

Remedy for Misrepresentation in Contracts: An Analysis Approach in Malaysian and Australian Law

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Abstract

A misrepresentation occurs when one party makes a misleading statement that influences the other party's decision to enter into a contract. The other contracting party's voluntary permission to enter into the contract is nullified by the misleading conduct, and that party is entitled to remedies. Therefore, the purpose of this study is to provide an analytical and critical case-by-case analysis of contract misrepresentation in Malaysian and Australian legal systems. The methodology used in this study is legal analysis approach by analysing the law and court cases in Malaysia and Australia. According to the findings, judicial judgements in Malaysia have provided remedies in some circumstances. The study discovered that in Malaysia, court rulings gave contract rescission remedies in some situations, but in others, the court awarded contract rescission along with damages. Contract rescission, on the other hand, is a remedy specifically granted under the Contracts Act 1950. This situation is perplexing because each remedy has different objectives. In comparison to Australia, where the award for each case is determined by the state's legislation, there is a major difference. By reference to the Contracts Act 1950, it is proposed that the provisions be examined to verify their appropriateness with the application of Malaysian misrepresentation laws. By referring to the legal requirements in Australia as a guideline, it is proposed that the provisions in the Contracts Act 1950 be examined to guarantee their appropriateness with the application of Malaysian misrepresentation laws.

Keywords: Remedy, Misrepresentation, Contract, Damages, Rescission.

Introduction

Misrepresentation is a factor that has a detrimental impact on a contract party's free consent to enter into a contract. It usually happens during the pre-contractual stage, when one of the contracting parties makes a deception that has an impact on the other party's decision to enter into the contract. Misrepresentation can be defined based on the following essential elements: essential factual statements made by one party to the contract to the other party that are wrong, erroneous, or false, which acts as an influence for the said party to enter into a contract, and which is not intended to bind the parties' responsibilities to the contract (Chris 2004; Duxbury 2006; Paterson et al., 2016). Also, the statement made is addressed to the party receiving the statement (*Commercial Banking Co of Sydney Ltd v RH Brown & Co* [1972] 2 Lloyd's Rep 360; *Smith v Eric S Bush* [1990] 1 AC 831) before or at the time the contract is executed (Stephen, 2015; Beatson et al., n.d). According to Atiyah and Smith (1995), misrepresentation can be defined as an incorrect factual statement.

The idea of misrepresentation in contract was initiated by English common law; later, equity played a hand to ensure fairness to the contracting parties in deciding on the remedies for misrepresentation. There are several remedies provided under common law and equity for misrepresentation cases, which include contract rescission, damages, and indemnity. Based on the remedies provided under common law, some Commonwealth countries apply common law legislation in part, while other countries choose an approach that diverts from common law. This article analyses the implementation of laws in Malaysia and Australia relating to misrepresentation remedies in contract cases.

Section 18 of the Contracts Act 1950 governs contract misrepresentation in Malaysia. The effect of misrepresentation in a contract is rescission, according to Section 19 of the Contracts Act 1950. Sections 65 and 66 of the Act also establish remedies for contract misrepresentation. As a result, the remedies afforded under the Contracts Act 1950 will be discussed in this article.

In Australia, besides having specific acts related to misrepresentation, provisions on misrepresentation are also included in its legislation for consumer protection known as the Competition and Consumer Act 2010 (CCA, 2010). Compared to other countries, consumer protection legislation in Australia is more detailed (Carter, 2013). The reason for choosing Australia as the comparative nation for this study is because Australia is one of the Commonwealth countries that applies common law. The misrepresentation principles are based on common law, which the United Kingdom later improved by enacting the Misrepresentation Act 1967 (MA, 1967). These principles and the subsequent MA 1967 were adopted and enhanced by Australia by enacting several related statutes.

Methodology

This article is based on pure legal research. The methodology used in this research is a comparative approach, i.e., by comparing the legislation related to misrepresentation in contract applicable in Malaysia and Australia. Samuel (2014) stated that a comparative approach is a scientific approach by placing several objects or elements of research to be analysed and concluded, where the results of this comparison can generate knowledge. Through this study's legal comparison approach, a recommendation for useful solutions to the problems that arise from misrepresentation principles in Malaysia's contract law can be made.

Legislation on Misrepresentation in Contracts: The Approach in Malaysia

In Malaysia, the contract's misrepresentation principles are controlled by legal means to ensure justice for the contracting parties. Several statutes in Malaysia provide for misrepresentation in a contract: general statutes such as the Contracts Act 1950 (CA, 1950), or specific statutes such as the Consumer Protection Act 1999 (CPA, 1999), Trade Descriptions Act 2011 (TDA, 2011), Hire Purchase Act 1967 (HPA 1967), Financial Services Act 2013 (FSA, 2013), and the Islamic Financial Services Act 2013 (IFSA, 2013). In these statutes, misrepresentation principles are provided, such as in the CA 1950, FSA 2013 and IFSA 2013. On the other hand, other statutes use terms such as representation or false statements that also carry the meaning of or include misrepresentation.

