even a 'face to face' contract will be regarded as void for mistake, as *Ingram* v *Little* (1961) (see below) shows.

Lewis v *Averay*, 1971 – Mistake as to identity when the parties are face to face (120)
Ingram v *Little*, 1961 – Another approach (121)

Effect of unilateral mistake in equity

If the claimant is asking for an equitable remedy, such as rescission of the contract or specific performance of it, then equitable principles will apply. As far as unilateral mistake is concerned, equity follows the principles of the common law and regards a contract affected by unilateral mistake as void and will therefore rescind it or refuse specific performance of it. Rectification of the contract is also available.

Webster v *Cecil*, 1861 – Unilateral mistake: the equitable approach (122)

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Bilateral identical (or common) mistake

This occurs where both parties are mistaken and each makes the same mistake. In other words it is a *shared mistake*. There is no general rule that common mistake affects a contract and in practice only common mistakes as to the existence of the subject matter of the contract or where the subject matter of the contract already belongs to the buyer will make the contract void at common law. The principles applied are considered below.

(a) Cases of *res extincta*. Here there is a common mistake as to the existence of the subject matter of the contract. Thus, if S agrees to sell his car to B and unknown to both the car had at the time of the sale been destroyed by fire, then the contract will be void because A has innocently undertaken an obligation which he cannot possibly fulfil. It should be noted that the goods may actually exist but the rule of *res extincta* applies if they are not in the condition envisaged by the contract.

(b) Cases of *res sua*. These occur where a person makes a contract about something which already belongs to him. Such a contract is void at common law.

Couturier v *Hastie*, 1856 – An example of *res extincta* (123)
Cochrane v *Willis*, 1865 – *Res sua* illustrated (124)

(c) Other cases – mistakes as to quality. These occur when the two parties have reached agreement but have made an identical mistake as to some fact concerning the quality of the subject matter of the contract. Suppose, for example, that X sells a particular drawing to Y for £5,000 and all the usual elements of agreement are present, including offer and acceptance and consideration, and the agreement concerns an identified article. Nevertheless, if both X and Y think that the drawing is by a well-known Victorian artist when it is in fact only a copy worth £25, then the agreement is made in circumstances of common mistake.

At common law a mistake of the kind outlined above has no effect on the contract and the parties would be bound in the absence of fraud or misrepresentation. The case law shows how reluctant the courts have been to establish a general rule of common mistake.

> ***Bell*** v ***Lever Bros Ltd***, 1932 – Mistakes as to quality (**125**)
> ***Leaf*** v ***International Galleries***, 1950 – Quality mistakes: a further illustration (**126**)

Effect of identity bilateral (or common) mistake in equity

The position in equity is as follows.

(a) Cases of *res extincta* and *res sua*. Equity treats these in the same way as the common law, regarding the agreement as void. The equitable remedy of specific performance is not available for such an agreement which may also be rescinded.

(b) Other cases. Equity could apparently regard an agreement affected by common mistake as voidable even though the case was not one of *res extincta* or *res sua*. The above statement derives from the decision of Lord Denning in *Solle* v *Butcher* [1950] 1 KB 671. In the case Lord Denning advanced the view that a contract affected by common mistake as to quality, although unaffected at common law, could be rescinded in equity. The case concerned the lease of a flat where the parties had assumed that the rent was controlled to a maximum by rent control legislation whereas by reason of improvements that the landlord had made to the premises a higher rent could have been charged. Lord Denning said that although the common law would ignore the common mistake as to quality that the flat had a controlled rent thus leaving the fortunate tenant to pay only the controlled rent equity could rescind the lease and in effect put the tenant out unless the parties could renegotiate the terms. This development was brought to an end by the House of Lords in *Great Peace Shipping Ltd* (see below).

> ***Cooper*** v ***Phibbs***, 1867 – Equity and *res sua* (**127**)
> ***Great Peace Shipping Ltd*** v ***Tsavliris Salvage (International) Ltd***, 2002 – Mistake as to quality, no general power of rescission (**128**)

(c) Rectification. If the parties are agreed on the terms of their contract but because, for example, of drafting or typing errors certain terms are set out incorrectly, the court may order equitable rectification of the contract so that it properly represents what the parties agreed. Thus, if A orally agrees to give B a lease of premises for 99 years and in the subsequent written contract the term is expressed as 90 years by mistake, then if A will not co-operate to change the lease, B may ask the court to rectify it by substituting a term of 99 years for 90 years. In order to obtain rectification it must be proved:

(i) that there was complete agreement on all the terms of the contract or at least continuing intention to include certain terms in it which in the event were not included. It is not necessary to show that the term was intended to be legally binding prior to being written down;
(ii) that the agreement continued unchanged until it was reduced into writing. If the parties disputed the terms of the agreement, the written contract may be taken to represent their final position;
(iii) that the writing does not express what the parties had agreed. If it does, then there can be no rectification.

