

CHAPTER THREE

Application and Statutory Exceptions of Doctrine of Privity in Malaysia

I. Introduction

The previous chapter examined the need and feasibility of reform of the doctrine of privity in contract law. This chapter examines the (i) hierarchy of courts and reception of English law, (ii) position of the doctrine of privity, (iii) application of the responsive bargain theory and (iv) statutory exceptions to the doctrine in Malaysia.

II. Hierarchy of Courts and Reception of English law in Malaysia

This part examines the hierarchy of courts and the reception of English law in Malaysia.

A. Hierarchy of Courts

Malaysia adopts a single hierarchy of courts.¹ At present, the highest court in Malaysia is the Federal Court, followed by the Court of Appeal and the High Court. These three courts are known as the superior courts. Before appeals from Malaysia to the Privy Council were abolished on 1 January 1985, Malaysia had a three-tier court system that was the Privy Council followed by the Federal Court and the High Court. From 1 January 1985, Federal Court was renamed the Supreme Court. The three-tier court system became two-tier court system that was the Supreme Court followed by the High Court. On 1 January 1994, the

¹ See Wan Arfah Hamzah & Ramy Bulan, *An Introduction to the Malaysian Legal System*, (Penerbit Fajar Bakti, 2001), ('Wan Arfah'), Chapter 9 and Padmanabha Rau and K.V., *General Principles of Malaysian Legal System*, (ILBS, 2005), Chapter 6.

Constitution (Amendment) Act 1994 (Act A885), renamed the Supreme Court back to Federal Court. The Court of Appeal was also created. The three-tier court system was restored. The jurisdictions and powers of the Federal Court, Court of Appeal and the High Court are governed by the Courts of Judicature Act 1964 (Act 91).

B. Reception of English Law in Malaysia

Section 3 and s.5 Civil Law Act 1956 (hereinafter referred to as 'CLA 1956') provide for reception of English law in Malaysia.² There are basically two differences between s.3 and s.5. Firstly, s.3 applies to all law generally whereas s.5 only governs law relating to commercial matters.³ Secondly, s.3 allows for application of English common law and rules of equity only. By contrast, s.5 extends its application to English statutes. Section 3 provides that the common law of England including the rules of Equity as administered on the 'cut-off'⁴ date in England is binding on Malaysian law. English judicial decisions decided after the 'cut-off' date only have persuasive effect on Malaysian law. For s.5(1), in West Malaysia (other than Malacca and Penang), the 'cut-off' date for the application of English commercial law is similar to s.3.⁵ For Malacca, Penang, Sabah and Sarawak, in the absence of Malaysian legislation, the present law in England continues to be applicable.⁶

² See Sinnadurai, Visu, *Law of Contract*, (Butterworths: Malaysia, 2003), Chapter 1, Phang, Boon Leong, Cheshire, Fifoot and Furmston's *Law of Contract*, 2nd Singapore and Malaysian Edition, (Butterworths Asia, 1998) (hereinafter referred to as 'Phang-Cheshire'), at 31-51 and Krishnan, Arjunan and Abdul Majid bin Nabi Baksh, *Contract Law in Malaysia*, (Lexis Nexis, 2008), Chapter 1.

³ The list of commercial matters in s.5 includes partnerships, corporations, banks and banking, principal and agents,, carrier by air, land and sea, marine insurance, average life and fire insurance and mercantile law generally.

⁴ In West Malaysia, the 'cut-off' date is 7 April 1956; s.3(1)(a). In Sabah and Sarawak, the 'cut-off' date is 1 December 1951 and 12 December 1949 respectively; s.3(1)(b) and (c).

⁵ As at 7 April 1956.

⁶ This is due to the wording of s.5(2) which states that the English law to be applicable is that which is administered in England 'at the corresponding period'.

In applying s.3 and s.5 in determining the application of English law in Malaysia, it must be first determined whether there is any written law in Malaysia governing the particular matter in dispute. English law is not applicable if there is such written law. In the absence of written law, the courts would determine whether the English law is suitable to be applied in Malaysia. If the answer is in the affirmative, the English law is applicable in Malaysia. But this is subject to the qualification that judges can add conditions or limitations to the English law if necessary due to local circumstances.⁷

In situations where the written law in Malaysia is similar to English law, the English judicial decisions continue to have a strong persuasive effect on Malaysian law. Even if s.3 and s.5 are not applicable, the Malaysian courts have the discretion to adopt the legal position in England for the development of local laws.⁸

The application of s.3 and s.5 raises the following queries which are relevant to this thesis:

- (a) Whether the latest developments in England on the legal principles existing on the ‘cut-off’ date are applicable in Malaysia?
- (b) Is the English law applicable in relation to specific areas not covered by the Contracts Act 1950 (hereinafter referred to as ‘CA 1950’)?

In relation to (a), the view taken by judges is that any development of the common law or rules of equity which applied in England on the ‘cut-off’ date is applicable in Malaysia

⁷ See Sinnadurai, Visu, *Law of Contract*, (Butterworths: Malaysia, 2003), Chapter 1, Phang, Boon Leong, *Cheshire, Fifoot and Furmston’s Law of Contract*, 2nd Singapore and Malaysian Edition, (Butterworths Asia, 1998), at 31-51 and Wan Arfah, Chapter 6.

⁸ *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81.

subject to the qualification in s.3.⁹ The answer to query (b) depends on whether the CA 1950 is considered to be exhaustive. The existing authority shows that the CA 1950 is not exhaustive as its long title describes it as ‘an Act relating to contracts’ rather than a code of contract law.¹⁰ As such, judges can fill in the lacunas left by CA 1950 by adopting English common law and equity by virtue of s.3 or s.5 CLA 1956.¹¹

III. Doctrine of Privity in Malaysia

Before discussing the application of the doctrine of privity in Malaysia, it is necessary to look at the position in India as the Malaysian Contracts Act 1950 is modelled on the Indian Contract Act 1872 which is in turn, mainly a codification of the English common law and equity relating to contract law. It is firmly established that the doctrine of privity applies in India.¹² In *Krishna Lal Sadhu v Pramila Bala Dosi*,¹³ Rankin CJ observed that since the definition of the ‘promisor’ and ‘promisee’ in s.2 Contract Act 1872 excludes the third party, this means that the doctrine of privity is applicable in India.

