

Innocent Misrepresentation

Terms of Reference

In 1971 the Committee was asked to consider whether there were any alterations desirable in the law relating to innocent misrepresentation and the remedies available for such misrepresentations.

Background of Reference

At common law, the only remedy available to a person induced into entering a contract by an innocent misrepresentation (which was not a term of the contract) was rescission of the contract. Because rescission requires that parties be restored to their pre-contract positions, this remedy may be lost if the contract has been performed. Generally, the plaintiff had no right to damages for any loss suffered as a result of an innocent misrepresentation, although they could obtain a limited form of indemnity.¹

In 1962, the English Law Commission published a report² on the subject of innocent misrepresentation. The recommendations contained in that report were substantially implemented by legislation³ in the United Kingdom which allowed an award of damages and ensured that the right to rescission was not barred where a contract had been performed. South Australia enacted similar legislation in 1971.⁴

In May 1972 the Committee issued a working paper setting out its provisional views on the issue. The working paper invited comment on whether legislation should be enacted to expand the remedies available for innocent misrepresentation such that:

- (a) the fact that a contract had been performed would not of itself be a bar to rescission;
- (b) the court would be empowered to award damages in lieu of rescission;
- (c) rescission would be available for a misrepresentation which had become a term of the contract;
- (d) the equitable remedy of rescission would be available in cases of contracts for the sale of goods; and
- (e) a buyer of goods would not be barred from rejecting goods for a misstatement which is a term of the contract until he or she had had reasonable opportunity of examining them.

Nature and Extent of Consultation

The working paper was widely distributed for comment and responses to the paper were received from the Hon John Hale, the Hon Justice Wallace and the Council of the Law Society of Western Australia. The respondents essentially agreed with the views that the Committee expressed in the working paper.

When the Committee was formally reconstituted as a Commission in January 1973, the Commission assumed the conduct of the project and delivered its final report on the subject in October of the same year.⁵

Recommendations

After considering the responses to the working paper and the reform made in other jurisdictions, the Commission recommended that the legal remedies available for an innocent misrepresentation that induced a contract be revised. The Commission outlined three alternative legislative schemes for reform:

1 In granting rescission the court can order the defendant to indemnify the plaintiff for loss resulting from obligations created by the contract but not for any other loss.
 2 Law Commission (UK), *Tenth Report*, Cmnd. 1782 (1962).
 3 *Misrepresentations Act 1967* (UK).
 4 *Misrepresentations Act 1971* (SA).
 5 Law Reform Commission of Western Australia, *Innocent Misrepresentation*, Project No 22 (1973).

- That the available remedies for an innocent misrepresentation that induces a contract be identical to the remedies for a breach of a term of a contract.
- That courts be given a wide discretion to award rescission or damages or both for an innocent misrepresentation, and to choose between the contractual measure of damages and the tortious measure.
- That the court be empowered to award damages (as in tort) or rescission, or both, in the case of an innocent misrepresentation made negligently.

If one of the recommended legislative schemes described above were adopted, the Commission further recommended that:

- The law should not restrict the right of the parties to contract out of any statutory provision. Restrictions on freedom of contract should be made only in legislation specially designed to protect particular classes of persons, such as consumers.
- Equitable remedies should be available in the case of contracts for the sale of goods.

Legislative or Other Action Undertaken

In September 1984, the Attorney-General announced⁶ that the Government had decided not to take any action on the recommendations contained in the Commission's report in view of developments in the law⁷ since it had been submitted.

⁶ Mr J M Berinson, Attorney-General, News Statement (5 September 1984).

⁷ For example the *Trade Practices Act 1974* (Cth) ss 52–53 applies to all forms of misrepresentation by a corporation in trade or commerce and allows a wide range of relief including rescission, damages or both. Corresponding sections in the *Fair Trading Act 1987* (WA) allow similar relief against misrepresentations made by individuals in trade or commerce.