

# ARTICLES

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## MISREPRESENTATION, AGENCY, AND CONTRACTS FOR THE SALE OF GOODS IN SOUTH AUSTRALIA — MORE EFFECTIVE REMEDIES OR INCREASING CONFUSION?

One of the aims of the considerable volume of consumer protection legislation enacted in South Australia in recent years has been to provide more effective remedies for the consumer induced to undertake contractual obligations after reliance on representations made by the vendor or his agent which subsequently turn out to be untrue. The paramount example is the Misrepresentation Act 1971-1972 but, in addition, there are other provisions scattered throughout the statute book designed to assist the consumer in cases of misrepresentation, the more important of which will be considered in the course of this paper. Many of these provisions will undoubtedly facilitate the consumer in obtaining necessary redress but others have been based on dubious suppositions which are likely to lessen their effectiveness. Further, there has been an apparent failure fully to consider the interaction between misrepresentation provisions in different pieces of legislation and also their effect on basic common law principles. This results in increasing complexity and uncertainty, making the task of advising as to the possible courses of action for misrepresentation far more difficult than is either necessary or desirable. The ensuing discussion of the problems of interpreting the legislative provisions designed to provide remedies for misrepresentation has been largely confined to misrepresentations made by the seller or his agent in the course of negotiations leading to the formation of a contract for the sale of goods. This is not because problems of interpretation of recent legislation providing remedies for misrepresentations inducing contracts for the sale of land do not arise<sup>1</sup>, but because the remedies available for misrepresentations inducing contracts for the sale of goods raise their own peculiar problems.

The paper deals firstly with the effect of the South Australian Misrepresentation Act, 1971-1972, the Consumer Transactions Act, 1972-1973, and the Second-hand Motor Vehicles Act 1971 on the availability of rescission for innocent misrepresentations inducing contracts of sale, together with consideration of the seller's liability for the misrepresentations of his agent or employee. Then follows an analysis of the remedy in damages provided by the Misrepresentation Act 1971-1972, the effect of the Consumer Transactions Act, 1972-1973 on the defences to an action under the Misrepresentation Act 1971-1972, and the extent to which the Consumer Transactions Act, 1972-1973 and the Second-hand Motor Vehicles Act, 1971 modify the common law principles governing the liability of a principal for the fraudulent misrepresentations of his agent or employee. In the third section of the paper reference is made to liability for misrepresentation under the South Australian Manufacturers Warranties Act, 1974, and consideration given to the circumstances in which the Australian Trade Practices Act, 1974 may help fill the gaps or uncertainties left by the local legislation.

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1. See generally, the S.A. Land and Business Agents Act 1973-74, especially ss.90, 91, and 104 as well as the Misrepresentation Act 1971-1972.

### 1. Rescission for Innocent Misrepresentation

#### (i) RESCISSION AND THE MISREPRESENTATION ACT, 1971-1972

A purchaser seeking to rescind a contract for the sale of goods for innocent misrepresentation appears, at first sight, to be assisted by the Misrepresentation Act 1971-1972, s.6 of which provides:

- “(1) Where a misrepresentation has been made by reason of which any party to a contract would, but for any one or more of the following considerations—
- (a) that the misrepresentation has become a term of the contract<sup>2</sup>;
  - (b) that the contract has been performed<sup>3</sup> . . .
- be entitled to rescind the contract, that contracting party shall be entitled to rescind the contract notwithstanding that consideration or those considerations”<sup>4</sup>.

The effect of the section appears to be that where a purchaser has a pre-existing right to rescind for innocent misrepresentation, such right may be exercised notwithstanding that the representation has become a term of the contract, or that the contract has been performed. But apart from the removal of the limitations to rescission specifically mentioned in the section, it does not appear to confer any greater right to rescind a contract for innocent misrepresentation than existed prior to its enactment. If the latter proposition is correct, and it seems difficult to construe the section in any other way, the initial question which must be considered is in what circumstances can a purchaser rescind a contract for the sale of goods for innocent misrepresentation. It is only after it has been determined that the purchaser has a *prima facie* right to rescind for the misrepresentation in question, that the removal of the limitations to the exercise of that right referred to in s.6(1) becomes relevant<sup>5</sup>.

According to Blackburn J. who delivered the judgment of the court in *Kennedy v. Panama, New Zealand and Australian Royal Mail Co. Ltd.*<sup>6</sup> the position at common law was that:

“ . . . where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what

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2. In *Pennsylvania Shipping Co. v. Compagnie Nationale De Navigation* [1936] 2 All E.R. 1167, Branson J. held that where an innocent misrepresentation is incorporated into a contract as a term, it becomes “merged” in the higher contractual right so that the contract cannot subsequently be rescinded on the ground of the misrepresentation which induced it. Contrast *Academy of Health and Fitness Pty. Ltd. v. Power* [1973] V.R. 254. See further, K. C. T. Sutton, *The Law of Sale of Goods in Australia and New Zealand*, 2nd ed., 1974, at 10-14.
  3. Prior to the enactment of this provision, it was very much an open question whether the so-called rule in *Seddon v. North Eastern Salt Co. Ltd.* [1905] 1 Ch. 326 that a contract cannot be rescinded for an innocent as opposed to a fraudulent misrepresentation where the agreement has been “executed”, applied to a contract for the sale of goods. See further Sutton, *op. cit.* at 8-10.
  4. In considering the effect of these provisions on the right to rescind, regard must also be given to s.7(3) of the Misrepresentation Act, 1971-1972 which provides: “Where in any proceedings before a court, it is proved that a party to a contract has rescinded, or is entitled to rescind, the contract on the ground of misrepresentation, the court after consideration of the consequences of rescission, and the consequences of a declaration under this section, in the circumstances of the case, may, if it considers it just and equitable to do so, declare the contract to be subsisting and award such damages as it considers fair and reasonable in view of the misrepresentation.”: see also, s.7(4), (5).
  5. Sutton *op. cit.* at 17 appears to take a similar view.
  6. (1867) L.R. 2 Q.B. 580 at 587 (Cockburn C.J., Blackburn, Mellor, and Shee J.J.).

was supposed to be and what was taken, so as to constitute a failure of consideration”.

On the other hand, a Court of Equity had power to order rescission of a contract where such had been induced by an innocent misrepresentation<sup>7</sup>, but the question arises as to whether the equitable principles apply to contracts for the sale of goods. There is little doubt that s.6(1) of the Misrepresentation Act was passed on the *assumption* that a contract for the sale of goods could be rescinded for innocent misrepresentation<sup>8</sup>, but unfortunately, that assumption appears to be very dubious, having regard to Australian authority on the point.

Thus, in *Watt v. Westhoven*<sup>9</sup> the Victorian Full Supreme Court<sup>10</sup> held that the equitable remedy of rescission for innocent misrepresentation does not apply to contracts for the sale of goods. The defendant had been induced to purchase a car by certain innocent misrepresentations made by the plaintiff seller. In rejecting the defendant's argument that he was entitled to rescind the contract on that ground, the court, following the earlier decision of the New Zealand Court of Appeal in *Riddiford v. Warren*<sup>11</sup> held that the expression “the rules of the common law” in s.4(2) of the Victorian Goods Act, 1928<sup>12</sup> was used in contradistinction to the principles of equity. Accordingly, a contract for the sale of goods could not be rescinded on the ground of an innocent misrepresentation inducing the contract, unless the misrepresentation was of the nature defined in *Kennedy v. Panama, New Zealand, and Australian Royal Mail Co. Ltd.*<sup>13</sup>, that is, unless it was such that there was a complete difference in substance between the thing bargained for and the thing obtained so as to constitute a failure of consideration. Mann A.C.J. said that the wording in the Victorian Act was originally taken verbatim from the United Kingdom Sale of Goods Act, 1893<sup>14</sup> and that it was:

“ . . . idle to suggest that Mr. Chalmers the draughtsman, and the distinguished lawyers, including four Law Lords, who formed the select committees upon the English bill as finally enacted, could in the year

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7. See, for example, *Rawlins v. Wickham* (1858) 3 De G. & J. 304 (44 E.R. 1285); *Cooper v. Joel* (1859) 1 De G. F. & J. 240 (45 E.R. 350); *Redgrave v. Hurd* (1881) 20 Ch. D. 1; *Newbigging v. Adam* (1886) 34 Ch.D. 582; *Wauton v. Coppard* [1899] 1 Ch. 92; *Whittington v. Seale-Hayne* (1900) 82 L.T. 49; *T. & J. Harrison v. Knowles and Foster* [1918] 1 K.B. 608; *Abram Steamship Co. Ltd. v. Westville Shipping Co. Ltd.* [1923] A.C. 773.
  8. In the debate on the second reading of the Misrepresentation Bill in the Legislative Council, it was stated that: “Innocent misrepresentation occurs where a statement is made that is incorrect but is made innocently, a typical case being where a representation is made that a motor car is a certain model or has done a certain number of miles when, in fact, an error was quite innocently made and perhaps the car was the previous model or perhaps the number of miles was incorrect. In these circumstances the law has always allowed, and will continue to allow, the person who discovers the mis-statement to seek a rescission of the contract and to be put back into the position he was in before he made the deal.” S.A. *Parl. Debs.* (1971-72) Vol. 4, at 3753.
  9. [1933] V.L.R. 458.
  10. Mann, A. C. J., Lowe and Gavan Duffy, JJ.
  11. (1901) 20 N.Z.L.R. 572.
  12. That section provided: “The rules of the common law including the law merchant save in so far as they are inconsistent with the express provisions of this Part and in particular the rules relating to the law of principal and agent and the effect of fraud misrepresentation duress or co-ercion mistake or other invalidating cause shall continue to apply to contracts for the sale of goods.” See now, s.4(2) Goods Act, 1958 (Vic.). The South Australian Sale of Goods Act, 1895-1972, s.59(2) is in the same terms.
  13. (1867) L.R. 2 Q.B. 580.
  14. S.61(2).

