



### RESEARCH ARTICLE

#### THE BURDEN OF PROOF IN MISREPRESENTATION IN CONTRACTS: A LEGAL ANALYSIS

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#### Abstract

Misrepresentation in contracts could lead to a contract becoming null and void. Misrepresentations frequently occur, either in physical contracts or online contracts. Therefore, the majority of countries around the world have enacted laws to control misrepresentation. Among the provisions enacted include the burden of proof in misrepresentations in a contract. This study analysed existing legal provisions in several commonwealth countries to identify the burden of proof in misrepresentations. The document analysis method was used to achieve the objectives of this study and involved the analysis of statutes and Acts related to misrepresentation. Findings indicate that there are differences in the burden of proof in misrepresentation found in the legal provisions of each country. The United Kingdom and Australia have clear legal provisions concerning the burden of proof, while Malaysia and India do not. Hence, the legal provisions in Australia and the United Kingdom should be taken as examples for enacting clear provisions in order to avoid any confusion.

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#### Introduction:-

Misrepresentation is one of the elements that can lead to a party's lack of freewill to enter into a contract. Misrepresentation can be defined based on essential elements, such as important factual statements that are false or incorrect or untrue, made by one contracting party to another, which tends to influence the party to enter into a contract that is not intended to bind obligations under the contract.<sup>1</sup> Besides that, the statement made is directed at

<sup>1</sup>T. Chris, Unlocking Contract Law, Hodder & Stoughton, London, 2004, page 202-203; Duxbury R., Contract in a Nutshell, 7th Ed., Sweet & Maxwell, London, 2006, page. 63; P. Jeannie et al., Principles of Contract Law, 5th Ed., Thomson Reuters (Professional) Australia Limited, New South Wales, 2016, page 637.

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the party that receives the statement<sup>2</sup> before or when the contract is made.<sup>3</sup> According to Atiyah,<sup>4</sup> misrepresentation is defined as a false statement of fact.

A contract that contains an element of misrepresentation will affect its validity. Therefore, it is customary to place the burden of proof on the party making the claim or claiming that the contract has an element of misrepresentation. Therefore, this study intended to identify the burden of proof of misrepresentation in contracts through legal provisions existing in the United Kingdom, Australia, Malaysia and India. Four commonwealth countries that apply the common law legislative system in their own countries were selected by this study.

### **Methodology Of The Study:-**

This research is a pure doctrinal research or legalistic analysis based on the content analysis method. The main purpose of this research is to study, elaborate and then systematically analyze the facts, principles, concepts and theories.<sup>5</sup> Therefore, this research performed a legal comparison pertaining to legislation related to misrepresentation in contracts between the United Kingdom, Australia, Malaysia and India. The purpose of selecting this approach was to look at the similarities and differences of legal provisions related to the burden of proof of misrepresentation in contract cases in these countries. This comparison helps reveal the advantages and disadvantages of a certain legislation in each country.

### **The Burden of Proof in Misrepresentation**

The burden of proof in an allegation that the false statement has influenced the contracting party to enter into a contract rests with the misled party or the recipient of the statement.<sup>6</sup> Lord Blackburn<sup>7</sup> stated;

I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and if it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement.

Thus, if the recipient of the statement can prove that he was influenced, he has the right to receive relief.<sup>8</sup> Therefore, according to common law, the burden of proof is on the recipient of the statement to prove that the statement made by the issuer of the statement had influenced him to enter into a contract.

### **An Analysis of the Legislation on the Burden of Proof in Misrepresentation in Contracts**

#### **Legislation in the United Kingdom - Misrepresentation Act 1967 (MA 1967)**

Legal provisions related to misrepresentation in contracts in the United Kingdom are provided for in the Misrepresentation Act 1967 (MA 1967). MA 1967 was enacted to fill gaps in the common law and equity. Although this Act has only a few provisions, it provides benefits and relief to parties that make claims for misrepresentation in a contract. According to Atiyah and Treitel,<sup>9</sup> existence of MA 1967 in the United Kingdom is a positive development in the field contract law, especially in the case of misrepresentation. The enactment of this act was based on suggestions by the Law Reform Committee found in the Law Reform Committee's Tenth Report.

