The remedies available to Linda would depend on the type of misrepresentation that

was committed. All misrepresentations render the contract voidable. Thus the contract

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Answering questions

continues to exist unless and until the innocent party chooses to have it set aside by

means of rescission. Along with the remedy of rescission, the courts can order a payment

of money known as an indemnity. An indemnity payment is designed to put the

parties back into their former position, and is only available for obligations necessarily

and inevitably created by the contract.

A misrepresentation may also give rise to a right to damages, depending on the

type of misrepresentation that has occurred. There are four types of misrepresentation:

fraudulent misrepresentation; negligent misrepresentation at common law;

negligent misrepresentation under statute; and innocent misrepresentation. Which

category a misrepresentation falls into depends on the state of mind of the person

making the statement. When Paul made the statement, he knew that he was having

considerable difficulty in getting materials from his supplier.

Looking first at fraudulent misrepresentation, it is very difficult to prove fraud. The

leading case is **Derry** *v* **Peek** where it was stated that fraudulent misrepresentation is

a false statement that is made: ‘(i) knowingly, or (ii) without belief in its truth, or

(iii) recklessly as to whether it be true or false.’ It is possible that Paul made his

statement recklessly and that the statement will therefore amount to fraudulent misrepresentation.

Alternatively, it was undoubtedly made negligently and would amount

to negligent misrepresentation both under statute and under common law. Fraudulent

and negligent misrepresentation both give rise to a right to damages.

In addition, it is possible that Paul’s statement may have become a term of the contract.

Whether a statement is a term of a contract is largely a question of the parties’

intentions (see p. 120). In determining the issue, the courts will take into account

the importance of the statement, the special knowledge and skill of Paul when he

made the statement, the timing of the statement and whether the eventual agreement

was made in writing. If Paul’s statement has become a term, then it is clear that

it has been breached, and the impact of this will depend on whether it was a condition

(see p. 135) because time was of the essence (see p. 303). If the statement was a condition,

then its breach will give rise to a right to terminate the contract as well as a right

to damages.