1893 have used the words 'the rules of the common law' in any other than their true and technical sense"<sup>15</sup>.

The defendant in *Watt v. Westhoven*<sup>16</sup>, relying on the judgment of Jessel M.R. in *Redgrave v. Hurd*<sup>17</sup>, contended that the more liberal equitable rule regarding rescission for innocent misrepresentation had, since the Judicature Acts, become the rule in all courts and applied to all contracts without exception including contracts for the sale of goods. However, Lowe J. rejected that argument, since in his opinion the equitable principle did not:

" . . . at any time apply, and does not now apply, to the sale of goods. The argument for the general application of the equitable rule rests on the provision of the Judicature Acts (which has been copied into our own Supreme Court Act) that in all matters in which there was before the passing of the Judicature Acts any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail. Courts of equity did not entertain jurisdiction (with exceptions not material to the present discussion) in the case of sale of goods. There was in such a case no conflict or variance between the rules of the common law and of equity. The provision referred to never operated, and the rule of common law was not affected"<sup>18</sup>.

A further ground for rejection of the defendant's claim for rescission in *Watt v. Westhoven*<sup>19</sup> was that an earlier Victorian Full Supreme Court in *The Picturesque Atlas Publishing Co. Ltd. v. Phillipson*<sup>20</sup> had accepted the principles propounded by Blackburn J. in *Kennedy v. Panama, New Zealand, and Australian Royal Mail Co. Ltd.*<sup>21</sup> as governing the extent of liability for innocent misrepresentations inducing contracts for the sale of goods. The decision in *The Picturesque Atlas Publishing Case* had been given after the reception of the Judicature Act in Victoria but prior to the enactment of the sale of goods legislation in that State and thus the "rules of the common law" preserved in the Victorian Act according to *Watt v. Westhoven*<sup>22</sup>

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15. [1933] V.L.R. 458 at 462. See also, at 466 *per* Lowe J., and at 467-468 *per* Gavan Duffy J. *Cf. Riddiford v. Warren* (1901) 20 N.Z.L.R. 572 at 577 where Williams J. said: "If 'rules of the common law' meant the rules of the existing law other than statute law, but including the rules of the equity, the phrase would have been 'the existing rules of law', or words of that kind. The use of the term 'common law' would be superfluous and misleading . . . I should suppose that the corresponding section of the English Act was introduced for the express purpose of settling the doubt raised in *Benjamin on Sales* (4th ed. 394) as to whether the doctrine of *Kennedy v. Panama, etc., Mail Company* (*supra*) continued to apply to contracts for the sale of goods notwithstanding the provisions of the Judicature Act. The existence of this doubt can hardly have been absent from the mind of the draftsman of the Act of 1893, and the object of the Act was to define and settle the law." However, since in that case the Court of Appeal found that there had been no misrepresentation, the judgments given on this point were strictly speaking *obiter*. *Cf. Root v. Badley* [1960] N.Z.L.R. 756.
  16. [1933] V.L.R. 458.
  17. (1881) 20 Ch. D. 1 at 12 where the Master of the Rolls said: "As regards the rescission of a contract, there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law—a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail."
  18. [1933] V.L.R. 458 at 465. See similarly, *Riddiford v. Warren* (1901) 20 N.Z.L.R. 572 at 579-580 *per* Denniston, J.
  19. [1933] V.L.R. 458 at 466 *per* Lowe, J. and at 468 *per* Gavan Duffy J.
  20. (1890) 16 V.L.R. 675.
  21. (1867) L.R. 2 Q.B. 580.
  22. *Ibid.*

referred to the law on misrepresentation previously settled by *The Picturesque Atlas Publishing Co. Ltd. v. Phillipson*<sup>23</sup>.

The narrow construction of the sale of goods legislation adopted in *Riddiford v. Warren*<sup>24</sup> and *Watt v. Westhoven*<sup>25</sup> has been subjected to considerable academic criticism<sup>26</sup>. Apart from *Watt v. Westhoven* there is very little Australian authority concerning the effect of an innocent misrepresentation on a contract for the sale of goods. However, the limited authority that does exist tends to suggest that the principles governing the right to rescind a contract for the sale of goods for innocent misrepresentation are no broader than those expounded by Blackburn J. in *Kennedy v. Panama, New Zealand, and Australian Royal Mail Co. Ltd.*<sup>27</sup>. Thus, in the Queensland case of *Hynes v. Byrne*<sup>28</sup>, Griffith C.J., after referring to the common law principles, expressed the view that no wider rule operated in equity<sup>29</sup>. Further, according to Street C.J. in the New South Wales case of *Marks v. Hunt Bros. (Sydney) Pty. Ltd.*<sup>30</sup>:

"It has to be remembered always that no liability rests upon anybody for an innocent misrepresentation as such"<sup>31</sup>.

In the latter case the plaintiff signed a hire-purchase agreement for a second-hand truck represented by the defendant dealers to be a "1949 Model". A few days later the plaintiff paid for the truck in cash. He subsequently discovered that the vehicle had a 1949 body, but a 1936 engine and sought to recover damages for breach of collateral warranty. The New South Wales Full Supreme Court held that the plaintiff purchaser could not succeed as he had failed to establish the necessary *animus contrahendi* and, in any event, the terms of the written agreement excluded liability for representations and warranties not expressly included in the contract. Street C.J.'s comment, therefore, was necessarily *obiter* but would seem to indicate a narrow view of the effect of innocent misrepresentations on contracts for the sale of goods. The Chief Justice's comment follows *dicta* by him to the same effect in two previous decisions<sup>32</sup>.

23. (1890) 16 V.L.R. 675.

24. (1901) 20 N.Z.L.R. 572.

25. [1933] V.L.R. 458.

26. See G. H. Treitel, *The Law of Contract*, 3rd ed., 1970 at 314-316; G. H. L. Fridman, *Sale of Goods*, 1966, at 300-302; J. G. Fleming, "Misrepresentation and the Sale of Goods", (1951) 25 *A.L.J.* 443 at 445-7; C. Grunfeld (1958) 21 *M.L.R.* 550 at 551 fn. 10; G. L. Williams, "Language and the Law", (1945) 61 *L.Q.R.* Part III, 293 at 302; Benjamin's *Sale of Goods*, 1974, at 7-9. But in contrast, a number of writers have expressed serious doubts as to the existence of an equitable right to rescind a contract for the sale of goods for innocent misrepresentation; see M. Howard, "The Rule in Seddon's Case", (1963) 26 *M.L.R.* 272 at 282-285; P. F. P. Higgins, "Rescission for Innocent Misrepresentation", (1963) 5 *Malaya Law Review* 74 at 85-90; S. J. Stoljar, "Conditions, Warranties and Descriptions of Quality in Sale of Goods—II." (1953) 16 *M.L.R.* 174 at 190-194; P. S. Atiyah (1959) 22 *M.L.R.* 76, *The Sale of Goods*, 1st ed., 1957, at 185-186, but see now *The Sale of Goods*, 4th ed., 1971 at 289-290. See also K. C. T. Sutton, *The Law of Sale of Goods in Australia and New Zealand*, 2nd ed., 1974 at 5-8.

27. (1867) L.R. 2 Q.B. 580.

28. (1899) 9 Q.L.J. 154.

29. Since it was found that the misrepresentation had not induced the contract, the Chief Justice's expression of opinion was strictly *obiter*. It was not followed in *Wilson v. Brisbane City Council* [1931] Q.S.R. 360 with respect to rescission of an executory contract for the sale of land.

30. (1958) 58 S.R. (N.S.W.) 380.

31. *Ibid.* at 383.

32. *Irwin v. Poole* (1953) 70 W.N. (N.S.W.) 186 at 187 where Steet, C.J. said: "An innocent representation does not form a cause of action, it it turns out to be unfounded or untrue, unless it is a term of a contract between the parties." See also *Hercules Motors Pty. Ltd. v. Schubert* (1953) 53 S.R. (N.S.W.) 301 at 303.

Section 6 of the South Australian Misrepresentation Act 1971-1972 removes, as we have seen<sup>33</sup>, certain bars to rescission for misrepresentation and in this respect follows the corresponding provision in the United Kingdom Misrepresentation Act 1967<sup>34</sup>. However, prior to the passing of the United Kingdom Act, the Court of Appeal had in a number of cases implicitly assumed that the equitable remedy of rescission for innocent misrepresentation applied to contracts for the sale of goods<sup>35</sup>. Further, in *Goldsmith v. Rodger*<sup>36</sup> the Court of Appeal held that the vendor of a fishing boat was entitled to rescind the contract having been induced to sell the boat at a lower price because of the buyer's misrepresentations as to defects in the keel. It seems clear from the judgment that in the United Kingdom rescission is available to either a purchaser or a vendor induced to enter into a contract for the sale of goods by innocent misrepresentation. When a South Australian court comes to consider the issue it will not, however, simply be a question of deciding whether to follow the United Kingdom cases in preference to Australian authority on the point, since the specific issues raised in *Watt v. Westhoven*<sup>37</sup> never appear to have been considered by the United Kingdom courts.