<sup>2</sup>Commercial Banking Co of Sydney Ltd v RH Brown & Co [1972] 2 Lloyd's Rep 360 (Australia); Smith v Eric S Bush [1990] 1 AC 831

<sup>3</sup> G. Stephen, An Introduction to the Law of Contract. 8th Ed., Thomson Reuters (Professional) Australia Limited, New South Wales, 2015, page. 346;

J. Beatson, A. Burrows & J. Cartwright, Anson's Law of Contract, page 301.

<sup>4</sup> P.S. Atiyah & S.A. Smith, Atiyah's Introduction to the Law of Contract, 6th Ed., Oxford University Press., Oxford, 1995, page 254.

<sup>5</sup> Anwarul Yaqin, Legal Research and Writing, LexisNexis Malaysia Sdn Bhd, Petaling Jaya, Selangor, 2007, page 10.

<sup>6</sup> Arkwright v Newbold (1880) 17 Ch D 301, page 324; Bristol & West BS v Mothew [1998] Ch 1.

<sup>7</sup> Smith v Chadwick (1884) 9 App Cas 187, page 196.

<sup>8</sup> Museprime Properties Ltd v Adhill Properties Ltd (1991) 61 P&CR 111, 124.

<sup>9</sup> P. S. Atiyah, & G. Treitel, 'Misrepresentation Act 1967' (1967) 30 The Modern Law Review 369.

In reference to MA 1967, provisions pertaining to the burden of proof in misrepresentation in a contract is mentioned in Section 2(1), which states, “if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true”. Therefore, based on this provision, the burden of proof is clearly returned to the party that has made the representation in order to proof the reasonableness of the representation.

### **Legislation in Australia**

The legal system in Australia also originated from England and began to take root in 1788.<sup>10</sup> Australia is a commonwealth nation that was colonised by the British, just like Malaysia. As in the United Kingdom, Australia also has a serious outlook on the elements of misrepresentation and fraud in contracts. Although the law applied in Australia is common law, however, it is evident that Australia is much advanced in enacting legislation and statutes related to misrepresentation in contracts compared to Malaysia. There are several acts or statutes applied in Australia to control misrepresentation in contracts, such as Australian Consumer Law (Schedule 2 Competition and Consumer Act 2010(Cth)), Misrepresentation Act 1972 (SA) and Civil Law (Wrongs) Act 2002 (ACT).<sup>11</sup>

### **The burden of proof in misrepresentation under the Misrepresentation Act 1972 (MA 1972)**

In reference to the Misrepresentation Act 1972 (MA 1972), the burden of proof in misrepresentation in contracts is indirectly provided under Section 7 of this Act. It mentions about compensation for contracts entered into because of a misrepresentation as well as the defence for the defendant regarding the claim of compensation that ought to be given by the defendant. The provision explains that the defendant can defend himself if he can prove that the representation made has reasonable grounds. Section 7(2) provides as follows:

It is a defence to an action under subsection (1)—

- (a) that the person by whom the representation was made had reasonable grounds to believe, and did believe, that the representation was true; or
- (b) that the defendant was not the person by whom the representation was made and did not know, and could not reasonably be expected to have known, that the representation had been made, or that it was untrue.

Based on this provision, it is clear that the burden of proof that initially rested with the plaintiff then passes on to the defendant

### **Burden of proof under Civil Law (Wrongs) Act 2002 (CLA 2002)**

Civil Law (Wrongs) Act 2002 (ACT) (CLA 2002) is an Act governing the liability of civil offenses occurring in the Australian Capital Territory. This Act provides for misrepresentation under Chapter 13 involving the provisions of Sections 172-179. Based on the provisions contained in CLA 2002, the burden of proof rests on the plaintiff to prove that the defendant was influenced into entering the contract. However, this burden then passes on to the defendant if the defendant wishes to defend himself by proving that he had reasonable grounds when making the misrepresentation. This is stated in Section 174 (3),

(3) It is a defence to an action under subsection (2) that—

- (a) if the representation was made by the defendant—the defendant had reasonable grounds for believing, and did believe up to the time the contract was made, that the representation was true.