Consumer Protection Act 1999 (CPA 1999)

Section 8, 10, 11 and 12 of the Consumer Protection Act 1999 (CPA, 1999) prohibits committing a false or misleading representation. According to Aun (1999), under section 8, 'false', 'misleading' or 'deceiving' is not a complete definition that covers conduct, representation or practice that can cause a consumer to commit a mistake. The word 'false' generally means 'untrue', 'wrong', or 'incorrect'. While the words 'misleading' and 'deceptive' contain meaning that is almost similar and is used interchangeably. Wu added that the meaning of 'false' or 'misleading representation' in this Act could be referred to section 18 CA 1950, which provides for misrepresentation. Section 10 does not allow any form of false or misrepresentation related to goods, services, and others listed under it; section 11 prohibits misrepresentation relating to land, and section 12 prohibits misrepresentation related to prices.

Based on the provisions available in this CPA 1999, it is clear that this Act also does not allow misrepresentation or untrue or false or misleading acts. Consequently, the Act protects consumers in the context of misrepresentation or misleading act in a contract. However, this Act contains limitations for certain parties and certain goods, which it does not protect holistically as CA 1950. Therefore, if there is no protection under the CPA 1999, then the protection related to misrepresentation in a contract remains under CA 1950.

Trade Descriptions Act 2011 (TDA 2011)

A misrepresentation relating to the supply or authorisation of goods or services is prohibited under Section 16 of this Act. Section 17, 18 and 20 state that misrepresentation related to services, advertisements, and contests or games that can be misleading are not allowed. Section 2 of the Act defines 'service' as any service description, whether industrial, commercial, professional or otherwise but does not include anything made under a service contract. Therefore, a violation of the Act causes the parties involved can be fined or imprisoned. Examples of a common fake commercial descriptor are displaying the halal logo in Muslim restaurants and displaying the fake halal logo on food products that confuses the community (Hussin, 2018). Therefore, it is clear that this Act is also limited to a certain context and contract, exclusively in controlling contract related to trade and services only. Meanwhile, other contracts are not under the Act's jurisdiction and remain subjected to CA 1950.

Hire Purchase Act 1967 (HPA 1967)

HPA 1967 that came into force beginning on 11 April 1968 (Alam, 2013) is the first local statute related to hire-purchase following the *Hire Purchase Act 1960*, New South Wales, Australia, which has been repealed. HPA 1967 remains largely in the same form even there are

amendments. Before the act's existence in 1967, the hire-purchase transaction is fully controlled by common law and CA 1950.

HPA 1967 only protects the hire-purchase transaction of items specified in the First Schedule of the Act, as provided in section 1(2). If there is a hire-purchase transaction beyond the First Schedule of the Act's scope, then the transaction is no longer covered by HPA 1967, but it is protected by general legislation such as AK 1950 (Vohrah & Aun, 2000). Among the list of items in the First Schedule is 'all customers goods'. Referring to Section 2 of this Act, 'customers goods' is intended as "goods that are bought for personal, family and household purpose." Consequently, this Act applies to the hire-purchase transaction for such goods only (Alam, 2013).

According to Buang (2001), misrepresentation in a hire-purchase contract can occur orally or in writing, whether made by owners, sellers, or anyone acting on their behalf. If a misrepresentation was made in a negotiation that led to the entering into a hire-purchase contract by one of the people mentioned earlier (Buang, 2011), then Section 8(1) HPA 1967 is applied to claim for remedies. Hence, the provisions under Section 8 protect a hirer when the hirer has entered into the contract due to misrepresentation (Pheng & Detta, 2011). Section 8 provides that when there was a misrepresentation made by an owner, or a seller, or their agents in the negotiation that led to a hire-purchase agreement, the law gives the hirer the rights to claim against the owner and people who made the statement (Vohrah & Aun, 2000). Section 8(1) is related to representation, warranty or statement made by an owner or seller or their agent as if the owner's agent made it. Referring to Section 8(1)(a), if an owner had made the statement, the provision gives the hirer "the same right to rescind the agreement as the hirer would have had if the representation, warranty or statement had been by an agent of the owner". Based on the provision in 8(1)(a), which provides contract rescission rights, the rescission effects are not mentioned. Therefore, this issue is subjected to the AK 1950 under section 65 and 66 (Ahmad, 2009). Section 8(1)(a) was applied in *Lau Hee Teah v. Hargill Engineering Sdn Bhd & Anor* [1980] 1 MLJ 145, in which the Federal Court found that the appellant is entitled to seek contract rescission remedy under section 8(1)(a) if the misrepresentation trick can be proven. Also, under this provision, the owner can be held liable for misrepresentation or false statement made by the seller. Thus, section 8(3) awards a remedy to the owner, who suffers the consequences of the seller's misconduct; the remedy is the indemnity rights that a seller must give to the owner (Ahmad, 2009).

However, if the agent had made the representation, warranty or statement, the hirer has "the same rights of actions in damages as the hirer....if the hirer had purchased the goods from the person." (Vohrah & Aun, 2000; Buang, 2001; Hamid, 2004) as provided under section 8(1)(b). This provision has been referred to by the Federal Court in *Lau Hee Yeah v. Hargill Engineering Sdn Bhd & Anor* [1980] 1 MLJ 145. However, the provision does not state the amount rate of such compensation (Abdul Shukor Ahmad 2009).

