

## Representations and warranties distinguished

A warranty is a contractual promise that a particular statement made is true. A breach of warranty therefore gives rise to a claim for breach of contract – the most common remedy being an award of damages. The intention behind expressing the warranties as also constituting representations is to establish potential liability in tort for misrepresentation. The distinction between the two legal concepts means the difference in damages which are potentially recoverable can be significant. In the 2012 case of *Sycamore Bidco Ltd v Breslin & Anor*, the buyer tried (unsuccessfully) to establish that the warranties in a share purchase agreement also constituted representations. The judge noted that the distinction had material consequences:

*“The point has a real significance in terms of the measure of damages (and also the date at which damages should or can be assessed), so it is necessary to deal with it. If the claimants are right about it, and can otherwise put their claim successfully in misrepresentation, then they may be entitled to recover damages which would not be available under a contractual claim. At their highest, the misrepresentation claim damages are equivalent to or exceed the consideration paid [approximately £16 million]. At its highest the warranty damages claim is about £6 million. Hence the point’s importance.”*

This passage introduces two of the key differences between claims for breach of warranty and for misrepresentation – the measure of damages and (potentially) the date of assessment of damages. We look at these concepts below, together with the rules on remoteness of damage and the availability of rescission.

The main differences between warranties and representations under English law

### Measure of damages

The contractual measure of damages for breach of warranty equates (in an M&A context) to the difference between the actual value of the target being purchased and its value had the warranty been true (i.e. to put the buyer in the position as if the contract had been performed). In tort, the damages are restitutionary in nature (i.e. to put the buyer in the position it would have been in had the tort not been committed) – so the damages are the difference between the price paid and the actual value of the target (strictly speaking, putting the buyer back in its original position but giving credit for value received). That said, sometimes the result of the assessment of damages in contract and tort will be more or less the same. This is because, when looking at a warranty claim, a court will usually (but not always) consider the sale price to be a good proxy for market value when looking at the question of what