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RESEARCH ARTICLE

REMEDY FOR MISREPRESENTATION IN CONTRACTS: A CASE ANALYSIS IN MALAYSIA

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Abstract

Misrepresentation is a false statement made by one party which affects the other party's decision to agree to a contract. The act of misrepresentation nullifies the free consent of the contracting party to enter the contract, and that party is entitled to remedy. In Malaysia, the act of misrepresentation in contract is governed by section 18, Contracts Act 1950, whereas the remedy is provided for under sections 65 and 66, Contracts Act 1950. Based on this provision, the remedy given in cases of misrepresentation is contract rescission. However, based on previous court decisions, the remedy of contract rescission and damages have both been awarded by the courts. The objective of this article is to provide an analytical and critical case-by-case analysis of misrepresentation in contract, specifically regarding the remedies awarded by the court. The analysis of these cases found that there are court decisions where the court had awarded the remedy of contract rescission, and other cases where the court awarded contract rescission together with damages. The remedy expressly provided for in the Contracts Act 1950 is, however, contract rescission. This situation may cause confusion as the effects of each remedy are different. It is also submitted that the provisions in the Contracts Act 1950 should be reviewed to ensure their suitability with the application of misrepresentation laws in Malaysia.

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Introduction:-

Misrepresentation is an element that negatively affects the free consent of a party to a contract in deciding to agree to a contract. Misrepresentation usually occurs at the pre-contractual stage, whereby during negotiations between the contracting parties, one party makes a misrepresentation that affects the other party's decision to enter into the contract. In Malaysia, misrepresentation in contract is governed by the Contracts Act 1950 under section 18. Section 19 of the Contracts Act 1950 provides that the effect of misrepresentation on a contract is rescission. The Act also provides remedy for misrepresentation in contract in sections 65 and 66. Therefore, this article will discuss the remedies provided by the Contracts Act 1950 according to the opinions of legal experts in contract law in Malaysia and by analyzing the application of provisions for remedy for misrepresentation in Malaysian court cases.

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Misrepresentation And Its Effects Under The Contracts Act 1950:

In Malaysia, section 18 of the Contracts Act 1950 is the provision that governs misrepresentation in all types of contracts. Section 18 provides the following:

“Misrepresentation” includes—

1. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
2. Any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
3. Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Based on this provision, it can be understood that misrepresentation is a false statement, whereby the misrepresenting party is convinced that the statement is true and is not made with any fraudulent intention.

Apart from section 18, section 19 of the Contracts Act 1950 provides for the effect of a contract entered into due to misrepresentation. Section 19 of the Contracts Act 1950 clearly states the voidable effect on a contract that has elements of misrepresentation:

Voidability of agreements without free consent:

When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

The two abovementioned provisions clearly show that contract laws in Malaysia do not allow for misrepresentation in contract and that the effect of entering a contract due to misrepresentation is the contract is null and void.

Remedy for misrepresentation:

To curb misrepresentation activities in contracts, the Contracts Act 1950 provides remedy for the contracting party if the contract agreed to was due to misrepresentation. The remedy for misrepresentation as provided by the Contracts Act 1950 is contract rescission and restitution under sections 65 and 66.

Section 65 states:

When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore the benefit, so far as may be, to the person from whom it was received.

Section 66 provides:

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Therefore, if the contracting party chooses to rescind the contract, that party can notify the other party to the contract of his intention to rescind the contract. If that party wishes to void the contract, the said party must return any benefit he had received to the other party as mentioned in section 65.

This was found in the decision of *Travelsight (M) Sdn Bhd & Anor v Atlas Corp Sdn Bhd*.¹ It comes to light however that the provisions of sections 65 and 66 are confusing and problematic. Under section 65, the party receiving the statement of misrepresentation is required to return any and all benefits gained to the party that made the statement of misrepresentation. The word ‘shall’ in the provision reflects the mandatory nature of the return of benefit to the misrepresenting party. However, for the party that made the statement of misrepresentation, there are no legal provisions that place responsibility upon him to return any benefit gained to the receiver of the statement as provided in section 65. That responsibility is supposed to be contained, albeit implicitly, in section 66.² Ideally, to

¹ [2003] 6 MLJ 658, HC.

² Beatrix Vohrah & Wu Min Aun, *Commercial Law of Malaysia*, p. 102.

avoid confusion when awarding this remedy, the provisions of the Act must unambiguously explain the actions that need to be taken by the parties involved. It is therefore proposed for this provision to be amended in order to prevent confusion regarding this provision and to outline clearer rights and responsibilities.

