a contract for the sale of a long lease of a flat being constructed in a block being built provided that the plan was for identification only and represented the Seller's present intention as to carrying out the development and the flat, but the Seller reserved the right to vary the layout and nature of the development and to vary the boundaries of the flat which in its absolute discretion it deemed necessary or desirable, provided that such variation should not materially diminish the value of the flat. Kitchin J accepted the purchaser's submission that although the vendor could vary the contractual description of the flat, a variation which diminished the value of the flat was not permitted. On the facts, the variations had not diminished the value of the flat, and so the vendor's claim for damages for breach of contract against the purchaser succeeded.

The Misrepresentation Act 1967

13. Before the Misrepresentation Act 1967 came into force, the law concerning misrepresentation was essentially concerned with misrepresentations made before a contract was entered into, which misrepresentations did not become terms of the contract. The position was that if such a misrepresentation induced the representee to enter into a contract, and was material, the representee could before completion rescind the contract, but could only claim damages if the misrepresentation was made fraudulently, or, in certain cases, negligently. If the misrepresentation was incorporated as a term of the contract, then the only remedy was for breach of contract; it was said by Russell LJ that, having become a term of the contract, the misrepresentation cannot have induced the misrepresentee to enter the contract, because the contract contained an

¹⁶[2006] EWHC 1115.

equivalent term.¹⁷ One of the important changes which the Misrepresentation Act 1967 made was that the representee could claim damages in any case of negligent misrepresentation, if damages could have been recovered had the misrepresentation been made fraudulently. A second important change was that the court could refuse to permit the representee to rescind the contract if the misrepresentation was innocent or merely negligent, and award him damages in lieu of rescission.¹⁸ A third was the removal of the restriction on rescission where the misrepresentation had been incorporated as a term of the contract¹⁹ or where the contract had been completed,²⁰ unless third parties had acquired intervening rights which would be prejudiced by rescission.²¹ A fourth was the reversal of the onus of proof in cases of misrepresentation leading to a contract. By section 2 (1) of the 1967 Act, damages may be recovered even though the misrepresentation was not fraudulent, unless the misrepresenter can prove that he had reasonable grounds for believing, and did believe up to the time the contract was made, that the representation was true.

Misrepresentation

14. At common law, a material and substantial misrepresentation entitled a purchaser to rescind a contract where the vendor had made a false statement to the purchaser, which induced the purchaser to enter into the contract.

¹⁷*George Wimpey v Sohn* [1967] Ch 487.

¹⁸The 1967 does not give a general remedy of damages for innocent misrepresentation; the general remedy for damages applies only in a case in which the defendant cannot show reasonable grounds for believing, and that he did believe, the representation to be true until the time the contract was made (i.e. subjective negligence). But the court may exercise its discretion to award damages in lieu of rescission.

¹⁹Misrepresentation Act 1967, section 1 (a).

²⁰Misrepresentation Act 1967, section 1 (b).

²¹The grant of a security by way of legal charge in favour of the purchaser's mortgagee when the purchase is completed is an obvious example.

“False”

15. The courts take a broad view, and it is unsafe to rely on the literal truth of a statement if the statement gives a misleading impression - a “half truth” will be regarded as a misrepresentation. To state in a property information form that no disputes with a neighbour existed, where an antagonistic neighbour had constantly been in dispute with all his neighbours (and quarreled with the purchaser), but there was at the time no subsisting dispute with the vendor, was held to amount to a knowing and therefore fraudulent misrepresentation.²²

“Statement”

16. Words, written or spoken, may constitute a statement. So may a picture of premises conveying information about their use.²³ So may conduct, such as filling in the cracks so as make it more difficult for the purchaser to detect problems with the foundations of a building²⁴ or having a builder conceal the signs of an active outbreak of dry rot before putting the property on the market.²⁵

“Of fact?”

17. It used to be said that the untrue statement had to be a statement of fact, not law, and not a statement of intention. But in *Parkhania v Hackney LBC*²⁶ it was held that this proposition had not survived *Kleinwort Benson v Lincoln City Council*²⁷ and that a misrepresentation of law could be actionable. Likewise, it

²²*McMeekin v Long* [2003] 2 EGLR 81.

²³*Atlantic Estates plc v Ezekiel* [1991] 2 EGLR 202: auction particulars included a photograph of showing people entering or leaving premises described as a wine bar by day, cocktail bar by night. In fact, the tenant had lost his licence, and the premises had ceased to be used as a wine bar or cocktail bar.