⁹ *AG, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167 (FC) and *Subashini Rajasingam v Saravanan Thangathoray (No 2)* [2007] 3 CLJ 209 (CA).

¹⁰ *Ooi Boon Leong v Citibank NA* [1984] 1 MLJ 222 (PC). The Indian position is similar on this matter as seen in the Privy Council’s decision such as *Irrawaddy Flotilla Co Ltd v Bugwandass* (1891) 18 1A 121 and *Jwaladutt Pillani v Bansilal Motilal* (1929) 115 IC 707. Accordingly, the SRA 1950 is also not exhaustive; *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd* [1996] 2 MLJ 265 (CA).

¹¹ *JM Wotherspoon & Co Ltd v Henry Agency House* [1962] MLJ 86. In this case, Suffian J (as he then was) applied the English law on del credere agency as the CA 1950 is silent on this type of agency. This case was referred to by the Federal Court without disapproval in *Royal Insurance Group v David* [1976] MLJ 128. However, there is a contrary view which maintains that Malaysian courts are not bound to follow English law in circumstances where the CA 1950 is silent on a particular area of the law; *Tan Mooi Liang v Lim Soon Seng* [1974] 2 MLJ 60.

¹² *Gyan Chandra Murkherjee v Monoranjan Mitra* AIR [1942] Cal 251; *Subbu Chetti v. Arunachalam Chettiar* ILR [1930] 53 Madras 270.

¹³ ILR [1928] 55 Cal 1315.

In view of the developments that had taken place in the early to mid 20th century in English contract law, particularly, the changes recommended by the English Law Revision Committee in the Statute of Frauds and the Doctrine of Consideration (Sixth Interim Report) 1937, the Law Commission of India had undertaken similar study on the Indian Contract Act 1872. The Law Commission of India in its 13th Report (1958) had recommended¹⁴ that the Indian Contract Act 1872 to be amended to incorporate the recommendation made by the English Law Revision Committee¹⁵ that a third party has the right to enforce a contract if the contract expressly purports to confer a benefit directly on him. However, the recommendation was not adopted by the Indian Parliament. This may be due to the fact that the English Parliament did not act upon the recommendation of the Sixth Interim Report (1937). Similarly, the Indian Parliament may not see the pressure to reform the doctrine of privity.

As a result, the Indian courts continue to uphold the strict application of the doctrine of privity. In *N C Chacko v State Bank Of Travancore*,¹⁶ the Supreme Court held that a person who is not a party to the contract, cannot, subject to certain well recognised exceptions, enforce the terms of the contract.¹⁷

This part continues to examine the recognition and application of the doctrine of privity in Malaysia to assess whether there is any reluctance of the courts to apply the doctrine and

¹⁴ At para 16 of the 13th Report (1958).

¹⁵ At para 41 of the Sixth Interim Report (1937).

¹⁶ AIR 1970 SC 504. The doctrine of privity was also upheld in *Narayani Devi v Tagore Commercial Corporation Ltd.* AIR 1973 Cal 401.

¹⁷ Shah CJ referred to the case of *Dunlop Pneumatic Tyre Co. v Selfridge* [1915] AC 47 in his decision to justify that the general rule is that a non-contracting party cannot enforce a contract.

the reasons for this reluctance. Malaysian courts have been applying the doctrine consistently since the late 19th century.¹⁸

The most authoritative decision on the recognition of the doctrine in Malaysia is the Privy Council decision of *Kepong Prospecting Ltd v Schmidt*.¹⁹ In this case, the appellant company was incorporated in July 1954 to take over the benefit of Tan's prospecting permit (Schmidt and Tan were the first directors of the company). In July 1954, an agreement was entered into between the appellant company and Tan ("1954 agreement") and it was executed on behalf of Tan by his attorney Schmidt. This agreement provided that the appellant company should take over the obligation of Tan to pay Schmidt one per cent of the selling price of all ore that might be sold. In September 1955, a further agreement ("1955 agreement") was entered into between the company and Schmidt which provided that the company agreed to pay Schmidt one percent of all ore that might be won from any land comprised in the 1954 agreement in "consideration of the services by the consulting engineer for and on behalf of the company prior to its formation . . ." One of the issues in this case was whether Schmidt had the right to enforce any of the above agreements against the appellant company. It was held by the Privy Council that the 1955 agreement was enforceable by Schmidt as s.2(d) CA 1950²⁰ recognised past consideration. However, the 1954 agreement was not enforceable by Schmidt as he was not a party to the agreement in his own personal capacity despite the fact that the contract was made for his benefit. The

¹⁸ One of the earliest cases which applied the privity doctrine is *Sammugam v Fraser* (1888) 4 Ky 338, a decision of the Supreme Court of the Straits Settlement. In *Sammugam*, it was held that the plaintiff who was not a party to the contract cannot sue for breach of contract.

¹⁹ [1968] 1 MLJ 416.

²⁰ Section 2(d) provides 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 or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

Privy Council rejected the contention that Malaysian contract law was different from the English position in the application of the doctrine of privity.

