SHOULD AN INNOCENT HALF-TRUTH BE AN ACTIONABLE MISREPRESENTATION UNDER THE CONTRACTUAL REMEDIES ACT 1979?

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Introduction

A vendor, in an attempt to procure a sale, accurately states that the property is let, but omits the further fact that the tenants have recently given notice to quit. Should the vendor be liable to the reliant purchasers for damages as a consequence of this unqualified statement?[1] Furthermore, should liability attach despite the vendor, or their agent, being ignorant of the issue of a notice to quit?

Liability for inadvertent, or innocent, half-truths is an unsettled issue in New Zealand law. The position is governed by the Contractual Remedies Act 1979, which offers little direction on the matter. In *Ladstone Holdings v Leonora Holdings Ltd*, [2] Potter J of the High Court purported to exclude the possibility of liability for such innocent half-truths. However, it is submitted that such a conclusion is inherently misguided.

This paper addresses Potter J's reasoning, and focuses on the policy behind the enactment of the Contractual Remedies Act ("the Act"). Additionally, a large body of law from various jurisdictions is examined, as there is no definitive law on this issue in New Zealand. Analogy is also drawn to the Fair Trading Act 1986 and Trade Practices Act 1974 (Cth), in an attempt to clarify the correct position

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[1] See *Dimmock v Hallet* (1866) 2 Ch App 21.

[2] *Ladstone Holdings Ltd v Leonora Holdings Ltd* [2006] 1 NZLR 211 (HC).

under the Contractual Remedies Act 1979.

A. Nature of a Misrepresentation Cause of Action

In connection with the formation of contracts, an action for misrepresentation must be brought under the Contractual Remedies Act 1979. This legislation deals with the effect of pre-contractual statements. Any misrepresentation inducing entry into a contract is redressable in damages as of right, as if the false statement were a term of the contract that has been broken.

A misrepresentation may be broadly defined as an erroneous statement of fact made to one contracting party, at a time prior to that party's entry into the contract, regarding some existing fact or past event. A claimant must show that such a misrepresentation was made; that it was made by the other contracting party or his agent; that it was made to the claimant (or intended to be received by him or her); and that the misrepresentation induced the claimant to enter into the contract. [3]

This requirement for inducement is does not demand that the misrepresentation was the sole reason for the plaintiff entering into the contract. Rather, the misunderstanding created by the misrepresentation must have been one of the reasons that induced the plaintiff to contract. This is assessed objectively.[4] A representation will not be actionable if it was of a kind that no reasonable person in the position of the plaintiff would have relied on it.[5] Additionally, there is no "inducement" unless the representor intended the representee to be induced, or used language that would induce a normal person.[6]

For the purposes of this discussion, the issue of inducement is

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[3] J F Burrows, J Finn, and S M D Todd, *Law of Contract in New Zealand* (2nd ed, LexisNexis, Wellington, 2002) at 326–336.
[4] *Edgington v Fitzmaurice* (1885) 29 Ch D 459.
[5] J F Burrows, J Finn, and S M D Todd, *Law of Contract in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) at [11.2.4].
[6] *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 (CA) at 145.

irrelevant. The focus is primarily on the first requirement, which is the existence of a misrepresentation. The element of intention, as required by the need for inducement, does not apply when determining whether a statement was a misrepresentation. The foremost issue is falsity. Was the statement, objectively assessed, untrue? The Oxford English Dictionary defines "false" as erroneous, not true or correct. Such a definition must be taken into consideration when determining liability, as falsity may exist regardless of knowledge. The enquiry into falsity is made at the time of reliance; that is when the false statement induces entry into the contract.[7]

B. Categorisation of half-truths

The general rule is that mere silence cannot amount to a misrepresentation.[8] Parties to a contract are under no obligation to ensure that the opposing parties are fully informed as to any aspect of the transaction. Thus, in *Spooner v Eustace*,[9] a vendor's failure to point out the encroachment of a building onto a neighbouring property did not amount to a misrepresentation.

However, an exception exists where the representor is under a "duty to disclose". Such a duty is imposed on contracts uberrimae fidei (contracts of utmost good faith), and where there exists a fiduciary relationship between the contracting parties. These are two very narrow exceptions, and apply primarily in narrow circumstances such as insurance contracts and in partnership agreements.

It is a conceptual mistake to treat liability for half-truths as connected to the rule against silence, or to view it as analytically dependent on the "duty of disclosure" exception. Despite popular academic and judicial commentary to the contrary, the subject matter of "half-truths" does not fall under the heading of "exceptions" to the general rule that

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[7] *With v O'Flanagan* [1936] Ch 576, 1 All ER 727.
[8] *Fox v Mackreth* (1788) 2 Cox Eq Cas 320 at 320 and 321, per Lord Thurlow.
[9] *Spooner v Eustace* [1963] NZLR 913 (SC).

silence is not a misrepresentation. Nor are half-truths to be considered "partial non-disclosure".[10] Admittedly, half-truths mislead because of what they omit to say, rather than what they do say, and thus they do involve an element of "non-disclosure" or "silence" on the part of the representor. It is arguable that the plaintiff's error is the result of the defendant's failure to speak.[11] But this does not relate to any failure of the representor to adhere to an imposed "duty of disclosure".[12]

As Bigwood argues, the objection to half-truths does not lie in an alleged "breach" of a duty to disclose sufficient information to the representee.[13] As I have previously stated, this duty to disclose applies in extremely limited circumstances. This is confirmed by Spencer Bower, Turner and Sutton, who state: "This situation is not one which involves a duty to disclose … [T]he proper place for its discussion is therefore in a work on Actionable Misrepresentation, and not in one on Non-disclosure."[14] The only operative obligation in a half-truth case is the normal obligation on all parties in pre-contractual negotiations, namely, not to mislead by their factual statements or conduct. This duty is of course imposed by s 6 of the Contractual Remedies Act.

Therefore, in all half-truth cases, the representor's statement must be viewed as itself a misrepresentation. It is not a true statement that gave rise to a duty to disclose further information. It is not an omission. Rather, the representor's omission, whether innocent or fraudulent, renders the initial statement objectively false.[15] The statement is false and misleading because it is incomplete and therefore does not tell the

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[10] Rick Bigwood "Reflections on Partial-Truths, Supervening Falsification, and Pre-Contractual Misrepresentation"(2004) 10 NZBLQ 124 at 157.
[11] Ibid.
[12] Rick Bigwood "The full truth about half-truths"?" [2006] NZLJ 114 at 116.
[13] Ibid.
[14] G Spencer Bower, A K Turner, and R J Sutton, *The Law Relating to Actionable Non-Disclosure and Other Breaches of Duty in Relations of Confidence, Influence, and Advantage* (2nd ed, Butterworths, London, 1990) at 205.
[15] Ibid.

full story. The statement itself is the operative representation and, given that it is false, it constitutes an actionable misrepresentation, providing the falsity induced the contract in question.

When considering a half-truth and a purely false statement, their practical effect cannot be differentiated. Their natural effect is to unambiguously mislead or deceive the representee, or to lead them into error.[16] Both the purely false statement and the half-truth are false, and this is the essential determination for this paper.