With reference to the same provision, the remedy for misrepresentation is contract rescission, and if the contract is rescinded, the contracting parties must return all benefit gained from the contract or pay compensation. Yet, there is some confusion in the application of said provision when the court awards a remedy to terminate the contract as in the case of *Segar Oil Palm Estate Sdn Bhd v Tay Tho Bok & Anor*³, where the plaintiff's contract was terminated by the court due to fraudulent misrepresentation. The Court of Appeal refused to allow the plaintiff's claim to make corrections to the contract he entered. A similar outcome was found in the case of *Wong May Leng & Anor v Thomas Patrick Francis Fernandes & Anor*⁴ where Zaiton Dato' Zaidan J in the High Court awarded termination of the contract because the contract was breached as a result of wrong information; the court only referred to the case of *Sim Thong Realty Sdn Bhd* and did not refer to the provision for misrepresentation in the Contracts Act 1950. The decision in this case differs from the Contracts Act 1950, which provides contract rescission as a remedy for contracts with elements of misrepresentation, and not termination of the contract. Contract termination has different effects compared to contract rescission, although there are views that put termination and rescission on the same level, such as in the case of *Photo Production Ltd. V Securicor Transport Ltd*⁵. Both of them lead to the contract being voided, but nonetheless contained differences therein.⁶

In the context of contract rescission, it is often known as 'rescission ab initio' whereby the contract was invalid from the onset. For instance, the right to property is transferable until the contract is rescinded; however, for the maker of the statement, the contract rescission is both prospective (future) and retrospective (past). Therefore, all unfulfilled duties and responsibilities are voided, and all benefit gained must be returned. Termination of contract however involves a contract between the contracting parties that was valid from the start. The contract may then be terminated by the innocent party, resulting in both parties to the contract not having to perform any unfulfilled responsibilities, and all benefit gained or transferred cannot be restored. Therefore, contract termination is only prospective in nature (rescission de futuro).⁷

Confusion also arises when a remedy is awarded by the court as if it were based on a 'category' of misrepresentation, when there is no such thing provided in the Contracts Act 1950. This perplexity can be found in several court decisions. In the case of *Admiral Cove Development Sdn Bhd v Balakrishnan Devaraj*⁸, Mohd Ghazali Mohd Yusoff FCJ stated,

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 which seem to suggest that to rescind 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.

In this case, the court mentioned innocent misrepresentation, yet there is no clear provision on innocent misrepresentation. The court in this case ruled based on what it perceived would do justice to the contracting parties.

³ [1997] 3 MLJ 211, CA.

⁴ [2017] 1 LNS 1034.

⁵ [1980] UKHL 2.

⁶ *Johnson v Agnew* [1980] AC 367.

⁷ Mindy Chen-Wishart, *Contract Law*, p. 235-236.

⁸ [2011] 5 MLJ 309, FC.

However, when reviewing the said ruling, the court deduced that there was no right to contract rescission, thus providing no remedy to the plaintiff.

Confusion has also occurred in awarding damages as a remedy by the court in misrepresentation cases, despite there being no express provision in the Contracts Act 1950 regarding damages as a remedy for misrepresentation.⁹ Reference to several court cases however shows that the courts have awarded damages as a remedy without referring to the Contracts Act 1950, but instead by referring to English cases such as those mentioned by Gopal Sri Ram J 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.”

Awarding damages as a remedy was also seen in the case of *Letchemy Arumugan v N Annamalai*¹⁰. In this case, a housing developer had made a fraudulent misrepresentation to the plaintiff, whereby the defendant did not believe the said statement. Wong Kim Fatt J in the High Court awarded a remedy of contract rescission and damages to the plaintiff for loss suffered due to the defendant’s fraudulent misrepresentation. The court in this case decided on this remedy by referring solely to the case of *Doyle v Olby (Ironmongers) Ltd*¹¹ and not the provisions of the Contracts Act 1950. In the case of *Tan Ah Tong v Che Pee Saad & Anor*¹², the court awarded damages as an alternative claim by referring to *Derry v Peek*¹³. Damages have also been awarded by the court to the party that wishes to continue with the contract despite a misrepresentation being present. This was seen in *Weber v Brown*¹⁴ where the court stated that the party that was innocent during the signing of the contract had the right to recover damages. However, the court did not disclose or explain how the damages were to be evaluated, nor did it refer to Section 19(2) of the Contracts Act. Belfield ACJ stated,

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.

According to Sinnadurai¹⁵, this judgment is confusing because the judge overlooked the scope of Section 19(2), which clearly provides that damages can be awarded in a case where a contracting party adheres to a contract that was influenced by fraud or a fraudulent misrepresentation. Sinnadurai is of the view that the judge’s observation was erroneous by citing the Contract Enactment, which does not mention anything related to the issue of recovering damages for fraud cases, and because the judge overlooked Section 19(2). The provision of this section specifically provides for damages to be awarded in cases where the contracting parties agree to a contract that is influenced by fraud or fraudulent misrepresentation. Therefore, in order to prevent further confusion, the provision needs to be reviewed and revised.

