STATING FACTS AND PROMISING THEIR TRUTH: WARRANTIES, REPRESENTATIONS AND THE LAW OF CONTRACT

1 Introduction

An awkward problem has recently arisen over misrepresentation in contract. It is hornbook law that a contractor can state a fact in the course of contractual negotiation without going so far as to promise that it is true. This is the intuitive idea underlying the long line of "mere misrepresentation vs warranty" decisions familiar to any contract student.[1] In such a case, if the statement proves to be false the representee is entitled to rescission or damages for misrepresentation (the latter for deceit, or under *Hedley Byrne*[2] or the Misrepresentation Act 1967 as the case may be); but unless the court holds the statement to be a warranty as well they have no right to any remedy for breach of contract.

But what of the converse situation? Is it possible for a contractor to warrant that a fact is correct without actually representing that it is true, meaning that the counterparty does have a claim for breach of contract but has no remedy for misrepresentation, even if they prove that they relied on the fact stated in making their decision to contract? The point is important in practice. Although it is often tacitly assumed by contract lawyers that a representee would prefer a contractual claim to one based on mere representation, this is not always so. Damages for misrepresentation, whether for fraud or negligence or under the Misrepresentation Act 1967, may well actually yield *more* than a claim for breach of warranty.[3] Furthermore, any material misrepresentation creates a semi-assured right of rescission, which will not apply in the case of breach of a contractual promise unless either that promise is a condition of the contract, or the breach is seen as repudiatory.

For many years it seems to have been accepted that as far as pre-contract representations were concerned this converse scenario was an impossibility. Warranties of fact were seen, so to speak, as a subset of representations. It followed that while a representation might or might not be incorporated as a contractual term, if it was so incorporated as a factual warranty it nevertheless of necessity also retained its character as a representation, with all that went with it. (Of course the remedies for that misrepresentation might be separately limited or excluded by agreement, a point we deal with below; but that was a different matter.)

More recently, however, the accepted position has changed. A curious series of cases from 2012, mainly but not entirely concerned with corporate acquisitions that subsequently went sour, has held that warranties cover entirely different territory from representations, and that for this reason it is quite possible, and indeed at times commonplace, for a statement of fact to come under the former rubric but not the latter.

The purpose of this article is to suggest that this revisionist streak is wrong, and that the older, traditionalist, position is the correct one.

2 The history

1 Familiar illustrative examples being *Couchman v Hill* [1947] K.B. 554; [1947] 1 All E.R. 103, *Oscar Chess Ltd v Williams* [1957] 1 W.L.R. 370; [1957] 1 All E.R. 325, and *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 W.L.R. 623; [1957] 1 All E.R. 325. See generally H. Beale (ed), *Chitty on Contracts*, 36th edn (London, Sweet & Maxwell, 2025), paras 16-002 – 16-004.

2 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465; [1963] 2 All E.R. 575.

3 Particularly given the open-ended extent of damages in deceit, and the curious "fiction of fraud" under s.2(1) of the Misrepresentation Act 1967, referred to below, which can also inflate recovery (see *Royscot Trust Ltd v Rogerson* [1991] 2 Q.B. 297; [1991] 3 All E.R. 294).

Until 2012, as stated above, it was regularly assumed that if you contractually warranted that a state of affairs was true, you necessarily stated that it was as well. True, that assumption was for a long time tacit. But it was made explicit in a 2009 corporate acquisition case, *Invertec Ltd v De Mol Holding BV*[4]. In this case DMH sold Invertec the share capital of V Ltd. As one might expect, the relevant SPA[5] embodied a large number of detailed factual warranties dealing with such matters as the financial position of V and the state of its accounts. Invertec later alleged that many of these were untrue to DMH's knowledge. It duly sued DMH for deceit and misrepresentation, but (significantly) not for breach of warranty.

The allegation of deceit succeeded. It was found that DMH had indeed lied egregiously in negotiating the sale of V Ltd, and that Invertec had relied on its statements in making the acquisition. What was significant, however, was the fate of an ingenious, though unmeritorious, argument raised by DMH against being held liable. This was that that because the case concerned the untruth of the warranties embedded in the SPA, Invertec's only remedy was for breach of those warranties. It could not, DMH said, have any remedy based on misrepresentation because there had been none; and, not having sued for breach of contract, it could therefore recover nothing under that head either.