As Lord Wilberforce stated in his judgment:

Their lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysia law as to contracts differs in so important respect from English law. It is true that s.2(d) of the Contracts (Malay States) Ordinances gives a wider definition of “consideration” than that which applies in England particularly in that it enables consideration to move from another person other than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties and it was not possible to point to any other provision having this effect. On the contrary, paras (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue.²¹

K.L. Koh raises the query whether s.2(d) CA 1950 really leaves no doubt on the principle that only contracting parties can enforce the contract as s.2(d) does not expressly mention anything on this matter.²² However, the learned author states that the decision of the Privy Council can be supported if the doctrine of privity and consideration are separate. This is because s.2(d) only deals with consideration.²³ The position of the doctrine of privity will then depend on the common law. Today, due to the number of local decisions which applied the doctrine of privity, it seems that the correctness of the interpretation of s.2(d) by the Privy Council in *Kepong Prospecting* is unquestionable. Furthermore, it has been accepted in England, Australia as well as in Malaysia that the doctrine of privity and consideration are separate from one another.

²¹ At 174. This quotation has also been referred to by his Lordship, Gopal Sri Ram JCA in the Federal Court decision in *Badiaddin Mohd Mahidin v Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, at 119 which is discussed later in this part.

²² “Privity of Contract and the Contracts (Malay States) Ordinance 1950” (1968) 10 *Mal LR* 125-127, at 126.

²³ Koh, K.L. (1968) 10 *Mal LR* 125-127, at 126.

Since *Kepong Prospecting Ltd*, the highest court in Malaysia (Federal Court and Supreme Court) had acknowledged and applied the doctrine of privity in numerous decisions involving numerous matters.²⁴ The Court of Appeal²⁵ and the High Court²⁶ also uphold the application of the doctrine throughout all these years.

There are five cases which require further discussion. The first case is *Badiaddin Mohd Mahidin v Arab Malaysian Finance Bhd*.²⁷ In *Badiaddin*, the appellants were the registered co-owners of a piece of Malay reservation land. In order to assist their business associate (Ismail) who was in financial difficulties, the appellants charged their land to the respondent. Later, Ismail committed a breach of loan agreement and the respondent foreclosed the security and obtained an order for sale of the property. The appellants successfully set aside the order of sale on the ground that the charge was a land dealing

²⁴ *Sime Darby Ltd v Port Swettenham Authority* [1966] MLJ 116; *Employees Provident Fund Board v Bata Shoe Company (M) Ltd* [1968] 1 MLJ 236; *The SS "Hwa Lung"* [1977] 2 MLJ 132; *Yeng Ying Enterprise Sdn Bhd v Liow Su Fah* [1979] 1 MLJ 240; *Lim Foo Yong & Sons Realty Sdn Bhd v Datuk Eric Taylor* [1990] 1 MLJ 168; *Emar Sdn Bhd (under receivership) v Aidigi Sdn Bhd* [1992] 2 MLJ 734; *Kho Ah Soon v Duniaga Sdn Bhd* [1996] 2 CLJ 218; *Lembaga Kesatuan Wang Simpanan Pekerja v Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja* [2000] 3 CLJ 81; *Capital Insurance Sdn v Cheong Heng Loong Goldsmiths (KL) Sdn Bhd* [2005] 4 CLJ 1.

²⁵ Cases where the Court of Appeal applied the doctrine of privity include *Anvest Corp Sdn Bhd v Wong Siew Choong Sdn Bhd* [1998] 2 MLJ 30; *Shearn Delamore & Co v Joseph Lee Henn Shen* [1998] 3 MLJ 833; *Bank Bumiputra Malaysia Bhd v Mohamed Salleh* [2000] 2 CLJ 13; *Lee Tee v Seek Lai Neo* [2000] 2 CLJ 761; *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd v Capital Insurance Bhd* [2004] 1 MLJ 353; *Fulcrum Capital Sdn Bhd v Moriya Kojima* [2004] 4 MLJ 393; *The Golf Cheque Book Sdn Bhd v Nilai Springs Bhd* [2006] 1 MLJ 554; *Government of the State of Sabah v Suwiri Sdn Bhd* [2005] 4 CLJ 727; *Foo Lian Sin v Ng Chun Lin* [2006] 1 MLJ 457; *Law Kam Loy v Boltex Sdn Bhd* [2005] MLJU 225; *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee* [2007] 2 MLJ 12; *Seloga Sdn Bhd v UEM Gynisys Sdn Bhd* [2007] 7 MLJ 385; *Woolley Development Sdn Bhd v Mikien Sdn Bhd* [2008] 1 MLJ 585.

²⁶ The following High Court cases applied doctrine of privity from 1992 onwards. *Royden (M) Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd* [1992] 1 MLJ 33; *Majujaya Holdings Sdn Bhd v Pens-Transteel Sdn Bhd* [1993] 3 MLJ 179; *Ribu Daya Sdn Bhd v Malsa Ideal Sdn Bhd* [1994] 3 CLJ 831; *Punca Klasik Sdn Bhd v All Persons in Occupation of the Wooden House Erected on a Portion of Land held under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor and Another Action (No 2)* [1996] 5 MLJ 92; *Ribaru Bina Sdn Bhd (dahulu dikenali sebagai Ribar Resources Sdn Bhd) v Bakti Kausar Development Sdn Bhd* [2003] 5 AMR; *Syarikat Ong Yoke Lin Sdn Bhd v Giant Cash & Carry Sdn Bhd* [2000] 4 AMR 4982; *The Viva Ocean* [2004] 2 AMR 284; *Evergrade Industries Sdn Bhd v Affin Bank Bhd* [2005] 4 CLJ 827; *Brilliant Team Management Sdn Bhd v South East Pahang Oil Palm Sdn Bhd* [2006] 2 CLJ 1218; *KM Quarry Sdn Bhd v Ho Hup Construction Co Bhd* [2006] 7 MLJ 203; *PB Securities Sdn Bhd v Justin Ong Kian Kuok* [2007] 1 MLJ 153; *Lightcraft (KL) Sdn Bhd v Fortune Valley Sdn Bhd* [2007] 7 MLJ 574.

²⁷ [1998] 2 CLJ 75.

which contravened the Malay Reservation Enactment. The respondent filed an application that the appellants, having received a benefit²⁸ from the respondent were liable to repay the outstanding amount to the respondents pursuant to s.66 CA 1950.²⁹ The Federal Court had to determine whether a contracting party could invoke s.66 CA 1950 against a stranger to the contract.