²⁴*Ridge v Crawley* (1959) 173 EG 959.

²⁵*Gordon v Selico Co Ltd* [1986] 1 EGLR 71.

²⁶ [2002] EWHC 2441 (Ch).

²⁷[1999] 2 AC 349.

has long been held that a statement of intention can give rise to an actionable misrepresentation if it is not in fact held by the representor.²⁸ A statement of opinion can amount to an actionable misrepresentation if the representee does not know the underlying facts, but the representor does, for the latter impliedly states that the underlying facts justifying the opinion are true.²⁹

Replies to preliminary enquiries

18. These are not part of the contract; no question of misdescription can arise, unless any reply is incorporated as a term of the contract. If the response is qualified so as to limit the reply to the extent of the vendor's knowledge or belief, then unless the vendor is dishonest³⁰ (i.e. deliberately untruthful or reckless as to the truth of the reply), then it cannot be regarded as a warranty of the truth of the reply.³¹

By the vendor to the purchaser

19. The vendor's agent does not have *ostensible* authority to make a misrepresentation on behalf of his principal,³² so the vendor cannot without more be held liable for a misrepresentation made by his agent. But if the vendor's agent has actual authority to make what is a misrepresentation, that is sufficient as a basis for liability on the part of the vendor. The purchaser must show that the misrepresentation was made to him or his agent, and was intended to be relied on by him. Note also the converse case of a misrepresentation made by the purchaser to the vendor with a view to reducing the price or making the property unsaleable, mentioned above.

²⁸*Edgington v Fitzmaurice* (1884) 29 Ch D 459.

²⁹*Smith v Land & House Property Corporation* (1884) 28 Ch D 7; the reply "not so far as the vendor is aware" implies that he has made reasonable investigations: *William Sindall v Cambridgeshire CC* [1994] 1 WLR 1016.

³⁰*Re Englefield Holdings Ltd and Sinclair's Contract* [1962] 1 WLR 1119.

³¹*Goody v Baring* [1956] 1 WLR 448.

³²*Overbrooke Estates v Glencombe Properties* [1974] 1 WLR 1335.

20. The position of those carrying on business as estate agents and property developers is, however, governed by the Property Misdescriptions Act 1991, which makes it a criminal offence to make a false or misleading statement about a “prescribed matter” otherwise than in the course of providing conveyancing services.³³ A breach of section 1 does not, however, give rise to any civil right of action.³⁴ There are 33 prescribed matters set out in the Property Misdescriptions (Specified Matters) Order 1992, ranging in gravity from the tenure or estate being sold to representations about the giving of any award or prize for design or construction. A vendor’s estate agent may, on the facts of the case, be under a duty to exercise reasonable care to ensure that statements made to a potential purchaser are accurate.³⁵

“Which induced”

21. Thus, if the representee was unaware of the making of the misrepresentation,³⁶ or was not in fact influenced by it,³⁷ or knew that it was untrue,³⁸ he has no legal remedy. The misrepresentation may indirectly induce the purchaser to contract, and will be actionable; in *Cemp Properties (UK) Ltd v Dentsply*³⁹ the misrepresentation was that certain documents of title were not available for inspection. In fact, they were available and would have disclosed certain adverse rights which would have deterred the purchaser. The purchaser’s claim succeeded. A purchaser’s claim will not be defeated by the vendor showing that

³³See section 1.

³⁴See section 1 (4).

³⁵*McCullagh v Lane Fox* [1996] 1 EGLR 35, although on the facts a disclaimer applied.

³⁶*Horsfall v Thomas* (1862) 1 H & C 90.

³⁷*Attwood v Small* (1838) 6 Cl & F 232.

³⁸*Cooper v Tamms* [1988] 1 EGLR 257.