C. Fraudulent half-truths

It is settled law that an accurate statement may nonetheless be misleading if the representor intends to mislead, and no mention is made of matters that qualify or alter the truth of the statement actually made. The half-truth creates a misleading impression because of what is unsaid – by concealing known facts, whose effect would be to make the initial statement false. Although the party to the contract may have been legally justified in remaining completely silent on the fact, by venturing to make a representation upon the matter, such a representation must be a full and frank statement, and not a partial and fragmentary account.[17]

This is illustrated by the English case of *Dimmock v Hallet*,[18] where it was held that if a vendor chooses to state that the farm for sale is let, they must not omit the further fact that the tenants have given notice to quit. This principle remains settled under the Act. In *Wakelin v RH* and EA Jackson Ltd,[19] a prospective purchaser of a lunch bar was told, by the vendor's agent, and in response to a direct question, that the nearest competition was "half a mile away", and that the council could no longer grant permission for additional lunch bars in the area. This

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[16] Bigwood, above n 10, at 129.
[17] *Oakes v Turquand* (1867) LR 2 HL 325 at 342-343.
[18] *Dimmock v Hallet,* above n 1.
[19] *Wakelin v RH and EA Jackson Ltd* (1984) 2 NZCPR 195 (HC).

statement was literally true, but nonetheless misleading, as the agent knew that nearby premises were being converted to house a competing lunch-bar business. The Judge stated: "In my opinion this is a typical case where an answer given to a specific question, although theoretically true, constitutes a misrepresentation for the reason that it does not indicate the true position." [20] The representor had painted an erroneous picture to the plaintiffs.

In the recent decision of *Thompson v Vincent*,[21] the Court of Appeal discussed half-truths. In this case the Thompsons sold a motel business, comprising a 20-year lease of a newly constructed block of units. The motel complex was marketed as having 24 units, when in fact there was planning consent for only 12. The purchasers (the Vincents) alleged misrepresentation. The Court stated: [22]

> We leave open the question whether, in absolute terms, this was a situation of duty to speak. If the vendors had said nothing whatsoever as to unit numbers, caveat emptor principles might apply. The present was not a case of complete silence. Nor was it a contract uberrima fides. It was, quite simply, a situation of half-truth, silence as to the other half rendering what was said deceptive. It was a half-truth to say the complex had 22–24 units without going on to say there was planning consent for only 12 of that number. There was, as the point sometimes is put, a "material distortion". A half-truth is an untruth. What was said was wrong.

It is thus evident that a half-truth is an actionable misrepresentation because what was said is wrong. This is settled law. However, the role of fraud in a half-truth case is yet to be determined.

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[20] Ibid at 197.
[21] *Thompson v Vincent* [2001] 3 NZLR 355 (CA).
[22] Ibid at [70].

D. Innocent half-truths – should fraud be a requirement for liability?

In the vast majority of half-truth cases the representor knew of the existence of a fact, and failed to disclose it, presumably in an act of deliberate concealment. In other words, most half-truths involve an element of fraud.[23] But is fraud a necessary requirement before a half-truth can be deemed an actionable misrepresentation under the Act?

Fraud is deemed as such by Potter J in *Ladstone Holdings v Leonora Holdings Ltd.*[24] In that case a property was represented as "presently available for development".[25] After contract formation it was discovered that there was a privately owned ceramic tunnel running under the land. The purchaser had not been told of the existence of the tunnel, as the vendor was unaware of it. The purchaser alleged, inter alia, that "presently available for development" constituted a misrepresentation, because it was made untrue by the omission of the existence of the drain.

It was held that the undisclosed facts regarding the drain did not render the initial representation untrue.[26] Redevelopment would be hampered and delayed by the drain, but the property was still available for redevelopment.[27] There was no misrepresentation at all. However, Potter J went on to discuss liability for misrepresentation and half-truths. She stated: [28]

> It is arguable that because under s 6 of the Contractual Remedies Act a misrepresentation can be innocent or fraudulent, then if the representor's statement is in fact false it is irrelevant whether or not the representor knew of the

[23] Burrows, Finn, and Todd, above n 5, at [11.2.1].
[24] *Ladstone Holdings Ltd v Leonora Holdings Ltd*, above n 2.
[25] Ibid at [33].
[26] Ibid at [51].
[27] Ibid at [43].
[28] Ibid at [53].

> undisclosed facts (see Law of Contract in New Zealand at p 333). I do not accept that argument.

Various aspects of Potter J's reasoning will be examined in turn.

1. The Purpose of the Act and the Common Law

Potter J reached her conclusion by stating: [29]

> It would not serve… the policy of the Act…if non-disclosure of facts unknown to the representor could constitute a misrepresentation, whether innocent or fraudulent, under s 6.

Therefore, the policy and reasoning behind the Contractual Remedies Act 1979 must be investigated, to determine whether in fact Potter J's conclusion is correct.

(a) The Position at Common Law

The current liability for innocent misrepresentations differs greatly from the previous position. At common law, misrepresentations were governed by a complicated and strange amalgam of law and equity, and of contract and tort.[30] If a statement could be treated as forming part of the contract, the representee could sue for damages for breach of contract. Additionally, the misrepresentation might be treated as forming a collateral contract, and therefore damages were available for its breach. If the representation had been made fraudulently, the representee could have a claim for damages under the tort of deceit, and would be allowed to rescind the contract at common law or in equity. If the representation had been made negligently, relief could be sought under the tort of negligent misstatement. [31]

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[29] Ibid at [55].
[30] Burrows, Finn, and Todd, above n 3, at 324.
[31] *Hedley Byrne v Heller* [1964] AC 465 (HL).

If the representation was innocent, that is, made without negligence or fraud, the remedy lay in equity only. The representee could not recover damages; instead, they had to choose whether to rescind the contract or perform it, without compensation for the loss arising from the misrepresentation.[32] The Court of Chancery could order rescission regardless of whether the misrepresentation was innocent or fraudulent. As stated in *Derry v Peek*: [33]

> Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand.

The availability of rescission was justified either because the representor should have found out the full truth before speaking his fragmentary words, or else he acted "morally delinquently" by resisting the claim after discovery of the true position.[34]

However, rescission was not always an adequate remedy. It could be lost in several ways, for instance if it was no longer possible to restore the parties to their original position. A precondition to rescission being available was that performance of the contract could in fact be reversed. As such, the representee must have been able to return to the representor whatever he received under the contract.[35] Additionally, rescission ceased to be available for a non-fraudulent representation if the representee delayed too long after the time of the contract before claiming the remedy.[36] Such a lapse of time could be taken as evidence of affirmation of the contract, or it could be a defence to rescission in

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[32] F Dawson and D W McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell, Auckland, 1981) at 3.
[33] *Derry v Peek* (1889) 14 App Cas 337 at 359 per Lord Herschell.
[34] Bigwood, above n 10, at 156.
[35] J Cartwright *Misrepresentation, mistake and non-disclosure* (2nd ed, Sweet & Maxwell, London, 2007) at 107
[36] Ibid at 104.

its own right.[37] The right to rescission for innocent misrepresentation was also severely limited by the rule in Seddon's case, which barred rescission if the contract was executed on both sides. Such a rule was arguably unfair, as often the representee would not discover the falsity of the representation until after the contract had been executed.[38]

Additionally, rescission could impose a liability upon the representor that was disproportionate to the importance of his assertion. This led to the anomaly that the remedy of rescission was available for a minor innocent misrepresentation, when damages would have been more appropriate. The 1967 Contract and Commercial Law Reform Committee argued that financial adjustment would bring about a more proper settlement.[39]

(b) Philosophy behind the Contractual Remedies Act 1979

The Act implemented the 1967 Contract and Commercial Law Reform Committee report on Misrepresentation and Breach of Contract. The Committee recommended that damages should be recoverable for both innocent and fraudulent misrepresentation, whereas previously damages had only been available for fraudulent misrepresentation. Such recommendation was adhered to 11 years later in the Committee's further report on misrepresentation and breach of contract, where they concluded that the intervening years had not affected the need for reform.[40]

