held that there were in fact two contracts (this difference in analysis only seems to matter where there is some legal requirement that the contract should be in writing or where there have been attempts to transfer the rights of one of the parties and it may be arguable that the rights under the written contract may be transferred independently of a separate collateral contract).

8–08 It can be seen that the decision in the *Evans v Andrea Merzario* case is very far reaching. In effect, all the transactions between the parties were subject to the oral undertaking given by the representative in his 1967 visit, even years later when all the relevant personnel in the two companies concerned might well have changed. From the point of view of the defendants, this is not at all an attractive result. In practice, modern standard written contracts often contain clauses designed to reduce the possibility of this kind of reasoning by providing expressly that the written contract is the whole of the contract between the parties and that all previous negotiations are not binding unless expressly incorporated into the contract. Such 'merger' or 'whole contract' clauses are very common, but their legal effect is not wholly clear.[8] It would probably be imprudent of sellers to assume that the presence of such a clause in their standard written terms would always prevent them from being bound by an oral statement made by one of their sales representatives.

LIABILITY FOR MISREPRESENTATION

8–09 Where the seller has made statements about the goods but the court has held that these statements are not terms of the contract, it might be thought that this was the end of the matter. However, it is quite clear that this is not the case. Some such statements will give rise to liability in misrepresentation.

What is a misrepresentation?

8–10 Basically, a misrepresentation is a statement of a fact made by one party to the contract to the other party before the contract is made which induces that other party to enter into the contract. So, the statement in *Oscar Chess v Williams* that the car was a 1948 Morris was, even if it was not a term of the contract, undoubtedly a misrepresentation.

8 See Furmston (ed), *Butterworth's Law of Contract*, 1999, London: Butterworths, para 3.7.

It should be noted, however, that not all of the terms of a contract are concerned with making statements of fact. Many terms contain promises as to future conduct, for example, that we will deliver the goods next week. In principle, a promise to deliver goods next week is not capable of being a misrepresentation because it is not a statement of fact. For such a promise to give rise to liability, it must be a term of the contract. This principle is well established but it is subject to one very important qualification. Hidden within many statements which look like statements of intention or opinion or undertakings as to the future there may be a statement of fact. This is because, as was said by Bowen LJ in *Edgington v Fitzmaurice* (1885),[9] 'the state of a man's mind is as much a fact as the state of his digestion'. The application of this famous aphorism is well illustrated by that case in which a company issued a prospectus inviting members of the public to lend money to it and stating that the money would be employed so as to improve the buildings and extend the business. In fact, the directors intended to spend the loan on discharging certain existing liabilities. It was held that the company had not contracted to spend the money on improving the buildings and extending the business but there had been a misrepresentation of fact because what the intention of the company was at the time of the prospectus was a question of fact. If the directors had in fact intended to spend the money on improving the buildings and extending the business and had later changed their minds, then there would have been no liability in misrepresentation since there would have been no misstatement about the intention of the company at the time of the loan. On the other hand, of course, if the directors had contracted that the money would be spent in this way, they would have broken the contract if they had later changed their minds.

8–11 In the same way, a statement of opinion is a statement of fact about what one's opinion currently is. So, if, in *Oscar v Williams*, the seller had said that he thought that the car was a 1948 Morris, he would not have been misrepresenting his state of mind since he did indeed think that it was. But, if this had not in fact been his opinion, then he would have been liable. So a car salesperson who is asked how many miles a car does to the gallon and says 'I don't know but I think about 40' when, in fact, he or she believes the mileage per gallon to be no better than 30 is guilty of misrepresenting his or her state of mind. Furthermore, courts have been prepared to hold that where people who state an opinion look as if they know what they are talking about, they may implicitly represent not only that they hold the opinion but that they know some facts upon which the opinion could reasonably be based. So, even if the car salesperson believes that the car will do 40 miles to the gallon, this

9 (1885) 29 Ch D 459.

may be a misrepresentation if he or she has never read any investigations. This is certainly the case where sales representatives are selling a particular brand of new car about which the customer could reasonably expect them to be well informed.

Sales representatives have a tendency to make eulogistic statements about the goods which they are trying to sell. Historically, English law has recognised that not all such eulogistic statements should be treated as giving rise to liability on the grounds that no reasonable man would take them seriously. It is probably fair to say, however, that standards have risen in this area and that courts are significantly more likely today to hold that a statement is either a term or a misrepresentation. This will certainly be the case with eulogistic statements which purport to be backed up by facts and figures.