Section 8 does not state about seller's act, especially relating to misrepresentation. A false statement is different from misrepresentation, in which a false statement is usually found in documents relating to hire-purchase agreements (Kevin, 2008). Therefore, a reference to a false statement should be made according to Section 36 HPA 1967. In reference to section 36, if there was a seller or agent or other person acting on behalf of the owner or proprietor who prepared a hire-purchase agreement and there was a false statement, then the seller or agent or person can be fined not more than ten thousand ringgit or imprisoned not more than twelve months or both.

Also, based on section 8(2) of this Act, if there is any provision in the hire-purchase agreement that excludes or limits or alters the hirer's rights as contained in section 8(1), then that provision is invalid (Vohrah & Aun, 2000; Buang, 2001). Therefore, it can be understood that under the said provision, the liability exclusion related to misrepresentation in the hire-purchase contract is also invalid.

The rights and remedies provided under this Act are applied to representation or statement made by the owner or his employees or agents during negotiations leading to entering into a hire-purchase contract. Therefore, this provision does not apply to representation by the owner or his employees or agents after entry into the hire-purchase contract (Ahmad, 2009). Thus, it is clear that HPA 1999 has certain limitations in determining the resolutions to problems related to misrepresentation in a contract, which requires reference to CA1950.

Financial Services Act 2013 (FSA 2013) and the Islamic Financial Services Act 2013 (IFSA 2013)

Financial Services Act 2013 (Act 758) (FSA, 2013) and Islamic Finance Services Act 2013 (Act 759) (IFSA, 2013), which came into force on 30 June 2013, are a combination of several separate laws such as the Banks and Financial Institutions Act 1989, Islamic Bank Act 1983, Insurance Act 1996, Takaful Act 1984, Payment System Act 2003 and Money Exchange Control Act 1953, which were repealed on the same date (Raj, 2013). The purpose of this combination is to regulate the financial sector, conventional and Islamic, under a single legal framework. Both of these acts are Bank Negara Malaysia's (BNM) efforts to regulate the conduct and supervise all financial institutions in Malaysia to ensure the country's financial stability while providing adequate protection for consumers (Utusan Online, 2015). This move shows that this act's provisions are only to protect contracts related to banking, takaful and financial business and do not bind the entire contract in Malaysia.

In controlling the relevant contracts, FSA 2013 and IFSA 2013 also has provisions on misrepresentation principles. Section 129 FSA 2013 has provisions on the obligation to disclose and remedies if there is a misrepresentation related to the insurance contract, which has to be referred to Schedule 9 Part 3 of the Act.

The provisions in FSA 2013 are the same as the provisions in the IFSA 2013. The difference is only in words used, which FSA 2013 uses insurance, while IFSA 2013 uses takaful. Under IFSA 2013, Section 141 has provisions on the obligation to disclose; there are also provisions on remedies if there is a misrepresentation related to takaful contract, which must be referred to Schedule 9 Section 3 of the Act.

This act provides more detailed provisions related to misrepresentation than other acts as Schedule 9 of IFSA 2013 covers all provisions starting from negotiations at the pre-contract stage to the claims dealing stage (Hussain, 2016). Nevertheless, this act does not provide holistic protection as it only regulates the financial institutions' conduct and does not involve all contractual matters that occur in Malaysia.

Although several other statutes govern misrepresentation in contract, these acts have limited jurisdiction and do not control all types of contracts entered into by the contracting parties. Therefore, if a contract is entered into, the principal act referred to and is applicable is the CA 1950. Similarly, if there is a contract that does not fall under the statutes' jurisdiction mentioned earlier, then from a strictly legal perspective, only the CA 1950 should apply. Therefore, in discussing the remedies for misrepresentation in contracts in Malaysia, the

discussion only covers the provisions of the CA 1950 and does not involve other statutory acts.

The Contracts Act 1950 and Misrepresentation

In a contract, misrepresentation is one element that interferes with or impairs the voluntary will of contracting parties. All agreements constitute contracts if they are made voluntarily by the contractual parties, according to Section 10 AK 1950. Two or more people are considered to be voluntary if they have agreed on the same topic in the same sense, according to section 13. Provisions related to this willingness to contract has been referred to in several cases, including *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd*. [1992] 2 MLJ 615. According to Sinnadurai (2015), this section recognises the basic principles that for a contract to exist, there must be *ad idem consensus* between the contracting parties. If there is no agreement between the contracting parties, there is no subsequent consent resulting in the contract's non-existence. Consent is deemed free as provided under section 14, i.e., not due to coercion under section 15, undue influence under section 16, fraud under section 17, misrepresentation under section 18 and mistake under sections 21, 22 and 23.

In Malaysia, misrepresentation in all types of contracts is governed under section 18 of the Contracts Act 1950. According to this provision, misrepresentation is a false statement made with the misrepresenting party's belief that the statement is real and not made with the aim to defraud. Besides section 18, section 19 provides for the effect of a contract entered into due to misrepresentation. The voidable impact of a contract with misleading features is explicitly stated in Section 19 of the Contracts Act 1950.

