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## Misrepresentation in Sale of Goods: Rescission and Restitution

### *Salt v Stratstone Specialist (CofA)*

By Matthew Bradley

1. Nearly a fortnight ago the Court of Appeal handed down its decision in *Salt v Stratstone Specialist Limited T/A Stratstone Cadillac Newcastle*<sup>1</sup>. If ever you deal with misrepresentation in the sale of goods, it is worth knowing about.

#### Facts

2. Mr Salt, a car enthusiast, purchased a Cadillac in 2007 having been told that it was "brand new". That was false: it was some two years old, had undergone various repairs and been involved in one collision. Mr Salt relied on the misrepresentation that the vehicle was brand new and would not have bought it if he had been aware of its age and history.

3. Mr Salt sought to reject the vehicle and get his money back, to no avail.

4. The district judge held that he could not order rescission because he could not put the parties back in their original position and that *restitutio in integrum* was impossible. That was because the car had now been registered and could not be returned as an unregistered car; there had been a considerable lapse of time since the sale and lastly, because no evidence was lead that would enable him to adjust the amount of the price that would be repayable to allow for the depreciation of the vehicle. He held that Mr Salt was confined to a remedy in damages, being the difference between the value of the car at the time of sale if it had been new and the actual value of the car at the time of purchase.

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<sup>1</sup> [2015] EWCA Civ 745

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5. The Circuit Judge, and now the Court of Appeal, disagreed. Fundamentally they did so because, once the proper legal test was applied, it was clear that restitution of the car was possible, and that the delay in seeking rescission was not such as to debar access to the remedy of rescission.
6. The decision is important for three reasons.

### **Section 2(2) Misrepresentation Act**

7. Firstly, it represents clear appellate authority to the effect that the power to award damages in lieu of rescission in relation to non-fraudulent misrepresentation under section 2(2) of the 1967 Act<sup>2</sup> presupposes that a power to rescind persists at all. That power must not have been lost – whether by the contract being affirmed, by third party rights intervening, by the elapse of an excessive time or by restitution having become impossible. That reasoning is intrinsic to the requirement that the damages should stand “in lieu” of rescission. The decision thus clears up a line of conflicting first instance High Court authority.

### **Impossibility of Restitution**

8. Secondly, the decision makes clear that a court will not readily permit factors such as depreciation or the intermittent enjoyment of the goods in question to mean that it is impossible for the goods to be returned to the representor such that he receives full restitution. The tail should not wag the dog: the consideration that the representor should not be prejudiced is secondary to the overriding principle that the representee should not be unjustly enriched at the representor's expense.

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<sup>2</sup> “(2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.”

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9. "Practical justice" is the guiding light. If "practical justice" requires a representor to be compensated for depreciation, or for the representee to account for his use of the goods, then *he* shoulders the burden of proof in that regard, not the representee. If no evidence is lead on those issues, that is the representor's tough luck. Per Longmore LJ:

*"The absence of evidence about depreciation or the value of the use of the car should not operate to the disadvantage of the representee who should never have been put in the position of having a troublesome old car rather than a brand new one."*

### **Delay**

10. Lastly, the decision makes clear that a lapse of time in seeking rescission will only operate as a bar where the lapse of a reasonable time is such that it would be *inequitable in all the circumstances* to grant rescission. That was not this case: Mr Salt was only able to discover the true age of the car when documents revealing the position were provided on disclosure in the proceedings.

11. In reaching this conclusion, the Court observed that the decision in *Leaf v International Galleries [1950] 2 KB 86*, which suggested that a representor should be in no worse a position than if the representation had become a term of the contract, was unlikely to survive the introduction of the Misrepresentation Act 1967, which effectively provides to the contrary.

**Matthew Bradley**