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Consumer Remedies on The Issue of Halal Under Contract Law

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Abstract

Ubi jus, ibi remedium is a well-known Latin maxim which means that 'where there is a right, there is a remedy'. This maxim asserts that in situations where the law has established a right, there should be a corresponding remedy for its breach. Therefore, in order to ensure that consumer rights are sufficiently protected by the law against unfair trade practices, remedy is the only means to ensure a consumer's right to redress is protected. This article aims to analyse the extent to which contract law act as a redress mechanism for consumers on the issue of fake halal logo. The main questions to be answered are whether the contract law provides sufficient protection to consumers relating to fake halal logo. Whether the consumer who has consumed fake halal logo products and suffers no injury entitled to claim remedies under the contract law. The findings of this study showed that the remedies available under the contract law are not able to provide appropriate protection to the consumer on the issue of fake halal logo.

Keywords: Contract, Damages, Remedies, Consumer, Halal.

Introduction

The purpose of this article is to analyse the extent to which contract law acts as a redress mechanism for consumers on the issue of fake halal logo. Contract law is discussed because it is a branch of law that has long been used in awarding damages to contracting parties. In Malaysia, contract law is based on statutes or on court decisions. The main legislation that governs contract law in Malaysia is the Contract Act 1950. Section 2(h) of the Contracts Act of 1950 defines a contract as "an agreement enforceable by law". A contract is formed when an offeror (the person making the offer) and an offeree (the person accepting the offer) accept it by notifying the offeror of its acceptance to the offeror's terms and conditions. The agreement can be enforced if the terms can be ascertained and the parties' conduct indicates that they intend to make the terms of the contract enforceable. However, in most cases, these contracts contain terms which are more favourable to manufacturer but are unfair to the consumer. This gives manufacturer the opportunity to exploit consumer and escape liability. As such, consumers are frequently vulnerable and unable to protect themselves against dishonest or exploitative manufacturer. Thus, this article discusses the extent to which contract law can provide adequate remedy for consumers in the issue of fake halal logo

product and at the same time impose liability on the manufacturer. Civil liability against the manufacturer is necessary so that they will feel intimidated to commit an offense especially in the issue of fake halal logo products.

Methodology

The nature of this research requires the application of a doctrinal approach which is based on legal research methodology and a qualitative method for the purpose of examining the types of remedies available for consumers on halal issues. Generally, the doctrinal approach involves analysis of legal principles, statutes, and court cases (primary sources) in order to come up with proper legal solutions (Parkinson, 2016). Hence, the analysis in this research is focused on contract law and previous court cases. Further, comparing the decisions of judges in certain cases can also help researchers carry out comprehensive research about the grounds of judgement and the uniformity of the courts in deciding the outcome of a particular case.

Findings and Discussion

Remedy

Contract law provides the remedies to the consumer. When a breach of contract occurs, the aggrieved party will seek remedies. The aggrieved party is entitled to 'damages' which is compensation in the form of money, even if the aggrieved party chooses to terminate the contract. The question that arises is whether the existing remedies are sufficient to provide appropriate compensation to consumers in the issue of fake halal logo products.

Damages

Damages represent the most common head of remedies claimed by an aggrieved party for breach of contract. Damages is an award of money that aims to compensate the aggrieved party for financial losses they have suffered as a result of the breach. Damages for breach of contract are designed to compensate the aggrieved party rather than to punish the guilty party. This has been explained in the classic case of common law namely, *Robinson v Harman* (1848) 1 Exch 850. Parke B J briefly states as follows:

"the rule of common law is that where a party sustains a loss by reason of a breach of contract, he is to be placed in the same situation with respect to damages as if the contract has been performed".

In the event of a breach of contract the aggrieved party will suffer a loss. The aggrieved party must prove the loss he has suffered and provide sufficient evidence of the amount of the loss. This has been explained in the case of *Datuk Mohd Ali bin Hj Abdul Majid & Anor v Public Bank Bhd* [2014] 6 CLJ 269, the Federal Court ruled as follows:

"... [32] It is trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof of such allegation falls on him (See s.

103 of the Evidence Act, 1950). If he fails to prove both the liability and the quantum of damages, he loses the action”.

However, if damages have been proved but the amount of loss suffered cannot be adequately proven, the court will usually only award nominal damages. Judge Edgar Joseph Jr. in the case of Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, stated that:

“...where damage is shown but its amount is not proved sufficiently or at all, the Court will usually decree nominal damages.”

Nominal damages are usually given in a small sum of money. In the case of Bhd v Hong [2002] 5 MLJ 247, the respondent did not submit any evidence through his witnesses or any supporting documents or agreement on his claim for the profits he might have earned if the contract had been continued. Therefore, the High Court awarded the defendant nominal damages of only RM10 as the defendant had failed to prove the actual loss even though the appellant had breached the contract. In the issue of fake halal logo, the failure of the consumer to prove the actual amount of loss will result in the consumer receiving only nominal damages if the claim is made through contract law.