The Contracts Act of 1950 was enacted to combat contract misrepresentation by providing remedies for the contracting party if the contract was agreed to because of misrepresentation. Sections 65 and 66 of the Contracts Act 1950 provide contract rescission and restitution as remedies for misrepresentation.

As a result, if one of the contracting parties decides to rescind the contract, he or she can notify the other party of his or her decision. If that party desires to void the contract, he or she must return to the other party any benefit obtained, as specified in section 65.

This was established in the case of *Travelsight (M) Sdn Bhd & Anor v Atlas Corp Sdn Bhd*. [2003] 6 MLJ 658, HC. The requirements of sections 65 and 66, on the other hand, appear to be unclear and ambiguous. Section 65 requires the party who receives a statement of misrepresentation to return any and all advantages received to the party who submitted the statement of deceit. The word "shall" in the law indicates that the benefit must be returned to the misleading party. However, there are no legal requirements requiring the party that made the false statement to refund any profit acquired to the recipient of the statement, as stated in section 65. Section 66 is designed to convey, albeit indirectly, that responsibility (Vohrah & Wu, 2000). To minimise ambiguity when awarding remedies, the Act's provisions should plainly state the steps that must be followed by the parties involved. As a result, it is requested that this section be modified to avoid ambiguity and to outline clearer rights and obligations.

In the same section, contract rescission is the remedy for misrepresentation, and if the contract is rescinded, the contractual parties must return all advantages received from the contract or pay damages. However, when the court gives a remedy to terminate the contract, such as in *Segar Oil Palm Estate Sdn Bhd v Tay Tho Bok & Ano* [1997] 3 MLJ 211, CA, where the plaintiff's contract was terminated due to false misrepresentation, there is some confusion in the applicability of the abovementioned provision. The plaintiff's claim to make

changes to the contract he signed was declined by the Court of Appeal. In *Wong May Leng & Anor v Thomas Patrick Francis Fernandes & Anor* [2017] 1 LNS 1034, Zaita Dato' Zaidan J of the High Court awarded contract termination because the contract was breached as a result of incorrect information; the court only referred to Sim Thong Realty Sdn Bhd and did not refer to the Contracts Act 1950 provision for misrepresentation. In this case, the judgement varies from the Contracts Act 1950, which offers contract rescission rather than contract termination as a remedy for contracts including elements of misrepresentation. Although certain opinions, such as in *Photo Production Ltd. V Securicor Transport Ltd* [1980] UKHL 2, put termination and rescission on the same level, contract termination has distinct effects than contract rescission. Both of them resulted in the contract being voided, but there were distinctions between them (*Johnson v Agnew* [1980] AC 367).

It is sometimes referred to as "rescission ab initio" in the context of contract rescission, where the contract was void from the beginning. For example, property rights are transferable until the contract is rescinded; nevertheless, contract rescission is both prospective (future) and retroactive (past) for the maker of the statement (past). As a result, all incomplete duties and responsibilities are invalidated, and all benefits must be returned. Termination of a contract, on the other hand, involves the existence of a legal contract between the contracting parties from the beginning. The contract may then be terminated by the innocent party, resulting in neither party having to fulfil any unfulfilled responsibilities, and all advantages acquired or transferred will be lost. As a result, contract termination (rescission de futuro) is purely prospective (Chen-Wishart, 2015).

Confusion also arises when the court awards a remedy based on a "category" of misrepresentation while the Contracts Act of 1950 makes no such provision. Several judicial rulings reflect this ambiguity. Mohd Ghazali Mohd Yusoff FCJ stated in *Admiral Cove Development Sdn Bhd v Balakrishnan Devaraj* [2011] 5 MLJ 309, FC that,

The question of law posed in the instant appeal is 'what relief is applicable in a case of innocent misrepresentation'. We would echo the words of the learned judge in Sim Thong Realty Sdn Bhd that the legal position in Malaysia is that a representee who has been induced by an innocent misrepresentation may sue for rescission and consequent restitution. But we would also add that a representee in such circumstances may only rescind the contract if it is still executory and if all parties can be restored to their original position.

We would reiterate that the legal position in Malaysia is that a representee who has been induced by an innocent misrepresentation may sue for rescission and consequent restitution. Be that as it may, there are authorities who seem to suggest that rescinding a contract may be rather a drastic step, particularly where the contract has been performed. In such scenario, the right to rescind could be lost.

The court mentioned innocent misrepresentation in this case, but there is no clear provision regarding innocent misrepresentation in the legislation. In this case, the court made its decision based on what it thought would be fair to the contracting parties. However, after reviewing the ruling, the court decided that there were no rights to contract rescission, providing the plaintiff with no remedy.