The Federal Court held that s.66 CA 1950 was not applicable in this case as the appellants were not parties to the loan agreement and they were not beneficiaries of the loan. The fact that the appellants were paid from the loan given by the respondent could not make them parties or privies to the contract so as to enable the court to bring them within the purview of s.66 CA 1950. In the words of Mohd Azmi FCJ:

In my view, since the appellants/chargors were not party to the Loan Agreement, s. 66 cannot be invoked against them. Under that section the party who is bound to restore any advantage received or to make compensation for such advantage should be construed as “any person” who is a party to the agreement and has received any advantage pursuant to the terms or conditions of the invalid contract, but not otherwise. To extend the meaning of “any person” in s. 66 to strangers to the agreement would be in violation of the elementary principle of contract. . . The appellants were not a party to the Loan Agreement and as such there was no question of repayment by them either by way of restitution of benefit or compensation.³⁰

Similarly, Gopal Sri Ram JCA stated that:

The notion that s. 2(d) had the effect of abolishing doctrine of privity of contract was exploded by the decision of the Privy Council in *Kepong Prospecting Ltd. & Ors v. Schmidt* [1968] 1 MLJ 170. The Board there held that our law does not recognise a *jus quaesitum tertio* arising by way of contract.³¹

²⁸ The appellants received a small fraction of the loan money from Ismail.

²⁹ Section 66 provides that:

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

³⁰ At 95 (*Badiaddin*).

³¹ At 119 (*Badiaddin*).

The learned judge further added that:

Kepong Prospecting is therefore authority for the proposition that the words “or any other person” appearing in s. 2(d) of the Contracts Act 1950 are not to be wide enough to exclude the doctrine of privity of contract. It follows, by parallel reasoning, that the identical words used by s. 66 do not include persons who are not parties to a contract under which a benefit passed. In my judgment, there is no justification, in principle or policy, to extend the terms of the section by means of an interpretation that runs counter to settled jurisprudence. It follows that the only parties to a contract may claim or become liable to make, restitution under that section. Any other construction would produce an anomaly because, while only parties to a contract may sue upon it, yet, when the very same contract is discovered to be void, anyone, including persons who cannot enforce it may recover any benefit received by one of the parties thereto.

Accordingly, in my judgment, the words “any person” appearing in s. 66 must refer only to parties to the original contract that either becomes or is discovered to be void. **The Indian cases of Giraj Baksh and Devi Prasad relied upon by the respondent in the High Court were not correctly decided and do not represent our law. (emphasis added)**³²

Badiaddin has been subject to criticism. Professor Cheong May Fong in her article entitled “Restitutionary Developments under Part VI, Malaysian Contracts Act 1950” opines that:

. . . The doctrine of privity of contract is not relevant in interpreting s 66, which applies to agreements discovered to be void or contracts that become void. In these two instances, since the void agreement and the contract that becomes void are unenforceable in law, a plaintiff’s cause of action cannot be based on contract. The relief provided under s 66 for these two situations is restitution.³³

Moreover, Gopal Sri Ram JCA had provided no strong reason as to why the Indian cases (*Giraj Baksh* and *Devi Prasad*) were decided wrongly. In India, a number of learned legal writers on the Indian Contracts Act 1872 have accepted the Indian cases as representing

³² At 119-120 (*Badiaddin*).

³³ [2005] *Australian Journal of Asian Law* 24, at 37.

the law in India.³⁴ Since the wordings of s.66 are similar to the equivalent section in the Indian Contract Act 1872,³⁵ the Indian cases should be highly persuasive in Malaysia. Nonetheless, despite the adverse comments on *Badiaddin*, this case is important to illustrate the recognition of the doctrine of privity as one of the fundamental principles in Malaysian contract law by the highest legal authority in Malaysia.³⁶

The second case is *Ramli bin Shahdan v Motor Insurer's Bureau of West Malaysia*.³⁷ This case stands out compared to the other cases in its liberal treatment on contracts made for the benefit of third parties. In *Ramli bin Shahdan*, the appellants were victims of a road accident caused by the negligence of one Wong. They obtained a judgment against Wong and claimed compensation from the Motor Insurer's Bureau (the first respondent) as Wong was uninsured at the time of the accident. The first respondent informed the appellants that they would not be responsible for the judgment obtained by the appellants. Thus, the appellants brought a legal action to recover the losses suffered from the respondents. The appellants' claim was based on two agreements entered into between the first respondent and the Minister of Transport (the second respondent). These agreements allowed victims of road accident who suffered death or personal injuries caused by the negligence of drivers who did not have a valid road policy of insurance as required under the Road Traffic Act 1987 to receive compensation from the Bureau. The purpose of the agreements is to benefit victims of road accidents who fall within the agreements.

³⁴ T.S. Venkatesa Iyer's, *The Law of Contracts & Tenders*, at 320 and Justice M.R. Mallick, *Commentaries on Indian Contracts Act*, at 678.

³⁵ Section 65 Indian Contract Act 1872.

³⁶ *Badiaddin* was referred to without disapproval in the Federal Court decision in *Suwiri Sdn Bhd v Government of the State of Sabah* [2007] MLJU 0621. In *Suwiri*, the Federal Court also upheld the application of the privity rule in Malaysia.

³⁷ [2006] 2 MLJ 116.

The original agreement between the respondents which was created in 1967 was rescinded and replaced by the second agreement created on January 1, 1992. These two agreements were different. The first agreement provided that the Bureau had to pay the victims the sum payable under the judgment. By contrast, the second agreement gives absolute discretion to the Bureau in determining whether it wants to make any compassionate payments or allowances to the victim. Hence, the victims' rights under the second agreement are restricted as it is not compulsory for the Bureau to make compensation to them. Even if the Bureau decides to do so, they can determine the amount payable to the victims which could be a lesser amount than the sum stated in the judgment obtained by the victims. Thus, the appellants argued that their claim fell within the first agreement.