### **The burden of proof under the Competition and Consumer Act 2010 (Cth) (CCA 2010)**

Competition and Consumer Act 2010 (Cth) (CCA 2010), which came into effect in July 2010 under the Australian Competition and Consumer Commission (ACCC), is the Act that replaced the Trade Practice Act 1974 (Cth) (TPA 1974).<sup>12</sup> Under the CCA 2010, actions that confuse or are fraudulent in nature come under Section 18 Schedule 2

<sup>10</sup> Athula Pathinayake, Commercial and Corporations Law, 2nd Ed., Thomson Reuters (Professional) Australia Limited, Sydney, Australia, 2015, page 3.

<sup>11</sup> Athula Pathinayake, Commercial and Corporations Law, 2nd Ed., Thomson Reuters (Professional) Australia Limited, Sydney, Australia, 2015, page 117-118.

<sup>12</sup> Athula Pathinayake, Commercial and Corporations Law, 2nd Ed., Thomson Reuters (Professional) Australia Limited, Sydney, Australia, 2015, page 202.

Competition and Consumer Act 2010 - Australian Consumer Law (ACL). Provisions in ACL are related to consumer protection found in TPA and also in legislation related to consumers that were applied in Australia some time ago.<sup>13</sup>

CCA contains 178 sections and 2 schedules. Schedule 2, which contains 287 sections, is related to 'misleading' and it is known as Australian Consumer Law (ACL). Based on Section 131A (2) Part XI Division 2, Application of the ACL as a law of Commonwealth, (a) states that Part 2-1 from Schedule 2 as well as Sections 34 and 156 of Schedule 2 are not applicable for actions related to financial services. Before 2010, Schedule 2 Competition and Consumer Act was known as the Trade Practices Act 1974<sup>14</sup>, which can be seen in 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 had suggested the introduction of a national trade legislation, namely the ACL, as a form of a comprehensive consumer protection legislation that should be uniformly applied all over Australia.<sup>15</sup> Under the Intergovernmental Agreement for the Australian Consumer Law, states and territories all over Australia apply the ACL as a form of legislation under their jurisdiction. Section 22 (1)(a) of the Interpretation Act 1901 states that, "Expressions used to denote persons generally...include a body politic or corporate as well as an individual." Hence, companies, unincorporated entities, and individuals are bound by the ACL, either in the Commonwealth or territories in Australia.<sup>16</sup>

Part XI of the Competition and Consumer Act provides for the application of the ACL as law in the Commonwealth. The legislative power of the Commonwealth Parliament is limited by the Commonwealth Constitution. The Competition and Consumer Act states that the ACL is applicable to activities under the jurisdiction of the Commonwealth Constitution.<sup>17</sup> Section 131(1) of the Competition and Consumer Act mentions that ACL is applicable for actions committed by a company. Meanwhile, Section 6(3) and (3A) mentions that ACL is applicable for actions committed by individuals. Therefore, generally, ACL provides protection for individuals and corporate entities as consumers of goods and services, which in some cases, the protection is only afforded to groups known as "consumers", as defined under Section 3.

Besides that, one important source related to relief against misleading conduct or fraud is under Part 2-1 and Part 3-1 of ACL. Section 18 (1) in Part 2-1 of ACL prohibits any misleading actions or fraud as well as deceptive actions in commerce or trade. More specific actions that are prohibited are found in Part 3-1 of the Australian Consumer Law.

Presently, there is only one law uniformly applied in all states and territories in Australia, namely the ACL under Part XI of the Competition and Consumer Act 2010 (Cth), which includes individual actions committed interstate and intrastate, as well as partners and corporations who adduce several types of false or misleading statements.<sup>18</sup>

Section 18 does not provide for burden of proof for cases concerning misleading actions. However, Section 4 provides for burden of proof for cases involving the adducement of representations about any future matters whereby the representation could be misleading. Section 4(1) states:

- (1) If
  - (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
  - (b) the person does not have reasonable grounds for making the representation; the representation shall be taken to be misleading.