Where a person has made a representation that induces another to contract with him, he should be responsible for the accuracy of the

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[37] N C Seddon and M P Ellinghaus *Cheshire and Fifoot's Law of Contract* (9th ed, LexisNexis Butterworths, Chatswood (NSW), 2008) at 527.
[38] Ibid, at 539.
[39] Contracts and Commercial Law Reform Committee *Misrepresentation and Breach of Contract: Report* (2nd ed, Govt. Print, Wellington, 1978) at [7.1(c)]
[40] Contracts and Commercial Law Reform Committee "Further report on misrepresentation and breach of contract" in *Misrepresentation and Breach of Contract: Report* (2nd ed, Govt. Print, Wellington, 1978) at [3] and [4].

representation, regardless of fault.[41] This was the philosophy behind the statutory liability for innocent misrepresentation. The Contract and Commercial Law Reform Committee was strongly opposed to the intrusion of negligence. They stated:[42]

> It is beside the point whether an undertaking was given on reasonable grounds or not; it suffices that it was given. It seems to us that the proper as well as the traditional approach is to look not a whether there was any fault on the part of the representor but at the expectations of the representee that naturally arise from the undertaking.

Under the heading "damages for innocent misrepresentation", the 1967 report stated "we are all agreed that innocent misrepresentation should be remediable by an award of damages".[43] The reasoning behind this conclusion was twofold. First, the drastic nature of rescission was considered inappropriate, as unwinding the contract was not always the aggrieved party's preferred remedy,[44] and, as discussed, often too extravagant a penalty upon the misrepresentor. Secondly, an award of damages "is a more business-like solution to many cases".[45]

In the explanatory note to the Contractual Remedies Bill 1978 it is stated that the proponents of the Act hoped to rationalise and simplify the law, by giving substantially the same remedies for an inducing misrepresentation as for breach of contract.[46] The principal effects of the Bill are listed; the first being that damages may be claimed for innocent misrepresentation as well as fraudulent.[47] It appears evident, then, that the inclusion of innocent misrepresentations was to be

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[41] Dawson and McLauchlan, above n 32, at 12.
[42] Contracts and Commercial Law Reform Committee, above n 39, at [9.4.3].
[43] Ibid at [13.1].
[44] However it was the only remedy available.
[45] Contracts and Commercial Law Reform Committee, above n 39, at [9.4.3]. The Committee does not expand on this concept of "business-like".
[46] Explanatory note to the Contractual Remedies Bill 1978
[47] Ibid.

considered as a substantial change in the law.

Therefore, in 1979, the Contractual Remedies Act was passed, with s 6(1) expressly stating that the same remedies are available for breach of an innocent misrepresentation, as for a fraudulent one. Since the enactment of the Contractual Remedies Act there has been a further development, the passing of the Fair Trading Act 1986. This makes alternative remedies available for misrepresentation, and thus is a useful analogy, as I will discuss later. Issues as to liability under the Fair Trading Act will often arise in tandem with, or intermingled with, enquiries as to liability under the Contractual Remedies Act 1979.

(c) The Position under the Act

The enactment of the Contractual Remedies Act 1979 means that the law on remedies for pre-contractual statements is thus governed substantially by statute in New Zealand. The main statutory remedy for both fraudulent and innocent misrepresentations is now damages, with the misrepresentation to be treated as if it were a term of the contract that has been broken. The common law availability of damages for deceit or negligence is removed.[48] This means the type of misrepresentation is irrelevant when assessing liability. Dawson and McLauchlan state that if a representor deliberately fails to tell the full truth, this is a case of fraudulent misrepresentation.[49] If they did not know that which they failed to disclose, and did so innocently, it is a case of innocent misrepresentation. In other words, the intention to deceive determines "not the fact of misrepresentation, but the type of misrepresentation. Of course, in the view of s 6, the latter issue is no longer important."[50]

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[48] Ibid at clause 6. At least as between the parties to the contract in question.
[49] Providing they intended to mislead.
[50] Dawson and McLauchlan, above n 32, at 23. Note that this is taken from a discussion of subsequent falsifying events (which is grouped with half-truths) but is equally applicable in a half-truth situation.

(d) What was Potter J referring to?

Given the reasoning and philosophy behind the Act, the "policy of the Act" cannot be said to deem inadvertent half-truths non-actionable. It rather suggests otherwise. It is possible that Potter J was instead referring to Parliament's intention to preserve the pre-Act conception of an actionable "misrepresentation".[51] Unlike s 7, s 6 does not purport to be a code. It is generally accepted that the common law remains relevant to determine whether a statement amounts to a misrepresentation under the Act. [52] As the Court of Appeal has stated:[53]

> It is only partly true that the Act "sweeps away" the previous common law. In significant areas it builds upon it, as can be seen by the continued use of common law concepts such as "misrepresentation".

Furthermore, the 1967 report, under the heading "damages for innocent misrepresentation", expressly states that "in this context the terms 'representation' and 'misrepresentation' are intended to have their common law meanings".[54]

If this is what Potter J was referring to, the question therefore becomes, would an inadvertent half-truth, on ordinary common law principles, be an "innocent" misrepresentation and thus have justified rescission of the contract in equity?[55] The purpose of the section was not to create sanctions for pre-contractual misrepresentations where none existed at common law.[56] In other words, one must look to the common law to define "misrepresentation"; although the context of the enquiry is somewhat different, its relevance now in determining

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[51] Bigwood, above n 12, at 114.
[52] *Ware v Johnson* [1984] 2 NZLR 518 (HC) at 537.
[53] *Thompson v Vincent*, above n 21, at [86].
[54] Contracts and Commercial Law Reform Committee, above n 39, at [13.3].
[55] Bigwood, above n 12, at 115.
[56] Contracts and Commercial Law Reform Committee, above n 39, at [13.3].

liability in damages.

Given that half-truths, at least fraudulent ones, are deemed misrepresentations under the common law,[57] Potter J's reasoning is once more sparse, and arguably erroneous.

Conclusion

Potter J's reference to the "policy of the Act" does nothing to bolster her argument against liability for inadvertent half-truths. It does rather the opposite. At common law the sanction of rescission acted to assist victims of wholly innocent representations, and while the sanction now available is widely removed from this position, the Act was not intended to change the meaning of "misrepresentation". The recognition of liability for innocent half-truths is consistent with the reasoning behind the pre-Act remedy for innocent misrepresentation.[58] Likewise, it evident from the 1967 Contract and Commercial Law Reform Committee report that the Contractual Remedies Act was enacted to assist victims of innocent misrepresentations, rather than working to their detriment. [59]

Bigwood is disinclined to determine the question of legal liability for inadvertent half-truths by reference to the spirit of the Act, or to Parliament's intention to distinguish between innocent and fraudulent untruths.[60] Rather, the decisive question is whether such misrepresentation would have justified rescission at common law.[61] Although such a determination is essential, it is submitted that the

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[57] *Oakes v Turquand*, above n 17. The position of innocent half-truths at common law has not been authoritatively settled, but Potter J makes no reference to any such case law.

[58] Bigwood, above n 12, at 115.

[59] See Contracts and Commercial Law Reform Committee, above n 38, at [13.3], assistance by offering a better remedy, that would be more readily available.

[60] Bigwood, above n 10, at 155-156.

[61] Ibid.

intention of Parliament and the 1967 report are a fundamental indication as to how this issue should be resolved. The Committee's determination to provide a more adequate remedy for innocent misrepresentation suggests that liability should attach for inadvertent half-truths. However, the decisive determination is indeed whether a false representation was actually made.