³⁹[1989] 2 EGLR 192.

had the opportunity of discovering the truth but failed to take it.⁴⁰ But the purchaser will not succeed if his solicitor knows the true position and fails to communicate it to the purchaser.⁴¹ Once the misstatement is shown to have been material, there is a “fair inference of fact” that the recipient was induced by the statement, but in cases of fraudulent misrepresentation, a more rigorous rule is applied, and it is sufficient for the representee to show that the misrepresentation was actively present in his mind.⁴²

“A contract”

22. Thus, an *agent* who, with authority to do so, made an untrue statement, without having reasonable grounds for believing it to be true, could not be liable under section 2 (1) of the Misrepresentation Act 1967; liability was imposed only on the principal as a party to a contract. Under the 1967, it is axiomatic that if no contract is concluded, no liability for misrepresentation arises.⁴³

Further or alternatively, a duty of care

23. Following *Hedley-Byrne v Heller*⁴⁴ Lord Denning MR enunciated a broad principle of liability in tort for economic loss in *Esso Petroleum v Mardon*⁴⁵ under which, if a person having special knowledge makes a representation to another, whether of advice, information or opinion, with the intention of inducing the representee to contract with him, he is under a duty to use reasonable care to see that the representation is correct. If he negligently gives unsound advice or misleading information, or expresses an erroneous opinion, and thereby induces the representee to enter into a contract, then he is liable for damages.

⁴⁰*Redgrave v Hurd* (1881) 20 Ch D 1; *Laurence v Lexcourt Holdings* [1978] 1 WLR 1128; *Atlantic Estates v Ezekiel* [1991] 2 EGLR 202.

⁴¹*Strover v Harrington* [1988] Ch 390.

⁴²*Ross River Ltd v Cambridge City Football Club* [2007] EWHC 2115 (Ch).

⁴³*Resolute Maritime v Nippon Kaiji Kyokai* [1983] 1 WLR 857.

⁴⁴[1964] AC 465.

⁴⁵[1976] QB 801.

24. This kind of tortious liability clearly overlaps to a considerable extent with the Misrepresentation Act 1967. But (1) although contributory negligence is available as a defence under the Misrepresentation Act 1967, it cannot be relied upon by a defendant where the claimant was induced by the misrepresentation not to investigate the very matter misrepresented.⁴⁶ Thus the claimant is in a better position in this respect under the 1967 Act.⁴⁷ (2) The claimant need show no special relationship under the Misrepresentation Act 1967, unlike in tort. (3) The statutory liability cannot be avoided by a bald statement that no responsibility is accepted. (4) Once a misrepresentation has been established, under the statute the burden shifts to the defendant to establish that he had reasonable grounds to believe and did believe up till the time of the contract that the misrepresentation was true.⁴⁸

Remedies

Rescission

25. Under the Standard Conditions, rescission is available only where the misrepresentation was made fraudulently or recklessly (but not where it was made negligently or innocently), or where the effect of the misrepresentation is that the buyer would be obliged to accept property differing substantially in quantity, quality or tenure from what the error or omission led him to expect.

⁴⁶*Gran Gelato v Richcliff* [1992] Ch 560.

⁴⁷Contributory negligence is not a defence to a claim for deceit and the Law Reform (Contributory Negligence) Act 1945 does not apply: see *Alliance & Leicester v Edgestop Ltd* [1994] 1 All ER 38. It may operate as a defence in a case in which the tort of negligent misrepresentation as in *Esso v Mardon* has been committed, whether or not the statutory cause of action under section 2 (1) of the 1967 has also been committed. But it cannot operate as a defence if the only cause of action is under section 2 (1) because the misrepresenter who cannot prove that he had reasonable grounds is liable as if the representation had been made fraudulently.

⁴⁸Section 2 (1).

Rescission will not, however, be available if a third party has acquired rights without notice of the right to rescind, and those rights would be prejudiced by rescission. A factor affecting whether rescission will be ordered is whether the parties can be restored to their initial positions; the less it is possible to restore the parties to their original position, the less likely it is that rescission will be ordered. If the purchaser affirms the contract, he loses the right to rescind, and, therefore, he needs within a reasonable time of becoming aware of the misrepresentation to take action if he wishes to seek to exercise the right to rescind. Under section 2 (2) of the Misrepresentation Act 1967, in a case of innocent misrepresentation, the court has discretion whether to order rescission, or to declare that the contract subsists and order damages in lieu of rescission. Jacob J has held that damages may be awarded under section 2 (2) where there had been a right to rescission, even though by the time of trial, rescission was no longer a viable remedy, but the authorities conflict.⁴⁹ In contrast to mistake, misrepresentation renders a contract voidable, not void⁵⁰.

Damages

26. As a result of the Misrepresentation Act 1967, damages may not be recovered for innocent misrepresentations unless the misrepresentation becomes a term of the contract (misdescription) or can be relied on as a collateral contract. Damages may be recovered for negligent misrepresentation (and note the reversed burden of proof), under the 1967 Act or in tort. The measure of damages under section 2 (1) of the 1967 Act in cases of innocent or negligent

⁴⁹*Witter Ltd v TBP Industries* [1996] 2 All ER 573; but the contrary was held in *Zanzibar v British Aerospace (Lancaster House)* [2000] 1 WLR 2333 and in *Floods of Queensferry v Shand Construction Ltd* [2000] Building LR 81.