One of the issues discussed by the Court of Appeal was whether the appellants had the locus standi to sue since they were not parties to the agreements made between the respondents. In a judgment given by PS Gill JCA which was concurred by Gopal Sri Ram JCA and Rahmah Hussain JCA, the Court of Appeal held that the appellants had the right to bring the legal action. This decision was achieved by following the English decision of *Gurtner v Circuit*³⁸ and utilising the concept of implied trust. The argument on the imposition of trust on the facts is discussed in detail in Chapter 5. However, the appellants' claim was rejected as it fell outside the realm of the first agreement.

It is vital to discuss the application of *Gurtner v Circuit* by PS Gill JCA in this case. In *Gurtner*, the issue was whether the Motor Insurers' Bureau ('MIB') was entitled to be joined as second defendants to the action taken by the plaintiff against the first defendant

³⁸ [1968] Lloyd's Rep 171.

for the physical injuries suffered by him due to the reckless driving of the first defendant.³⁹ Attempts to discover the first defendant's insurer had failed. In a unanimous decision of the Court of Appeal, it was held that MIB was entitled to be joined and defended the action brought by the plaintiff and exercised all the first defendant's rights arising from the facts.

PS Gill JCA relied on Lord Denning's judgment in *Gurtner* and stated that:

To this issue, we universally adopt the views propounded by the erudite judge Lord Denning, who we note treated the relationship and position of a Motor Insurers Bureau as a unique entity, a league of its own,⁴⁰ so to speak, which goes against conventional wisdom, in area of privity of contract. In *Gurtner v Circuit* . . . at 176, Lord Denning held:

Then the plaintiff will be able to come down on the MIB and call upon them to pay because they have made a solemn agreement that they will pay. . .

It is true that the injured person was not a party to that agreement between the Bureau and the Minister of Transport and he cannot sue in his own name for the benefit of it. **But the Minister of Transport can sue for specific performance of it. He can compel the Bureau to honour its agreement by paying the injured person, see *Beswick v Beswick* [1967] 3 WLR 932.** If the Minister of Transport obtains an order for specific performance, the injured person can enforce it for his own benefit, . . . If the Minister of Transport should hesitate to sue, **I think it may be open to the plaintiff to make him a defendant: and thus compel performance.** (emphasis added)⁴¹

It is submitted that in *Gurtner*, Lord Denning adopted a more liberal approach than his fellow judges (Diplock and Salmon LJ) in deciding that the plaintiff had the right to enforce the contract (created by the MIB and the Minister of Transport) if the Minister refused to sue by joining the Minister as a defendant. There was disagreement, though not

³⁹ On the contrary, in *Ramli Shahdan*, the appellants brought a legal action against the Motor Insurer's Bureau.

⁴⁰ The reason why PS Gill JCA stated that the Motor Insurers Bureau is "a unique entity, a league of its own" was due to the role played by the Bureau in compensating the victims of road accident where the negligent driver does not have any valid insurance policy. It will be very unfair if the victims who, for eg., suffered serious bodily injuries and cannot claim any damages from the Bureau.

⁴¹ At 129 (*Ramli Shahdan*).

directly stated in the judgment between Lord Denning and his fellow judges on this issue.

This was seen very clearly in Diplock LJ's (as he then was) judgment as follows:

But the Minister is the only party entitled to bring an action to enforce the contract. It confers no right of action against the MIB upon any unsatisfied judgment creditor.

Nevertheless the Courts have upon a number of occasions entertained actions by unsatisfied judgment creditors brought against the Bureau to enforce on their own behalf undertakings given by the Bureau to the Minister under the contract. In these actions, in which the Minister was not joined as a party, the Bureau has not taken the point that the plaintiff was not privy to the contract on which he has sued. The Court for its part, has turned a blind eye to this. Unless the point is specifically raised, the Court is entitled to proceed upon the assumption that the Bureau has before the action is brought, contracted for good consideration with the plaintiff to perform the obligations specified in the contract with the Minister or has by its conduct raised an estoppel which would bar it from relying upon the absence of privity of contract.⁴²

According to Diplock LJ, the plaintiff would have no right to enforce the contract made between the MIB and the Minister of Transport. Similar sentiment was echoed by Salmon LJ (as he then was) where his Lordship stated that:

I would only add that in my view no person would be entitled to sue the Bureau on its contract with the Minister other than the Minister himself. . . I do not think, however, that any such person not being a party to that contract, can sue upon it.⁴³

As such, it is difficult to accept the validity of PS Gill JCA's reliance on Denning LJ's judgment in *Gurtner* as the opinion of the majority in *Gurtner* was disregarded. This may be the reason why PS Gill JCA further supported his decision that the appellants had the right to sue by imposing an implied trust in their favour.

⁴² At 178 (*Gurtner*).

⁴³ At 181 (*Gurtner*).

In *Ramli Shahdan*, PS Gill JCA also acknowledged the shortcomings of the privity doctrine where the learned judge stated:

On our part we are aware that the doctrine of privity, while not an irrational doctrine from the nature of contract, has in particular incidence caused injustice and proved inadequate to modern needs. In such circumstances, it is not surprising that various attempts have been made to induce courts to sanction the evasions of the doctrine.

...

... litigants have from time to time been able to invoke the assistance of equity.⁴⁴

In sum, the Court of Appeal in *Ramli Shahdan* displayed the possibility of a greater willingness to avoid the doctrine of privity in deciding disputes involving contracts made for the benefit of third parties.