The issue also arises in terms of the amounts of damages that can be recovered by the aggrieved party, which is essentially what is determined to be appropriate in the case of breach of contract. Damages are assessed according to the amount of money lost by the consumer when entering into the contract (Lee & Lee, 2017). For example, if the consumer has paid RM10 for the product, the maximum damages that will be received is only RM10. The reality is that what consumers have experienced in the case of fake halal logo is far more serious than that, because not all damages can be quantified in terms of money. Determining the actual loss suffered by the consumer in the case of a fake halal logo can be difficult especially when the product contains non-halal ingredients and when the consumer has used or consumed it.

Non-Pecuniary Loss

The general principle is that claims for damages for non-pecuniary losses will not be granted in the case of a contract (Holmes, 2004). This is due to the fact that compensation for such damages can be obtained under tort law. Thus, the question arises as to whether a claim for damages for injury to feelings and mental distress can be granted by the court. A claim for damages for injuries to feelings and mental distress will not be awarded in the case of a contract due to the difficulties in assessing and providing compensation for injuries to feelings allegedly suffered by the plaintiff, as well as to avoid the possibility of opening a "floodgate," which is not appropriate for such a claim (Cheong, 2004). This general principle has been established in *Addis v Gramophone Co Ltd* [1909] AC 488. In this case, the House of Lords held that the plaintiff could recover damages for loss of wages and commissions but was not entitled to a claim for damages for injury to the feelings suffered as a result of his dismissal. Such claims would have to be brought under tort law.

However, subsequent cases have developed and provide exceptions to this general principle, whereby in some situations, damages for injury to feelings and “loss of amenity” can still be awarded. Bingham LJ in the case of *Watts v Morrow* [1991] 1 WLR 1421 has explained the general principle and exceptions to this general principle in one passage as follows:

“A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party ... But the rule is not absolute. Where the very object of the contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead ...”

Exceptions to this general principle are not only for commercial contracts but also involve consumer contracts i.e., contracts that are not purely profit-motivated. The exception to the general principle involving consumer contracts can be seen through the case of *Ruxley Electronics and Construction Ltd v Forsyth* (1996) AC 344. The case involved a swimming pool construction contract. Forsyth has asked Ruxley Electronics to build a pool that is 7 feet 6 inches deep. After the pool was completed, Forsyth found that the depth at the end of the pool was only 6 feet 9 inches. The only way to correct this defect is by rebuilding the pool. However, Forsyth did not intend to do so. Forsyth also refused to make a final payment for the pool on the grounds that it was defective. Therefore, the plaintiff has sued the defendant. Nevertheless, the defendant has made a claim for damages for breach of contract. The House of Lords upheld an earlier court decision awarding £ 2500 for loss of amenities. Lord Mustill in this case stated that:

“and in particular those where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract. But these remedies are not exhaustive, for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the ‘consumer surplus’ (see eg the valuable discussion by Harris, Ogus and Phillips, ‘Contract Remedies and the Consumer Surplus’ (1979) 95 LQR 581) is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless, where it exists the law should recognise it and compensate the promisee if the misperformance takes it away.”

If seen in this case, the defendant did not suffer any pecuniary loss. However, the court held that by not awarding anything was something impossible because the loss suffered by the defendant was a loss that was not easily assessed. The court awarded damages for "loss of amenities" for the "actual loss" suffered by the defendant. Therefore, it is not impossible to compensate the aggrieved party for losses other than pecuniary losses under the meaning of "consumer surplus".

"Loss of amenity" was adopted in the Malaysian Court in the case of *Subramaniam a/l Paramasivam & 2 Ors v Malaysian Airline System Bhd* [2002] 1 MLJ 45. In this case, the court stated that unlike a commercial contract involving the execution and enforcement of an offer where non-pecuniary losses such as frustration, discomfort, mental distress and humiliation cannot be awarded for unforeseen losses, unless the contract involves personal, social or family interests then non-pecuniary loss can be awarded in the event of breach of contract. Based on the above case, it shows the willingness of the court to grant non-pecuniary loss claims in consumer contracts as opposed to commercial contracts. This clearly shows that the

approach used is very good in providing protection to consumers. If seen in the situation of consumers having used fake halal logo products, the losses suffered by consumers can be classified as non-pecuniary losses because in many cases consuming non-halal products may lead to mental, spiritual and emotional injuries such as frustration and discomfort.

Punitive/ Exemplary Damages

As a general rule, punitive damages cannot be awarded in purely contractual action, since the object of such an action is not to punish defendant but to compensate the claimant especially when the defendant's actions were reprehensible and at the same time preventing the wrongdoer and other parties from doing the same in the future. Court of Appeal Judge Abdul Malik Ishak in the case of the Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh Mamat & Ors [2009] 5 CLJ 1, stated that:

“[143] The primary purpose of awarding damages is to compensate the aggrieved party for the harm done to him. Whereas the secondary purpose of awarding damages is to punish the wrongdoer and this is done by imposing what is known as exemplary damages or punitive damages or vindictive damages or retributory damages (Bell v The Midland Railway Company [1861] English Reports 142, 10 GB (NS) 287 at 308; Cassell & Co. Ltd. V Broome & Another [1972] AC 1129).