⁵⁰In *Islington v Uckac* [2006] EWCA Civ 340, Dyson LJ said that a tenancy governed by the Housing Act 1985 (s. 82) could not be terminated except by the court on the grounds set out in the Act. This was a case where the tenancy was induced by a misrepresentation. The proposition is inconsistent with the authorities, which are clear that a misrepresentee may rescind by giving notice of rescission: *Car & Universal Finance v Caldwell* [1961] 1 QB 525.

misrepresentation is the same as if there had been a fraudulent misrepresentation.⁵¹ The principle is that the comparison to be made is between the claimant's actual position, and the position if the tort had not been committed, that is to say, the claimant had been told the truth.

27. Where a claimant has been induced by a fraudulent misrepresentation to buy a property, the following principles apply to the assessment of damages:
- 27.1 the defendant is bound to make reparation for all damage directly flowing from the transaction;
 - 27.2 although such damage need not be foreseeable, it must have been directly caused by the transaction;
 - 27.3 the claimant is entitled to recover as damages the full price paid by him, but he must give credit for all benefits which he received as a result of the transaction;
 - 27.4 in general, but not universally, such benefits include the market value of the property acquired on the date of completion;
 - 27.5 examples of where the general rule does not apply are where the misrepresentation has continued to operate after completion, or where the fraud means that the claimant is locked into the property;
 - 27.6 the claimant is entitled to recover consequential losses caused by the transaction;
 - 27.7 the claimant is, however, not entitled to recover loss which, once he had discovered the misrepresentation, he could, by taking reasonable steps, have avoided.⁵²
28. So, on the sale of a leasehold flat in 1984, in which the misrepresentation was that the annual service charge was said not to exceed £250 for the first year, but where in fact the correct estimate was £625 and the actual service charge £800 (62 years of the term remaining), damages were assessed on the basis of the difference in value between the flat on the footing of a service charge of £250

⁵¹*Royscott Trust v Rogerson* [1991] 2 QB 297.

⁵²*Smith New Court Securities v Citibank NA* [1997] AC 254.

and one of £625. This was accepted to be £3,000.⁵³ In a case in which the misrepresentation was that a house was connected to mains drainage, whereas in fact it shared a cesspool with an adjoining house on whose land it was situated,⁵⁴ the correct measure of damage was the difference between the price paid under the contract and the actual value of the property at the time of completion. On the evidence, even with cesspool drainage, the property was worth what the purchasers paid for it, and no damages were payable. Where the misrepresentation related to the availability of documents which would have shown what rights to light and air were enjoyed over the property by adjoining properties, extra costs of redesigning and building the residential block so as to take account of such rights of light and air were in principle recoverable as damages in addition to the difference between the price paid and market value.⁵⁵ In *Hussey v Eels*⁵⁶, the difference in value between the property as represented (free from subsidence) and as it was in fact as at completion (subject to subsidence and in need of underpinning) was £17,000 was awarded as damages; it was held irrelevant that, more than 2 years later, the claimants had been able to sell the house with the benefit of planning permission at a figure which in fact wiped out the loss. In cases of fraudulent misrepresentation, it is clear that, in some cases, consequential loss in the form of falls in the market value of the property after its acquisition are recoverable, but the House of Lords⁵⁷ specifically refused to comment on the correctness of dicta in *Royscot Trust v Rogerson* [1991] 2 QB 297 to the effect that the “plain words” of section 2 (1) of the Misrepresentation Act 1967 mean that, in a case of negligent misrepresentation under the Act, the measure of damages is the same as if there had been fraud.

⁵³*Heineman v Cooper* [1987] 2 EGLR 154.

⁵⁴*Strover v Harrington* [1988] Ch 390.

⁵⁵*Cemp Properties (UK) Ltd v Dentsply* [1989] 2 EGLR 196.

⁵⁶[1990] 2 QB 227.

⁵⁷In *Smith New Court Securities, supra*.