### (ii) RESCISSION AND THE CONSUMER TRANSACTIONS ACT 1972-1973

The importance of determining whether the equitable remedy of rescission for innocent misrepresentation applies to contracts for the sale of goods has been accentuated in South Australia by the Consumer Credit Act 1972-1973 and the Consumer Transactions Act 1972-1973. Under that legislation, where a "consumer"<sup>38</sup> acquires goods on credit, the credit being provided via a finance company, the transaction will basically take the form of a "consumer contract"<sup>39</sup> for the sale of goods from the dealer to the consumer, and a loan of money from the finance company to the consumer pursuant to the terms of a "consumer credit contract"<sup>40</sup> repayment being secured by way of a "consumer mortgage"<sup>41</sup> over the goods. The right to rescind the "consumer contract" of sale for innocent misrepresentations made by the dealer would

33. *Supra*.

34. Section 3 of that Act provides: "Where a person has entered into a contract after a misrepresentation has been made to him, and—(a) the misrepresentation has become a term of the contract; or (b) the contract has been performed; or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b) of this section."

35. See, for example, *Leaf v. International Galleries* [1950] 2 K.B. 86; *Long v. Lloyd* [1958] 1 W.L.R. 753.

36. [1962] 2 Lloyd's L.R. 249.

37. [1933] V.L.R. 458.

38. A "consumer" is defined by the Consumer Transactions Act, 1972-1973 (hereafter referred to as the C.T.A.) s.5 as meaning a person, other than a body corporate, who enters into a "consumer contract" for goods or services, a "consumer credit contract", or a "consumer mortgage".

39. A "consumer contract" means, *inter alia* ". . . a contract or agreement (a) under which a person (other than a body corporate)—(i) purchases any goods or contracts for the performance of any services; . . . and (b) under which the consideration to be paid or provided by or on behalf of the consumer in money or money's worth (excluding any credit charge) does not exceed ten thousand dollars". : C.T.A. s.5.

40. Defined as meaning, *inter alia*: "a credit contract (a) under which the principal does not exceed ten thousand dollars and in respect of which no security is taken over land; . . .": C.T.A. s.5. See also, the definition of "credit contract" in the Consumer Credit Act, 1972-1973 s.5.

41. A "consumer mortgage" means: "any mortgage, charge or other security (including a bill of sale within the meaning of the Bills of Sale Act) over goods, by which the performance of any obligations by a consumer under a consumer credit contract is secured; . . ." C.T.A. s.5.

seem to be determined by the same principles discussed earlier in this paper<sup>42</sup>. The uncertainty on the point is most unfortunate for on it depends not only the consumer's right to rescind the "consumer contract" of sale with the dealer for the latter's misrepresentations, but also whether he can rescind an associated "consumer credit contract". Thus, under the Consumer Transactions Act, rescission of a "consumer contract" has the effect of rescinding a "consumer credit contract" in circumstances where, for example, the dealer has introduced the consumer to the finance company or has taken part in negotiations leading to the formation of a "consumer credit contract" between the finance company and consumer<sup>43</sup>. In this respect a consumer buying goods "on time payment" finds himself in a more uncertain position under the recent South Australian consumer credit legislation than a hirer under the former South Australian Hire-Purchase Agreements Act 1960-1971<sup>44</sup>. Thus, it was held in the Victorian case of *Mihaljevic v. Eiffel Tower Motors Pty. Ltd. and General Credits Ltd.*<sup>45</sup> that under the misrepresentation provisions of the Australian "uniform" hire-purchase legislation<sup>46</sup> a hirer can rescind a hire-purchase agreement with a finance company for innocent misrepresentations made by the dealer as to the quality of the goods, apart from other statutory remedies available to the hirer against the dealer for the false representations.

### (iii) RESCISSION AND THE SECOND-HAND MOTOR VEHICLES ACT, 1971

Special provision has been made in the South Australian Second-hand Motor Vehicles Act, 1971 for misrepresentations made by dealers selling second-hand motor vehicles. To understand the effect of the misrepresentation provisions, it should be pointed out that s.23 of that Act requires a notice containing certain required particulars to be attached to vehicles offered for sale. The required particulars are: (a) the name and business address of the person from whom the vehicle is to be bought; (b) the name of the last owner of the vehicle, not being the trade owner; (c) the reading of the vehicle's odometer at the time the vehicle was acquired from the owner referred to in (b); (d) the cash price of the vehicle; (e) the year of first registration and model designation (if any) of the vehicle; and (f) such other particulars as are prescribed in the Regulations to the Act<sup>47</sup>.

42. The C.T.A. s.11 provides: "This Act does not affect the operation of the Sale of Goods Act, 1895-1972, or of any other Act or law in relation to consumer contracts except to the extent that this Act is inconsistent with the provisions of the Sale of Goods Act, or the other Act or law."

43. C.T.A. s.16, and see the definitions of "linked consumer credit contract" and "linked supplier" in s.5. For the adjustment of the rights and liabilities of the parties in that event, see *infra* fn. 64.

44. That Act has been repealed by C.T.A. s.4(1).

45. [1973] V.R. 545.

46. See (Vic.) Hire-Purchase Act, 1959-1971, s.6; (N.S.W.) Hire-Purchase Act, 1960-1974, s.6; (Tas.) Hire-Purchase Act, 1959-1971, s.10; (W.A.) Hire-Purchase Act, 1959-1974, s.6; (A.C.T.) Hire-purchase Ordinance, 1961-1969, s.11; (N.T.) Hire-Purchase Ordinance, 1961-1974, s.10. See also, (S.A.) Hire-Purchase Agreements Act, 1960-1971, s.6 but note fn. 44 *supra*. The problem with the hire-purchase legislation, however, is that in a number of States companies have devised alternative methods of financing credit with the result that in many instances consumers have been deprived of the protective provisions of that legislation: see generally, C. Turner, "Avoidance of the Operation of the Australian Hire-Purchase Legislation, and the Development of Alternative Instalment Credit Contracts", 48 *A.L.J.* 63, 134.

47. Where a second-hand vehicle has been brought into South Australia for sale and any one or more of the required particulars are not available to the dealer, the Commissioner may direct by notice in writing that such particulars need not be contained in the statutory notice: s.23(2).

The provision likely to be of most practical importance regarding the consumer's remedies for misrepresentation by a second-hand car dealer is s.29, which provides:

- (1) Where the Commissioner<sup>48</sup> is of the opinion that a second-hand vehicle not being a commercial vehicle<sup>49</sup> sold by a dealer is *substantially different*<sup>50</sup> from the vehicle as represented in a notice under section 23 of this Act or where no such notice was displayed in relation to the vehicle that the vehicle as so sold was *substantially different* from the vehicle as represented by the dealer, the Commissioner may apply to a local court of full jurisdiction for an order for rescission of the sale of the vehicle.
- (2) An application referred to in subsection (1) of this section shall set out the grounds on which it is made.
- (3) Upon hearing the Commissioner or a representative of the Commissioner and upon affording any other person likely to be affected by the order an opportunity to be heard the court may order that the sale be rescinded the vehicle be returned to the dealer and any consideration passed by the purchaser be returned to the purchaser and may make such further or consequential orders including an order as to the payment of the costs of the application as to it seems necessary or desirable."

Further, it is not ". . . a bar, to the making of an order rescinding a sale, that the parties cannot be restored to the positions that existed prior to the sale"<sup>51</sup>. Where the purchaser is buying the vehicle "on terms" and finance is, for example, provided by way of a credit contract between a finance company and the purchaser, then if such credit contract was arranged or procured by the dealer and the contract of sale with the dealer has been rescinded pursuant to s.29, the obligations and rights of the purchaser under such "collateral credit arrangement"<sup>52</sup> with the finance company are "transferred from the purchaser to the dealer and . . . may be enforced by or against the dealer in all respects as if he were the purchaser"<sup>53</sup>.

The scope and limitations of s.29 can be seen in the recent judgment of His Honour Judge White in *South Australian Commissioner for Prices and Consumer Affairs v. Kevin John Davis, Trading as Fairdeal Motor Market*<sup>54</sup>, the first decision on an application by the Commissioner for rescission under that section. The required particulars in the statutory notice attached to the second-hand vehicle sold in that case had stated, *inter alia*, the year of first registration as 1967 when the actual date was 1965. The Commissioner, being of the opinion that the discrepancy in dates rendered the vehicle "substantially different" from that represented in the s.23 notice, applied to

48. That is, the South Australian Prices Commissioner appointed under the Prices Act, 1948, as amended: s.4(1).

49. Defined as: ". . . a vehicle constructed or adapted solely or mainly for—(a) the carriage of goods; (b) the carriage of persons exceeding ten in number; or (c) industrial or agricultural use, but does not include a vehicle being a derivative of a passenger vehicle, commonly called a utility or panel van." : s.4(1).