Even though there is no clear provision in the Contracts Act 1950 providing damages as a remedy for misrepresentation, there has been some confusion in awarding damages as a remedy by the court in misrepresentation cases (Phang 1998). However, a review of various court decisions reveals that judges awarded damages as a remedy without resorting to the

Contracts Act 1950, instead citing English cases such as Gopal Sri Ram J's in Abdul Razak bin Datuk Abu Samah, "*The representee is therefore entitled to apply to a court for a decree of rescission from a court and also to an award of damages. See Archer v Brown [1985] 1 QB 401.*"

In *Letchemy Arumugan v N Annamalay [1982] 2 MLJ 198*, HC, damages were awarded as a remedy. A housing developer made a fraudulent misrepresentation to the plaintiff in this case, and the defendant did not believe the statement. Wong Kim Fatt J of the High Court granted the plaintiff a contract rescission remedy as well as damages for losses incurred because of the defendant's fraudulent misrepresentation. In this case, the court determined this remedy entirely based on *Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158*, rather than the Contracts Act 1950. By citing *Derry v Peek [1889] 14 App Cas 337*, the court in *Tan Ah Tong v Che Pee Saad & Anor [2010] 6 CLJ 560* awarded damages as an alternative claim. The court also awarded damages to the party who wants to keep the contract despite the misrepresentation being present. This was demonstrated in *Weber v Brown (1908) 1 FMSLR 12*, when the court declared that the innocent party had the right to claim damages during the contract's signing. The court, on the other hand, made no reference to Section 19(2) of the Contracts Act or how the damages were to be calculated. According to Belfield ACJ (*AIR 1937 Nag 270*),

This is a matter [that is, the right to recover damages] not dealt with by the Contract Enactment 1899; but that Enactment does not profess to do more than define and amend parts of the law relating to contracts, and the fact that the respondent had elected to stand by the contract is, in view of the fraud found, no bar to his obtaining damages.

This decision is perplexing, according to Sinnadurai (2015), since the judge failed to consider the meaning of Section 19(2), which plainly states that damages can be given where a contracting party adheres to a contract influenced by fraud or false misrepresentation. Sinnadurai believes the judge's comment was incorrect because the judge cited the Contract Enactment, which does not say anything about recovering damages in fraud instances, and because the judge ignored Section 19(2) of the Act. In the case when the contracting parties agree to a contract that is affected by fraud or fraudulent misrepresentation, this clause particularly provides for damages to be awarded. As a result, the provision should be reviewed and amended to avoid additional uncertainty.

Section 76 of the Contracts Act 1950 cannot be used to determine the amount of damages in cases of contract misrepresentation since this section is clearly applicable to cases where the contract is void, as decided by Vivian Bose J in *Haji Ahmad v Abdul Gani* (Sinnadurai 1980), where only in the case of termination due to the breach of contract may be classified as 'unfulfilling the contract.' Therefore, in fraud and misrepresentation cases, damages cannot be recovered under Section 76.

In addition to the ambiguity surrounding the award of damages in cases of contract misrepresentation under the Contracts Act 1950, the Act also does not specify the amount of damages to be given to the party that has suffered a loss. However, in evaluating damages where a contract is ended by the receiver of a statement that constituted a fraudulent misrepresentation, courts are increasingly leaning upon English cases. This was indicated in Abdul Razak bin Datuk Abu Samah's ruling, where Gopal Sri Ram J said,

Where damages are awarded for fraudulent misrepresentation (and we consider the principle to be the same as a case of negligent misrepresentation), the assessment of damages must take into account any sum recovered as restitution

under the claim for rescission to prevent double recovery. Damages for fraud are awarded on the basis that the innocent representee is put, so far as money can do so, in the position he/she would have occupied had there been no reliance on the fraudulent inducement. See, Holmes v Jones (1907) 4 CLR 1692 at page 1709; Demetrios v Gikas Dry Cleaning Industries Pty Ltd (1991) 22 NSWLR 561 at page 575; Sellars v Adelaide Petroleum NL (1994) 179 CLR 332. Therefore, the assessment of damages would include all expenditure incurred reasonably and properly in consequence of and flowing directly from the deceit, whether before or after the date of the rescission. It may, where appropriate, include exemplary and aggravated damages. See Archer v Brown [1985] 1 QB 401.

Sim Thong Realty Sdn Bhd had a similar outcome, in which the court granted damages as a remedy, and the damages were calculated by referring to English instances, as stated by Gopal Sri Ram JCA,

If the misrepresentation is made fraudulently, the representee is entitled to rescission and all damages directly flowing from the fraudulent inducement. The relevant law governing the measure of damages for fraudulent misrepresentation is set out in Lord Denning MR's judgment in Doyle v Olby (Ironmongers) Ltd 2 All ER 119.

The basis of this issue is the ambiguity caused by the Contracts Act of 1950's provisions on the award and evaluation of damages to rectify contract misrepresentation. Sinnadurai (2011) argues whether Section 19(2) is the most appropriate method for calculating damages. Sinnadurai believes that section 19(2) 'should be placed in the rightful situation if the statement made was true,' as if to indicate that damages are assessed on the basis of contract rather than tort.

According to Abdul Razak bin Datuk Abu Samah, the evaluation of damages in a contract is to place the innocent party in the position they would be in 'if the representation were true,' whereas in tort, it is to place the innocent party in the position they would be in 'if the representation were never made.' By looking to English cases such as in the case of Sim Thong Realty Sdn Bhd, the courts have also ruled on the amount of damages to be awarded, "The relevant law governing the measure of damages for fraudulent misrepresentation is set out in the judgment of Lord Denning MR in Doyle v Olby (Ironmongers) Ltd [1969] 2 All ER 119."

