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Challenges in Claiming Under The Doctrine of Privity Contract in Malaysia: The Issue of Halal

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Abstract

The doctrine of privity provides that only the contracting parties to a contract incur rights and obligations under the contract. Third parties cannot sue or be sued under a contract. Thus, if a manufacturer who sells a product to a seller who then sells it to a consumer who is injured by the product, the consumer could sue the seller based on the contract of sale between the seller and the consumer. The consumer cannot sue the manufacturer because there is no contract between the consumer and the manufacturer. This article thus addresses the question of the extent to which the doctrine of privity can give rise to liability on the part of the manufacture or the seller on the issue of halal. The findings of this study suggest that the doctrine of privity has some weaknesses that need to be addressed in order to provide better consumer protection on the issue of halal.

Keywords: Contract, Privity, Consumers, Halal, Manufacturer, Seller

Introduction

The doctrine of privity states that no one but the contracting parties can be entitled under it, or bound by a contract (Beatson et al., 2020). A third party who is not even clearly related to the two parties involved does not have the right to bring an action against the said parties, even if the contract was made for their benefit. The purpose is to protect the interests of the contracting parties and to prevent third parties from taking unfair advantage of the terms of the contract (Lee et al., 2020). Thus, this article will discuss the extent to which the doctrine of privity can impose liability on the manufacturer or the seller while protecting consumers on the issue of halal.

Methodology

The study adopts a qualitative approach through library research and the method of content analysis. Data were obtained from both primary and secondary sources. The primary sources were the contract law. As for secondary sources, data was obtained from journals, judicial decisions, articles and books relating to the subject matter of the study. Information in the form of legal reports was also referred to obtain a better understanding on the doctrine of privity.

Results and Discussion

Doctrine of Privity in England and New Zealand

Historically, the doctrine of privity has been firmly established in countries that apply the common law. Due to difficulties in applying the doctrine of privity to contracts made in the benefit of third parties, the common law has created exceptions to the doctrine of privity to allow third parties to enforce contracts. The laws in the United Kingdom and New Zealand have been amended in relation to the application of the doctrine of privity to their contract laws. The reason for this is that this doctrine has a weakness in the implementing of the wishes expressed by the parties involved and can sometimes lead to decisions that are perceived as unfair by the parties who wish to benefit from the contract.

In the United Kingdom, the English Parliament enacted the Contracts (Rights of Third Parties) Act 1999, which creates exceptions to the doctrine of privity (Stevens, 2004). The right of a third party to enforce the terms of a contract is enshrined in section 1 of the Contracts (Rights of Third Parties) Act 1999. However, section 2 of the Contracts (Rights of Third Parties) Act 1999 provides that a third party has no right if it is clear from it that the parties to the contract do not intend the terms to apply to it. In New Zealand, the Contracts (Privity) Act 1982 was enacted based on the recommendations in 'Privity of Contract' A Report by the Contracts and Commercial Law Reform Committee (1981). Third party rights in New Zealand are now governed by section 4 of the Contracts (Privity) Act 1982. Section 4 of the Contracts (Privity) Act 1982 provides that:

“Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise”.

Doctrine of Privity Contract in Malaysia

The doctrine of privity in Malaysia is based on English law. The principle of this doctrine is that a third-party to a contract does not acquire any rights or benefits under the contract and therefore cannot sue or be sued under a contract. There are two main aspects of the doctrine of privity, namely that the contracting party cannot impose any liability or burden on the third party and that a person who is not a party to the contract cannot enforce the rights under the contract to which he is not a party (Yusoff et al., 2015). Only the contracting party can invoke one of the contract clauses as a defence to a claim brought against it.

The scope of Malaysian contract law shows that there is no statutory authority in the Contracts Act 1950 in relation to the doctrine of privity. The closest provision that indicates the existence of this doctrine is found in section 2 (d) of the Contracts Act 1950, which states that:

“when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do so or to abstain from doing something, such act or abstinence or promise is called consideration of the promise”.

Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170 was the first case in Malaysia to uphold the application of the doctrine of privity under section 2 (d) of the Contracts Act 1950. In that case, Lord Wilberforce held that although section 2 (d) of the Contracts Act 1950 used

a broader definition of "consideration" than that used in England, only parties to a contract could claim on the basis of the contract. Since the decision of the Privy Council's in *Kepong Prospecting Ltd v Schmidt*, the doctrine of privity has been part of Malaysian contract law. A similar approach was followed and adopted in *Razshah Enterprise Sdn Bhd v Arab Malaysian Finance Bhd* [2009] 2 MLJ 102. Justice Abdul Malik Ishak of the Court of Appeal stated:

"Our Contracts Act 1950 (Act 136) does not contain any express provision on the doctrine of privity of contract. Indeed, *Kepong Prospecting* gives the gloom picture that the doctrine still applies in Malaysia. Mohamed Dzaidin J (who later rose to become Chief Justice of Malaysia) relied on *Kepong Prospecting* and aptly said in *Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1988] 1 M.L.J. 269, page 271: "It is clear that the English doctrine of privity of contract applies to our law of contract."