50. Emphasis added.

51. S.29(5).

52. The Second-hand Motor Vehicles Act, 1971, s.29(6) provides: "In this section 'collateral credit agreement' means a contract or agreement for the provision of credit for the purposes of the sale of a second-hand vehicle by a person other than the dealer who took part in the negotiations for the sale of that vehicle where that contract or agreement was arranged or procured by that dealer."

53. S.29(4).

54. 65 L.S.J.S. 193.



the court for an order for rescission of the contract of sale. Judge White, after pointing out that on application the court itself must also be satisfied as to the existence of a "substantial difference" made an order, *inter alia*, for rescission. In the course of his judgment, the learned judge made a number of important observations regarding the ambit of s.29.

He said that where there was a notice as required by s.23 the court would determine the existence of a "substantial difference" by comparing the vehicle itself with the displayed statutory particulars. Other misrepresentations which may have been made, for example, in an advertisement, were not relevant. It was only where there was no statutory notice that other misrepresentations would be relevant in determining whether the vehicle as sold was "substantially different" from that represented by the dealer. Furthermore, on an application based on a misstatement of particulars in a s.23 notice, evidence that *overall* the purchaser was getting good value for his money is irrelevant, since the sole question is whether there is a "substantial difference" between the particulars contained in the notice and the actual facts.

It would seem to follow from this reasoning that orders for rescission under s.29 are likely to be very largely confined to where the misrepresentation arises from misstatement in the particulars required in a s.23 notice, since in the vast majority of cases the required notice will have been attached to the vehicle<sup>55</sup>. Accordingly, misrepresentations as to the quality or attributes of the vehicle will not fall within s.29 for most practical purposes and the remedies available for misrepresentations of that kind will be determined by the general law as modified by the Misrepresentation Act 1971-1972<sup>56</sup>. Where the misrepresentation does fall within the ambit of s.29 the court is not, of course, troubled by the vexed question of whether the equitable remedy of rescission for innocent misrepresentation applies to contracts for the sale of goods.

A further limitation to s.29 is that, according to Judge White, the court, on awarding rescission of the contract, cannot make an order for damages under its power "... to make such further or consequential orders ... as it seems necessary or desirable"<sup>57</sup>. Thus, for example, a claim by the dealer for damages arising from the purchaser's use of the car, or for damage or deterioration owing to its misuse, would have to be pursued by a separate cause of action.

In *South Australian Commissioner for Prices and Consumer Affairs v. Kevin John Davis, Trading as Fairdeal Motor Market*<sup>58</sup> the purchaser had paid a deposit of \$50 to the dealer, the balance of \$803 being borrowed under a credit contract with I.A.C., a finance company, the loan being secured by a "consumer mortgage" over the vehicle. Since the loan from I.A.C. was arranged by the dealer, the purchaser's credit contract with the finance company constituted a "collateral credit agreement" under s.29(4) of the Second-hand Motor Vehicles Act, 1971. At the time of the Commissioner's application for rescission of the contract of sale, the purchaser had paid \$424 to I.A.C. under his credit contract with that company. Pursuant to the power of the court to make consequential orders on rescission of the contract of sale, Judge

55. Failure to attach a s.23 notice to a second-hand vehicle offered for sale is an offence carrying a penalty of two hundred dollars: s.23(1).

56. The Second-hand Motor Vehicles Act, 1971, s.36 provides: "Except as expressly provided in this Act, nothing in this Act shall have the effect of limiting, restricting or otherwise affecting any right or remedy a person would have had had this Act not been enacted."

57. S.29(3).

58. 65 L.S.J.S. 193.

White ordered that the dealer return the purchaser's \$50 deposit, and that I.A.C. return the \$424 paid by the purchaser under his credit contract, which sum was to be paid by the dealer to I.A.C.

As we have seen<sup>59</sup>, the effect of a court order for rescission of a contract of sale under s.29 of the Second-hand Motor Vehicles Act, 1971 is that the obligations and rights of the purchaser under an associated "collateral credit agreement" are transferred from the purchaser to the dealer and may be enforced by or against the dealer in all respects as if he was the purchaser. Strictly speaking, therefore, the dealer could simply have maintained the payments of the purchaser under the latter's credit contract with the finance company. Judge White held, however, that having regard to the dealer's misrepresentations to I.A.C. to induce it to advance credit to the purchaser<sup>60</sup> and having regard also to the terms of the supplier's agreement between I.A.C. and the dealer<sup>61</sup> the latter should be ordered to pay the balance owing under the purchaser's credit contract with the finance company within fourteen days of the dealer taking possession of the vehicle<sup>62</sup>.

It was pointed out earlier in this paper that the effect of rescinding a "consumer contract" under the Consumer Transactions Act, 1972-1973 is that an associated or "linked" consumer credit contract with a finance company is also rescinded<sup>63</sup>. The Consumer Transactions Act provides for the adjustment of the rights and obligations of the parties on such occurrence<sup>64</sup>. In *South Australian Commissioner for Prices and Consumer Affairs v. Kevin John Davis, Trading as Fairdeal Motor Market*<sup>65</sup>, Judge White said:

"Section[8](7)<sup>66</sup> of the [Consumer Transactions Act] excludes the sale of second-hand motor vehicles from its purview, so that the consequences of rescission, vis-à-vis I.A.C., are governed solely by section 29 of the [Second-hand Motor Vehicles] Act."

59. *Supra* fn. 53 and text.

60. Thus, the documents disclosed that the dealer had falsely "jacked-up" the deposit paid from \$50 to \$296 by representing to I.A.C. that there had been a "trade-in" of another vehicle, and had similarly "jacked-up" the sale price from \$853 to \$1,099, leaving the balance of \$803 to be financed by I.A.C.

61. The trade or supplier's agreement between I.A.C. and the dealer required the dealer to pay the whole balance due in the event of any breach of certain stipulated warranties.

62. The dealer's entitlement to stand in the purchaser's shoes pursuant to s.29(4) is stated to be "subject to this section". According to Judge White the words "subject to this section" empower the court to make an order under s.29(5) which deprives the dealer of his *prima facie* right to continue in the purchaser's shoes, if the court thinks it appropriate to so order. Section 29(5) provides that "the rights and obligations of the parties . . . under any . . . contract or agreement relating to a collateral credit agreement . . . shall be as provided for in that order" [i.e. the order rescinding the sale] "or in any order ancillary to or consequential upon that order". In Judge White's view both a "consumer mortgage" and the dealer's trade agreement with I.A.C. were "contracts or agreements relating to the collateral credit agreement."

63. See *supra* fn. 43 and text.

64. Thus, s.16(2) provides: "Upon rescission of a consumer credit contract under this section—(a) the consumer may recover, as a debt, from the credit provider any amount paid by the consumer under that consumer credit contract; (b) the credit provider may recover, as a debt, from the supplier any amount paid by him to the supplier under the credit contract, and, in addition, the amount of any loss incurred by him as a result of the rescission; and (c) the credit provider may recover, as a debt, from the consumer, any amount paid to the consumer under the credit contract." See also, s.17 discussed *infra*.

65. 65 L.S.J.S. 193 at 195.

66. The report of the judgment refers to s.7(7) but this is an error for s.8(7).

With respect, it is submitted that this is clearly wrong. Thus, s.8(7) of the Consumer Transactions Act, 1972-1973 provides, in effect, that the conditions of correspondence with description, merchantable quality and fitness for purpose implied in "consumer contracts"<sup>67</sup> ". . . do not apply to a consumer contract for the sale of a second-hand vehicle within the meaning of the Second-hand Motor Vehicles Act, 1971." Accordingly, the result would seem to be that although the conditions generally implied in "consumer contracts" are not implied in consumer contracts for the sale of second-hand motor vehicles, the other provisions of the Consumer Transactions Act, 1972-1973 do apply to such contracts where relevant. On the other hand, it might be argued that the adjustment of rights and liabilities under the Consumer Transactions Act 1972-1973 on rescission of a "consumer contract" and a "linked consumer credit contract" do not apply where the court orders rescission of a contract for the sale of a second-hand motor vehicle under s.29 of the Second-hand Motor Vehicles Act 1971. The tenuous argument for that proposition is that s.16(1) of the Consumer Transactions Act begins: "Where a *consumer*<sup>68</sup> rescinds a consumer contract (either in pursuance of this Act, or any other act or law)— . . ." certain consequences, rights and liabilities follow as provided by that section<sup>69</sup>. If that view is taken by the courts, it would seem to the writer to be an over-subtle distinction. Furthermore, it would have the result that if one of the parties found it more convenient or advantageous to pursue his remedies on rescission under the Consumer Transactions Act, 1972-1973 rather than under the analogous provisions in s.29 of the Second-hand Motor Vehicles Act, 1971, his right to do so would depend on whether the consumer fortuitously elects to rescind the contract of sale for the dealer's misrepresentation<sup>70</sup> rather than seek the Commissioner's aid in applying to the court for an order for rescission under s.29 of the Second-hand Motor Vehicles Act, 1971.