Arnold J was having none of it. The warranties, he explained, "also amount to representations of fact as to the state of [V];" and, he added, he saw no reason "why Invertec cannot claim that it was induced to enter into the agreement by the representations made by those warranties so as to found a misrepresentation claim if they were false, particularly if they were fraudulently made."[6]

So far, so good. Change, however, came with another corporate acquisition case three years later. In *Sycamore Bidco Ltd v Breslin*[7] a company was acquired for some £16 million under an SPA containing the usual raft of factual warranties, but also in addition a clause limiting the sellers' liability to roughly £6 million in respect of "all claims under the Warranties." In the event the warranties proved untrue and the company all but worthless. The buyer sued for breach of contract, and also under the Misrepresentation Act 1967 (the latter, no doubt, with a view to recouping the whole of its loss, something likely to present difficulties if it simply sued for breach of warranty). Mann J held the sellers liable; but only for £6 million, and only for breach of warranty. The additional claim under the 1967 Act he dismissed completely.

Explicitly disagreeing with Arnold J's analysis in *Invertec*, he brushed aside an argument that the warranties had had any "dual quality" allowing them also to be treated as misrepresentations at the buyer's option.[8] On the contrary, he said: warranties and representations were two entirely separate things, and in neither case did one imply the other. Here the provisions in question had been called warranties; and they had been drafted in purely promissory terms. From this it followed that any misrepresentation claim was doomed from the start. Quite apart from any questions as to whether the limitation clause would have covered it in any case, thus taking away any advantage in bringing it,[9] there simply had been no misrepresentation in the first place.

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4 [2009] EWHC 2471 (Ch).

5 Sale and purchase agreement.

6 At [363]. See too similar reasoning by Rix L.J. in the earlier *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235 at [18]-[20], rejecting the idea that incorporating something as a warranty automatically deprived it of its character as a representation.

7 [2012] EWHC 3443.

8 At [200]-[203].

9 Which, on a sensible reading, it might well have, though his Lordship did regard such a construction as "forced:" para [203]. With respect, as pointed out below, it is not clear that such a construction is particularly forced: but that is by-the-by.

Although a drastic change from previous practice, Mann J's view has since become the orthodoxy. In a later company acquisition case, *Idemitsu Kosan Co Ltd v Sumitomo Corp*,[10] warranties were provided by the seller, but claims under them were subject to a contractual time-bar. An issue arose of whether the buyer, who had delayed in claiming and was now contractually out of time, could sidestep the time-bar clause by instead characterising the warranties as misrepresentations and invoking the 1967 Act.

This case could have been decided on the basis that there had been an effective, and separate, contractual disclaimer of liability for misrepresentation (which was found to be the case).[11] But the judge went further. Faced with a choice between the approaches in *Invertec* and *Sycamore*, he emphatically preferred *Sycamore*. Even if the warranties had been contained in the document presented for signature by the buyer and had been specifically relied on by it, they did not amount to any kind of misrepresentation at all.[12] The seller therefore obtained summary judgment.

Idemitsu was seen as effectively settling matters. In a series of subsequent decisions, the prevalence of *Sycamore* has been accepted as a *fait accompli*.[13] The orthodox position today is thus roughly as follows. It remains possible for a representation of fact contained in a warranty to give rise to the misrepresentation remedies in certain particular cases. This applies if, for example, it is separately expressed by the warrantor before the contract is concluded;[14] it has also been said to apply if the parties intended it to retain its character as a misrepresentation.[15] However, the default rule is that if all we have is a warranty of fact contained in a contract, then, even if this is put to and relied on by the promisee prior to contracting (for example, by the contract being presented to them for signature[16]), it will not be regarded as a representation giving rise to misrepresentation remedies if in fact false.

3 Criticisms of the orthodox position

The new orthodoxy may look plausible at first sight. It is nevertheless, it is suggested, less firmly established than it looks. The cases establishing it are all first instance decisions, bar one. The exception is the Court of Appeal decision in *The C Challenger*,[17] a shipping case where a charterer unsuccessfully sought to escape a charter by alleging misrepresentation arising out of a fuel consumption warranty. However, it is suggested that its authority is limited. Although it is true that both Foxton J[18] and the Court of Appeal[19] cited *Idemitsu* in passing, two points weaken the authority of the case as support for the *Sycamore* position. First, the finding was that there had been no reliance anyway, which was amply sufficient to dispose of the misrepresentation point. And secondly, both courts were at pains to stress that on a reasonable reading the warranty there was merely a promise of *future* performance rather than a false statement of present fact. Since this