Rectification is available for both common and unilateral mistake.

Joscelyne v *Nissen*, 1970 – Rectification: no need for previous binding agreement (**129**)

Frederick Rose (London) Ltd v *William Pim & Co Ltd*, 1953 – Rectification where writing is what the parties agreed (**130**)

Thomas Bates & Sons Ltd v *Wyndham's (Lingerie) Ltd*, 1981 – Rectification available for unilateral mistake (**131**)

Non-identical bilateral (or mutual) mistake

In a situation where A intends to buy real pearls but the seller intends to sell imitation pearls, and in the absence of misrepresentation by the seller, there is a bilateral mistake that is non-identical. It will be remembered that in the previous category the mistake was bilateral but both parties had made an identical mistake. Here we have what may be described as a *mutual misunderstanding*. Confusion of this non-identical bilateral kind generally exists in the mind of one party only and may therefore have no effect on the contract (see below).

Effect of non-identical bilateral (or mutual) mistake at common law

The contract is not necessarily void because the court will try to find the 'sense of the promise'. This usually occurs where, although the parties are at cross purposes, the contract actually *identifies* a credible (or believable) agreement.

If the parties are at cross purposes and the contract does *not identify* a credible (or believable) agreement, it is void.

The basis of the 'sense of the promise' rule is that the court does not ascertain contractual intention from what is in the minds of the parties, i.e. *a subjective intent*, because the parties are confused. Instead the court decides contractual intention in an *objective way* by looking at the parties dealings to see if these identify a contract. If they do, the court will enforce it; if not, the transaction is void.

Effect of non-identical bilateral (or mutual) mistake in equity

Equity also tries to find the sense of the promise as identified by the contract, thus following the law. However, equitable remedies are discretionary and even where the sense of the promise as identified by the contract can be ascertained equity will not necessarily grant specific performance if it would cause hardship to the defendant.

Wood v *Scarth*, 1858 – The sense of the promise: the hardship rule (**132**)

Raffles v *Wichelhaus*, 1864 – Where there is no sense of the promise (**133**)

Trading electronically

Mistake is a matter that should concern online traders. Suppose purchasers wanting to buy advertised goods of one company through its website visit the website of a company with a similar name in a similar line of business. Would such purchasers be entitled to return the goods or reject the services and obtain a refund once the mistake was realised? A mistake as to identity is fundamental as we have seen and may negate the consent of the purchasers.

13

REALITY OF CONSENT II

In this chapter we continue a study of further situations in which a contract can be affected by lack of proper consent. Topics considered to complete the study of consent problems are misrepresentation, duress, undue influence, economic duress and unconscionable bargains.

Misrepresentation

Misrepresentation is an expression used to describe a situation in which there is no genuineness of consent to a contract by one of the parties. The effect of misrepresentation on a contract is less serious than that of mistake because the contract becomes *voidable and not void*. This means that the party misled can ask the court to rescind the contract, i.e. to put the parties back into the positions they held before the contract was made. Thus in a sale of goods the goods would be returned to the seller and the money to the buyer.

However, the effect on third parties is more fundamental because if A sells goods to B under circumstances of misrepresentation by B and before A has a chance to rescind the contract B sells the goods to C, who takes them for value without notice of the misrepresentation, C has a good title and A cannot recover the goods or sue him in conversion. His remedy is against B and the type of remedy available will depend upon the nature of B's misrepresentation, i.e. whether it was fraudulent, negligent or innocent.

Meaning of representation

A representation is an inducement only and its effect is to lead the other party merely to make the contract. A representation must be a statement of some specific existing and verifiable fact or past event. It becomes a misrepresentation, of course, when it is false.

However, a statement which is not entirely false but a half-truth may be a misrepresentation. Thus in *Dimmock* v *Hallett* (1886) LR 2 Ch App 21 it was held that a statement that a property was let, and therefore producing income, was a misrepresentation because it was not revealed that the tenants had given notice (see also *Curtis* v *Chemical Cleaning and Dyeing Co* (1952) in Chapter 15).

There are three ingredients: (1) a statement, (2) of specific existing and verifiable fact or past event, and (3) that the statement induces the contract.