In practice it will probably make little difference whether the position of the parties on rescission of the consumer contract for the sale of the vehicle is governed by s.16 of the Consumer Transactions Act, 1972-1973 or s.29 of the Second-hand Motor Vehicles Act, 1971. However, where finance is provided by a finance company "linked" to the dealer by virtue of the dealer arranging credit for the purchaser *via* that finance company, the position of the latter appears somewhat more favourable under the Consumer Transactions Act than under the Second-hand Motor Vehicles Act. Thus, where the moneys loaned by the finance company to the consumer for the purchase are paid directly to the dealer, the finance company can recover such moneys from the dealer immediately on rescission of the consumer contract by the purchaser<sup>71</sup>. This avoids the kind of considerations taken into account by Judge White in determining whether the dealer should pay the finance company the lump sum "pay-out" figure under the purchaser's credit contract and consumer mortgage, or whether the dealer, as in effect provided in s.29 of the Second-hand Motor Vehicles Act, 1971, should step into the shoes of the purchaser and pay out the balance owing to the finance company by monthly instalments as provided for in the purchaser's credit contract. The Consumer Transactions Act, 1972-1973 also makes specific provision for the finance

67. As to the meaning of "consumer contract", see *supra* fn. 39.

68. The emphasis is the writer's.

69. See *supra* fn. 64.

70. Assuming, of course, that the misrepresentation in issue enables the purchaser to rescind, a question which raises its own peculiar problems as we saw at the beginning of this paper.

71. See *supra* fn. 63 and text and fn. 64.

company to recover from the dealer any loss incurred as a result of the rescission<sup>72</sup>: there is no express corresponding provision in the Second-hand Motor Vehicles Act, 1971.

One combination of circumstances, admittedly likely to be unusual in practice, could seriously prejudice the interests of a consumer if the remedies for rescission in s.16 of the Consumer Transactions Act, 1972-1973 were held to be available in the event of an order for rescission under s.29 of the Second-hand Motor Vehicles Act, 1971. If a finance company, "linked" to the dealer, paid the moneys borrowed by the purchaser under a credit contract directly to the purchaser, who in turn handed it over to the dealer in payment for the vehicle, then if the dealer became insolvent after an order for rescission under s.29, the purchaser would still be liable to the finance company for the amount borrowed<sup>73</sup> notwithstanding that title to the vehicle would presumably re-vest in the dealer on rescission of the contract. In other words, the purchaser would bear the risk of the dealer's insolvency in such a case<sup>74</sup>: in contrast, under s.29 of the Second-hand Motor Vehicles Act, 1971, it seems that the finance company would bear the greater risk of loss since the purchaser's obligations under the "collateral credit agreement" with the finance company are transferred to the dealer on rescission of the purchaser's contract of sale.

We have seen that it could be tenuously argued that the adjustment of the rights and liabilities of the parties on rescission provided by s.16 of the Consumer Transactions Act does not apply where a *court* orders rescission under s.29 of the Second-hand Motor Vehicles Act because it is not the *consumer* who rescinded the contract. That argument could not be applied to the remedies for rescission provided by s.17 of the Consumer Transactions Act, 1972-1973. Section 17 provides:

- "(1) The fact that goods to which a consumer contract relates are subject to a consumer mortgage shall not prevent the rescission of of the consumer contract either under this Act or under any other Act or law.
- (2) Where a consumer contract is rescinded—
- (a) the supplier under that contract shall assume and be bound by the obligation of the consumer to repay any principal amount secured by the mortgage (and the repayment of that amount shall fall due immediately upon return of the goods to the supplier);
  - (b) the amount (if any) that the consumer is entitled to recover back from the supplier upon rescission of the contract shall be reduced by the extent of the supplier's liability under paragraph (a) of this subsection."

The relationship between ss.16 and 17 of the Consumer Transactions Act, 1972-1973 seems particularly obscure to the writer. Where a consumer borrows from a "linked" finance company the money he requires to purchase goods from the dealer, then if no security is taken over the goods, the position of the parties on rescission is governed by s.16. If the finance company does take

72. s.16(2)(b), *supra* fn. 64.

73. See Consumer Transactions Act, 1972-1973, s.16(2)(c), *supra* fn. 64. That seems to be the position under the Consumer Transactions Act, 1972-1973, s.16(2)(c) irrespective of the class of goods being purchased under the "consumer contract".

74. Contrast the consumer's position under the Consumer Transactions Act, 1972-1973, s.13 in circumstances where the consumer has a cause of action in damages against a dealer who becomes insolvent.

security over the goods, that is, enters into a "consumer mortgage" with the consumer, then s.17 also requires consideration. Section 17 provides that where the amount borrowed is secured by a "consumer mortgage", then the dealer assumes the consumer's obligations to repay the principal amount secured by the mortgage. However, since s.16 already provides that the finance company can recover moneys paid directly to the dealer or directly to the consumer pursuant to the consumer's credit contract<sup>75</sup>, it is difficult to see how s.17 then operates on that situation. Perhaps it was intended that where a "consumer mortgage" was given, the dealer should be responsible for the consumer's obligations to the finance company on rescission. If that was the intention it appears that it can only be achieved by ignoring the remedies provided in s.16 in those circumstances. But there seems to be no specific provision in s.17 warranting such interpretation.

Section 17 is not expressly limited as is s.16 to situations where the finance company providing the credit is "linked" to the dealer. Accordingly, it appears to follow that if the consumer arranges a loan with a finance company independently of the dealer, and the finance company or other credit provider takes a "consumer mortgage" over the goods to secure repayment of the loan, s.17 would then operate so that in the event of rescission of the consumer contract, the obligations of the consumer to repay the amount borrowed are assumed by the dealer<sup>76</sup>. If the remedies provided under s.17 are applicable in circumstances where the court orders rescission of a contract for the sale of a second-hand motor vehicle under s.29 of the Second-hand Motor Vehicles Act, 1971<sup>77</sup>, the purchaser's remedies are broader than those provided under s.29. Thus, s.29 operates to transfer the obligations and rights of the purchaser to the dealer on rescission only where the dealer has arranged or procured credit for the consumer with a particular finance company. Section 17 of the Consumer Transactions Act, 1972-1973 is not so limited in its terms and so would seem to apply where the consumer arranges his own loan with a finance company which takes a "consumer mortgage" over the vehicle. The balance owing by the consumer to the finance company is payable by the dealer under s.17(2) of the Consumer Transactions Act, 1972-1973 as soon as the goods are returned to the dealer, whereas under s.29(4) the dealer has, at least *prima facie*, the right to simply maintain the consumer's instalments under the credit contract with the finance company<sup>78</sup>.

It should be apparent from this analysis of the provisions in ss.16 and 17 of the Consumer Transactions Act, 1972-1973 and their possible interaction with the remedies on rescission under s.29 of the Second-hand Motor Vehicles Act, 1971 that the situation has become unduly complex and requires a thorough-going re-appraisal of the policy objectives desired and the simplest methods by which those objectives can be achieved.

75. See *supra* fn. 64.

76. The risk of the dealer's insolvency in those circumstances would seem to be largely borne by the finance company in contrast to the position under s.16 should the "linked" finance company pay the money borrowed directly to the consumer, rather than to the dealer. Logically the position should be reversed, namely, a finance company "linked" to the dealer should bear the greater risk of the dealer's insolvency than where there is no "link" between the finance company and the dealer.

77. As indicated earlier, there seems to be no obvious reason why s.17 of the Consumer Transactions Act, 1972-1973 should not apply in such a case, particularly having regard to the difference in wording between ss.16 and 17.

78. Cf. *South Australian Commissioner For Prices and Consumer Affairs v. Kevin John Davis, Trading as Fairdeal Motor Market* 65 L.S.J.S. 193.

## (iv) RESCISSION FOR THE MISREPRESENTATIONS OF THE SELLER'S AGENT OR EMPLOYEE

We have so far considered the availability of rescission for innocent misrepresentation inducing a contract for the sale of goods where the seller himself makes the representation. In circumstances where an agent or employee of the seller is responsible for the misrepresentation, other factors must also be taken into account. A principal is liable for misrepresentations made within the scope of his agent's actual or apparent authority. There seems little reason to doubt that generally, innocent misrepresentations made by an agent as to the quality or attributes of goods he is selling on behalf of his principal would be regarded as coming within the scope of his authority<sup>79</sup>.

Where an employee's or agent's misrepresentations concern goods supplied under a "consumer contract"<sup>80</sup> no problem arises as to whether what was said comes within the scope of the representor's authority, since the Consumer Transactions Act, 1972-1973, s.14 provides:

"Any statement or representation made in relation to goods and services that are, or subsequently become, subject to a consumer contract by an employee or a person acting on behalf, of a supplier<sup>81</sup> shall be deemed to be a statement or representation made by the supplier."

That section prevents the supplier from denying responsibility for representations made by his employee or agent. In the same vein, the Second-hand Motor Vehicles Act, 1971, s.32 provides:

"For the purposes of this Act, any statement or representation made by an employee of a dealer or a person appearing to act on behalf of a dealer in relation to the quality, description or history of a second-hand motor vehicle offered or displayed for sale by that dealer shall be deemed to be such a representation or statement of the dealer."

However, neither s.14 of the Consumer Transactions Act, 1972-1973 nor s.6 of the Misrepresentation Act, 1971-1972<sup>82</sup> are likely to be of much assistance to a consumer seeking to rescind a "consumer contract" for the sale of goods for misrepresentations by the supplier's agent or employee until it has been determined that the equitable remedy of rescission for innocent misrepresentation applies to contracts for the sale of goods in South Australia.