As established in Letchemy Arumugan v N Annamalay, the courts' damages calculation method is based on a duty to ensure equal and fair damages among the contracting parties with sufficient proof. According to Wong Kim Fatt J, "The court pointed out that in such cases, whatever measure of damages the court applies, its duty is to award damages or damages as fairly and justly as possible as between the parties based on the evidence before it." Looking back at the cases decided and the courts' opinions on the remedy for contract misrepresentation and the measure of damages, there is apparent ambiguity in Malaysia's legal provisions, particularly the Contracts Act 1950, when it comes to settling the issue of contract misrepresentation.

Legislation for misrepresentation in contract: The approach in Australia

Like Malaysia, the Australian legal system is also rooted in England's common law and was established in 1788 (Athula Pathinayake 2015). Australia is a Commonwealth country that was colonised by the British, as was Malaysia. In line with the approach taken in Malaysia and the

United Kingdom, Australia also takes misrepresentation and deception in a contract very seriously. Although the legislation applied in Australia is common law, it can be seen that Australia is more advanced in drafting and forming acts or statutes related to misrepresentation in contracts compared to Malaysia, even though Australia does not have a specific act related to a contract, such as Contract Act 1950 enacted in Malaysia.

There are several acts or statutes that are applied in Australia to govern misrepresentation in a contract, such as the Australian Consumer Law (Schedule 2 Competition and Consumer Act 2010(Cth)) under sections 18 and 19, the Misrepresentation Act 1972 (SA) and Civil Law (Wrongs) Act 2002 (ACT) (Athula Pathinayake 2015). These Acts will be discussed in further detail as follows:

Misrepresentation Act 1972 (SA)

In 1971, South Australia enacted a law like the Misrepresentation Act 1967, which was also known as the Misrepresentation Act 1972 (MA 1972) (Law Reform Commission of Western Australia, 2002). The purpose of this Act can be seen in its preamble: *“An Act to provide criminal sanctions against misrepresentation in certain commercial transactions; to expand the remedies available at common law and in equity for misrepresentation; and for other purposes.”*

The MA 1972 provides the damages and contract rescission remedies for misrepresentation in a contract. If the common law provides damages only for fraudulent misrepresentation cases, the MA 1972 further expands the scope of this damages remedy, where the MA 1972 (SA) provides damages for misrepresentation that is other than fraudulent (Turner 2011). Section 7(1) provides damages if the other party to the contract or his agent persuaded a person to enter into a contract by misrepresentation. However, the party against whom damages are being claimed can defend himself if he has reasonable grounds to actually believe the statement he had made to the aggrieved party was true as provided under section 7 (2). Besides that, section 6 provides the contract rescission, where certain bars to rescission were removed from this provision. The application of this provision can be seen in *International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378, in which the buyer of a lorry was provided with the contract rescission remedy because there was an honest misrepresentation regarding the condition of the engine which was only realised 12 months after purchase. However, if the court finds that the damages remedy serves to do more justice than contract rescission, the court will then issue an order for the award of damages as stated under section 7 (3).

Civil Law (Wrongs) Act 2002 (ACT)

The Civil Law (Wrongs) Act 2002 (ACT) (CLA 2002) is an Act governing liability in civil offences occurring in the Australian Capital Territory. This Act provides for misrepresentation under Chapter 13 involving the provisions in sections 172-179. The remedies provided by the CLA 2002 are the same as the MA 1972; the feature that distinguishes the two is from the point of view of the defendants' right to defence if made to pay damages. Therefore, the remedies under this Act also include rescission and damages.

The contract rescission remedy is provided under section 173, where this provision removes certain barriers that prevent the granting of contract rescission as a remedy. Aside from that, this Act also provides damages for misrepresentation, as stated in section 174. Based on these provisions, it is clear that if a person enters into a contract after making a non-fraudulent misrepresentation to the contracting party, and the contracting party enters into

the contract as a result of the misrepresentation, and the contracting party benefits as a result of the contract they entered into, damages can be awarded. If the other party suffers a loss as a result of the misrepresentation, the party who made the misrepresentation is responsible for compensating the other party.

In addition, section 175 also provides the damages remedy. The court awarded this remedy if it believes that damages are a more appropriate remedy than rescission. Presently, the court will order the contract to be enforced.

Competition and Consumer Act 2010 (CCA 2010): Schedule 2 – The Australian Consumer Law

The Competition and Consumer Act 2010 (Cth)(CCA 2010), which came into force in July 2010 under the Australian Competition and Consumer Commission (ACCC), is an act that replaced the Trade Practice Act 1974 (Cth)(TPA 1974) (Pathinayake, 2015). Under the CCA 2010, misleading and deceptive acts fall under Section 18 Schedule 2 of the Competition and Consumer Act 2010 - Australian Consumer Law (ACL). Provisions in the ACL related to consumer protection can be found in the TPA and other consumer-related legislation that used to apply in Australia in the past (Paterson, 2016).