There must be a statement

In consequence, silence or non-disclosure has no effect except in the following circumstances.

(a) Failure to disclose a change in circumstances. Where the statement was true when made but became false before the contract was made there is a duty on the party making the statement to disclose the change and if he does not do so his silence can amount to an actionable misrepresentation.

(b) Where the contract is *uberrimae fidei* (of utmost good faith), such as a contract of insurance (see further p 324).

(c) Where there is a confidential or fiduciary relationship between the parties, as where they are solicitor and client. Here the equitable doctrine of constructive fraud may apply to render the contract voidable.

Although this branch of the law is closely akin to undue influence, which will be considered later, there is a difference in the sense that in undue influence the person with special influence, such as a solicitor over his client, is often the prime mover in seeking the contract. Constructive fraud, however, could apply where the client was the prime mover in seeking a contract with his solicitor. In such a case if the solicitor remains silent as regards facts within his knowledge material, say, to the contract price, then the client could rescind the contract for constructive fraud.

(d) Where statute requires disclosure, as does the Financial Services and Markets Act 2000 under which a number of specified particulars must be disclosed in an advertisement/prospectus issued by a company to invite the public to subscribe for shares or debentures. The particulars must give all such information as investors and their professional advisers would reasonably require and reasonably expect to find in the advertisement/prospectus for the purpose of making an informed assessment as to whether to buy the securities.

The provisions of the Financial Services and Markets Act 2000 apply to companies which have a full listing on the Stock Exchange. Similar disclosures are required in relation to prospectuses that are used for issues of unlisted securities that are quoted on the Alternative Investment Market. These provisions are contained in the Offers of Securities Regulations 1995 and 1999.

(e) In cases of concealed fraud, following the case of *Gordon* v *Selico Co Ltd* (1986) *The Times*, 26 February. In that case a flat in a block of flats which had recently been converted by a developer was taken by the claimant on a 99-year lease. Soon after he moved in dry rot was discovered. Goulding, J, who was later upheld by the Court of Appeal, decided that deliberate concealment of the dry rot by the developer could amount to fraudulent misrepresentation whereupon damages were awarded to the claimant. Silence can, therefore, amount to misrepresentation in the case of concealed fraud.

With v *O'Flanagan*, 1936 – Where circumstances change (**134**)

Specific existing and verifiable fact or past event

The representation must be a statement of some specific, existing and verifiable fact or past event, and in consequence the following are excluded.

(a) Statements of law. Everyone is presumed to know the law which is equally accessible to both parties and on which they should seek advice and not rely on the statements of the other party. Thus, if A has allowed B, a tradesman, to have goods on credit and C has agreed orally to indemnify A in respect of the transaction, then if A enters into a second contract with B under which A is to receive two-thirds of the price of the goods from B in full settlement on B's representation that C's indemnity is unenforceable at law because it is not in writing, then the second contract would be good because A cannot deny that he knows the law because of the maxim 'ignorance of the law is no excuse'.

(b) Statements as to future conduct or intention. These are not actionable, though if the person who makes the statement has no intention of carrying it out, it may be regarded as a representation of fact, i.e. a misrepresentation of what is really in the mind of the maker of the statement.

(c) Statements of opinion. Again, these are not normally actionable unless it can be shown that the person making the statement held no such opinion whereupon the statement may be considered in law to be a misstatement of an existing fact as to what was in the mind of the maker of the statement at the time. However, in *Bissett* v *Wilkinson* [1927] AC 177 it was held that a vendor of land was not liable for stating that it could support 2,000 sheep, because he had no personal knowledge of the facts, the land having never been used for sheep farming. The buyer knew this so that it was understood by him that the seller could only be stating his opinion.

Nevertheless, the expression of an opinion may involve a statement of fact. Suppose A writes a reference for B to help B get a house to rent and A says to C, the prospective landlord: 'B is a very desirable tenant'. A is doing two things: first he is giving his opinion of B, but also he is making a statement of fact by saying that he *believes* B to be a very desirable tenant. If in fact therefore A actually believes B to be a bad tenant he is lying as to what is in his mind.

(d) Sales talk, advertising, 'puffing' (or what is called these days 'hype'). Not all statements in this area amount to representations. The law has always accepted that it is essential in business that a seller of goods or services should be allowed to make some statements about them in the course of dealing without necessarily being bound by everything he says. Thus, if a salesman confines himself to statements of opinion such as 'This is the finest floor polish in the world' or 'This is the best polish on the market', there is no misrepresentation. However, the nearer a salesman gets to a statement of specific verifiable fact, the greater the possibility that there may be an action for misrepresentation. Thus a statement such as 'This polish has as much wax in it as Snooks' wax polish' may well amount to a misrepresentation if the statement is not in fact true.