10 [2016] EWHC 1909 (Comm); [2016] 2 C.L.C. 297
11 See paras [33]-[36].
12 See para [31].
13 See *Ivy Technology Ltd v Martin* [2020] EWHC 94 (Comm) at [30]-[33] (Teare J); *Arani v Cordic Group Ltd* [2021] EWHC 829 (Comm) at [121]-[122]; *The C Challenger* [2022] EWCA Civ 231; [2022] 1 C.L.C. 552 at [49]-[51] (Males L.J.); *McCarthy v Proctor* [2024] EWHC 684 (Ch) at [46]-[47]; *MDW Ltd v Norvill* [2021] EWHC 1135 (Ch) at [244]; and, most recently, *Veranova Bidco LP v Johnson Matthey Plc* [2025] EWHC 707 (Comm); [2025] B.C.C. 776 at [32]-[59].
14 See *Panasonic Europe BV v Core Communication Investments Ltd* [2019] EWHC 2520 (Comm) at [33]-[35]; see too H. Beale (ed) *Chitty on Contracts*, 36th edn (2025), para 10-14.
15 Suggested in *Bell v Singh* [2022] EWHC 3272 (Comm) at [157], referred to below.
16 See *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] 2 C.L.C. 297 at [27]-[32], where an argument based on this idea was specifically rejected.
17 [2022] 1 C.L.C. 552.
18 [2020] EWHC 3448 (Comm); [2020] 2 C.L.C. 816 at [129].
19 [2022] 1 C.L.C. 552 at [36]-[37].

article is concerned with the status of warranties of present fact, this of itself gives plausible grounds for distinguishing the decision.

Authority aside, it is suggested here that the position taken in *Sycamore* as to warranties of present fact is also intellectually indefensible. This is for five reasons. First, it is logically incoherent. Secondly, unlike the traditional position it requires courts to draw distinctions that are both arbitrary and at times almost incomprehensible. Thirdly, it is contrary to the spirit, if not the letter, of s.1 of the Misrepresentation Act 1967. Fourthly, it cuts very awkwardly across the restrictions on parties' ability to contract out of liability for misrepresentations. And fifthly, it is an entirely unnecessary complication, since in so far as it has desirable objectives, these can be attained in other ways. These are serious charges. Each of these will now be established in turn.

(a) The problem of coherence

We can start with the point made at the beginning of this article. Anyone can understand what someone means when they assert some fact, but then go on to say that they are not prepared to guarantee it ("This is what I'm saying: but mind you, I'm making no promises"). However, things get more awkward when we turn matters round and try to imagine a promise without a statement. True, there is a fairly obvious disconnect between a promise of *future* action and a statement of fact. While a promise to do something may imply a statement that one is willing to do it,[20] or even in some cases that one has reasonable grounds for thinking that one will be able to carry it out,[21] there is no necessity in the matter. It is thus perfectly possible for a promise of future action to carry no factual implication at all.[22] But, it is suggested, completely different considerations apply as regards a promise that a *present or past* fact is true.

Imagine the seller of a painting who says to a would-be buyer, "I promise you faithfully that this is a Picasso, but of course I'm in no way saying that it is." Such a person is not simply being tiresomely cautious: they are, it is suggested, being incoherent. Whether they like it or not, they are making a representation. A concurrent denial that a statement like this amounts to a representation at all is, in the words of Christopher Clarke J in a slightly different context, nothing more than an untruth: it is a vain attempt to "rewrite history."[23] Toulson J, indeed, has put the point in a way it is hard to argue with: "If a seller of a car said to a buyer 'I have serviced the car since it was new, it has had only one owner and the clock reading is accurate', those statements would be representations, and they would still have that character even if the seller added the words 'but those statements are not representations on which you can rely.' "[24]

Of course denials of this sort may be relevant in some other way. For example, if suitably worded they might amount to a valid disclaimer of any liability to the representee in damages for misrepresentation, and an exclusion of any right to rescind. But, as appears below, there is a world of difference between a finding that someone has not sad something at all, and a finding that they

20 See e.g. *Watts v Watts* [2014] EWHC 3056 (Ch); [2014] W.T.L.R. 1781.

21 E.g. *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15; [2002] E.M.L.R. 27 at [29].

22 So held by the House of Lords in the 1970s: *British Airways Board v Taylor* [1976] 1 W.L.R. 13; [1976] 1 All E.R. 65 (a criminal case holding that breach of contract to carry, even if foreseen as possible, did not amount to a false statement of fact under the then Trade Descriptions Act 1968). More recently see *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016; [1994] 3 All E.R. 932 at 1034 at 949-950 (Hoffmann L.J.); also *Wiggin Osborne Fullerlove (a firm) v Bond* [2021] EWHC 1381 (Comm) at [112], making the similar point that courts needed to resist the temptation to turn all contractual promises into factual representations by invariably drawing from them factual assertions that the contractor reasonably thought they could perform them.

23 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm); [2011] 1 Lloyd's Rep. 123 at [314-5].