Section 76 of the Contracts Act 1950 cannot be referred to in determining measure of damages for cases of misrepresentation in contract. According to the provision of the Indian Contract Act which is pari materia with the Contracts Act 1950, Section 75 Indian Contracts Act (Section 76 Contracts Act 1950), it is not applicable for awarding damages in cases of misrepresentation because this section is clearly and expressly only applicable to cases where the contract is not fulfilled, as decided by Vivian Bose J in *Haji Ahmad v Abdul Gani*,¹⁶ where only in the case of termination due to breach of contract may be classified as ‘unfulfilling the contract.’ Therefore, in cases of fraud and misrepresentation, damages cannot be recovered under Section 75 (Section 76 Malaysia).

⁹ Andrew Phang Boon Leong, *Law of Contract*, Malayan Law Journal Sdn Bhd., Kuala Lumpur, 1998, p. 309.

¹⁰ [1982] 2 MLJ 198, HC.

¹¹ [1969] 2 QB 158; [1969] 2 All ER 119.

¹² [2010] 6 CLJ 560.

¹³ [1889] 14 App Cas 337.

¹⁴ (1908) 1 FMSLR 12.

¹⁵ AIR 1937 Nag 270; Visu Sinnadurai, *The Law of Contract in Malaysia and Singapore: Cases and Commentary*, p. 249; Visu Sinnadurai, *Contracts Act a Commentary General Principles and the Law of Indemnity, Guarantee, Bailment and Agency*, p. 208.

¹⁶ Visu Sinnadurai, *The Law of Contract in Malaysia and Singapore: Cases and Commentary* p. 247.

Aside from the ambiguity surrounding award of damages in cases of misrepresentation in contract according to the Contracts Act 1950, the Act also does not provide for the measure of damages to be awarded to the party which suffered a loss. The general trend however is for the courts to have a tendency to lean towards English cases in determining damages when a contract is terminated by the receiver of the statement which was a fraudulent misrepresentation. This was found in the decision of Abdul Razak bin Datuk Abu Samah where Gopal Sri Ram J stated,

Where damages are awarded for fraudulent misrepresentation (and we consider the principle to be the same to a case of negligent misrepresentation) the assessment of damages must take into account any sum recovered as restitution under the claim for rescission so as 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 which he 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. The assessment of damages would therefore 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*.

A similar outcome was found in the case of *kes Sim Thong Realty Sdn Bhd* where the court awarded damages as a remedy, and the measure of the damages was done by referring to English cases as mentioned by Gopal Sri Ram JCA,

So, if the misrepresentation is made fraudulently, than 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 the judgment of Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd* 2 All ER 119.

The source of this problem is the confusion caused by the provisions in the Contracts Act 1950 regarding award and evaluation of damages as a remedy to misrepresentation in contract. According to Sinnadurai¹⁷, it is unclear as to whether Section 19(2) is the right approach to take for estimating damages. Sinnadurai opines that the provision under section 19(2) 'should be placed in the rightful situation if the statement made was true', as if to propose that the assessment of damages is based on contract and not tort.

The evaluation of damages in contract is to place the innocent party in the position he would be in 'if the representation were true', whereas under tort, it is to place the innocent party in the position he would be in 'if the representation was never made', as stated in Abdul Razak bin Datuk Abu Samah. The courts have also decided on the amount of damages to be awarded by referring to English cases such as in the case of *Sim Thong Realty Sdn Bhd*, "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."

The method of calculation of damages applied by the courts are based on a duty to ensure equal and fair compensation amongst the contracting parties with sufficient proof as decided in *Letchemy Arumugan v N Annamalay*¹⁸. Wong Kim Fatt J¹⁹ stated, "The court pointed out that in such cases, whatever measure of damages the court applies, its duty is to award damages or compensation as fairly and justly as possible as between the parties based on the evidence before it." Looking back at the decided cases and the courts' decisions regarding remedy for misrepresentation in contract and the measure of damages, there is clear confusion within the legal provisions of Malaysia, specifically the Contracts Act 1950, in resolving the issue of misrepresentation in contract.

Conclusion:-

Malaysia is not left behind in terms of laws relating to misrepresentation in contract, as found in section 18 of the Contracts Act 1950. The effects and remedy for misrepresentation are also provided under sections 19, 65 and 66 of the same Act. However, some confusion arises within the Act regarding remedy for misrepresentation when the remedy clearly provided for in the Act is contract rescission. Despite this, the courts have awarded termination of

¹⁷ Visu Sinnadurai, *The Law of Contract*, p. 348.

¹⁸ [1982] 2 MLJ 198.

¹⁹ [1982] 2 MLJ 198, 202.

contract as a remedy. There is also ambiguity concerning the award of damages as a remedy and measure of damages in cases of misrepresentation, even if it appears to be implicitly contained within section 19, Contracts Act 1950. The implication of this lack of clarity in the provision is that it has affected the courts, where they have a tendency to refer to English cases and not to the provisions of the Act. Furthermore, there are inconsistencies in the courts' decisions when awarding remedy for cases of misrepresentation in contract. Therefore, it is necessary for the Act to be revised and amended, particularly regarding remedy for misrepresentation in contract, so that it can be applied totally and to further strengthen contract law in Malaysia so as to ensure justice for all contracting parties.

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