The CCA has 178 sections and 2 tables. The schedule related to 'misleading' is Schedule 2 is known as the Australian Consumer Law (ACL). Schedule 2 has 287 sections. Pursuant to section 131A (2) Part XI Division 2, Application of the ACL as a law of the Commonwealth, (a) states Part 2-1 of Schedule 2 and section 34 and section 156 of Schedule 2 do not apply to actions related to financial services. Prior to 2010, Schedule 2 of the Competition and Consumer Act was known as the Trade Practices Act 1974 (Carter, 2013), which can be seen in the Trade Practices Amendment (Australia Consumer Law) Act (No 2) 2010, Schedule 5, Items 1-2. The Commission's Review of Australia's Consumer Policy Framework proposes introducing a national trade law, the ACL, as a comprehensive and uniformly applicable consumer protection law throughout Australia (Paterson, Robertson & Duke 2016). Under the Intergovernmental Agreement for the Australian Consumer Law, states and territories throughout Australia apply the ACL as the law under their jurisdiction. Section 22 (1) (a) of the Interpretation Act 1901 provides, "Expressions used to denote persons generally ... include a body politic or corporate as well as an individual." As such, companies, unincorporated entities, and individuals are bound by the ACL, whether in the Commonwealth or the states or territories of Australia (Paterson et al., 2016).

Part XI of the Competition and Consumer Act provides for applying the ACL as a law in the Commonwealth. The Commonwealth Constitution limits the Legislative power of the Commonwealth Parliament. The Competition and Consumer Act provides that the ACL applies to activities under the Commonwealth Constitution's jurisdiction (Paterson et al. 2016). Section 131 (1) of the Competition and Consumer Act provides that the ACL applies to acts committed by a company, while sections 6 (3) and (3A) provide that the ACL applies to acts committed by individuals. Thus, the ACL generally protects individuals or corporations as consumers of goods or services, whereby in some cases, protection is given only to groups known as 'consumers' defined under section 3.

Also, important sources of relief for misleading conduct are under Part 2-1 and Part 3-1 of the ACL. Section 18 (1) of Part 2-1 of the ACL prohibits misleading and deceptive acts in business or trade (trade or commerce). More specific prohibited acts are included in Part 3-1 of the Australian Consumer Law.

Currently, there is only one standardised law applicable to all states and territories in Australia, namely the ACL under Part XI Competition and Consumer Act 2010 (Cth), which includes individual interstate and intrastate acts, partners, and corporations that make statements that are misleading or confusing (Gibson & Fraser, 2011).

The ACL provides various remedies for misleading offences in a contract. Parts 5-1 and 5-2 of the ACL are related to Enforcement and remedies and allow the court to make various orders, including issuing injunctions (section 232), the right to claim damages (section 236), and various discretionary support orders (section 243).

In the context of granting remedies for misrepresentation, the Australian Competition and Consumer Commission has the authority to enforce certain ACL provisions by applying for fines and remedies for those involved, or the parties may initiate their own legal proceedings (Paterson et al., 2016).

Statutory remedies are given for contracts entered into due to misrepresentation. The party suffering losses due to an act in contravention of section 18 of the ACL is entitled to receive damages as provided under section 236 of the same Act.

To claim under section 236, the loss is one of the elements that must be proven based on the provision of "loss or damage" due to the respondent's misleading actions. Through this provision as well, the party making a claim is entitled to damages even if the claimant did not depend on the statement given by the respondent (*Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (No 2) [2010] FCA 698).

The amount of damages or losses due to a breach of section 18 is in line with common law in the case of fraud or negligence in giving a statement (Paterson et al. 2016). Compensation given is the difference (if any) between the price paid and the actual price in the business or asset, plus the consequential loss (if any), which is causally related to the misleading act (*HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54; *North East Equity Pty Ltd v Proud Nominees Pty Ltd* [2010] FCAFC 60, [130]-[131]).

Besides, the court also has the power to issue other orders deemed appropriate to avoid losses as a result of violating section 18 of the ACL, such as declaring the contract to be void or to be amended or the party to return money or property as provided in section 237 and section 243 of the same Act.

The provision under Section 237 is different from the provision under section 236. Section 237 is for the prevention and reduction of loss or damage likely to be suffered. Besides, the order for awarding damages under section 237 is at the discretion of the court, while the right to damages under section 236 is granted due to a violation of section 18.

Whereas section 243 lists the types of instructions that can be made under section 237. Pursuant to the provisions of section 243, the orders that may be made include declaring the contract as void in whole or in part; order to change the contract; order to not implement all or some of the provisions contained in the contract; order the return of money or assets; order payment to be made to a person suffering losses based on the amount of loss he incurs and ordered to fix the allocation (Paterson et al., 2016).

In granting a remedy at its discretion, the court will refer to the general law as stated by Einstein J in the case of *Chint Australasia Pty Ltd v Cosmoluce Pty Ltd* [2008] NSWSC 635 [130] (*Akron Securities Ltd v Ilife* (1997) 41 NSWLR 353, 367E; *Campbell v Back Office Investments Pty Ltd* [2008] NSWCS 95 [105]), "The power of the court to make orders in the nature of rescission under the Trade Practices Act [now ACL] is guided (but not controlled by) the same considerations as effect the availability of rescission in equity."