24 *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm); [2007] 1 Lloyd's Rep. 264 at [68].

have said it while at the same time attempting to exempt themselves from the legal consequences of doing so.

Can the orthodox view be saved from this logical difficulty by saying, as is often done in the case of intractable difficulties in the law of contract, that at the end of the day it is all a matter of determining the intention of the parties? There have certainly been suggestions to that effect. Thus in *Bell v Singh*[25] in 2022 we find this: "Representations in a contract can also be warranties (*and vice versa) if that is what the parties intended*."[26] But, it is suggested, this attempted reconciliation will not do either.

True, it will work for deciding whether a representation is also a warranty. However, this is because that question is a normative one. It is a feature of our contract law that to answer the question whether a statement gives rise to a contractual obligation or not, we ask whether on a reasonable objective interpretation it demonstrates an intent to be bound.[27] But the argument will not work the other way round. The existence or not of a representation is a factual, not a normative, issue. A person either states that something is the case, or they do not. And in determining whether they have done so what matters is the factual interpretation that would be placed on what they have said by a reasonable reader or listener. When a person promises that a fact is true, the inescapable reasonable interpretation is, it is submitted, that they have also asserted that it is. The question whether they intended to make such an assertion does not come into the picture.[28]

(b) The problem of arbitrariness and indeterminacy

The second difficulty with the position embraced in *Sycamore* lies in the distinctions that it asks courts to draw. In essence it requires judges to create a sharp line between a statement of fact encapsulated solely in a contractual warranty, and a statement which also has had some kind of prior existence outside the contract and independent of the provisions of that warranty: the latter amounting to representations as well as contractual terms, while the former do not.[29] Unfortunately this distinction is anything but straightforward, as a number of examples make clear.

For instance, imagine a very common situation: an oral statement by a seller about the goods they are selling, made shortly before the sale, which is held to be incorporated in the contract.[30] From one perspective this can be seen as a representation in tandem with a contractual warranty, thus allowing the buyer who has relied on it a choice of remedies. But it could just as plausibly be characterised as a unitary oral warranty, thus allowing a breach of contract claim but excluding rescission and other misrepresentation rights: after all, according to *Idemitsu v Sumitomo Corp,*[31] a statement is not prevented from being so classified merely because it has been pre-presented as a proposed term of the contract and relied on by the other party in deciding whether to conclude the deal. Which side of the line does our oral statement fall on? Pre-*Sycamore* authority, such as

25 [2022] EWHC 3272 (Comm)
26 [2022] EWHC 3272 (Comm) at [157] (italics supplied).
27 See e.g. Lord Denning MR in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 W.L.R. 623 at 627.
28 Cf *Spice Girls Ltd v Aprilia World Service BV* [2002] E.M.L.R. 27 at [57], where Morritt V-C makes this precise point: determining whether there is a representation is an objective, not an intention-based, issue.
29 See e.g. H. Beale (ed), *Chitty on Contracts*, 36th edn (2025), para 10-14. Having stated the accepted position derived from *Sycamore*, this airily adds, as if the distinction were the easiest in the world to comprehend, "It is different if there was a previous representation, followed by a warranty; in that case the other party will have a choice of remedies."
30 As happened in the classic car sale case of *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 W.L.R. 623.
31 [2016] 2 C.L.C. 297.

Couchman v Hill [32] and *Dick Bentley v Smith*,[33] clearly assumed that such statements could be treated as misrepresentations if the representee so chose. But if *Sycamore* is right, the answer now seems to be anybody's guess.

Again, the suggestion that statements are not representations merely because they are presented as part of a proposed contract raises its own difficulties. What about the case where an offeror presents a document containing proposed factual warranties for approval during negotiations and then, following the offeree's approval, incorporates those identical warranties in a formal contract and forwards it for signature? Is there here a discrete representation of the facts contained in the warranties followed by their incorporation in the signed contract, or are the statements in the original document merely an integral part of the later one? One case suggests that, in contrast to *Idemitsu*, this will probably create a representation as well as a warranty,[34] though it is hard to see why why the sterile fact that the statement happens to have appeared in a different document from that presented for signature should make all the difference. But to add yet more confusion, an earlier decision makes clear that even this distinction is beset with nuance. Even if a person presents a separate draft of a warranty of fact as part of the negotiations leading to a contract, there has been a suggestion that this act might be better construed not as a statement of the fact asserted, but merely an indication that the presenter might be prepared in the future to warrant it.[35] The mind boggles.