79. See *Mullens v. Miller* (1882) 22 Ch.D. 194; *Wauton v. Coppard* [1899] 1 Ch. 92. Cf. *Overbrooke Estates Ltd. v. Glencombe Properties Ltd.* [1974] 1 W.L.R. 1335; *Presser v. Caldwell Estates Pty. Ltd. and Anor.* [1971] 2 N.S.W.L.R. 471. All those cases concerned the liability of a principal for his agent's innocent misrepresentations in relation to contracts for the sale of land since, as we saw earlier, the question of whether the equitable right to rescind for innocent misrepresentation applies to contracts for the sale of goods is open to doubt, particularly in Australia. However, the general principles governing the authority of an agent to make representations referred to in those cases would seem applicable to personal as well as real property.

80. For the meaning of "consumer contract", see Consumer Transactions Act, 1972-1973, s.5 and *supra* fn. 39.

81. "Supplier" in relation to a consumer contract means a person carrying on a business in the course of which—(a) he enters into the consumer contract; (b) negotiations leading to the formation of the consumer contract are carried out whether or not he owns or personally supplies the goods or services subject to the contract; or (c) he sells goods to another person with a view to that other person entering into a consumer lease with a consumer with whom he (the vendor of the goods) has previously conducted negotiations in relation to the goods": C.T.A., s.5.

82. See *supra* fns. 2, 3 and text.

## 2. Damages for Misrepresentation

### (i) THE MISREPRESENTATION ACT, 1971-1972

The Misrepresentation Act, 1971-1972, s.7(1) provides:

“Where a contracting party is induced to enter into a contract by a misrepresentation made—

(a) by another party to the contract;

(b) by a person acting for, or on behalf of, another party to the contract;

or

(c) by a person who receives any direct or indirect consideration or material advantage as a result of the formation of the contract, and any person (whether or not he is the person by whom the representation was made) would, if the misrepresentation had been made fraudulently, be liable for damages in tort to the contracting party subjected to the misrepresentation in respect of loss suffered by him as a result of the formation of the contract, that person shall, subject to subsection (2) of this section, be so liable to that contracting party, in all respects as if the misrepresentation had been made fraudulently and were actionable in tort.”

The section up to this point provides, in effect, a remedy in damages for innocent misrepresentations inducing contracts including, of course, contracts for the sale of goods with which we are primarily concerned. However, damages are only recoverable from the person making the representation where, in essence, the representation was also made negligently, since s.7(2) provides:

“It shall be a defence to an action under subsection (1) of this section—

(a) that the person by whom the representation was made had reasonable grounds to believe, and did believe, that the representation was true.”

In the absence of establishing this defence, liability attaches to the person who made the misrepresentation irrespective of whether he was a party to the contract which his misrepresentation induced. Thus, an agent or employee will be liable for misrepresentations made in the course of selling goods on behalf of his principal or employer unless the agent or employee can show that he was not negligent in making the misrepresentations<sup>83</sup>.

Section 7(1) provides that where a person would have been liable in damages had the representation been made fraudulently, he is so liable as if the representation had been made fraudulently, even if he was not the person who actually made the misrepresentation. A principal is liable for the fraudulent misrepresentations of his agent made within the scope of the agent's authority: similarly an employer is liable for the fraud of his employee committed within the employee's course of employment<sup>84</sup>. Accordingly, the effect of s.7(1) in the principal/agent, employer/employee situation appears to be that the principal or employer is *prima facie* liable in damages for the innocent misrepresentations of his agent or employee which induce a contract of sale<sup>85</sup>.

83. For an analysis of the position at common law, see D. W. Greig, “Misrepresentations and Sale of Goods”, (1971) 87 *L.Q.R.* 179.

84. For the authorities on the liability of a principal for the fraudulent misrepresentations of his agent, see fn. 90.

85. The measure of damages is apparently that in an action of deceit, that is, the difference between the price paid and the actual value of the goods received, in contrast to the contractual measure of damages, namely, the difference between the value of the chattel as it was and what it would have been had the representation been true: see P. S. Atiyah and G. H. Treitel, “Misrepresentation Act 1967”, (1967) 30 *M.L.R.* 369 at 373-374.

However, that liability is modified by the defence provided in s.7(2)(b) whereby the defendant will not be liable if he can show that he:

“ . . . 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.”

Subject to what is said later, the result of s.7(2)(b) is that where an agent or employee has made an innocent misrepresentation, the defendant principal or employer will only be liable in damages for that innocent misrepresentation under s.7(1) where he either knew or could reasonably be expected to have known that the representation had been made or that it was untrue. The reason for so limiting the principal's liability under s.7 seems questionable particularly if it is argued that a purchaser should be able to rescind a contract for the sale of goods with the principal for his agent's misrepresentations. In any event, the intention behind s.7(2)(b) appears to have been that a principal should not be able to benefit by his agent's innocent misrepresentations where, for example, the principal knew or could reasonably be expected to have known of the falsity of the agent's representations which induced the purchaser to enter into the contract, notwithstanding that the principal was not a party to the representation being made. However, if such was the intention, it does not, unfortunately, appear to have been successfully achieved. Thus, in circumstances where the principal cannot rely on the defence under s.7(2)(b) since he was aware of facts which made the agent's laudatory statements untrue, there seems nothing to prevent the principal from relying on the defence under s.7(2)(a) and thereby argue that the agent had reasonable grounds for believing and did believe that his representation was true, the agent not being cognisant of the true facts known by the principal. Accordingly, the principal's *prima facie* liability in damages for his agent's innocent misrepresentation where the principal, although in no way a party to the representation being made, knows the falsity of his agent's representation appears to be reduced to liability for the agent's negligent misrepresentation. If the agent has not been negligent, then no liability in damages under s.7 of the Misrepresentation Act, 1971-1972 attaches to either the agent or the principal, notwithstanding the principal's knowledge of the true facts which in all probability would have rendered him liable to an action for fraudulent misrepresentation had he made the representation instead of his agent. The purchaser in these circumstances would be left to his remedy of rescission for the agent's misrepresentations<sup>86</sup> but in the case of innocent misrepresentation inducing contracts for the sale of goods, this, as we have seen, presents difficulties and uncertainties yet to be determined by the South Australian courts.

**(iii) EFFECT OF THE CONSUMER TRANSACTIONS ACT, 1972-1973 ON THE DEFENCES UNDER THE MISREPRESENTATION ACT, 1971-1972**

Where an agent's or employee's misrepresentations induce a consumer to enter into a "consumer contract"<sup>87</sup> under the Consumer Transactions Act, 1972-1973, a further question arises as to the availability of the defences under

86. Unless, of course, the agent's representation constituted a warranty. As to the implied authority of an agent to give warranties as to the character or quality of the chattels he has been authorised to sell, see *Gardiner v. Grigg* (1938) 38 S.R. (N.S.W.) 524. On what constitutes a warranty, see *Blakney v. J. J. Savage & Sons Pty. Ltd.* [1973] V.R. 385; 119 C.L.R. 435; *Mihaljevic v. Eiffel Tower Motors Pty. Ltd. and General Credits Ltd.* [1973] V.R. 545 at 555-557.

87. For the meaning of "consumer contract", see Consumer Transactions Act, 1972-1973, s.5 and *supra* fn. 39.



s.7(2) of the Misrepresentation Act, 1971-1972. The Consumer Transactions Act, 1972-1973, s.14 provides, as we have seen, that statements or representations by an employee or person acting on behalf of a supplier are deemed to have been made by the supplier himself<sup>88</sup>. If, therefore, the supplier's agent or employee innocently misrepresents the goods or services and in consequence the consumer seeks damages under s.7(1) of the Misrepresentation Act, 1971-1972, can the defendant supplier rely on the defence provided by s.7(2)(b) of that Act? In other words, since the supplier is deemed to have made the misrepresentation under s.14 of the Consumer Transactions Act, 1972-1973, would he still be able to establish that he 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 under s.7(2)(b) of the Misrepresentation Act, 1971-1972? If the supplier of the goods or services under a "consumer contract" is unable to rely on s.7(2)(b) in those circumstances he would, *prima facie*, be liable in damages to the purchaser under s.7(1) of the Misrepresentation Act, 1971-1972 for the innocent misrepresentations of his agent or employee, notwithstanding that he was unaware of the falsity of the representations made. Could he in such a case argue that as the person deemed to have made the representation, he is entitled to rely on the defence under s.7(2)(a) so that no liability for damages would attach to him if he could show that the misrepresentation had not been made negligently? The answers once more seem to depend on judicial interpretation.