In order to create liability, it is necessary to show not only that there has been a misrepresentation but that the other party to the contract entered into the contract because of the misrepresentation. So, in a number of 19th century cases concerning flotation of companies, it was shown that there were fraudulent statements in the prospectus but it was also shown that some people bought shares in the company without ever having seen the prospectus and were ignorant of its contents. It was held that such a person could not rely on the undoubted misrepresentation in the prospectus. Even where one party knows there is misrepresentation, he or she may not have entered into the contract because of it but may have relied on his or her own judgment or indeed known that the statement was untrue. On the other hand, it is not necessary to show that the misrepresentation was the only reason for entering into the contract. It would be sufficient to show that the misrepresentation was a significant reason for entering into the contract. Of course, people often enter into contracts for a combination of reasons and provided that one of the reasons is the misrepresentation this will be quite sufficient.

Types of misrepresentation

8–12 Originally, misrepresentation created liability only where it was fraudulent; that is, where the person making the statement did not honestly believe that it was true. During the 19th century, there was some vacillation of judicial opinion about the precise definition of fraud, which was promoted by a significantly wider definition of fraud adopted by the Court of Chancery. The narrow common law definition was applied by the House of Lords in the famous case of *Derry v Peek* (1889).[10] In this case, a company applied for a special Act of Parliament authorising it to run trams in Plymouth. The Act passed provided that

10 (1889) 14 App Cas 337.

the trams might be animal powered or, if the consent of the Board of Trade was obtained, steam or mechanically powered. The directors persuaded themselves that, since earlier plans had been shown to the Board of Trade without apparent objection the requirement of Board of Trade, consent was a formality and issued a prospectus saying that the company had the right to use steam power. In fact, the Board of Trade refused to give consent and the company was, in due course, wound up. The plaintiff, who had bought shares in the company, and of course suffered a loss, alleged that the directors had been fraudulent. The statement that the company was authorised to use steam power was clearly untrue but the House of Lords held that the directors were not fraudulent because they honestly believed the statement to be true. It is clear that on the facts this was a rather indulgent view since it might well have been said that the directors knew that what they said was untrue but hoped and believed that it would soon become true. However, on the basis that the directors, however foolishly and carelessly, believed their statement, the House of Lords had no difficulty in affirming that they could not be liable for fraud. To establish liability in fraud, it had to be shown that the person making the statement knew that it was untrue or at least did not care whether it was true or false.

8–13 *Derry v Peek* is still a leading decision as a definition of fraud. However, for 75 years after the decision, it was treated not only as deciding that the directors were not fraudulent but that no liability at all should attach in circumstances of this kind. In fact, there was an immediate statutory amendment to the decision but it was limited to the special case of share prospectuses and it was not until the decision of the House of Lords in 1963 in *Hedley Byrne v Heller* (1964)[11] that it was established that, in principle, it was possible for a careless statement made by one person and relied on by another, causing that other to suffer financial loss, to give rise to liability. The precise limits of the decision in *Hedley Byrne* are still being worked out by the courts and it is clear that the statement has to be not only careless but made in circumstances in which the defendant owed a duty of care to the plaintiff. This involves consideration of such factors as whether the defendant should have contemplated that the plaintiff would have relied on him or her; and whether the plaintiff did in fact rely on the defendant, and whether in normal circumstances it was reasonable for him or her to have done so. What is clear is that there may be such a duty of care between one contracting party and another where, in the run-up to the contract, it is reasonable for that party to rely on advice which is given by the other. So, in *Esso Petroleum v Mardon* (1976),[12] the plaintiff let a filling station to the defendant on a three year

11 [1964] AC 465.
12 [1976] QB 801.

lease. In the negotiations representatives of the plaintiff had expressed the opinion that the filling station might be expected to sell 200,000 gallons a year. In fact, this was a careless overestimate which did not take into account the rather curious configuration of the pumps that was imposed by local planning restrictions. The defendant had no previous experience of running a filling station, though he was an experienced business man, and reasonably relied on the plaintiff's representatives who had many years' experience in the marketing of petrol. It was held that, although the lease, not surprisingly, contained no mention of the forecast, the plaintiff did owe a duty of care to the defendant because it knew that the defendant was relying on its expertise and the defendant was reasonable in so doing. So, the defendant's counterclaim to the plaintiff's action for arrears of rent, that he should recover damages for negligent misrepresentation was upheld. It should be emphasised that not every contract will give rise to liability in this way but there will be many contracts in which one party reasonably relies on the other's expertise and will have a damages action if the other party gives careless advice.