The most recent case in the saga, the 2025 decision in *Veranova Bidco LP v Johnson Matthey Plc*[36], introduces yet a further twist. Here there were factual warranties in an SPA relating to a company to be acquired, but these were expressed as being qualified to the extent that matters were revealed in a separate disclosure letter. The buyer later alleged that the disclosure letter had been misleading, and sued the seller for misrepresentation. The seller cried foul: relying on *Sycamore*, it sought a strike-out, arguing that since the disclosure letter went hand-in-hand with the warranties this must fail as an illegitimate attempt to treat the latter as representations. The buyer by contrast retorted that the disclosure letter was no part of the contract at all and therefore could not but amount to a separate misrepresentation. The judge was clearly perplexed, and understandably so. In the event he was able – one suspects with no little relief – to avoid the trouble of trying to solve this pettifogger's puzzle (on which a good deal of money rode) by refusing a strike-out and leaving the matter to be determined at trial.

Put bluntly, the law is now in an unholy mess here, which would have been avoided entirely if we had kept to the traditional position that remedies for breach of contract and for misrepresentation could happily co-exist side-by-side. The necessity today for lawyers and their commercial clients to hack their way through conceptual thickets of this kind does no credit whatever to our contract law, and leaves one seriously wondering why foreigners continue to flock to choose a legal system that requires them to engage in such essentially sterile arguments as these, or whether they will continue to do so.

(c) The Misrepresentation Act 1967, s.1: a case of mismatch

A further difficulty with the *Sycamore* position lies in its slightly awkward relationship with s.1 of the Misrepresentation Act 1967.[37] To remind readers, this section states that if someone has

32 [1947] K.B. 554

33 *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 W.L.R. 623

34 See the discussion in *Panasonic Europe BV v Core Communication Investments Ltd* [2019] EWHC 2520 (Comm) at [33]-[35].

35 See Lloyd L.J. in *Leofelis SA v Lonsdale Sports Ltd* [2008] EWCA Civ 640; [2008] E.T.M.R. 63 at [141].

36 [2025] EWHC 707 (Comm); [2025] B.C.C. 776.

37 Which provides, relevantly, as follows: "Where a person has entered into a contract after a misrepresentation has been made to him, and … (a) the misrepresentation has become a term of the contract; ... then, if otherwise he

concluded a contract after a misrepresentation has been made to them by the other party, the fact that the misrepresentation has since become a term of the contract does not take away any existing right they may have to rescind it. In other words, it is a provision clearly aimed at preserving the possibility of a representee having concurrent remedies for both breach of contract and misrepresentation, a matter which some previous authorities had called into question.[38] Yet the new orthodoxy arising from *Sycamore* has exactly the opposite effect. By insisting that prima facie a contractual warranty of fact cannot be made to do double duty as a representation, even if relied on pre-contract by the person it is addressed to, it drastically cuts back on the remedies open to that counterparty.

True, very theoretically it can be said that there is no conflict here. In so far as an untrue factual statement embodied in a contractual warranty is not regarded in law as a representation at all, then the representee has not entered into the contract after a misrepresentation has been made to them, and therefore has no right to rescind that needs conserving. Nevertheless, a distinct impression remains that all this goes very much against the spirit of s.1. The Law Reform Committee that recommended the enactment of the 1967 Act[39] would, one suspects, have been rather surprised to learn that its preservation of the right to rescind in respect of representations forming part of a contract would be largely nullified fifty years later, when the courts took it on themselves to decide that in very many such cases there was no misrepresentation at all, despite impeccable evidence of a statement made and pre-contract reliance on its truth by the person it was addressed to.

(d) The problem of exception clauses and misrepresentation

A fourth difficulty with the holding in *Sycamore* and *Idemitsu* concerns how, if at all, it can be reconciled with the limits placed on parties' rights to disclaim liability for misrepresentation. Apart from the specialised area of consumer law, where the matter is dealt with by Part 2 of the Consumer Rights Act 2015 (which we will not cover here), there are two significant such restrictions. One is the common law rule stated by Lord Bingham in *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank*:[40] the law, he said, "on public policy grounds, does not permit a contracting party to exclude liability for his own fraud in inducing the making of the contract."[41] The other is s.3 of the Misrepresentation Act 1967,[42] subjecting all clauses limiting or excluding rights arising out of misrepresentation to a reasonableness test.

Take first the common law prohibition on exoneration from fraud, as described in *HIH*. Imagine a corporate acquisition where it turns out that factual warranties given by the seller were not only false, but false to the knowledge of the seller's directing mind and will.[43] (This actually happened in *Invertec Ltd v De Mol Holding BV*[44], referred to above.) Now suppose further that some clause

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would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in [paragraph (a)] of this section."