Edgington v *Fitzmaurice*, 1885 – Statements as to future conduct or intention (**135**)

Smith v *Land and House Property Corporation*, 1884 – Opinion may be construed as fact (**136**)

The statement must induce the contract

It must therefore:

(a) have been relied upon by the person claiming to have been misled who must not have relied on his own skill and judgment or some other statement.

Thus in *Attwood* v *Small* (1838) 6 Cl & Fin 232 the purchaser of a mine elected to verify exaggerated (but not fraudulent) statements of its earnings by commissioning a report from his agents. This failed to reveal the defects in the original statement and the purchaser bought the mine. It was later *held* that he could not rescind the contract because he had relied on the report, not on the statement. It should be noted that relief is not barred simply because there has been an unsuccessful attempt by the misled person to discover the truth where the misrepresentation was fraudulent (*Pearson* v *Dublin Corpn* [1907] AC 217);

(b) have been material in the sense that it affected the claimant's judgment;

(c) have been known to the claimant. The claimant must always be prepared to prove that an alleged misrepresentation had an effect on his mind, a task which he certainly cannot fulfil if he was never aware that it had been made.

Thus in *Re Northumberland and Durham District Banking Co, ex parte Bigge* (1858) 28 LJ Ch 50 a person who bought shares in a company asked to have the purchase rescinded because the company had published false reports as to its solvency. Although these reports were false, the claimant failed because, among other things, he was unable to show that he had read any of the reports or that anyone had told him what they contained;

(d) have been addressed to the person claiming to have been misled.

Peek v *Gurney*, 1873 – The statement must induce the contract: the common law approach (**137**)

Knowledge that statement is untrue

If the person to whom the false statement was made knew that it was untrue then he cannot sue in respect of it because he has not been misled. However, it is not an acceptable defence to an action for misrepresentation that the representee was given the means of discovering that the statement was untrue.

Redgrave v *Hurd*, 1881 – No need to check on a statement (**138**)

Did the statement influence the representee's decision?

The law requires that a misrepresentation must have operated on the mind of the representee. If it has not, as where the representee was not influenced by it, there is no claim.

Smith v *Chadwick*, 1884 – Was the statement material? (**139**)

Types of actionable misrepresentation and remedies in general

Innocent misrepresentation

A purely innocent misrepresentation is a false statement made by a person who had reasonable grounds to believe that the statement was true, not only when he made it but also at the time the contract was entered into. As regards reasonable grounds, the representer's best hope

of proving this will be to show that he himself had been induced to buy the goods by the same statement, particularly where he is not technically qualified to verify it further (see *Humming Bird Motors Ltd* v *Hobbs* (1986) and *Oscar Chess Ltd* v *Williams* (1957)). The party misled can ask the court to rescind the contract but has no right to ask for damages. However, the court may at its discretion award damages instead of rescission (Misrepresentation Act 1967, s 2(2)). Rescission in effect cancels the contract and the court may in some cases regard this as a drastic remedy, particularly where there has been misrepresentation on a trivial matter, such as the quality of the tyres on a car. Suppose the seller of a car in a private sale says: 'The previous owner fitted new tyres at 26,000 miles'. If that statement is false but the seller was told this by the previous owner, the court could award damages instead of rescission, thus leaving the contract intact but giving the party misled monetary compensation. Statements by dealers, however, are often taken to be terms of the contract (see Chapter 14).

There has been uncertainty as to whether damages could be awarded under s 2(2) of the Misrepresentation Act 1967 if the remedy of rescission was no longer available as where a third party had acquired rights in the subject matter of the contract. However, in *Thomas Witter* v *TBP Industries Ltd* [1996] 2 All ER 573 the High Court ruled that damages could be awarded under s 2(2), provided that the right to rescind had existed *at some time*. It was not necessary said the High Court for the right to exist at the time of the judgment. This seems a reasonable interpretation of the sub-section because the remedy of rescission is lost so quickly that it is unlikely to exist at the time of trial because of, among other things, the passage of time (see later in this chapter).

The same ruling was given again by the High Court in *Zanzibar* v *British Aerospace (Lancaster House) Ltd* (2000) *The Times*, 28 March and would seem to be firmly established.