Based on these provisions, it shows that representations concerning a future matter includes misleading representations, unless the party making the representation has reasonable grounds for making it. Meanwhile, Section 4(2) requires the party making the representation to adduce proof of his alleged reasonable grounds for

<sup>13</sup> Jeannie Paterson et al., *Principles of Contract Law*, page 48.

<sup>14</sup> JW Carter, *Contract Law in Australia*, page 20.

<sup>15</sup> Jeannie Paterson, Andrew Robertson & Arien Duke, *Principles of Contract Law*, 5<sup>th</sup> Ed., Thomson Reuters (Professional) Australia Limited, New South Wales, 2016, page 48.

<sup>16</sup> Jeannie Paterson et al., *Principles of Contract Law*, page 48.

<sup>17</sup> Jeannie Paterson et al., *Principles of Contract Law*, page 48.

<sup>18</sup> A. Gibson & D. Fraser, *Business Law*, Ed. Ke-3, Thomson Reuters (Professional) Australia Limited Pyrmont, NSW, Australia, 2011, page 54-56.

making the said representation.<sup>19</sup> Thus, if the party making the representation does not possess any proof of his strong grounds for making the representation, then the representation is presumed to be misleading.<sup>20</sup> However, if the party making the representation can adduce proof, then that party is exempt from claims under Section 4(2).<sup>21</sup> Therefore, the responsibility is on the party receiving the representation to assert that the party making the representation does not have reasonable grounds for making that representation.<sup>22</sup>

### **Legislation in India – Indian Contract Act 1872 (ICA 1872)**

India also applies the English common law in its law of contract. The Indian Contract Act 1872 (ICA 1872) was enacted to regulate contractual activities in India, including misrepresentations in contracts. As this act is not a complete code that covers all types of contracts, the common law will be referred to if there is a gap in any of the legal provisions. The Indian Law Commission proposes to include common law principles into the Act, which have been applied by the courts in India, so that it is no longer necessary to refer to English law in cases thereafter.<sup>23</sup>

In reference to ICA 1872, provisions pertaining to misrepresentation is provided under Section 18 of the Act.

18. "Misrepresentation" defined

"Misrepresentation" means and 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, gains an advantage to the person committing it, or anyone claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him;
- (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is subject of the agreement

Provisions pertaining to the effects of misrepresentation on the contract is provided under Section 19 of ICA 1872.

### **Voidability of agreements without free consent**

**19.** 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.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Provisions pertaining to providing remedies for misrepresentations are provided in Section 64 and 65 of ICA 1872.

### **Consequences of rescission of voidable contract.**

64. Where 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 the promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

<sup>19</sup> Jeannie Paterson et al, Principles of Contract Law, page 673.

<sup>20</sup> Futuretronics Pty Ltd v Gadzhis [1992] 2 VR 217.

<sup>21</sup> North East Equity Pty Ltd v Proud Nominees Pty [2010] FCAFC 60, [33].

<sup>22</sup> North East Equity Pty Ltd v Proud Nominees Pty [2010] FCAFC 60, [33]; Hadgelias Holding Pty Ltd v Seirlis [2014] QCA 177.

<sup>23</sup> Law Commission of India, Thirteenth Report (Contract Act, 1872), 26 September 1958.

**Obligation of a person who has received an advantage under a void agreement or contract that becomes void.**

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

Based on the provisions related to misrepresentation found in ICA 1872, it is clear that there are no provisions pertaining to burden of proof for misrepresentations in a contract.