38 Notably, Branson J had decided in 1936 that a representation, once incorporated as a term of the contract thereby induced, became in some way spent and thenceforth remediable only as a breach of contract: *Pennsylvania Shipping Co v Cie Nationale de Navigation* (1936) 55 Lloyd's L.L.R 271 at 276. Lord Evershed MR had also hinted as much in *Leaf v International Galleries Ltd* [1950] 2 K.B. 86; [1950] 1 All E.R. 693 at 95, 697. On the other hand, in the earlier *Cie de Chemins de Fer Paris-Orléans v Leeston Shipping Co Ltd* (1919) 1 Lloyd's LL.R. 235 at 237-8 Roche J had unequivocally affirmed the position later taken in s.1 of the 1967 Act.

39 In its Tenth Report in 1962: Cmnd 1782 (1962).

40 [2003] UKHL 6; [2003] 2 Lloyd's Rep. 61.

41 See [2003] 2 Lloyd's Rep. 61 at [16]. Note that this is limited to representations known to be false to an individual representor or to the directing mind and will of a corporate one, and not simply to an employee (it being accepted that liability in the latter situation can be excluded).

42 As slightly amended by the Unfair Contract Terms 1977, but nothing turns on this.

43 Thus avoiding the complication that despite the *HIH* case a party can, with suitably unequivocal wording, disclaim liability for the fraud of its agents.

44 [2009] EWHC 2471 (Ch).

purports to limit or exclude the seller's liability for any misrepresentation or misstatement whatever (or place a time-bar on any claim). Is this effective? Oddly enough, the logic of *Sycamore* suggests that it is. If the warranties did not even potentially amount to representations at all (which is what *Sycamore* holds), then the inference seems inescapable: there is no "fraud in inducing the making of the contract" to be excluded in the first place, and hence no room for the application of the rule of public policy.

The only way to avoid this conclusion would be to say that the fraud for which liability cannot be excluded at common law includes not only false statements but fraudulent breaches of contract (i.e. giving a contractual warranty that a fact is true when one knows it is untrue or is reckless as to whether it might be). But this is, to say the least, doubtful: indeed, at least one decided case clearly suggests a negative answer.[45] If this is right, then it is suggested that as a result of *Sycamore* the law has been rendered seriously defective: what is essentially a claim by someone deceived by a false statement can be excluded by contract under what is little more than a technicality.

What of the second case, s.3 of the Misrepresentation Act 1967? Assume that a contract for the sale of a business contains warranties of fact which in actuality are false (but nothing which under the *Sycamore* rules amounts to a separate misrepresentation), and that these are relied on by the buyer in concluding the contract. Assume also a clause in the SPA restricting the right of the buyer to rely on this fact in order to rescind or to sue for damages in tort or under the 1967 Act, and further that the court finds this exclusion to be unreasonable as between the parties. What is the position?

At first sight, the buyer might seem to be in a good position to invoke the section. Indeed, in a series of cases starting with *Cremdean Properties Ltd v Nash*[46] in 1977 and culminating in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc*[47] in 2010, the courts have made it clear that s.3 will be construed in a purposive way, so as to limit the effect not only of conventional exception clauses but also of attempted workarounds such as clauses stating such things as "no representations are made," or "the buyer agrees that it has not relied on any representations," or any other bids to evade its effect by simply weaponising the "ingenuity of a draftsman."[48]

Pre-*Sycamore* this argument would clearly have worked. There would have been a misrepresentation inducing a contract, an attempt to shrug off liability for it, albeit indirectly, and hence a requirement of reasonableness. But this is now very doubtful. The decisions mentioned in the previous paragraph all assume that any false recitation of a fact, contractual or otherwise, would but for the clause amount to a misrepresentation which if relied on would afford a remedy to the representee. But that is precisely what *Sycamore* now holds is not the case. Even if the buyer has relied on false information provided by the other party in deciding whether to contract, there is apparently no representation at all: and if there is no representation in the first place, s.3 is left with nothing to bite on.[49] If this is right, then once again something is seriously wrong.

A retreat from the *Sycamore* line of cases would avoid all these difficulties. Where the seller of a business, or anything else, wished to limit possible liability in case what they said turned out to have been incorrect, they would remain able, within limits, to do so. But the argument would shift

45 In *Innovate Pharmaceuticals Ltd v University of Portsmouth Higher Education Corp* [2024] EWHC 35 (TCC) at [116]-[117], the judge pointedly refused to extend the *HIH* principle so as to cover any fraudulent breach of contract. So too the Hague-Visby Rules have been held, when contractually applicable, to allow restriction of liability for fraudulent breach of contract (in that case, blatant misappropriation of cargo by the carrier): see *The Captain Gregos* [1990] 1 Lloyd's Rep. 310.