Negligent misrepresentation

A negligent misrepresentation is a false statement made by a person who had no reasonable grounds for believing the statement to be true. The party misled may sue for rescission (see below) and/or damages, and the requirement to prove that the statement was not made negligently but that there were reasonable grounds for believing it to be true is on the maker of the statement (or representer) (Misrepresentation Act 1967, s 2(1)).

The sub-section recognises only a claim for damages and says nothing about rescission. However, in *Mapes* v *Jones* (1974) 232 EG 717 a property dealer contracted to lease a grocer's shop to the claimant for 21 years but in fact did not have sufficient interest in the property himself to grant such a lease, the maximum period available to him being 18 years. Despite constant requests, no lease was supplied as originally promised and the claimant shut the shop and elected to treat the contract as repudiated. Willis, J held that the claimant was entitled to rescission for misrepresentation under s 2(1) of the 1967 Act. He also found that the defendant's delay in completion was a breach of condition which *also* allowed the claimant to repudiate the contract. As we have seen, s 2 claims can extend to statements of opinion (see *BG plc* v *Nelson Group Services (Maintenance) Ltd* [2002] EWCA Civ 547.

Gosling v *Anderson*, 1972 – Negligent misrepresentation illustrated (**140**)

Fraudulent misrepresentation

A fraudulent misrepresentation is a false representation of a material fact made knowing it to be false, or believing it to be false, or recklessly not caring whether it be true or false.

Mere negligence is not enough. An element of dishonesty is required. For example, if Mr Tidbury in the *Gosling* case had *known* that there was no planning permission for the garage but had nevertheless gone on to state that there was, then the element of dishonesty would have been present and he would have been guilty of fraud. The party misled may sue for rescission and/or damages. As regards the action for damages, the claimant sues not on the contract but on the tort of deceit.

In this connection, it is worth noting that when a person is sued upon the tort of deceit he or she will not be able to defend the claim on the basis that although the contract was induced by deceit it would not have been if the claimant had done more checking and not been perhaps careless in accepting the fraudulent inducement. Why? – because the defence of contributory negligence does not apply where the claim is for fraud (see *Standard Chartered Bank* v *Pakistan National Shipping Corp (No 2)* [2002] 3 WLR 1547).

Derry v *Peek*, 1889 – Fraudulent misrepresentation defined (**141**)

Compensation under the Financial Services and Markets Act 2000

Under this Act, where the directors of a company with a full Stock Exchange listing publish an advertisement or prospectus containing false statements made innocently they may have to pay a form of damages called compensation.

This will occur where they have issued listing particulars or a prospectus that is inaccurate. In general terms, errors of omission or commission in listing particulars or a prospectus will render any party responsible such as the directors of the company liable for loss caused thereby to anyone acquiring the securities covered by the document.

Those responsible such as the directors can escape liability if they made such enquiries as were reasonable and reasonably believed that the statement was true when the document was submitted to the Financial Services Authority (as Listing Authority for the UK) for approval provided that at the time the securities were *subsequently* acquired:

- they continued in that belief;
- it was not reasonably practicable to bring the correction to the attention of those likely to acquire them;
- they had taken all reasonable steps to bring the correction to their attention; or
- they ought reasonably to be excused because they believed it when dealings commenced and now too much time has elapsed.

Where the statement is in a report by an expert such as an engineer or accountant the directors are not liable for it provided they had a reasonable belief in the competence of the expert.

Experts, such as accountants, are liable under the Act for false statements in their reports which are included in the listing particulars or prospectus. Again, the defence of lack of responsibility is available, as where the expert has not consented to the inclusion of his report in the prospectus. However, given that he accepts responsibility for the inclusion of his report, he has a defence if he can show that he had reasonable grounds for believing the statement to be true. Presumably, he could sustain this defence by showing, amongst other things, that the false statement came from an official document. Furthermore, whether or not a professional person has reasonable grounds will almost always depend upon the steps taken

to *verify* the statement. If these are reasonable the professional person will not be liable even if the statement is wrong.

Agent's breach of warranty of authority

Under the law of agency where an agent misrepresents himself as having authority he does not possess, the third party will not obtain a contract with the principal and if he suffers loss as a consequence he may sue the agent for breach of warranty of authority, the action being for damages and brought in *quasi-contract*. Quasi-contract is based on the idea that a person should not obtain a benefit or unjust enrichment or cause injury to another with impunity merely because there is no obligation in contract or another established branch of law which will operate to make him account. The law may in these circumstances provide a remedy by implying a *fictitious promise* to account for the benefit of the enrichment or to compensate for damage caused.