**Legislation in Malaysia - Contract Act 1950 (CA1950)**

The law applicable for regulating contract activities in Malaysia is the Contract Act 1950 (CA1950) (Act 136). Highlighted from a historical perspective, ICA 1872 was extended to the Federated Malay States as the Contract Enactment 1899, with some modifications. Until 1950, the Contract Ordinance was unofficially approved by the Federal Legislative Council of the Federated Malay States.<sup>24</sup> The Contracts (Malay States) Ordinance 1950 was applied in nine states in Malaysia, excluding Pulau Pinang, Melaka, Sabah and Sarawak, which still applied English Law similar to that applied in England.<sup>25</sup> When the Contract Ordinance 1950 was reviewed in 1974, it became an Act under the Revision of Laws Act 1968 without going through Parliament. Beginning with this, the Act became applicable to the whole of Malaysia in 1974<sup>26</sup>, including the legislation pertaining to misrepresentation.

The enactment of CA1950 was modelled based on ICA 1872. Therefore, provisions contained in CA 1950 is *pari materia* with ICA 1872. Provisions related to misrepresentation in CA 1950 are also found in Section 18, as mentioned below.

“Misrepresentation” includes –

- (a) 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;
- (b) 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
- (c) 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.

Similarly, provisions related to contracts affected by misrepresentation are provided in Section 19,

- (1) 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.
- (2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

**Exception –**

If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

**Explanation –**

A fraud or misrepresentation which did not cause the consent to a contract of the party on whom the fraud was practised, or to whom the misrepresentation was made, does not render a contract voidable.

<sup>24</sup>Minutes of the Legislative Council of the Federation of Malaya, February 1950 to January 1951, Third Session, (A36).

<sup>25</sup> Visu Sinnadurai, *The Law of Contract in Malaysia and Singapore: Cases and Commentary*, 2nd Ed., Butterworth & Co (Asia) Pte Ltd, Singapore, 1987, page 1.

<sup>26</sup> Visu Sinnadurai, *The Law of Contract in Malaysia and Singapore: Cases and Commentary*, page 3.

**Illustrations**

(a) A, intending to deceive B, falsely represents that five hundred gantangs of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred gantangs of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred gantangs of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an undervalue. The contract is voidable at the option of A.

(d) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

Remedy for contracts that contain elements of misrepresentation are found under Sections 65 and 66,

65. 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.

66. 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.

Based on these provisions, it is evident that there is no clear provision regarding the burden of proof in cases of misrepresentation in a contract. The following is a summary of the differences in the burden of proof in cases of misrepresentation in contracts in accordance with the legal provisions of four Commonwealth countries.

COUNTRY	STATUTE	BURDEN OF PROOF
UNITED KINGDOM	MISREPRESENTATION ACT 1967	Plaintiff & Defendant (the party making a representation to prove the reasonableness of its representation)
AUSTRALIA	MISREPRESENTATION ACT 1972	Plaintiff & Defendant (the burden of proof which initially rested on the plaintiff is then passed on to the defendant)
	CIVIL LAW (WRONGS) ACT 2002	Plaintiff & Defendant (the burden of proof which initially rested on the plaintiff is then passed on to the defendant)
	COMPETITION AND CONSUMER ACT 2010	Plaintiff & Defendant (the party making the representation provides evidence to prove he has strong grounds for making the representation) (The recipient of the representation must emphasize that the party making the representation does not have a strong reason for making

		the representation)
<b>MALAYSIA</b>	<b>CONTRACTS ACT 1950</b>	No clear provision in the statute
<b>INDIA</b>	<b>CONTRACT ACT 1872</b>	No clear provision in the statute

### Conclusion:-

Basically, the burden of proof in a case lies on the plaintiff, i.e., the party making the claim. Meanwhile, if the defendant wants to defend himself, then the defendant has to prove his defense, which in this case the burden of proof shifts from the plaintiff to the defendant. Provisions on the burden of proof in cases of misrepresentation in a contract are provided for in the legislation from the United Kingdom and Australia,<sup>27</sup> but in Malaysia, stipulations regarding the burden of proof are not expressly provided for in AK 1950 or any other Act. Similarly, in India, there is no clear provision in the Act on the burden of proof of misrepresentation in a contract. Therefore, based on the legal comparisons between the United Kingdom, Australia, Malaysia and India, a clear provision on the burden of proof available in the United Kingdom and Australia should be cited as an example. Clear provisions in the act or statute are needed to avoid confusion in future cases and to facilitate the judiciary when deciding a case.

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