46 [1977] 2 E.G.L.R. 80

47 [2010] EWHC 1392 (Comm); [2011] 1 Lloyd's Rep. 123 at 314-315. See too *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 W.L.R. 2333; [2000] C.L.C. 735 at 2347, 748 and also *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221; [2010] 2 C.L.C. 705.

48 Bridge L.J.'s phrase in *Cremdean Properties Ltd v Nash* [1977] 2 E.G.L.R. 80 at 82.

49 A conclusion that Mann J reached, with apparent equanimity, in *Sycamore*: see [2012] EWHC 3443 at [210].

from the obscure and metaphysical issue of whether there had been a representation to the correct, and much more manageable, question: was there a clause apt to limit their liability for misrepresentation, and if so, was that clause valid?

(e) The lack of any necessity for the change.

We have so far suggested that the change to misrepresentation law since *Sycamore* has caused the law to become illogical and over-complicated, and that it is hard to reconcile it with the spirit of the Misrepresentation Act and the limits on exclusion of liability for misrepresentation. Nevertheless, despite all this it might still be said to be justified. It is, after all, an attraction of English law that in so far as a rule serves the interests of business it is strongly inclined to uphold it, and that to do this it is prepared to overlook a good deal of illogic. Unfortunately, it is also hard to see that the change serves any seriously useful purpose at all. We look below at a number of advantages that might be alleged.

First of all, it might be argued that there was a danger that the previous practice of classing all contractual stipulations – or at least all contractual warranties relating to past or present facts – as representations and extending the remedies for misrepresentation to cover them served to over-complicate the law by providing two sets of remedies where one would do. Contract, it might be said, has been in danger of being overwhelmed by misrepresentation law; cutting back misrepresentation remedies so as to make them inapplicable to simple warranties is a welcome corrective.

But is this convincing? It seems doubtful. For one thing, it is always open to parties, especially sophisticated ones with access to good legal advice, to exclude potentially expansive liabilities arising from misrepresentation if they wish. But in any case, there are good reasons to doubt whether such extended liability for misrepresentation need worry us too much anyway. Warranty claims are very straightforward and easy to bring: all that needs to be proved is a breach and resulting damage. There is no need even for reliance, meaning for example that a claimant can recover for breach even of a warranty buried deep in the boilerplate which they never read at all and only serendipitously discovered later.[50] By contrast, the task of making good a claim based on misrepresentation is much more demanding. In order to recover, the claimant must prove that those statements specifically influenced them in their decision whether or not to contract, and possibly also that they actually knew of them at the time;[51] and that had they not been made at all[52] they would not have contracted, or would have agreed different terms. And even then there may be the possibility of a reduction for contributory negligence if the claimant is found to have failed to look properly to its own interests. These are difficult requirements to satisfy, and (it is suggested) they are amply sufficient to prevent the law of contract disappearing in a sea of misrepresentation.

Alternatively, it might be said that reducing the role of misrepresentation in warranty cases had the effect of removing a possible mismatch between the remedies of rescission and damages. Rescission, this argument goes, is problematic in that it is too readily available: it can be had almost

50 "If a party wishes to claim relief in respect of a breach of a term of a contract … he need prove no actual reliance." (Slade L.J. in *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 Q.B. 564; [1990] 1 All E.R. 737 at 584, 751-752; and see too Stuart-Smith L.J. at 579, 747).

51 See *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48; [2017] A.C. 142 at [26]. Whether they have to prove knowledge of the statements as well is uncertain. Cockerill J's decision in *Leeds City Council v Barclays Bank Plc* [2021] EWHC 363 (Comm); [2021] Q.B. 1027 suggests they do, whereas the Privy Council has recently, and trenchantly, expressed the opposite view in *Credit Suisse Life (Bermuda) Ltd v Ivanishvili* [2025] UKPC 53. It remains to be seen which will be followed in England.

52 Note that this is the correct counterfactual, not the more claimant-friendly "had the truth been told:" *Downs v Chappell* [1997] 1 W.L.R. 426; [1996] 3 All E.R. 344 at 433, 351.

as of course for misrepresentation,[53] while its availability in the case of breach of a factual warranty is limited to repudiatory breaches, or to situations where the warranty is also a condition of the contract. If so, then allowing the other party the option to treat a warranty as a representation might let in by the back door a remedy rightly excluded at the front.