The application of the doctrine of privity is also evident in earlier cases such as *Sulisen Sdn Bhd v Government of Malaysia* [2006] 7 CLJ 247, where Justice Abdul Malik Ishak also held that:

"the doctrine has always been accepted by the courts... and it will continue to be accepted by the courts for many years to come."

Also in *Phua Siong Hoe v. RHB Bank; Persatuan Pemilik Tanah Taman Pandan (Intevenor)* [2001] 6 CLJ 326, where Justice Abdul Malik Ishak stated that:

"... to relax the law of privity by allowing a third party beneficiary to succeed would result in floodgates of litigation in our courts. To me, a contract is a very personal affair, affecting only the parties to it..."

The above cases show that the courts in Malaysia still defend the application of the doctrine of privity. Although no effort has been made to reform the doctrine of privity in Malaysia, the Parliament of Malaysia has created exceptions to the rules of privity. These statutory exceptions include insurance contracts, statutory assignments, commercial transactions and consumer transactions.

For consumer transactions, Parliament introduced strict liability for product liability in Part X of the Consumer Protection Act 1999. The strict liability regime on product liability eases the plaintiff's burden of proof when claiming damages against defendants. Under this principle, the consumer does not have to prove fault on the part of the manufacturer. Thus, a consumer who has no contractual relationship with the manufacturer can sue the manufacturer for compensation for the damage suffered. These claims can be brought not only against the manufacturer, but also against the person placing the trademark or the importer as provided under section 68 of the Consumer Protection Act 1999. In order for the consumer to succeed with his claim, he must prove that the goods are defective, that damage has occurred and that the consumer has suffered the damage in question as a result of the defect in the goods. Unfortunately, the law only offers protection to buyer consumers and not to non-buyer consumers (Isa et al., 2011).

Doctrine of Privity in Consumer Protection

From the consumer's point of view, the doctrine of privity is one of the fundamental doctrines of contract law formation and is a major obstacle to consumer actions, especially for consumers who are not purchasers, to recover damages, as this doctrine was created to give the privilege to contracting parties to obtain remedies and not a third party (Isa, Aziz & Yusoff, 2011). In most transactions, no contractual relationship is established between the manufacturer and the consumer, who is also the buyer, as the buyer consumer usually receives the goods from the seller and not directly from the manufacturer. Similarly, consumers who are not buyers and do not have a contractual relationship with the seller cannot take action against the seller under contract law as there is no contractual liability between them. Indeed, buyer consumer also cannot claim compensation incurred by non-buyer-consumers due to the doctrine of privity which provide that contractual remedies are only meant to compensate the contracting parties.

In the case of purchasing products that use a fake halal logo, only the buyer consumer can take legal action against the seller. However, the buyer consumer does not have the right to bring contractual claims against the manufacturer as there is no contractual relationship between them. Similarly, non-buyer consumers cannot take action against the seller as there is no contractual liability between them, nor can the buyer claim damages incurred by non-buyers as the doctrine of privity provides that contractual remedies only serve to compensate the parties to the contract. In most cases, this just makes things a little more complicated and can lead to practical problems if one party falls out of the contractual chain. This doctrine has some weaknesses when it comes to imposing liability on seller or manufacturer as well as protecting buyers and non-buyers consumers (Cartwright, 1996).

There is a need to review the application of doctrine of privity in Malaysia to ensure that contract law remains competitive and relevant to current needs compared to other countries' laws, especially in terms of civil liability to manufacturer and consumer protection. The current trend of legal developments on the doctrine of privity supports the need for renewal in contracts made for the benefit of third parties especially non-buyer consumers. However, the problem of consumer claims under contract law raised by the doctrine of privity can be resolved under the Consumer Protection Act 1999 and tort law. According to section 3 of the Consumer Protection Act 1999, a consumer is a person who acquires or uses goods or services without the need for a contractual relationship. In addition, Part VII of the Consumer Protection Act 1999 also introduced civil liability to manufacturers and gives consumers the right to make claims against manufacturers.

Since this doctrine prevents third parties (buyer-consumers and non-buyer-consumers) from bringing claims under contract law, the alternative that can be brought against the manufacturer is to pursue this case based on tort law, i.e., negligence, similar to the case of *Donoghue v Stevenson* [1932] AC 562. The *Donoghue* case shows that the doctrine of privity can be applied as a deterrent to consumer claims when claims for non-halal products are brought under tort law rather than contract law. The application of the doctrine of privity results in injustice to third parties, particularly buyers or non-buyers, who must bear the loss without any compensation. According to the principles set out in the *Donoghue* case, a third party may claim compensation from the manufacturer in respect of physical damage suffered by the consumer because of the manufacturer's negligence. However, it can be cumbersome for the consumer to prove all the elements of negligence. The difficulty faced by the consumer is to prove that the manufacturer did not take reasonable measures in the manufacture of a product that made it a dangerous product.

Conclusion

In conclusion, the doctrine of privity is somewhat onerous and acts as a kind of barrier to consumer protection. According to the doctrine of privity, third parties, i.e. the buyer consumer and the non-buyer consumer, cannot claim damages from the seller or manufacturer as there is no contractual liability between them. Thus, it is impossible to provide consumers with comprehensive protection under contract law on the issue of halal. Alternatively, actions may be brought under tort law (negligence) and the Consumer Protection Act 1999.

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