1. Potter J's incorrect application of *Savill v NZI Finance*

Potter J's reasoning also largely rests upon a quote from Hardie Boys J's judgment in *Savill v NZI Finance*:[62]

> Not only must the representation have caused the representee to enter into the contract but also the representor must, either in fact or in contemplation of law have intended to cause him to do so … I cannot think that the legislature intended such a change, which would make the test of inducement a purely subjective one, judged from the point of view of the representee … Therefore I consider that it remains the law that it is not enough for a party to say that a representation caused him to act in a particular way. He must also show either that the representor intended him to do so, or that he "wilfully used language calculated, or of a nature, to induce a normal person in the circumstances of the case to act as the representee did."

However, Potter J's reliance on this quote is misguided. The reference to "the test of inducement" is clear. In the light of this, it appears evident that Hardie Boys J was referring to the element of "inducement", as required by a misrepresentation cause of action. Additionally, the leading textbook on contract law also reproduces Hardie Boys J's quote under the heading "inducement".[63] As I have previously stated, the issue of inducement is separate from the initial

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[62] *Ladstone Holdings Ltd v Leonora Holdings Ltd*, above n 2, at [54]; quote is from *Savill v NZI Finance Ltd,* above n 6, at 145.
[63] Burrows, Finn, and Todd, above n 5, at [11.2.1].

enquiry as to whether there is a misrepresentation.

Hardie Boys J's analysis is accurate, as it applies to this separate element of the misrepresentation enquiry. In S*avill v NZI Finance*,[64] the appellants were sued on a guarantee. They claimed they were induced to sign the guarantee by a representation, made by the respondent's solicitor, that he was satisfied with a letter stating that a collateral transaction was unconditional. The issue was whether it could be said that Mr Levin (the solicitor) intended the Savills to act upon his statement, or could be held to have so intended because his words were calculated to have that result. Hardie Boys J held there was no ground for concluding that a reasonable person would have thought that Mr Levin meant for them to execute the guarantee on the strength of what he said.

In the light of this, Potter J's reference to Hardie Boys J's quote must been seen as an assertion that to make innocent half-truths actionable would be inconsistent with the need for intention when assessing inducement. Such an assertion is deeply flawed. Providing it can be shown that the representor intended the representee to rely on the literally true part of the statement to induce entry into the contract (or he wilfully used language calculated, or of a nature, to induce a normal person in the circumstances of the case to act as the representee did), and the representee was induced, Hardie Boys J's concerns are met.[65] For example, in *Thompson v Vincent* a statement that the unit block comprised 24 units was intended to induce the purchasers into entering the purchase agreement. The sellers did not intend to the statement to be misleading, but this was deemed irrelevant.[66]

Therefore, Hardie Boys J's quote does not demand an objective intention to mislead or deceive by one's fragmentary statement as a

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[64] *Savill v NZI Finance Ltd,* above n 6.
[65] Bigwood, above n 12, at 114.
[66] *Thompson v Vincent*, above n 21, at [72].

precondition to liability under s 6 of the Contractual Remedies Act.[67] It is confined to a requirement of intention merely to induce entry into the contract by what was actually stated. In referring to *Savill v NZI Finance*, Potter J has not bolstered the argument in favour of making inadvertent half-truths non-actionable. Rather, by referring to the need for intention in a completely separate enquiry, her reasoning appears, with respect, somewhat awry.

2. Other Case Law

In giving her conclusion, Potter J makes no reference to any other case law that deals with innocent half-truths. It is imperative that a significant body of such case law be discussed because, as mentioned, Parliament, in enacting s 6, did not intend to alter the fundamental nature of liability for misrepresentation.[68] Given that there is no definitive law as to whether an inadvertent half-truth attracts liability, the weight of obiter statements in case law will likely be a significant factor in the determination of this issue.

In *Ware v Johnson*,[69] the purchaser of a failed kiwifruit orchard business alleged that the vendor had made a pre-contractual statement that constituted a misrepresentation by way of a half-truth. The vendor's representative, Mr Johnson, had represented that the vines would produce their first crop in May 1982 (as would be the normal expectation if they were in good health), and had stated that the kiwifruit vines had been sprayed with herbicides normally used on kiwifruit, without saying that Krovar, a harsh herbicide, had also been used.[70] Prichard J concluded that, on the facts, misrepresentation was not made out, but still offered obiter as to the issue of knowledge. The Judge quoted from Spencer Bower and Turner, Actionable

[67] Bigwood, above n 12, at 114.
[68] They merely wished to alter the remedies available.
[69] *Ware v Johnson,* above n 52.
[70] Ibid at 537.

Misrepresentation:[71]

> But there are other cases where in the course of the negotiations the party has let fall something which, whether he so intended or not, he immediately perceives to have a delusive effect on the mind of the representee, and where, by not correcting the delusion, he is deemed to confirm and perpetuate it, and so to misrepresent.

This led Prichard J to conclude:[72]

> It comes back to a question of whether there was a duty to say anything further; and that, in turn, depends upon whether the representor appreciates that what he said, in conjunction with what he has not said, has misled or will mislead the representee unless the necessary correction is made.

However, the impact of this case and its accompanying quote is somewhat lessened by academic criticism. Bigwood notes the discernible inconsistencies in Spencer Bower and Turner's approach to actionable misrepresentation via partial-truths.[73] There is no mention of knowledge in the authors' encapsulation of their discussion dealing with partial-truth-telling. Additionally, Burrows notes the influence of Spencer Bower and Turner on cases, particularly *Ware v Johnson*, and remarks that the requirement of fraud is somewhat alien to the spirit of s 6, and also to the overriding importance of reliance evinced by the other cases.[74]

Other obiter statements also collaborate Potter J's conclusion. In a

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[71] Quote is from Spencer Bower and Turner *"Actionable Misrepresentation"* (3rd ed, Butterworths, London, 1974) at 99-100. Emphasis added.
[72] *Ware v Johnson,* above n 52, at 539. Emphasis added.
[73] Bigwood, above n 10, at 154.
[74] J F Burrows "The Contractual Remedies Act 1979 – Six Years On" (1986) 6 Otago LR 220 at 224.

2010 application for summary judgment it is stated:[75]

> The plaintiffs also invoke the doctrine of misrepresentation by silence or half-truth. They claim that the failure to disclose the Transit proposals meant the express statements were a half-truth i.e. that what was left unsaid (the existence of the Transit proposals) rendered the express statements misleading. For summary judgment purposes, it was accepted the plaintiffs would be required to prove the defendant had knowledge of the undisclosed fact.

Although it has very limited precedential value, this quote is relevant given its recency. However, the Judge, like many academics, appears to have mistakenly equated "knowledge of the undisclosed fact" with fraud. As previously discussed, knowledge is separate from the determination of whether there was an intention to mislead. Therefore, while the Judge's terminology may be mistaken, it suggests that at least some judges believe that a mental state akin to fraud is required. It confirms, at least, the unsettled nature of the law in this area, and emphasises the need for clarification.