(iii) **FRAUDULENT MISREPRESENTATION AND THE EFFECT OF THE CONSUMER TRANSACTIONS ACT, 1972-1973 AND THE SECOND-HAND MOTOR VEHICLES ACT, 1971**

A purchaser induced to enter into a contract for the sale of goods by the seller's fraudulent misrepresentations may set the contract aside and recover damages for the loss suffered or affirm the contract and bring an action in damages for deceit<sup>89</sup>. A seller is also liable for the fraudulent misrepresentations of his agent made within the scope of the agent's actual or apparent authority<sup>90</sup> and there seems little reason to doubt that an agent's fraudulent misrepresentations which induce a contract for the sale of goods will generally be regarded as coming within the scope of his authority. For example, in *Udell v. Atherton*<sup>91</sup> the defendant's agent had fraudulently misrepresented a log of mahogany to be perfectly sound and of good quality, whereas when it was cut up by the plaintiff it was found to be defective and worth less than half the price paid. According to Wilde, B.:

"There are, no doubt, many frauds committed by agents which would not bind their principals. But I hold that the statements of the agent which are involved in the contract as its foundation or inducement are in law the statements of the principal"<sup>92</sup>.

It is usually difficult to establish a fraudulent intention. In particular, it has been held that where an agent has made an innocent misrepresentation

88. See *supra*, fn. 81 and text. The corresponding provision in the Secondhand Motor Vehicles Act, 1971, s.32 is limited to proceedings under that Act: s.14 of the Consumer Transactions Act, 1972-1973 is not so expressly confined.

89. See *Alati v. Kruger* (1955) 94 C.L.R. 216 at 222.

90. On the liability of a principal for the fraudulent misrepresentations of his agent, see generally, *South Australian Farmers' Co-operative Union Ltd. v. Lamshed* [1941] S.A.S.R. 122; *Kadner v. Brune Holdings Pty. Ltd.* [1973] 1 N.S.W.L.R. 498; *Coastal Estates Pty. Ltd. v. Melevende* [1965] V.R. 433; *S. Gormley & Co. Pty. Ltd. v. Cubitt* [1964-5] N.S.W.R. 557.

91. (1861) 7 H. & N. 172.

92. *Ibid.* at 184.

and the principal, although aware of the true facts, has neither authorised nor been cognizant of his agent's misrepresentations, the principal cannot be successfully sued in damages for deceit<sup>93</sup>. In the words of Lord Devlin:

"There is no way of combining an innocent principal and agent so as to produce dishonesty. You may add knowledge to knowledge or, . . . state of mind to state of mind. But you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind. You cannot add innocent knowledge to innocent knowledge and get guilty knowledge . . . If you cannot find an intention in either the principal or the agent separately, you will not produce it by knocking their heads together"<sup>94</sup>.

However, in the case of "consumer contracts" for the sale of goods and services, the Consumer Transactions Act, 1972-1973, s.14 provides that statements or representations by an employee or person acting on behalf of a supplier, are deemed to have been made by the supplier<sup>95</sup>. On a literal interpretation of that section, it could be argued that an innocent misrepresentation by an agent or employee selling goods on behalf of the supplier, who is aware of the true facts regarding the goods or services, would render the supplier liable to an action for fraudulent misrepresentation. If that approach was adopted, it would enable a consumer to rescind a "consumer contract" for what in essence amounts to an innocent misrepresentation and/or entitle him to recover damages from the supplier for the agent's or employee's innocent misrepresentations. To that extent, the remedy in damages would be broader than that provided by s.7 of the Misrepresentation Act, 1971-1972, which appears to be largely confined to damages for innocent but negligent misrepresentations. One suspects, however, that the courts would be very reluctant to allow such actions, notwithstanding s.14 of the Consumer Transactions Act, 1972-1973, and would still require some evidence of fraudulent intent on the part of the principal or agent where the action is essentially based on fraudulent misrepresentation.

The Second-hand Motor Vehicles Act, 1971 provides a novel civil remedy, at least in Australia, for certain kinds of fraudulent misrepresentation. Under that Act, a person who wilfully and with intent to enhance the value of a second-hand motor vehicle alters the reading of an odometer on the vehicle, misrepresents the year of actual manufacture, year of first registration, or model designation, commits an offence<sup>96</sup>. Further, where a dealer is convicted of such offence:

" . . . a purchaser who purchased the second-hand vehicle in respect of which that offence was committed from that dealer relying on—

- (a) the reading of the odometer of the vehicle as altered;
- (b) the statement or representation as to the year of manufacture of the vehicle;

or

93. *Cornfoot v. Fowke* (1840) 6 M. & W. 358; *Armstrong v. Strain* [1952] 1 K.B. 232; see also *Frank Hammond Pty. Ltd. v. Huddart Parker Ltd.*, and *The Australian Shipping Board* [1956] V.L.R. 496. Cf. *Ludgater v. Love* [1881-5] All E.R. 270; *London County Freehold and Leasehold Properties Ltd. v. Berkeley Property and Investment Co. Ltd.* [1936] 2 All E.R. 1039.

94. "Fraudulent Misrepresentation: Division of Responsibility Between Principal and Agent", (1937) 53 L.Q.R. 344 at 362-363.

95. See *supra*, fn. 81 and text.

96. Second-hand Motor Vehicles Act, 1971, s.35(1): the statutory penalty is two hundred dollars.

- (c) the statement or representation as to the year of first registration of the vehicle or as to the model designation of the vehicle, as the case may be, may sue for and recover from the dealer so convicted as a debt due to him an amount equal to *three times*<sup>97</sup> the prescribed amount<sup>98</sup>.

The "prescribed amount" is defined as the amount determined by the court as being the difference between the sale price of the vehicle and its fair value at the time of the sale<sup>99</sup>. A dealer will be liable under these provisions not only where he himself had the necessary wilful intent but also where an employee or a person appearing to act on his behalf had such intent, since representations by an employee or a person appearing to act on behalf of a dealer are deemed to be representations of the dealer for the purposes of the Act<sup>100</sup>.

### 3. Other Major Statutes Affording Relief for Misrepresentation

An analysis of the remedies available to a purchaser induced to enter into a contract for the sale of goods by misrepresentations as to the quality of the goods purchased would be incomplete without reference to two recent and innovative pieces of legislation which are likely to play a major rôle in this area in the future, namely, the South Australian Manufacturers Warranties Act 1974 and the Australian Trade Practices Act 1974.

#### (i) MANUFACTURERS WARRANTIES ACT 1974

We have been essentially concerned in this paper with the remedies available to a purchaser induced to enter into a contract of sale by the misrepresentations of the seller or his agent. The South Australian Manufacturers Warranties Act, 1974<sup>101</sup> goes one considerable step further by providing remedies directly against the manufacturer of defective goods. Thus, the Act imposes on the "manufacturer"<sup>102</sup> a "statutory warranty" of "merchantable quality"<sup>103</sup> in the case of "manufactured goods"<sup>104</sup> sold by retail in South

97. The emphasis is the writer's.

98. Second-hand Motor Vehicles Act, 1971, s.35(3).

99. *Ibid.* s.35(4).

100. *Ibid.* s.32.

101. The Act was assented to on 10th April, 1975 and came into operation on the same date. The Act applies to goods manufactured either within or outside South Australia, but does not apply to goods manufactured before the date of its commencement: s.3(2).

102. Defined as: "(a) any person by whom, or on whose behalf, the goods are manufactured or assembled; (b) any person who holds himself out to the public as the manufacturer of the goods; (c) any person who causes or permits his name, the name in which he carries on business, or his brand, to be attached to or endorsed upon the goods or any package or other material accompanying the goods in a manner or form that leads reasonably to the inference that he is the manufacturer of the goods; or (d) where the goods are imported into Australia, and the manufacturer does not have a place of business in Australia, the importer of goods": s.3(1).

103. "... goods are of merchantable quality if they are as fit for the purpose, or purposes, for which goods of the kind are ordinarily purchased as it is reasonable to expect having regard to—(a) any description applied to the goods by the manufacturer; (b) the price received by the manufacturer for the goods; and (c) any other relevant factors": s.4(2). The manufacturer is not liable if the goods are not of merchantable quality by reason of: "(a) an act or default of the consumer or some other person (not being the manufacturer, or his servant or agent); or (b) a cause independent of human control, occurring after the goods have left the control of the manufacturer": s.4(3). The Act also provides a "statutory warranty" as to the availability of spare parts, unless the manufacturer has indicated he does not undertake to provide spare parts: see s.4(1)(d), s.4(4), s.6(2).

104. Defined as: "... goods manufactured for sale or disposal by retail but does not include goods that are normally offered for sale by retail at a genuine retail price in excess of ten thousand dollars": s.3(1).

Australia or which are delivered, on being sold by retail, to a purchaser in South Australia<sup>105</sup>. Of particular importance in the present context is the right of recourse given to a purchaser against the manufacturer for breach of an "express warranty", defined as:

" . . . any assertion or statement in relation to the quality, utility, capacity, performance or durability of manufactured goods (including an assertion or statement in an advertisement or in a brochure or other literature designed to promote sale or use of the goods) by the manufacturer, or a person acting on his behalf, the natural tendency of which is to induce a reasonable purchaser to purchase the goods"<sup>106</sup>.

Where an "express warranty" or a "statutory warranty" is not complied with in relation to manufactured goods:

" . . . a consumer who has lawful possession of the goods may, by action, recover against the manufacturer damages for breach of warranty in all respects as if the action were for breach of warranty under a contract between the manufacturer and the consumer"<sup>107</sup>.