8–14 During the 1950s, it increasingly became felt that the combination of the rules about terms of the contract and misrepresentation was unsatisfactory. The question was referred to the Law Reform Committee and in its tenth report in 1962 that Committee recommended a change in the law so that damages could be given for negligent misrepresentation. This proposal was made before the decision of the House of Lords in *Hedley Byrne v Heller* and indeed implicitly assumed that the law would not be changed in the way that it was by that decision. In a rational world, it would have been appropriate to reconsider the Committee's report in the light of the decision in *Hedley Byrne v Heller* but instead the committee's report was made the basis of the Misrepresentation Act 1967.

Section 2(1) of that Act provides that:

> Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation is not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

The rule enacted by this sub-section significantly overlaps with the common law rule laid down in *Hedley Byrne v Heller* but it is not the same rule. The *Hedley Byrne* rule is wider in that it applies whether or not there is a contract between plaintiff and defendant. Indeed, many

of the cases under *Hedley Byrne* are of this kind. On the other hand, the Misrepresentation Act only applies where the result of the misrepresentation is that a contract is entered into between the person making the representation and the person to whom it is made. However, where the Act applies, it is more favourable to the plaintiff because, in effect, it provides for recovery of damages for negligent misrepresentation and puts on the person making the misrepresentation the burden of proving that it was not negligent. Furthermore, the statutory provision establishes liability for negligent misrepresentation in relation to all contracts, whereas the rule in *Hedley Byrne* would only apply to those contracts where one contracting party owes the other a duty of care in relation to statements made during negotiations, as in *Esso v Mardon*.

Of course, there will remain cases in which the person making the misrepresentation is neither fraudulent nor negligent in the *Hedley Byrne* sense and can succeed in rebutting the presumption of negligence implicit in the 1967 Act. The seller in *Oscar Chess v Williams* would be an example of such a case. Such a case may be described as one of innocent misrepresentation (though we should note that, before 1963, that term was commonly applied to all cases of misrepresentation which were not fraudulent in the *Derry v Peek* sense).

Remedies for misrepresentation

8–15 A plaintiff who has entered into a contract as a result of a misrepresentation by the defendant can recover damages either by showing that the defendant was fraudulent as in *Derry v Peek*, or by showing that the defendant owed a duty of care and was in breach of that duty as in *Esso v Mardon* or if the defendant is unable to show that it was not negligent in making the misrepresentation. A plaintiff, if he or she wishes, can rely on all three of these theories. In practice, prudent plaintiffs do not usually make allegations of fraud unless they have a very strong case since English courts traditionally are reluctant to stigmatise defendants as fraudulent.

The possibility of recovering damages for negligent as well as fraudulent misrepresentation substantially reduces the importance of deciding whether the statement of fact is a contractual term or a misrepresentation although it does not totally remove the significance of this distinction. It should be noted, however, that it does not follow that the same amount of damages can be recovered in a contract action as in an action for misrepresentation. The possible distinctions can perhaps best be illustrated by adopting the facts of the well known case of *Leaf v International Galleries* (1950).[13] In this case, the plaintiff bought a

13 [1950] 2 KB 86.

painting from the defendant which the defendant incorrectly stated to have been painted by Constable. The plaintiff might have argued on these facts that it was a term of the contract that the painting was by Constable. If he could establish this, the plaintiff could have recovered whatever sum of money was necessary to enable him to obtain what he should have obtained under the contract, that is a genuine Constable. On the other hand, in an action for misrepresentation, which would be substantially a tortious action, he would recover sufficient damages to enable him to be restored to his original position before the contract. If the price which was paid was a standard market price for a painting by Constable of that kind, the two tests would reach substantially the same result. If, however, there was a significant gap between the price paid and the open market price it would make a difference which is adopted. So, in *Leaf*, the plaintiff had only paid £80 for the painting and his maximum recovery in tort would therefore be £80, even assuming that the painting had actually got no value at all. On the other hand, it is likely that the open market price for the Constable, even in 1945, was several thousand pounds and in a contract action the plaintiff could expect to recover the difference between this and the value, if any, of the painting he actually received. This is of course a dramatic difference on the figures of the case. In practice, it is difficult to believe that someone who buys a painting for £80 can actually believe that the other party is contracting that it is a Constable because, at least in sale by a dealer where he was contracting that the painting was by Constable, he would be asking a price at the market level of guaranteed Constables.