Having considered a selection of case law that suggests inadvertent half-truths are not misrepresentations, one must now consider those that suggest otherwise. In *King v Wilkinson*[76] the purchasers of a property brought a claim under s 6 of the Contractual Remedies Act. They claimed that the position of the fence misrepresented the property's boundary, and the Judge held this to be an actionable misrepresentation. However, the Judge, in obiter, also considered a statement made by the defendant's real estate agent. The question of boundaries was raised by the plaintiffs, who asked the agent whether the fence constituted the boundary. The agent replied, pointing at the fence on the eastern boundary, that the fence represented the

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[75] *Draper v Pegasus Town Ltd* HC Christchurch CIV-2008-009-3823, 17 February 2010 at [32].
[76] *King v Wilkinson* (1994) 2 NZ ConvC 191,828 (HC).

boundary. Although this was accurate regarding the eastern fence, the agent's statement needed qualification as to the true position of the southern boundary. As regards this half-truth, the Judge stated, albeit obiter: [77]

> The agent was undoubtedly innocent in saying and indicating that the boundaries of the property were as fenced. That is immaterial because of the provisions of the Contractual Remedies Act 1979.

In *Adele Holdings v Westpac Finance Ltd* [78] it was argued that the presence of a Transcabin on the land for sale was one of the factors that induced the plaintiff to enter into the contract, believing the structure to form part of the land. However, the Transcabin was a chattel. The defendant denied liability on the basis that they had no knowledge of the fact that the cabin was a chattel only. Doogue J stated that "it is clear that it was an innocent misrepresentation, but, in my view, it is nonetheless a misrepresentation".[79] The Judge would have found for the plaintiff on this issue, had it been necessary to do so.

Returning to the case of *Thompson v Vincent*,[80] the Court of Appeal stated:[81]

> The Thompsons are correct that their state of mind in relation to the representation – fraudulent, negligent, or otherwise – is not relevant in light of s 6. The Judge's finding that Mr Thompson "well knew" what he said was wrong is not relevant to the existence or absence of misrepresentation (although not entirely irrelevant to other discretionary matters such as interest and costs).

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[77] Ibid at 191,832-191,833.
[78] *Adele Holdings Ltd v Westpac Finance Ltd* (1988) ANZ ConvR 20 (HC).
[79] Ibid at 22.
[80] *Thompson v Vincent*, above n 21.
[81] Ibid at [72].

This explicit statement from the Court of Appeal in 2001 is arguably detrimental to Potter J's argument. Unlike in *Ladstone Holdings*, the Court in this decision was dealing with a half-truth, and held that there was a misrepresentation as pleaded.[82]

One case that deserves considerable attention is *Clarkson v Whangamata Metal Supplies Ltd.*[83] In that case the purchasers of land alleged misrepresentation, as a structure (a quarry) on the land encroached upon adjoining crown-owned property. The plaintiff purchasers claimed that the encroachment was a breach of an implied term, a breach of the Contractual Remedies Act, and a breach of the Fair Trading Act. Venning J found an implied term that the quarry sold under the agreement for sale and purchase was located on the property described in the agreement.[84] Therefore, the vendor was in breach of this term.

It was therefore strictly unnecessary to consider the alternative causes of action that dealt with encroachment (that is, liability under the Contractual Remedies Act and the Fair Trading Act). However, Venning J continued, in obiter, to conclude on these issues, in deference to counsel's submissions.[85]

The nature of the representation was in dispute. The plaintiff submitted that the representation was by positive conduct, specifically the placement of the pit and of the crushing plant. The defendants treated the representation as one by silence. Venning J held that the pit and crushing plant were described as assets of the property in the sale and purchase agreement, therefore the physical presentation of the property in the agreement constituted a representation that the pit and crushing plant were within the boundaries of those properties.[86] The

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[82] Ibid at [75].
[83] *Clarkson v Whangamata Metal Supplies Ltd* HC Auckland CIV-2003-404-6869, 8 June 2006.
[84] Ibid at [51].
[85] Ibid.
[86] Ibid at [52].

Judge stated: [87]

> In my judgment the representation was made, not by silence, but rather, by positive conduct, as the plaintiff submitted. More accurately the positive conduct was a half-truth: the defendants were silent as to the true boundaries … The defendants' silence can be construed as positively affirming the misconception which the physical presentation of the property formed: *King v Wilkinson* (1994) 2 NZ ConvC 191,828.

Thus, it is clear that Venning J was dealing with a half-truth situation. Additionally, it was an innocent half-truth, as the defendants did not know of the encroachment. The defendants naturally relied on Potter J's judgment in Ladstone to absolve themselves of liability. Venning J did not accept this, and went further to criticise Potter J's reasoning. This quote is essential to the deliberation contained in this paper, and thus is reproduced in its entirety: [88]

> In *Ladstone* Potter J held that the representation by silence generally needs to be a deliberate nondisclosure of the fact known to the representator (see paras 52-55). In reaching that conclusion Potter J referred to the objective approach advocated by Hardie Boys J in *Savill v NZI Finance Ltd* [1990] 3 NZLR 135. The reasoning in *Ladstone* has been criticised: see Professor Bigwood "The full truth about half-truths" [2006] NZLJ 114. In the article Professor Bigwood averts to the fact that the objective approach of Hardie Boys J in *Savill* relates to the inducement aspect of s 6 of the Contractual Remedies Act rather than the representation aspect which was the matter before Potter J and is the matter before this Court. It is strictly unnecessary for this Court to resolve the issue but in my judgment there is force in Professor Bigwood's argument that the reliance by the Judge in *Ladstone* on the objective approach

[87] Ibid.
[88] Ibid at [53].

> was mistaken. Half-truth cases involve both silence and positive representation. Innocent half-truths are not simply representations by silence. The approach taken in Ladstone, that for there to be a misrepresentation by silence would generally require deliberate nondisclosure of a fact known by the representator, may not be applicable to innocent half-truths.

This succinct statement has much to recommend it. The High Court confirms my previous discussion of *Savill* and the requirement for intention in the inducement enquiry. Venning J goes as far as to state that Potter J's reliance on Hardie Boys J's quote in *Savill* was indeed mistaken. The Judge concludes that innocent half-truths may not require deliberate non-disclosure.

It is submitted that Clarkson should be taken as decisive on this matter. The High Court, albeit obiter, offers a well-reasoned opinion suggesting that inadvertent half-truths are capable of attracting liability. The leading contract textbook compares *Ladstone* with Clarkson, and states, in reference to Clarkson, "it is submitted that this view is the preferable one".[89]

Given the discrepancies between the decisions I have discussed, liability in this area remains unsettled. However, the decisions in favour of liability for inadvertent half-truths outweigh the alternative, both in quantity and calibre of reasoning. The culmination of decisions such as *Thompson v Vincent* and Clarkson suggest that any decisive decision on this issue will feasibly purport to create liability for inadvertent half-truths.

3. Fair Trading Act 1986 and Trade Practices Act 1974 (Cth)

Having discussed liability for inadvertent half-truths under the Contractual Remedies Act 1979, it is instructive to consider the position under the Fair Trading Act 1986. Section 9 of the Fair

[89] Burrows, Finn, and Todd, above n 5, at [11.2.1].

Trading Act states: "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."[90] The Act is clearly apt to cover any conduct that could be classified as a misrepresentation for the purposes of the Contractual Remedies Act 1979, and thus it is arguable that inadvertent half-truths are capable of also attracting liability under s 9 of the Fair Trading Act 1986. Thus, the issue of half-truths must be considered under the Fair Trading Act 1986, to assist in determining the position under the Contractual Remedies Act.