The next four cases discussed show an over-emphasis by the High Court on the importance of the doctrine of privity. All four cases were decided by Abdul Malik Ishak J (as he then was). In *Punca Klasik Sdn Bhd v Foh Chong & Sons Sdn Bhd*,⁴⁵ the plaintiff purchased a piece of land ('the land') from the trustees of the estate of the late Syed Hassan Ahmad Alattas. The plaintiff who became the registered proprietor of the land brought an action against the defendants contending that the defendants were trespassing on its land and sought vacant possession of the land. The defendants (squatters) were occupying part of the land at the time of the dispute without the plaintiff's consent. The third defendant claimed beneficial ownership of the said land due to a sale and purchase agreement entered into with Syed Hassan Ahmad Alattas.⁴⁶

⁴⁴ At 129 (*Ramli Shahdan*).

⁴⁵ [1998] 1 CLJ 601.

⁴⁶ This argument was rejected by the court.

A pertinent issue arising from this case which was relevant to this thesis was whether the third defendant can secure a benefit from the contract entered into by the plaintiff and the trustees of the deceased. Clause 1 of the agreement⁴⁷ between the plaintiff and the trustees subject the plaintiff (purchaser) to existing rights of occupiers and claimants who had interest in the land. The third defendant argued that since he had beneficial ownership of the land, the plaintiff's right to obtain vacant possession was subject to his interest. The facts of the case showed that the plaintiff was aware that the land was valued at RM52,800,000 with vacant possession. This meant that the plaintiff was willing to be subject to any prior interest in the land as he purchased the land at half of its market value. The third defendant contended that he could enforce Clause 1 against the plaintiff although he was not a party to the agreement by relying on the common law mechanisms utilised to avoid the privity doctrine in *Malaysian Australian Finance Co. Ltd v The Law Union & Rock Insurance Co. Ltd*⁴⁸ and *Beswick v Beswick*⁴⁹ (Court of Appeal's judgment).

Abdul Malik Ishak J decided in favour of the plaintiff. The learned judge held that a third party cannot enforce a contract which purports to benefit him. None of the common law mechanisms was applicable in this case. Therefore, the third defendant could not enforce Clause 1. The learned judge's reasoning was as follows:

Can the sale and purchase agreement dated 9 July 1991 between the plaintiff and the surviving trustees of the estate of the late Syed Hassan bin Ahmad Alattas be construed generously so as to secure a

⁴⁷ Clause 1 stated that:

The vendors shall sell and the purchaser shall buy the said land on an "AS IS" basis and upon the terms and conditions herein contained without vacant possession and subject to all the existing occupiers, squatters, tenants and/or claimants as aforesaid for the consideration of Malaysian Ringgit Twenty-Four Million (MYR24,000,000 only (hereinafter referred to as 'the purchase price').

⁴⁸ [1972] 2 MLJ 10. The facts of this case are discussed in Chapter 5, Part II(D). This case provided that the exceptions to the doctrine of privity in Malaysia are agency, trust and where there is a direct agreement to pay to the third party.

⁴⁹ [1968] AC 58. The decision of the Court of Appeal could not assist the third defendant as it was overruled by the House of Lords.

benefit to the third defendant in relation to the 20,000 square feet of land? A perusal of the sale and purchase agreement does not show this trend at all. The third defendant was an entire stranger to the sale and purchase agreement dated 9 July 1991 and, consequently, the exceptions to the privity concept do not apply here.

...

The doctrine of privity of contract is well known. It provides that only parties to a contract can enjoy the benefits of that contract or suffer the burdens of it. Consideration must flow or move from the promisee; a person cannot simply sue on a contract if the consideration is provided by another, even where the contract is made for his benefit. A good example would be the case of *Tweddle v. Atkinson* [1861] 1 B & S 393; ...⁵⁰

Three comments are made on the learned judge's application of the doctrine of privity. Firstly, Abdul Malik Ishak J did not discuss any unfairness that could arise if a third party is not allowed to enforce a contract made for his benefit. This may be due to the fact that no unfairness arises from *Punca Klasik* as the third defendant could not satisfy the condition (must had interest in the land) attached to the enjoyment of benefit in Clause 1. The third defendant failed to prove that he had any interest in the land.

Secondly, with due respect, Abdul Malik Ishak J seems to have applied the case of *Tweddle v Atkinson* wholly without any reference to s.2(d) CA 1950 which provides that consideration can move from a person other than the promisee.

Thirdly, in determining whether a person was a party to a contract, Abdul Malik Ishak J looked at the terms of the agreement and whether he participated in the formation of the contract, assuming the role of the promisor or the promisee. The fact that the performance of the contract relates to the person is irrelevant.

⁵⁰ At 619–620 (*Punca Klasik*).

In *Baharuddin Ali & Co v BPMB Urus Harta Sdn Bhd*,⁵¹ the plaintiff rented an office space where the first defendant (BPMB) was engaged by the owner of the premises to manage the office premises. The plaintiff alleged that the first defendant and/or second defendant (general manager of BPMB) had committed acts which prevented the plaintiff from carrying out its legal practice in an orderly manner. One of the issues was whether the plaintiff could sue the second defendant for breach of contract. It was held that the second defendant as an employee of the first defendant was not privy to any agreement created between the plaintiff and the first defendant. Accordingly, he could not be sued as a burden could not pass to a third party to the contract. In the course of the judgment, Abdul Malik Ishak J explained that:

Unfortunately, textbook writers were not happy with the doctrine of privity and this was more pronounced in a situation where third parties were outrightly prevented from recovering under the contracts even though those contracts were made for their benefit (see for example *Millner 16 ICLQ* 446; *Scammell* [1955] CLP 131; *Andrews 8 LS 14* and *Kincaid* [1989] CLJ 243). Even the majority of the High Court of Australia in the case of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* [1988] 165 CLR 107, [1988] 80 ALR 574 rejected the privity doctrine. In Malaysia, however, the decision of Gunn Chit Tuan SCJ in *Lim Foo Yong & Sons Realty Sdn Bhd v. Datuk Eric Taylor* [1990] 1 MLJ 168 at 170 would serve as a good guideline.⁵²

A brief introduction must be made on *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*.⁵³ In this case, an insurer under an insurance policy agreed to indemnify a company against all liabilities incurred in respect of injury to persons at specified building sites. “The insured” was defined to include the company’s contractors. A person was injured as a result of one of the company’s contractors’ negligence and recovered damages against the contractor which was not engaged at the time the policy was issued. The issue was whether

⁵¹ [2000] 4 CLJ 693.