This is true in principle. However, two points very much limit the force of this contention. First, if taken to its logical conclusion it would equally apply to an entirely separate pre-contractual misrepresentation which later ends up being contained in the contract; yet here even *Sycamore* admits that misrepresentation remedies remain.[54] Secondly, if the giver of the warranty wants to avoid this result, it is not difficult to do so. They can always (subject to s.3 of the Misrepresentation Act 1967, referred to above) stipulate that any right to rescission for misrepresentation is excluded, and frequently do.

The same comments also apply a further argument, which is that whereas a breach of warranty in, say, a corporate acquisition normally gives rise to a fairly fixed measure of damages, a parallel misrepresentation claim if allowed may well allow a more open-ended one. Tort damages for negligent misrepresentation do not obey the same strict rules of remoteness as contract damages; deceit damages are subject to no remoteness rule at all;[55] and the same seemingly applies if damages are awarded under s.2(1) of the Misrepresentation Act 1967 (because of the "fiction of fraud"[56]). The answer, however, is the same. The argument proves too much, since it applies to any misrepresentation claim based on the same facts as a breach of warranty; and in any case, if sellers of businesses and others wish to protect themselves the matter can always be adjusted by suitable drafting.

A final argument is that allowing too large a scope to misrepresentation in contract warranty cases carries with it the risk of frustrating the parties' intention. Assume a warrantor selling a business has taken care to draft a clause qualifying their liability – for example limiting the amount of damages for breach, or putting a strict time-bar on claims – and that that clause refers, as it very naturally might, to any action for "breach of warranty." It might be said that if we allow alternative claims here for misrepresentation, there is a danger of allowing the beneficiary to make an end-run around such clauses simply by reclassifying their claim as one for (extra-contractual) misrepresentation rather than (contractual) breach of warranty.

One can certainly understand such suggestions, particularly since restrictions of this kind formed an element of the decisions in both *Sycamore* (where there was a limitation in amount) and *Idemitsu* (where there was a time-bar). In both cases there was a distinct whiff of a buyer trying to use a technicality to escape an exemption clause it had agreed to with its eyes open. On the other hand, there are two reasons why these ideas are not ultimately convincing.

One is that it is very arguable that such a crabbed interpretation of exception clauses should not be accepted. Contracts are generally interpreted not literally, but in accordance with their relation to their commercial purpose;[57] furthermore, the tendency in earlier years to construe exemption clauses

53 So long as no bar has arisen, such as impossibility of a return to the status quo, or a possible application of s.2(2) of the Misrepresentation Act 1967.

54 A point arguably true at common law, but in any case made crystal clear by s.1 of the Misrepresentation Act 1967, referred to above.

55 *Clerk & Lindsell on Torts* (24th edn, London, Sweet & Maxwell, 2023), para.17-54.

56 See *Royscot Trust Ltd v Rogerson* [1991] 2 Q.B. 297, taking up the point that s.2(1) uses the wording "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 was not made fraudulently." (Emphasis supplied.)

57 See generally *Chitty on Contracts*, 36th edn (2025), paras 16-47 onwards; and see generally cases such as *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] A.C. 1101 and *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 W.L.R. 2900.

as narrowly as possible is now much diminished.[58] Despite the suggestion in *Sycamore* that such a reading would be "forced,"[59] it is highly arguable that if necessary to avoid a commercially unreal result, a clause affecting liability for "breach of warranty" should be construed as applying equally to any claim alleging falsity of the relevant information, however the claim might be dressed up by an enterprising claimant.

The other answer is even simpler. If a warrantor wishes to make assurance doubly certain and avoid problems of this sort, they can always draft a suitably inclusive term to that effect. This would achieve their object without the courts having to engage in mental gymnastics over how far a statement of a fact amounts also to an assertion of it.

4 Conclusion

The conclusion to this article can be simply stated. The turn taken by the law since *Sycamore Bidco Ltd v Breslin*[60] was unnecessary, confusing and illogical. It has had the effect of throwing the law on misrepresentation and warranties seriously out of kilter and complicating it entirely unnecessarily. The law would be much simpler and more straightforward were we to return to the simpler days of *Invertec Ltd v De Mol Holding BV*[61], and the assumption that where a person has relied on a statement later contained in a contract in deciding whether to enter into it, that party's remedies for breach of contract and misrepresentation operate straightforwardly in parallel. It remains open to the Court of Appeal to reverse this unfortunate development, and very much to be hoped that an attempt will be made in the near future to persuade it to do so. Such a step would be greatly to the advantage of our commercial law, if not to the earnings of the lawyers who spend a disproportionate amount of time and energy in arguing such cases.

58 See e.g. *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373; [2017] 2 C.L.C. 28.
59 See [2012] EWHC 3443 at [203].
60 [2012] EWHC 3443.
61 [2009] EWHC 2471 (Ch).