In *Des Forges v Wright*,[91] a s 9 claim was brought, as the seller of a distribution agreement (Wright) had failed to inform the purchasers that a major supplier was for sale. Wright had no knowledge of that fact. On appeal it was argued that knowledge is irrelevant for the purposes of a claim under the Fair Trading Act, and thus its absence should not defeat a s 9 claim. Elias J noted that an omission may be misleading or deceptive conduct, and stated "the question whether conduct is misleading or deceptive is substantially a question of fact and degree".[92] Intention to mislead or deceive is irrelevant. However, this is qualified by her statement that no policy of the Act would be served by imposing liability for a wholly unconscious omission.[93] In *Ladstone Holdings*, Potter J heavily relies upon this statement when reaching her conclusion.[94]

Although Elias J's statement regarding a "wholly unconscious omission" may initially seem to deem innocent half-truths as non-actionable, it is essential to note that a half-truth must not be categorised as an omission. A half-truth attaches liability because what is said is misleading, as it has not been qualified. Bigwood notes that Elias J's holding regarding wholly unconscious omissions should only

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[90] Fair Trading Act 1986, s 9.
[91] *Des Forges v Wright* [1996] 2 NZLR 758
[92] Ibid at 764.
[93] Ibid at 766.
[94] *Ladstone Holdings Ltd v Leonora Holdings Ltd,* above n 2, at [67]. Potter J's conclusion is that innocent half-truths are non-actionable.

apply to pure omissions, not half-truths. Because of this, he submits that *Des Forges* should not be followed in a case involving innocent partial-truth-telling.[95] It is submitted that such a conclusion, while in principle accurate, is unnecessary. It is arguable that Elias J did not purport to conclude that a "wholly unconscious omission" included a half-truth. Indeed, *Des Forges v Wright* does not involve a half-truth at all. In obiter Elias J stated: [96]

> It is not suggested by Mr Des Forges in his evidence that Mr Wright made any explicit representation as to the continuation of the business in its present form. If such representation had been made, at least where there was no basis for it, it could well constitute misleading or deceptive conduct even though innocent in the sense that the fact that it was wrong was not known.

Elias J was dealing with a situation of pure silence, and clearly held that no liability should attach. However the above quotation suggests that this is not the case for half-truths. It is arguable that Elias J's reference to an innocent representation, which the representor does not know is wrong, can logically extend to include a half-truth. Admittedly there is a "basis" for half-truths, as that which is said is accurate, but is deemed inaccurate by what is unsaid. However, as discussed, when considering a half-truth and a purely false statement, their practical effect cannot be differentiated. Therefore, Elias J's statement can reasonably extend to include half-truths, as well as baseless innocent representations.

Proceeding on this assumption, an erroneous half-truth creates liability, even if the omitted facts are unknown.[97] However, where no positive representation is made at all, *Des Forges v Wright* naturally shows that there will be no liability. In adherence to the previous assumption,

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[95] Bigwood, above n 12, at 116.
[96] *Des Forges v Wright*, above n 91, at 766.
[97] W Pengilley "Section 52: Can the Blind Mislead the Blind?"(1997) 5 TPLJ 4 at 14.

Potter J's reliance on *Des Forges v Wright* is mistaken. Indeed, Bigwood confirms that Potter J's reliance on Elias J's statement regarding a "wholly unconscious omission"[98] does not lead one to conclude that innocent half-truths are non-actionable. This is confirmed in Clarkson, where Venning J stated: [99]

> In *Des Forges v Wright* [1996] 2 NZLR 758 the Court held that there should be no liability for an omission which is wholly unconscious. Half-truths may sometimes be wholly unconscious but they are not wholly omissions.

Therefore, Venning J found that there was an argument that the defendant's inadvertent half-truth would constitute misleading and deceptive conduct under the Fair Trading Act.[100] Given our previous assumption, such a conclusion was consistent with, rather than contrary to, the decision of *Des Forges v Wright*.

Thus, it is arguable that an inadvertent half-truth is capable of attracting liability under the Fair Trading Act. It is submitted that such a conclusion bolsters the argument for the liability of half-truths under the Contractual Remedies Act. As discussed, mere silence cannot constitute a misrepresentation for the purposes of either Act. Additionally, it appears that an inadvertent half-truth can constitute misleading conduct under the Fair Trading Act, which suggests liability must also attach under the Contractual Remedies Act.

In *Ladstone Holdings v Leonora Holdings Ltd*, Potter J considered Fair Trading Act liability and discussed *Des Forges v Wright*. Her obiter discussion centred on the theoretical possibility that "presently available for development" constituted an inadvertent half-truth.[101] In

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[98] *Des Forges v Wright*, above n 91, at 766.
[99] *Clarkson v Whangamata Metal Supplies Ltd*, above n 83, at [55]-[56].
[100] Ibid at [56].
[101] *Ladstone Holdings Ltd v Leonora Holdings Ltd*, above n 2, at [51]. Potter J held that there was no misrepresentation at all, thus this discussion is in obiter.

such an instance, Potter J held that there would be no liability under the Fair Trading Act. As previously explored, this was due to her reliance on Elias J's statement that "no policy of the Act is served by imposing liability for an omission that which is wholly unconscious".[102] As discussed, this quote from *Des Forges v Wright* does not purport to equate inadvertent half-truths with omissions. When coupled with the discussion by Bigwood and the decision in Clarkson, it is evident that Potter J's reliance on this quote is incorrect.

Additionally, when Potter J recites Elias J's "wholly unconscious" point, she changes the wording. Potter J states "while in some circumstances silence can mislead and deceive, conduct cannot properly be regarded as misleading and deceptive which is wholly unconscious".[103] Elias J referred to 'omissions', not conduct. As discussed, the use of the word 'omissions' is the reason why Elias J's statement does not apply to half-truths. A half-truth is not an omission. However, conduct can be viewed as half-truth.[104] This inaccuracy is further proof that Potter J did not fully comprehend what Elias J was purporting to say. Bigwood's conclusion that subsequent courts should be slow to follow *Ladstone* is indeed sound.[105]

One can also argue by analogy to the Trade Practices Act 1974, the Australia equivalent to the Fair Trading Act.[106] Section 52 states that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.[107] As the New Zealand Court of Appeal has stated:[108]

> The category of misleading or deceptive conduct in trade

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[102] Ibid, at [65]; relying on *Des Forges v Wright*, above n 91, at 765-766.
[103] *Ladstone Holdings Ltd v Leonora Holdings Ltd*, above n 2, at [65].
[104] See *Adele Holdings Ltd v Westpac Finance Ltd*, above n 78.
[105] Bigwood, above n 12, at 116.
[106] (CTH) Trade Practices Act 1974
[107] (CTH) Trade Practices Act 1974 s 52(1). Misleading conduct by *persons* is governed by separate Acts in the individual states.
[108] *Thompson v Vincent*, above n 21, at [71].

> arguably is wider than contractual misrepresentation. However, there remains a close analogy … The Australian approach [in the Trade Practices Act] is a commonsense one. It is common sense which can find equal application here [in a claim under Contractual Remedies Act].