⁵² At 701 (*Baharuddin*). It is noted that the High Court in *Trident* did not reject the doctrine of privity but three High Court judges created an exception to the doctrine applicable in certain circumstances only.

⁵³ [1988] 165 CLR 107.

the contractor who was not a party to the contract could sue the insurer for the indemnity stated in the insurance policy.

The High Court by a majority of 4-3 upheld the contractor's claim against the insurer. Three of the judges (Mason CJ, Wilson J and Toohey J) created an exception⁵⁴ to the doctrine to allow the third party to enforce the contract. In coming to this conclusion, Mason CJ and Wilson J stated that:

. . . the traditional rules which were adopted here as a consequence of their development in the United Kingdom, have been subject of much criticism and of legislative erosion in the field of insurance contracts. Regardless of the layers of sediment which may have accumulated, **we consider that it is the responsibility of this Court to reconsider in appropriate cases common law rules which operates unsatisfactorily and unjustly.** The fact that there have been recent legislative developments in the relevant field is not a reason for continuing to insist on the application of an unjust rule as it stood before its alteration by the *Insurance Contracts Act 1984 (Cth)*. (emphasis added)⁵⁵

Mason CJ and Wilson J provided a guideline in determining whether the doctrine of privity operates unjustly.⁵⁶ If the approach of Mason CJ, Wilson J and Toohey J in *Trident* is adopted, the problems created by the doctrine will be eradicated in situations where the contracts are made for the benefit of third parties. Abdul Malik Ishak J rejected the application of *Trident* in Malaysia. This is understandable as *Baharuddin* is a case dealing with passing of burden in a contract to a third party. According to Abdul Malik Ishak J, he was bound by the Supreme Court decision in *Lim Foo Yong* (cited in *Baharuddin*). However, *Trident* which was decided in 1988 and was not referred to in *Lim Foo Yong* which was reported in 1990. There is nothing in *Lim Foo Yong* which expressly prevents

⁵⁴ This exception is discussed in Chapter 5, Part IV(A). Another judge which made up the majority is Gaudron J who decided in favour of the contractor on the basis of unjust enrichment. Gaudron J's decision is discussed in Chapter 5, Part IV(C).

⁵⁵ At 123 (*Trident*).

⁵⁶ This guideline is discussed at Chapter 5, Part IV(A).

the creation of exceptions to the privity doctrine. Nonetheless, the adoption of Mason CJ and Wilson J's approach will have great impact on the certainty and predictability of the law relating to the doctrine. As such, it is more suitable for the Federal Court than the High Court to determine whether to adopt Mason CJ and Wilson J's approach.

In *Phua Siong Hoe v RHB Bank; Persatuan Pemilik Tanah Taman Pandan (Intevenor)*,⁵⁷ Abdul Malik Ishak J repeated his support for the doctrine of privity. This case involved a charge on a piece of land created between the first defendant (RHB Bank) and the second defendant (owner of the land). The plaintiff purchased the land from the second defendant. The plaintiff who was not a party to the charge sought the first defendant to discharge the charge.

The court decided that the plaintiff could not advance his cause of action as he was not a party to the charge. In this case, Abdul Malik Ishak J adamantly pronounced that:

It is an established principle in the law of contracts and should not be set aside or discarded easily. To simply abolish the doctrine of privity of contract or to ignore it totally, without more, would certainly represent a major change to the common law involving complex and uncertain ramifications. Of course, the doctrine of privity has come under attack for its refusal to recognise the right of a third party beneficiary who seeks to enforce contractual provisions made for his benefit. Judges and text book writers have come out in the open and pointed out the gaps that sometimes exist between the strict contract theory on the one hand and the commercial reality on the other. To relax the law of privity by allowing 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. This court must uphold a strict application of the doctrine of privity as it is not desirable to change the law overnight. Complex changes with uncertain ramifications must be left to the wisdom of Parliament. My duty is only to apply the law as it stands. It is not my duty to make an incremental change to the law by

⁵⁷ [2001] 6 CLJ 326, at 334.

developing the common law to make it more consistent with the modern notions of commercial reality and justice.⁵⁸

Abdul Malik Ishak J went on in his judgment to support the outcome in *Tweddle v Atkinson*⁵⁹ and stated his refusal to follow Lord Denning's attack on the doctrine of privity.⁶⁰

Abdul Malik Ishak J again showed his support for the doctrine in *Sulisen Sdn Bhd v Kerajaan Malaysia*.⁶¹ In this case, the plaintiff sought to claim payment for the food, drinks and other tenting equipment supplied for a programme organised by the defendant. The defendant denied payment by stating that there was no contract created between the plaintiff and the defendant. Evidence showed that the contract of supply of food, drinks and equipment was made with another company, not the plaintiff. Accordingly, Abdul Malik Ishak J decided in favour of the defendant on the ground that the plaintiff lacked privity to the contract. In the course of the learned judge's judgment, it was reiterated that the doctrine "has been accepted by the courts since time immemorial . . . and it will continue to be accepted by the courts for many more years to come."⁶²

From the preceding discussion, Abdul Malik Ishak J showed a strong preference for the application of the doctrine of privity.⁶³ A strict approach towards the application of the doctrine will definitely curtail judicial development of the common law mechanisms to

⁵⁸ At 334 (*Phua Siong Hoe*).

⁵⁹ At 334 (*Phua Siong Hoe*).

⁶⁰ At 336 (*Phua Siong Hoe*). Lord Denning's attack on the doctrine of privity is stated at n 4 in Chapter 2 Part II.