Negligence at common law

The tort remedy in general

Where the parties concerned were not in a *pre-contractual relationship* when the statement was made, s 2(1) of the Misrepresentation Act 1963 will not apply. However, an action for damages for negligence will lie in tort, provided the false statement was made negligently. The law relating to tortious negligent misstatements is considered in more detail in Chapter 21. However, the leading case is looked at now.

Hedley Byrne & Co Ltd v *Heller & Partners Ltd*, 1963 – Negligent misstatements: the tort remedy (**142**)

Use of the tort remedy in contract cases

In *Esso Petroleum* v *Mardon* [1976] 2 All ER 5 the court held that the principle in *Hedley Byrne* could apply even where the parties concerned were in a pre-contractual relationship and in addition that the person who had made the statement need not necessarily be in business to give advice, provided it is reasonable for one party to rely on the other's skill and judgement in making the statement. Mr Mardon was awarded damages for a negligent misstatement by a senior sales representative of Esso in regard to the amount of petrol he could expect to sell per year from a petrol station which he was leasing from Esso. The facts of *Mardon* pre-dated the 1967 Act and the court could not use it. The decision is obviously important but where the facts have occurred since 1967 the Misrepresentation Act is likely to prove more popular to claimants who have been misled *into making contracts*, since they can ask the representer to show he was not negligent. In *Hedley Byrne* claims the burden of proof is on the claimant to prove negligence.

There is a very obvious use, however, for the tort of negligence claim even where the careless misstatement has induced a contract. The tort claim allows an action for a misleading *opinion or falsely stated intention*, whereas misrepresentation in all its forms requires a misstatement of *fact*, not opinion or intention. The use of *Hedley Byrne* would today make the legal

gymnastics seen in *Edgington* v *Fitzmaurice* (1885) and *Smith* v *Land and House Property Co* (1884) unnecessary.

Use of the tort remedy for inaccurate company securities advertisements

As regards actions against directors and experts in respect of statements in an advertisement for the sale of securities or in a prospectus, there is as we have seen a statutory claim under the Financial Services and Markets Act 2000 and under *Hedley Byrne* at common law. The claim against directors under *Hedley Byrne* is specifically preserved by the Financial Services and Markets Act 2000 in s 87(9). A claim under the Misrepresentation Act 1967 is against 'the other party to the contract', i.e. the company or issuing house, and not against directors or agents.

It will be recalled that in *Esso Petroleum Co Ltd* v *Mardon* (1976) (see above) the court held that it was too restrictive to limit the duty in *Hedley Byrne* to persons who carried on or who held themselves out as carrying on the *business* of giving information or advice. The acceptance of these views means that the duty can apply more widely and brings in company directors in terms that they could be liable on a personal basis for negligence.

In any case, it is a requirement as part of admission of the shares to a full Stock Exchange listing or AIM (Alternative Investment Market) listing that the advertisement or prospectus shall state that the directors have taken reasonable care to ensure that the facts stated in it are true and accurate, that there are no misleading omissions and that, accordingly, all the directors take responsibility for the prospectus.

In view of this statement, it is likely that a duty of care is owed only by the individuals involved in the making of the statements and not by the company as such. If this is so, no claim can be made against the company. This would accord with the general principle of capital maintenance inherent in the prospectus remedies, i.e. it is difficult to get one's money back from the company and easier to get compensation from directors or experts, leaving capital contributed with the company.

In view of this it would seem that an action for rescission of the contract (see below) against the company will not in the company law context be a likely remedy. In any case it is very quickly lost as we shall see.

Remedy of rescission

As we have seen, this remedy is available to a party misled by innocent, negligent or fraudulent misrepresentation. It restores the status quo, i.e. it puts the parties back to the position they were in before the contract was made. However, the remedy may be lost:

(a) By affirmation. If the injured party affirms the contract he cannot rescind. He will affirm if with full knowledge of the misrepresentation he expressly affirms the contract by stating that he intends to go on with it or if he does some act from which an implied intention may properly be deduced. In the company situation this could, for example, be attending a company meeting to complain about an inaccurate prospectus.

(b) By lapse of time. This is a form of implied affirmation and applies as follows:

(i) In innocent and negligent misrepresentation the position is governed by equity and the passage of a reasonable time, even without knowledge of the misrepresentation, may prevent the court from granting rescission: *Leaf* v *International Galleries* (1950) – see Chapter 12.