The notion of misleading or deceptive conduct is wider than that of an actionable misrepresentation under the general law. Silence may constitute misleading deceptive conduct, even though it would fail to be considered an actionable misrepresentation.[109] However, it is apparent that silence per se will rarely ground liability under s 52.[110] Rather the majority of cases that find liability for "silence" are situations of half-truths.[111] Therefore, one can clearly breach s 52 by failing to disclose the whole truth, thus creating an erroneous position by what has been disclosed. [112] As Gilles notes, such conduct will often be able to be viewed in conventional terms as positive conduct that misleads or deceives.[113]

But is knowledge of the undisclosed facts required? Section 52 imposes strict liability, as no intention to mislead or deceive needs to be proven. It is sufficient if the conduct is objectively misleading.[114] It would therefore appear that the assumption formed from *Des Forges v Wright* applies, creating liability for inadvertent half-truths.[115] Pengilley states that such a conclusion would be consistent with all Australian authority.[116] However, the application of *Des Forges v Wright* to Australia is complicated by s 4(2)(c)(i) of the Trade Practices Act. This

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[109] *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202.
[110] P Gilles "Non-disclosure: Trade Practices Act, s 52" (2004) 78 ALJ 653 at 664.
[111] As previous stated, half-truths are not situations of silence.
[112] Pengilley, above n 97, at 5.
[113] Gilles, above n 110, at 664. Emphasis added.
[114] Ibid at 661.
[115] See *Gregg v Tasmanian Trustees Ltd* (1997) 73 FCR 91 at 106. This is proceeding on the assumption that Elias J did not intend to make half-truths non-actionable. See previous discussion.
[116] Pengilley, above n 97, at 14.

states that refraining to do an act may constitute conduct, but such conduct must not be inadvertent. While this statutory indication is possibly identical to the conclusion reached in *Des Forges v Wright*, the difference between statutory provisions in Australia and New Zealand may make Australian application of *Des Forges* inappropriate.[117]

It is uncertain as to what bearing s 4(2) has on the issue of inadvertent half-truths. Academics believe that s 4(2) may only apply to cases of pure silence. In a half-truth case, it is argued the provision has no application, as the defendant's actions constitute a mix of refraining to act (the non-disclosure) and a representation (which is not covered by 4(2)(c)(i)). Thus, as Gilles states, "collectively the defendant's conduct is not truly a refusal to act."[118]

Alternatively, the half-truth could be split in half, thus comprising both a positive statement and, separately, an omission. By not providing additional qualifying facts, the defendant has refrained from acting, and such an act must be intentional.[119] However, Pengilley states that such an argument is "a somewhat thin straw to grasp".[120] Given my previous discussion on the nature of half-truths, it is submitted that the former view is correct, as the defendant's initial disclosure is the operative misleading statement. Therefore, the representor has not refrained from acting in the usual sense of the phrase. Indeed, in Cheshire and Fifoot's Law of Contract it is suggested that, to the extent that s 52 and s 4(2) are inconsistent, the former should prevail so that an element of deliberateness is not a necessary requirement in half-truth cases.[121] Likewise, Australian courts may be encouraged to

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[117] The position under *Des Forges v Wright* and s 4(2) is certainty the same for situations of pure silence. For example, Wright, by providing no information as to the proposed sale of the Tenderkist factory, refrained from acting, and therefore s 4(2) would ensure that he is not liable as such inaction was inadvertent. This is the same conclusion reached by Elias J.

[118] Gilles, above n 110, at 661.

[119] (CTH) Trade Practices Act 1974 s 4(2)(c)(i).

[120] Pengilley, above n 97, at 15.

[121] Seddon and Ellinghaus, above n 37, at 588.

hold *Des Forges v Wright* as applicable Australian law, as the New Zealand High Court sees its application in Australia as "beyond doubt".[122]

From the weight of available authorities, it is evident that where silence alone is concerned, the defendant must have actual knowledge of the facts he failed to disclose.[123] This is consistent with *Des Forges v Wright*, and the application of s 4(2)(c)(i). The position regarding inadvertent half-truths remains unsettled. Regardless of whether s 4(2) is applicable to half-truths, one must consider that s 9 of the Fair Trading Act is demonstrably similar to, and indeed derived from, the Trade Practices Act 1974. Thus, the exclusion of an "inadvertence" section in the Fair Trading Act suggests that the legislature intended an inadvertent failure to act as capable of attaching liability in New Zealand.

It is argued that the issue should be decided in principle, rather than a superficial discussion of the word "inadvertence".[124] When approaching the Fair Trading Act or the Trade Practices Act, academics and judges agree that the issue is substantially a question of fact and degree, in light of the circumstances.[125] In *Forwood Products Pty Ltd v Gibbett*,[126] a claim was brought under s 52 of the Trade Practices Act. The Court confirmed that it is not necessary that the misrepresentation be known by the respondent to be false or misleading.[127] However, instead of a complex discussion of inadvertence, the Court focused on the whether the defendant's conduct was misleading overall. The Court stated: "the question is whether, in all the circumstances, that conduct contravened s 52".[128] This approach must also be adopted when considering the Contractual Remedies Act, demanding a general investigation into "falsity" of the

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122 Pengilley, above n 97, at 15.
123 Gilles, above n 110, at 663.
124 Pengilley, above n 97, at 15.
125 Elias J in *Des Forges v Wright*, above n 91; Gilles, above n 110, at 655.
126 [2002] FCA 298.
127 *Forwood Products Pty Ltd v Gibbett* [2002] FCA 298 at [3].
128 Ibid at [113].

statement, rather than a strict process of categorisation and determination of knowledge.

Other Jurisdictions

It is beneficial to explore the status of inadvertent half-truths within alternative jurisdictions. In the United Kingdom, this was initially governed by the common law. Relief afforded to a representee did not extend to an award of damages, unless the representee could further show that the representation was made fraudulently, negligently or in breach of a fiduciary duty. Therefore, damages were not available for a purely innocent misrepresentation. However, the introduction of the Misrepresentation Act 1967 (UK) provided the possibility of an award of damages despite the absence of fraud on the part of the representor. It is instructive to compare s 6 of the Contractual Remedies Act with s 2(1) of the Misrepresentation Act 1967. This provision differs from the New Zealand position, as s 2(1) does not abolish the common law actions for fraudulent and negligent misrepresentation. [129] Equity and actions in tort for deceit and negligent misstatement run parallel to the Act. However, the Act provides the only recourse for purely innocent misrepresentation. Under s 2(2), damages are available for innocent misrepresentation in lieu of rescission, if it is equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused if the contract was upheld, as well as the loss that rescission would cause to the other party.[130]

In the United Kingdom, as in New Zealand, a statement may amount to a misrepresentation if facts are omitted that render that which has actually been stated false or misleading in the context in which it is made.[131] It must always be proved that the incompleteness rendered

[129] Dawson and McLauchlan, above n 32, at 13.
[130] Misrepresentation Act 1967 s 2(2).
[131] HG Beale (ed) *Chitty on Contracts* (29th ed, Sweet & Maxwell, London, 2004) at [1-016].

the initial statement fallacious and false.[132] However, the leading UK text onerously concludes that these cases of partial disclosure can either be explained as cases of actual misrepresentations, or as cases in which there is a duty to disclose certain facts by reason of the facts already stated.[133] As previously discussed, half-truths must not be categorised as depending on a "duty to disclose". This distinction is important, as the Misrepresentation Act 1967 only applies to actual misrepresentations, not breaches of duties to disclose. The text later states that cases of partial non-disclosure will normally be treated as cases of actual misrepresentation, thus falling within the Act, whereas complete non-disclosure will not. Indeed, academics accept that non-disclosure is not sufficient for a claim under s 2(1), since it refers to liability for a misrepresentation that has been "made".[134] This is consistent with New Zealand's position on mere silence.[135]

It must be asked whether fraud is required by s 2(1) of Misrepresentation Act, in relation to a claim of misrepresentation. The section states that the defendant is liable, even if he was not fraudulent, "if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently".[136] However, fraud is not a requirement. The reference to fraud is historical, and arguably an unnecessary complication in the Act.[137] It merely means that a claimant must prove all the elements of the tort of deceit except for fraud. This equates to the claimant proving the defendant intended him to act on the statement, and he did in fact act on it.[138]

The position of statutory liability in the United Kingdom appears substantially similar to that under the Contractual Remedies Act 1979.