29. Examples of the more generous measure of damages allowed in fraud cases include (1) if the assets is “already flawed”, the possibility that the purchaser will have damages awarded not just on the basis of the difference in value of the asset as represented and as it in fact was on the date of the transaction, but also to include a further fall in its value by the time the fraud was discovered, at least if the purchaser has been “locked into” the transaction. This would be the case if the purchaser had intended to retain the asset and it was not feasible to resell the asset.⁵⁸ (2) Reduction in value due to fall in the market. Such loss was allowed in *Downs v Chappell*⁵⁹ but the broad test enunciated by Hobhouse LJ was disapproved by the House of Lords in *Smith New Court Securities*.⁶⁰

Non-disclosure

30. A contract for the sale of an interest in land contains (save insofar as otherwise expressly provided) an implied term that the vendor is selling the interest free from incumbrances. In order for the vendor not to put himself in breach of that term, he will need to disclose any incumbrances which are not patent or obvious⁶¹, but which are latent. Thus, the position, under an open contract, is that the *caveat emptor* rule applies to the extent that there is not a general duty of disclosure of all defects, latent and patent; but the vendor is obliged to disclose latent defects.
31. The Standard Conditions, 4th edn., provide:
- “3.1.1 The seller is selling the property free from incumbrances, other than those mentioned in Condition 3.1.2.
- 3.1.2 The incumbrances subject to which the property is sold are:

⁵⁸*Smith New Court Securities*, above.

⁵⁹[1997] 1 WLR 426

⁶⁰[1997] AC 254.

⁶¹“.. a defect which arises either to the eye, or by necessary implication from something which is visible to the eye ...” *Yandle & Sons v Sutton* [1922] 2 Ch 199.

- (a) Those specified in the contract;
- (b) Those discoverable by inspection before the contract;
- (c) Those the seller does not and could not reasonably know about;
and
- (d) Entries made before the date of the contract in any public register except those maintained by HM Land Registry or its Land Charges Department or by Companies House;
- (e) public requirements.

Standard Condition 3.1.2 (c) thus requires the vendor to take reasonable steps to acquaint himself with the incumbrances affecting the property.

Latent and patent defects

32. Since the test for patent defects extends to defects which are a necessary consequence of something which is patent to the eye,⁶² but not matters which might reasonably be inferred from inspection, the vendor ought to make clear if an apparent, and little-used right of way over the property is in fact a *public* right of way.⁶³ As far as other occupiers of the land are concerned, who may be anything from tenants under leases to licensees or even trespassers, the vendor ought to disclose the nature (if any) of the occupier's interest, and the rights and interests of an occupier should not constitute patent defects unless the purchaser has actual knowledge of them. As between the vendor and the purchaser, the purchaser is in a weaker position to obtain reliable replies from the occupier than the vendor.

The kinds of matters which vendors ought to disclose

33. First, matters which detract from the vendor's right to convey the title he is selling. These will normally emerge on the investigation of title. Examples include title depending on adverse possession, or a failure to have complied with the overreaching machinery so as to overreach beneficial interests.

⁶²*Yandle & Sons v Sutton* [1922] 2 Ch 199.

⁶³*Ibid.*

34. Second, incumbrances subject to which the vendor will convey: easements, tenancies, restrictive covenant which will bind the purchaser, and certain kinds of overriding interests.
35. In the case of the grant or transfer of leases, unusual or onerous covenants.
36. Not, however, defects in quality.⁶⁴

Disclosure

37. If made in the contract, it is clearly up to the purchaser to take advice before signing. If made by referring to documents which the purchaser can inspect before signing the contract, then the test is whether an ordinary purchaser would understand the difficulty. It is not sufficient that “a trained equity conveyancer, reading it, would know, after he had put on a wet towel and consulted all the works available, precisely and exactly what the trouble was.”⁶⁵

Remedies of the purchaser

38. If the matter not disclosed is substantial, the purchaser can elect to rescind, and the vendor will not obtain an order for specific performance; the purchaser may elect to complete but with an abatement of the purchase price. If the matter not disclosed is not substantial, the purchaser can be compelled to complete but only at an abated price to reflect the loss. The purchaser must seek his remedy before completion because, unless the contract provides for non-merger in the transfer, the contractual rights will merge on completion into the transfer.

⁶⁴Such as stigma attaching to a property in which a murder was committed: *Sykes v Taylor-Rose* [2004] EWCA Civ 299. There are US authorities to the contrary in the case of an allegedly haunted house, but these are not thought to be reliable.

⁶⁵*Faruqi v English Real Estates* [1979] 1 WLR 963.