8–16 Alternatively, the plaintiff may seek to rescind the contract on the grounds of the defendant's misrepresentation. During the course of the 19th century, it became established in the Court of Chancery that rescission was available as a general remedy to parties who had entered into contracts as a result of misrepresentation, even if the misrepresentation was entirely innocent. This is still the case. However, although rescission is a remedy easily granted where the contract has been made but not performed, it can have dramatic results where the contract has been carried out because it involves unscrambling the omelette. Section 2(2) of the Misrepresentation Act 1967 has, therefore, conferred on the court a general power to award damages instead of allowing rescission. The right to rescission may also be lost by the operation of what are often called the bars to rescission. This, again, is a reflection of the fact that rescission is a potentially drastic remedy and so plaintiffs have a choice whether to rescind or not and if they choose not to rescind then they are said to affirm the contract and thereby to lose the right. There is some theoretical discussion as to whether one could lose this right simply by doing nothing. The practical answer is that plaintiffs who know they have the right to rescind are very ill-advised not to make

a prompt decision. Rescission is also impossible where the plaintiff cannot restore in substance what he or she has received under the contract as the subject matter of the contract has been consumed or used, so that the court may say that it is impossible to unscramble the omelette. Courts sometimes take a broad view on this question, particularly where the defendant is fraudulent. So, if the defendant sells a business to the plaintiff on the basis of fraudulent representations as to the value of the business, the defendant may well not be able to resist rescission by arguing that the business being offered back is not the one that he or she sold. To require exact restoration in such cases would obviously be impractical. The principle that the contract is capable of being affirmed and is not rescinded until the plaintiff chooses to do so is often expressed by saying that the contract is voidable. This means that the contract is capable of having legal effects up to the moment that it is avoided. A very important consequence of this is that rights may be conferred on third parties and that the recognition of those rights prevent rescission. Classic examples are in the case of fraudulent buyers. Suppose a buyer obtains goods from a seller by a fraudulent representation, for instance, that his or her cheque is of value, and then sells the goods onto a third party before the seller discovers the fraud. This can undoubtedly create rights in the third party which cannot be defeated by rescission. This matter has already been considered in Chapter 6.

IMPLIED TERMS

8–17 The implied terms laid down for contracts of Sale of Goods are contained in ss 13, 14 and 15 of the Sale of Goods Act 1979. These provisions are undoubtedly of central importance and they are amongst the most commonly quoted and relied on provisions in the whole Act. Similar provisions have been laid down by statute for contracts of hire purchase starting with the Hire Purchase Act 1938. Much more recently, general provisions applying to all contracts under which property in goods is transferred other than contracts of sale and hire purchase have been laid down by the Supply of Goods and Services Act 1982. This Act also lays down very similar provisions in relation to contracts of hire. So we may now say that in any contract under which property or possession in goods is transferred there will be a core of basic obligations, subject only to the ability of the seller to qualify or exclude his or her liability, which will be discussed in Chapter 9.

Obligations of the seller as to description

8–18 Section 13 of the Sale of Goods Act 1979 provides:

> (1) Where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description.

> (1A) As regards England and Wales and Northern Ireland, the term implied by sub-s (1) above is a condition.
> (2) If the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
> (3) A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.'

The first thing to note about s 13 is that, unlike s 14, it applies to contracts for the sale of goods of all kinds and is not limited to the case of the seller who sells goods in the course of a business. So, even a private seller is bound by this section. Secondly, we should note that the section involves a paradox. If one contracts to sell a horse and delivers a cow, one might say that the cow does not fit the description of the horse contained in the contract and s 13 applies. But, one might also say that the failure to deliver a horse is a breach of an express term of the contract. This was recognised in *Andrews Brothers v Singer* (1934).[14] In this case, the seller contracted to deliver a new Singer car under a standard printed form in which the seller sought to exclude liability for implied terms. The effectiveness of such an exclusion raises important questions which are discussed in Chapter 9. The important point for present purposes is to note that the Court of Appeal said that in any case the exclusion of implied terms was ineffective to exclude the seller's obligation to deliver a 'new Singer car' because that was an express term of the contract. The section obviously assumes that there will be cases in which a description is attached to the goods which is not an express term but becomes an implied condition by virtue of s 13(1). This raises two central questions. The first is *what is a sale by description* and the second is *what words are to be treated as forming part of the description*.