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132 *Re Coal Economising Gas Co, Grover's Case* (1875) 1 ChD 182 at 199.
133 Beale, above n 131, at [1-016].
134 Cartwright, above n 35, at 24.
135 Mere silence is not a misrepresentation.
136 Misrepresentation Act 1967 s 2(1).
137 Cartwright, above n 35, at 246.
138 Ibid at 248.

However, the Misrepresentation Act presents one fundamental difference. An innocent representor is liable, unless he proves that he had reasonable grounds to believe, and did believe at the time the contract was made, that the facts represented were true. This statutory defence is similar to negligent misstatement, a previous remedy for a victim of an innocent misrepresentation.[139] However, there are two important differences. The burden of proof is reversed, meaning that the representor must prove they had reasonable grounds, rather that the representee having to prove the representor failed to take reasonable care. Additionally, there is no need to prove a duty of care between the contracting parties.

Is this "reasonable grounds" defence of relevance to New Zealand? Given the similarities between the two Acts, it is arguable that an innocent representor could claim they had reasonable grounds for their belief, and thus should be excused from liability under the Contractual Remedies Act. However, the Contract and Commercial Law Reform Committee report deems such an argument unsuccessful. The Committee expressly rejected the English approach. At paragraph 1.2 they state: "the changes recommended in England and now given effect to by the Misrepresentation Act 1967 do not go far enough and carry their own disadvantages",[140] and "the subject should be approached in a more fundamental way".[141] More explicitly, the Committee stated:[142]

> Our second object is against the intrusion of negligence ... [I]t is beside the point whether an undertaking was given on reasonable grounds or not; it suffices that it was given.

The report repeatedly rejects the English approach,[143] as "damages

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[139] *Rust v Abbey Life Assurance Co Ltd* [1978] 2 Lloyd's Rep 386.
[140] Contracts and Commercial Law Reform Committee, above n 39, at [1.2].
[141] Ibid at [1.1].
[142] Ibid at [9.4.3].
[143] Ibid at [9.4.3], [13.2].

should be available for all misrepresentations".[144] This explicit rejection, when coupled with lack of reference to "reasonable grounds" within the Contractual Remedies Act, makes it clear that this defence is not available in New Zealand. In addition, when faced with the Committee's determination to provide damages regardless of reasonable grounds for belief, the argument for inadvertent half-truths is indeed strengthened.

The common law position in Australia parallels that existing in the United Kingdom. If the representor has an absence of belief in the truth of representation, or knowledge of its falsity, the representee can bring an action for deceit. Honesty is sufficient to defeat such a claim. Thus, the remedy for innocent misrepresentation lies in equitable rescission. *Dimmock v Hallet* and *Peek v Gurney* apply in Australia, providing liability for a half-truth, when a withholding makes an active misstatement absolutely false. As the High Court of Australia stated, a contract may be set-aside in equity so long as the court can achieve practical justice between the parties.[145]

The Australia legislative position differs somewhat from the New Zealand approach. Legislation dealing with innocent misrepresentation exists only in the Australian Capital Territory (Civil Law (Wrongs) Act 2002)[146] and South Australia (the Misrepresentation Act 1972). The object of these Acts was to directly reform the common law of misrepresentation. Like New Zealand and the UK, the Acts permit an award of damages for innocent misrepresentation. However, the application of the Acts is limited to misrepresentations made in trade or business (SA) or in the course of trade or commerce (ACT).[147] Both Acts provide that it is a statutory defence to the action for damages that the representor had reasonable grounds to believe, and did in fact

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144 Ibid at [13.2], emphasis added.
145 *Vadasz v Pioneer Concrete (SA) Pty Ltd* 130 ALR 570 (HCA).
146 Civil Law (Wrongs) Act 2003 Ch 13.
147 Misrepresentation Act 1972 (SA) s 4(1) and Civil Law (Wrongs) Act 2003 Ch 13 (ACT) s 177.

believe, that the representation was true.[148]

Apart from ACT and SA, Australia thus remains governed the common law. The High Court of Australia has stated:[149]

> The court will be more drastic in exercising its discretionary powers in a case of fraud than in a case of innocent misrepresentation … The court will be less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the court will exercise its jurisdiction to the full in order.

This statement, coupled with the lack of reform in the remaining states and territories, suggests that those wronged by innocent misrepresentation are unlikely to have unmitigated access to the remedies they arguably deserve.

The position in Australia fails to shed light on the issue of inadvertent half-truths. Similarly, the United States law fails to offer any substantial assistance. In its definition of misrepresentation, the Restatement (Second) of Contracts confirms that half-truths may be as misleading as an assertion that is wholly false.[150] A statement may be true with respect to the facts stated, but may fail to include qualifying matter necessary to prevent the implication of an assertion that is false with respect to other facts.

Whether fraud is a requirement within the United States is somewhat more complex. As the Restatement verifies:[151]

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148 Misrepresentation Act 1972 (SA) s 7(2)(a); Civil Law (Wrongs) Act 2003 Ch 13 (ACT) s 173(3)(a). This defence does not apply in New Zealand.
149 *Vadasz v Pioneer Concrete (SA) Pty Ltd* 130 ALR 570 (HCA) (discussing rescission for misrepresentation).
150 American Law Institute *Restatement of Contract* (2nd ed, St Paul, Minnesota, 1981) § 159.
151 Ibid.

> An assertion need not be fraudulent to be a misrepresentation. Thus a statement intended to be truthful may be a misrepresentation because of ignorance or carelessness, as when the word "not" is inadvertently omitted or when inaccurate language is used. But a misrepresentation that is not fraudulent has no consequences under this Chapter unless it is material.

Is this requirement for fraud or materiality required when defining a misrepresentation, or is it, like the need for intentional inducement, a separate requirement? The rule is expressed in § 164, where it is stated:[152]

> Three requirements must be met in addition to the requirement that there must have been a misrepresentation. First, the misrepresentation must have been either fraudulent or material … Second, the misrepresentation must have induced the recipient to make the contract … Third, the recipient must have been justified in relying on the misrepresentation.

Therefore, an innocent half-truth could be regarded as misrepresentation, but the additional requirements of the misrepresentation enquiry provide that such a half-truth would not be actionable unless material. The United States position offers little assistance to a jurisdiction where purely innocent misrepresentations are actionable, regardless of materiality.

Conclusion

In *Ladstone Holdings v Leonora Holdings Ltd* Potter J purported to remove the possibility of liability for an innocent half-truth. This paper has sought to examine Potter J's reasoning, to determine whether such a conclusion should represent accurate New Zealand law. For the reasons given, it is submitted that Potter J's conclusion is erroneous.

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[152] American Law Institute *Restatement of Contract* (2nd ed, St Paul, Minnesota, 1981) § 164. Emphasis added.

The element of intention, while required for assessing inducement, does not apply when determining the existence of an actionable misrepresentation. Additionally, the 1967 Misrepresentation and Breach of Contract report evidences an explicit intention to improve the remedies available for innocent misrepresentation, rather than abolishing such sanctions altogether.

However, the paramount determination is whether an erroneous statement was indeed made. As discussed, a half-truth is misleading in itself, as the statement fails to tell the full story. Such a statement should be capable of attracting liability under the Contractual Remedies Act, irrespective of fault. As the New Zealand Court of Appeal has stated, "state of mind in relation to the representation – fraudulent, negligent, or otherwise – is not relevant in light of s 6".[153] Fraud is not, and should not be, a necessary requirement before a half-truth is deemed an actionable misrepresentation under the Act. Although there is no definitive law on this issue, it is imperative that such a conclusion be made.

[153] *Thompson v Vincent*, above n 21, at [72].