[144] Exemplary damages would normally be ordered when the conduct of the wrongdoer has been outrageous as to merit such a punishment. Thus, when the conduct of the wrongdoer discloses malice, cruelty, fraud, insolence, etc, then exemplary damages would be ordered.”

In addition, exemplary damages will not be awarded even if the breach was committed deliberately and with a view of profit (Treitel, 2003). Nevertheless, there are exceptions in some cases where exemplary damages have been provided in contract law to punish defendants. The exemplary damages laid down in the English case of *Rookes v Barnard* [1964] AC 1129 can only be granted if it meets the categories set out by Lord Devlin. Lord Devlin in this case propounded two categories of circumstances where exemplary damages could be awarded:

- a) Oppressive, arbitrary or unconstitutional action by the servants of the government; and
- b) Cases where defendant's conduct had been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

The aforementioned principles laid down in the case of *Rookes v Barnard* which had been applied in string of Malaysian cases.

Despite the fact that the case of *Rookes v Barnard* falls under tort law, it has been applied in Malaysian cases under breach of contract. This was decided in the case of *Dato Hashim v Shukla* [1996] 6 MLJ 589. The High Court in this case awarded RM500,000 in exemplary damages to the plaintiff. In this case, the plaintiff alleges that he had lent money to the defendant to buy the shares and demanded repayment of the loan. With regard to this loan, it is said that the defendant agreed to marry the plaintiff and that the defendant would convert to Islam. However, the defendant has breached the agreement. The plaintiff has claimed exemplary damages because the defendant has deceived her into marrying him. The court decided that the cause of action in this case was a claim for the loan and not a breach of the marriage contract. The court further observed that this marriage agreement was the

reason for the loan. The court had referred to the case of *Rookes v Barnard* and ruled that the case fell under the second category, i.e., where the conduct had been calculated to make a profit. The court has also expanded the meaning of "profit" by stating that profit is not limited to finance alone but also covers the rise of status and reputation. Based on this case, the court ruled that the defendant's desire to be called Datin or Mrs. Abdullah and to reap the benefits that go with such a prefix are included in the word "profit" under the second category.

In the case of fake halal logo products, this can be fall under the second category, i.e., conduct that is calculated to bring profit. Manufacturer will benefit by stating that the product is halal and as a result, they will get double profits. If Malaysian courts adopt this approach, there will be fewer issues concerning fake halal logo. This is due to the fact that, if compensation is only given in cases involving fake halal logo products, the manufacturer will commit the same offence in the future because the award of this compensation is too small compared to the benefits gained by stating their products are halal. Of course, if exemplary damages are awarded, it will definitely intimidate the manufacturer into committing this fraudulent practice.

Injunction

Generally, an award of damages is assessed by reference to financial loss. However, it is not always 'adequate' or sufficient as a remedy to compensate the aggrieved party for a breach of contract as stated case *AG v Blake* [2001] 1 AC 268. An injunction is a preventive relief which is a form of court order addressed to a particular party either to restrain him from doing, continuance or repetition of some wrongful conduct in the future. An order for an injunction is an equitable remedy which is also regulated by Specific Relief Act 1950. Based on equitable principles, it is normally granted when damages are not an adequate remedy. However, in certain situations, the court may also deny the grant of an injunction even if the damages obtained by the plaintiff is insufficient (Spry, 1971).

In *American Cyanamid Co v Ethicom Ltd* [1975] AC 396, Lord Diplock developed a set of guidelines for granting an injunction. First, whether there is a serious question to be tried. Second, damages must be shown not to be an adequate remedy, i.e., the plaintiff will suffer irreparable harm if the injunction is not granted. The last thing to be considered is the balance of convenience. What would be the balance of convenience of each party should the order be granted. The balance of convenience must favour the grant of the interim injunction. In this situation the court will consider whether it is the plaintiff or the defendant that would suffer greater hardship and injustice if the interim injunction were granted or refused.

However, this raises the question of whether or not the court will allow the application for an injunction on the issue of supplying fake halal logo products. If the court allows the granting of an injunction, it will be very meaningful to all Muslim consumers especially on the issue of non-halal products and at the same time, it will be able to prevent manufacturer from supplying products that use fake and unrecognised halal logo. Moreover, the manufacturer will also not make the same mistake twice. However, an injunction application is only allowed for parties who have a contractual relationship such as between the seller and the buyer. In situations of fake halal logo products, the buyer often does not have any contractual relationship with the manufacturer. Therefore, the possibility of an injunction being granted on the issue of the supply of products using a fake halal logo is impossible due to the absence of a contractual relationship between the buyer and the manufacturer.

Conclusion

Fake halal logo is a widespread phenomenon. Certainly, product manufacturers are responsible for the claims they make on their products. Hence, in order to ensure that consumer rights are sufficiently protected, it should begin with remedy as remedy is the only tool to sufficiently enforce consumer rights. The contract law should act as a protector to consumer by providing adequate redress. Only with the proper remedied scheme, consumer can be protected and uphold consumer rights. Thus, it can be concluded that contract law will be a meaningful branch of law if able to preserve the rights and interests of consumers and at the same time be the shield expected by consumers in facing unfair trade practices.

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