In the case of *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* [2008] NSWSC 635 [130], originally, the plaintiff made a claim for damages, then made a claim for rescission of the contract under section 87 of the TPA (now ACL, section 237). The majority of the judges ruled that rescission was not appropriate at the time. In giving remedies at its discretion, the court considered the two-year postponement before the case was brought to court. The court also looked at the severe changes that took place in the business, which were not due to misleading acts. Therefore, the court decided to grant remedial damages. The same applied in the case of *Tenji & Associates v Henneberry Pty Ltd* [2000] FCA 550, where the court awarded damages to the plaintiff because the contract was entered into due to a misleading statement, and the remedy was, therefore, a fairer option.

Based on the provisions under the ACL, it is clear that the ACL provides remedies to the contracting party in case the contract is entered into due to misleading acts, which include misleading statements. The main remedy given is damages, while other remedies such as rescission, contract amendment, returning money or assets obtained, and so on may be given at the court's discretion.

Results and Discussion

In Malaysia, legislation on misrepresentation in contracts is found in several acts, among them the CA 1950. Provisions related to misrepresentation under this Act are provided for in section 18. However, there are cases where the court also refers to section 17 in deciding misrepresentation cases. In addition, section 19 of this Act provides for the consequences of misrepresentation, and sections 65 and 66 provide a remedy for misrepresentation, i.e., contract rescission.

In addition to the CA 1950, there are several other acts that provide for misrepresentation in contract. Although some acts appear to attempt to govern the act of misrepresentation, those acts do not have the authority of the CA 1950 because those acts are only limited to certain contexts or contracts. One example is the APP 1999; although it does not use the word misrepresentation in its provisions, the provision on the prohibition of making false or misleading representations includes acts of misrepresentation. However, the APP 1999 only protects the users as defined in the act. Therefore, the parties not included under the consumer category do not fall within the ambit of the act.

In Australia, legislation on misrepresentation is also emphasised and is clearly reflected in consumer protection laws with the enactment of a new act known as the CCA 2010. Provisions on misrepresentation and elements of misrepresentation are clearly included in the act. This Act applies at the federal level and is also applicable in every state in Australia. In addition, there are states that have specific acts related to misrepresentation such as in South Australia, which has the MA 1972, while in the Australian Capital Territory, there is an act known as the Civil Law (Wrongs) Act 2002 (ACT) (CLA, 2002) which regulates liability for civil offences, which also include misrepresentation. From a remedy point of view, it appears that there are several reforms of the approach taken in Australia, where the courts have various remedy options with reference to the provisions of the law that have been approved by parliament as contained in the CCA 2010. The table below is a summary of the discussion of remedies for misrepresentation in a contract according to Malaysian and Australian law.

Table 1

Legal provisions in Malaysia and Australia related to misrepresentation in a contract.

| COUNTRY | STATUTE | REMEDY | | |
|-----------|-----------------------------------|---------|---------------------|---|
| | | Damages | Contract Rescission | Others |
| Malaysia | Contracts Act 1950 | | / | |
| | *Court Decision | / | / | Termination of contract |
| Australia | Misrepresentation Act 1972 | / | / | |
| | Civil Law (Wrongs) Act 2002 | / | / | |
| | Competition and Consumer Act 2010 | / | / | <ul style="list-style-type: none"> ● contract amendment ● return of goods |

Conclusion

In terms of contract misrepresentation laws and regulations, Malaysia is not far behind. Although Malaysia has various statutes that have provisions for misrepresentation, they have limitations on a contract, and if the contract formed is not governed by the statutes, then a reference to the Contracts Act 1950 must be done. The Contracts Act 1950 provides for misrepresentation under section 18. Sections 19, 65, and 66 of the same Act deals with the effects and remedies for misrepresentation. However, there is some ambiguity in the Act regarding remedies for misrepresentation, although contract rescission is clearly provided for in the Act. Despite this, courts have awarded contract termination as a remedy. Even though it appears to be implicitly incorporated under section 19 Contracts Act 1950, there is still ambiguity about the award of damages as a remedy and measure of damages in misrepresentation cases. The lack of clarity in the provision has had an impact on the courts, which have tended to refer to English cases rather than the Act's provisions. Furthermore, when it comes to awarding remedies for cases of misrepresentation in contract, the courts' decisions are inconsistent.

Australia's approach is different when it does not enact a specific act related to a contract, such as the Contracts Act 1950. However, South Australia has a specific act relating to misrepresentation. While in other states, this misrepresentation is regulated under the Civil Law (Wrongs) Act 2002 and the Competition and Consumer Act 2010. Provisions relating to remedies for misrepresentation in contracts are seen more clearly in the acts.

As a result, it is recommended that the Contract Act 1950 be reformed and amended, particularly in regard to the remedy for misrepresentation in contract, so that it can be fully implemented and improved in Malaysia to ensure that all contractual parties are treated

fairly. The legal provisions of Australia can be used as a model for improving Malaysian legislation.

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