The expression "consumer" is given a much broader meaning than is found elsewhere in recent South Australian consumer protection legislation. A "consumer" is defined as any person, including a body corporate, who purchases the goods when offered for sale by retail and includes any person who derives title to the goods through or under any such person<sup>108</sup>. A manufacturer cannot exclude or limit his liability under an "express warranty" or a "statutory warranty" and any purported exclusion or limitation of liability is an offence under the Act<sup>109</sup>. This is not the place to enter into an exhaustive analysis of this legislation, but it will undoubtedly facilitate consumers seeking redress for goods which do not live up to the expectations anticipated as a result of the representations made by manufacturers, particularly in promotion campaigns.

#### (ii) AUSTRALIAN TRADE PRACTICES ACT, 1974

Superimposed on the South Australian legislation affecting liability for misrepresentations inducing contracts of sale are the consumer protection provisions of the Australian Trade Practices Act, 1974<sup>110</sup>. It is not proposed to examine this legislation in detail here but rather to highlight some of the more important sections of the Act which may be utilised by those seeking redress for loss arising from misrepresentations by suppliers of goods.

The Australian Trade Practices Act, 1974, s.52(1) provides:

"A corporation<sup>111</sup> shall not, in trade or commerce, engage in conduct that is misleading or deceptive"<sup>112</sup>.

105. S.4(1).

106. S.3(1).

107. S.5(1).

108. S.3(1).

109. S.6(1), (3).

110. The consumer protection provisions are contained in Part V of that Act: see also Part VI dealing with enforcement and remedies.

111. Although virtually all the provisions of Part V are expressed to apply to conduct by a corporation, the effect of s.5 and s.6 of the Trade Practices Act, 1974 is that many acts of individuals will be affected, for example, persons engaged in interstate trade and commerce: see generally, Taperell, Vermeesch, Harland, *Trade Practices and Consumer Protection*, Butterworths, 1974, at 173-174, para 910.

112. For an analysis of what constitutes "misleading or deceptive" conduct, see Taperell, Vermeesch, Harland, *op. cit.* 183-191, paras. 1006-1017. See also, *Trade Practices Commission v. Vaponordic (Aust.) Pty. Ltd.* (1975) 6 A.L.R. 248.

Although contravention of that section does not carry a criminal sanction<sup>113</sup>, a person who suffers loss or damage by, for example, misleading or deceptive misrepresentations inducing contracts of sale, may recover the amount of that loss or damage within three years after the date on which the cause of action accrued<sup>114</sup>. The misrepresentation may also fall within the more specific false representation provisions of s.53 of the Act, which provides in part:

“A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services—

- (a) falsely represent that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model;
- (b) falsely represent that goods are new;
- (c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have; . . .”<sup>115</sup>.

Contravention of s.53 is an offence carrying severe penal sanctions<sup>116</sup>, in the absence of establishing one of the defences to a prosecution under the Act<sup>117</sup>. Apart, however, from the penal sanctions, a person who suffers loss or damage by the act of another which contravenes s.53 can, as in the case of contravention of s.52, recover the amount of loss or damage incurred<sup>118</sup>. Furthermore, where in a proceeding instituted under or for an offence against the Act, the Court<sup>119</sup> finds that there has been a contravention of, for example, the false representation provisions of s.53, the Court may, in addition to imposing a penalty, granting an injunction, or making an order pursuant to an action for the recovery of the amount of any loss or damage suffered, make such other orders as it thinks fit to redress injury to persons caused by any conduct to which the proceeding relates or any like conduct engaged in by the defendant<sup>120</sup>. In particular, orders that may be made include, but are not limited to:

- “(a) an order declaring the whole or any part of a contract or of a collateral arrangement relating to a contract to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;
- (b) an order varying a contract or such an arrangement in such manner as is specified in the order, and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;

113. An injunction may, however, be granted restraining a person from engaging in conduct that constitutes or would constitute contravention of the section: Trade Practices Act, 1974, s.80.

114. Trade Practices Act, 1974, s.82.

115. An analysis of this section can be found in Taperell, Vermeesch, Harland, *op. cit.* at 191-199, paras. 1018-1029. See also, *Hartnell v. Sharp Corporation of Australia Pty. Ltd.* (1975) 5 A.L.R. 493. For cognate provisions concerned with false or misleading representations or conduct, see Trade Practices Act, 1974, ss.55, 54, 56, 58 and 59.

116. “(a) in the case of a person not being a body corporate—by a fine not exceeding \$10,000 or by imprisonment for a period not exceeding 6 months; or (b) in the case of a person being a body corporate—by a fine not exceeding \$50,000”: s.79.

117. See s.85.

118. S.82.

119. Such proceedings must be brought in the Australian Industrial Court: s.86 and s.169. See further, Taperell, Vermeesch, Harland, *op. cit.* at 229, para. 1070, and at 30, paras. 224-225.

120. S.87(1).

- (c) an order directing the refund of money or the return of property; and
- (d) an order directing the payment to a person who has suffered loss or damage of the amount of the loss or damage<sup>121</sup>.

It has been submitted by a commentator on the consumer protection provisions of the Trade Practices Act, 1974 that the making of a false or misleading statement as to any of the matters specified in s.53 may constitute a criminal offence even though the maker of the statement honestly believes it to be accurate<sup>122</sup>. That result, the argument runs, is implied by the defence in s.85(1) which provides that in a prosecution for contravention of the consumer protection provisions, it is a defence if the defendant establishes that the contravention was due to a mistake, to reliance on information supplied by another person, to the act or default of another person, to an accident or to some other cause beyond his control and that he took reasonable precautions and exercised due diligence to avoid the contravention. It is also contended that although s.85(1) does not apply to contravention of s.52, since as no criminal proceedings can be brought under s.52 no necessity for such defence arises, proof of knowledge of falsity is not an essential ingredient in proceedings under s.52 having regard to the interpretation suggested of s.53<sup>123</sup>. Furthermore, even if, contrary to the argument advanced, the inclusion of the s.85(1) defences does not necessarily mean that no *mens rea* need be shown in a prosecution for contravention of, for example, s.53:

“ . . . it does not follow that intentional, or even negligent, wrong doing must be established in civil proceedings. The very fact that defences based on s.85(1) are not available in civil proceedings indicates that a stricter standard of liability is imposed in such proceedings<sup>124</sup>.

These arguments tend to suggest that damages can be obtained in civil proceedings for innocent misrepresentations contravening, for example, ss.52 and 53 of the Australian Trade Practices Act, 1974, in contrast to what appears to be the position under the South Australian Misrepresentation Act, 1974, s.7 where for most practical purposes damages will be obtainable only where the misrepresentation has been made not only innocently but also negligently. Furthermore, where damages are sought for the loss occasioned by, for example, an innocent misrepresentation which contravenes s.53, the Court has a wide discretionary power to avoid the contract or collateral arrangement relating to the contract, untrammelled by considerations of whether a contract for the sale of goods can be rescinded under the South Australian Sale of Goods Act, 1895-1972 on the equitable ground of rescission for innocent misrepresentation, notwithstanding the removal of certain bars to rescission by the South Australian Misrepresentation Act, 1971-1972, s.6. The disadvantage here, however,

121. S.87(2). In the writer's opinion, the provisions of that section are inapplicable to contravention of s.52, since a proceeding under s.52 would not be “instituted under or for an offence . . .” under s.87(1), having regard to s.79 which provides: “A person who contravenes a provision of Part V other than section 52 is guilty of an offence punishable on conviction— . . .”

122. Taperell, Vermeesch, Harland, *op. cit.* at 183-184, para. 1006.

123. “. . . it would certainly be strange if proof of knowledge of falsity were unnecessary in a prosecution under s.53, yet were an essential ingredient under s.52, when no question of a criminal conviction can arise. It would require very convincing reasons to establish that the same or similar concepts should have one meaning in s.53 and other sections, and yet bear a more restricted meaning in s.52, especially when the width of s.52 is kept in mind”: *op. cit.* at 184. Cf. *Trade Practices Commission v. Vaponordic (Aust.) Pty. Ltd.* (1975) 6 A.L.R. 248.

124. *Op. cit.* at 237, para. 1081.

is that proceedings under the Australian Trade Practices Act, 1974 for contravention of the unfair practices provisions of that Act can only be brought in the Australian Industrial Court at the present time<sup>125</sup>.

### **Conclusions**

While recognizing that recent South Australian legislation will assist many consumers seeking appropriate remedies for misrepresentations which induced them to enter into contracts of sale, it is unfortunate, in the writer's opinion, that more care was not taken to clarify the dubious assumptions on which some of that legislation is based and to avoid the uncertainties arising both within specific pieces of legislation and in the interrelationship between the provisions of different Acts which may be relevant in advising on a particular problem. The resultant complexity may well tend to lessen the effectiveness of some of this remedial legislation. Perhaps the gaps, or at least uncertainties in the State legislation, particularly in the area of damages and/or rescission for innocent misrepresentations inducing contracts of sale will be filled by resort to the civil remedies provided for contravention of the false representation provisions of the Australian Trade Practices Act, 1974, although interpretation of the latter is by no means free from doubt. It is hoped that this paper may have at least raised some of the more important problems of interpretation in this area and that eventually we can look forward to a thorough re-appraisal of the law with the object of creating a more cohesive, less uncertain, and above all, a simpler, more comprehensible set of principles concerning the remedies available for misrepresentations inducing contracts for the sale of goods.

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125. See *supra* fn. 119.