What is a sale by description? The Act contains no definition of a sale by description. In the 19th century, it was often assumed that sales by description were to be contrasted with sales of specific goods. However, this distinction has not been maintained in the post-Act law. So, in *Varley v Whipp* (1900),[15] it was held that a contract to buy a specific second hand reaping machine which was said to have been 'new the previous year' and very little used was a sale by description. In that case, though the goods were specific, they were not present before the parties at the time that the contract was made; however, in *Grant v Australian Knitting Mills* (1936),[16] the Privy Council treated the woollen undergarments which were the subject of the action as having been

14 [1934] 1 KB 17.
15 [1900] 1 QB 513.
16 [1936] AC 85.

sold by description, even though they were before the parties at the time of the contract. At the time of that case, what is now s 13(3) of the Act was not a part of the Act but it clearly assumes that a contract can be a sale by description despite being a contract in which the goods are specific and effectively chosen by the buyer. So, in a modern supermarket, most of the goods have words of description on the packaging and such contracts are clearly sales by description. The effect of this development is that virtually all contracts of sale are contracts for sale by description except for the very limited group of cases where the contract is not only for the sale of specific goods but no words of description are attached to the goods.

8–19 This makes the second question, *what is the description,* very important. It might be the law that if the contract is one of sale by description and words of description are used then they inevitably form part of the description. This would have dramatic practical effects. It would mean that the decision in *Oscar Chess v Williams* was wrong because the statement that the car was a 1948 Morris should have been treated as part of the description of the car. Indeed, this was precisely the result reached in a rather similar case, *Beale v Taylor* (1967),[17] where the seller advertised that he had a 1961 Triumph Herald for sale. In fact, the car was an amalgam of two Triumph Heralds, the front and back of which had been put together. Only half of the car was of the 1961 vintage and it was held that the seller was liable because the car did not correspond with the description (the seller in this case was a private and not a commercial seller and so was not bound by s 14 of the Act but, as noted above, was subject to s 13).

However, it is clear that not all words which could be regarded as words of description will be treated as part of the description of the goods for the purpose of s 13. An important case is *Ashington Piggeries v Christopher Hill* (1972).[18] In this case, the plaintiff was in the business of compounding animal feedstuffs according to formulae provided by its customers. It was invited by the defendant to compound a vitamin fortified mink food in accordance with a formula produced by the defendant. The plaintiff made it clear that it was not expert in feeding mink but suggested substitution of herring meal for one of the ingredients in the defendant's formula. Business continued on this footing for about 12 months and the plaintiff then began to use herring meal which it bought from a supplier under a contract which stated that it was 'fair average quality of the season' and was to be taken 'with all faults and defects…at a valuation'. In fact, unknown to any of the parties, this meal contained a chemical produced by chemical

17 [1967] 3 All ER 253; [1967] 1 WLR 1193.
18 [1972] AC 441.

reaction which was potentially harmful to all animals and particularly to mink. These facts raised the questions of whether the plaintiff was liable to the defendant and whether the supplier was liable to the plaintiff. The House of Lords held that as between the plaintiff and defendant it was not part of the description that the goods should be suitable for feeding mink. As between the plaintiff and its supplier, the House of Lords held that the goods did comply with the description 'Norwegian herring meal' which was part of the description but it was not part of the description that the goods should be 'fair average quality of the season'. Of course, the goods could not have been correctly described as 'meal' if there was no animal to which they could be safely fed. Why were the words 'fair average quality of the season' not part of the contractual description? The answer given by the House of Lords was that these words were not needed to identify the goods.

8–20 In *Harlingdon and Leinster Enterprises v Christopher Hull Fine Art* (1989),[19] both the defendant and the plaintiff were art dealers. In 1984, the defendant was asked to sell two oil paintings which had been described in a 1980 auction catalogue as being by Gabriele Munter, an artist of the German expressionist school. The defendant contacted the plaintiff amongst others and an employee of the plaintiff visited the defendant's gallery. Mr Hull, for the seller, made it clear that he was not an expert in German expressionist paintings. The plaintiffs bought one of the paintings for £6,000 without making any more detailed inquiries about it. The invoice described the painting as being by Munter. In due course, it was discovered to be a forgery. The majority of the Court of Appeal held that it had not been a sale *by* description. The principal test relied on by the Court of Appeal was that of reliance. It was pointed out that paintings are often sold accompanied by views as to their provenance. These statements may run the whole gamut of possibilities from a binding undertaking that the painting is by a particular artist to statements that the painting is in a particular style. Successful artists are of course often copied by contemporaries, associates and pupils. It would be odd if the legal effect of every statement about the identity of the artist was treated in the same way. This is certainly not how business is done since much higher prices are paid where the seller is guaranteeing the attribution and the Court of Appeal therefore argued that it makes much better sense to ask whether the buyer has relied on the seller's statement before deciding to treat the statement as a part of the description. On any view, this case is very close to the line. It appears plausibly arguable that the majority did not give enough weight to the wording of the invoice or

19 [1991] 1 QB 564; [1990] 1 All ER 737.