⁶¹ [2006] 7 CLJ 247. In an earlier case, *M-Fold Development Sdn Bhd v Altrue Sdn Bhd* [2002] 2 CLJ 44, at 49 which dealt with the passing of burden in a contract to a third party, Abdul Malik Ishak J held that "That doctrine (of privity) is here to stay."

⁶² At 264 (*Sulisen*).

⁶³ From the analysis of High Court cases relating to the privity doctrine, only Abdul Malik Ishak J had commented quite extensively on the doctrine.

avoid the doctrine in Malaysia. It is submitted that not all the learned judge's concerns on the detrimental effects of relaxing the doctrine in *Phua Siong Hoe* are legitimate. Relaxing the doctrine may not necessarily open the floodgate of litigation. As seen in Chapter 2, not all third parties can enforce the contract. Abdul Malik Ishak J also adopted a too restrictive stance on the role of judges in developing the law.⁶⁴ The hardship created by the doctrine of privity as discussed in Chapter 2 in relation to contracts made for the benefit of third parties should also be considered.

IV. Responsive Bargain Theory in Malaysia

Chapter 2, Part VI(D) argues that the responsive bargain theory can justify third party rights.⁶⁵ This part examines whether the responsive bargain theory is applicable in Malaysia.

The contract law of Malaysia is governed by the CA 1950. In relation to areas which are not covered by the CA 1950, the English common law is still influential and applicable in Malaysia. The discussion on Malaysian cases in this chapter shows that besides local and Indian cases, judges also rely on English authorities in applying the doctrine of privity. Accordingly, it can be contended that the bargain theory can be used to explain the basis of enforceability of contracts in Malaysia. The general requirements to create a valid contract are the same in both English and Malaysian contract law. In Malaysia, in order to enter into a contract, there must be a proposal and acceptance supported by consideration. This is

⁶⁴ See Devlin, "Judges and Lawmakers" (1976) 39 *MLR* 1-16 as to the duty of judges to ensure that the law is abreast with the times. Perhaps, Abdul Malik Ishak J's stance is understandable as the learned judge may view that it is more proper for higher appellate courts to play a more active role in developing the law.

⁶⁵ The responsive bargain theory argues that the strict bargain theory must be more responsive to the needs of the society. The doctrine of privity which defeats the intention of the contracting parties must be reformed.

similar to the characteristics of a bargain theory which is used to explain the reason behind the enforceability of contracts in England.

A perusal of Malaysian cases shows that judges treat contracts entered into by contracting parties as ‘bargains’.⁶⁶ The words ‘contract’ and ‘bargain’ are used interchangeably. The Federal Court in *Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd*⁶⁷ agreed with the trial judge in this case that a “contract is essentially a bargain”. Moreover, the assessment of damages for breach of contract is based on ‘loss of bargain’.⁶⁸

There is only one reported case which discussed the application of the strict bargain theory in Malaysia. Abdul Malik Ishak J in *Phua Siong Hoe v RHB Bank; Persatuan Pemilik Tanah Taman Pandan (Intevenor)*⁶⁹ adhered to the bargain theory in its strict form in relation to the application of the doctrine of privity in Malaysia.⁷⁰ This represents the decision of only one judge. There is definitely room to adopt a broader bargain theory in Malaysia. The following are some indications in the law to support this argument.

In Malaysia, the principles of consideration are not as strict as the English law. Section 26(a) CA 1950⁷¹ allows a contract to be valid based on natural love and affection even

⁶⁶Some of the Federal Court decisions on this matter include *Malayan Banking Bhd v Basarudin bin Ahmad Khan* [2007] 1 MLJ 613; *Rimba Muda Timber Trading v Lim Kuoh Wee* [2006] 4 MLJ 505; *Chan Yock Cher v Chan Teong Peng* [2005] 1 MLJ 107; *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81; *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 51; *Lim Chia Min v Cheah Sang Ngeow* [1997] 1 MLJ 127 and *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd* [1996] 2 MLJ 461.

⁶⁷ [2007] 5 MLJ 501 at 534.

⁶⁸ *Morello Sdn Bhd v Jaques (International) Sdn Bhd* (FC) [1995] 1 MLJ 577 and *Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd* (FC) [1994] 3 MLJ 777.

⁶⁹ [2001] 6 CLJ 326.

⁷⁰ At 334 (Phua Siong Hoe). The quotation is produced earlier in this Chapter in Part III.

⁷¹ Section 26 CA 1950 provides that:

An agreement made without consideration is void, unless –
(a) it is in writing and registered;

though no consideration is provided by the promisee. This is not allowed in English common law.⁷² Besides, the definition of consideration in s.2(d) CA 1950 permits consideration to be furnished by a person other than the promisee.⁷³ Consequently, one of the main arguments provided by Kincaid that a third party is not allowed to enforce a contract as he does not furnish any consideration has no application in Malaysia. The relaxation of the principles of consideration does not mean that the bargain theory is not applicable in Malaysia. In fact, this relaxation supports the contention that what is important is that a 'price' is paid to purchase the promise. It does not matter where the 'price' comes from.⁷⁴

The rationale behind the rule that consideration can flow from another person other than the promisee can be used to support the reform of the privity doctrine. The rule can be explained on the basis that it does not matter who provides the consideration as long as it is provided with the intention to bind the promisor to his promise. The promisee who does not provide anything is allowed to sue as he is a party to the contract. Although he does not provide any consideration, without the promisee requesting the other party to pay or in situations where the other person wants to give a present to the promisee, the promisor would not have concluded the deal and earned extra profit. Such situations often happen in contracts made for domestic purposes where the payer who is of a better financial standing agrees to pay for the purchases or other kind of contracts for the benefit of their loved ones.

it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other.

⁷² *Eastwood v Kenyon* (1840) 113 ER 482.

⁷³ *Venkata Chinnaya v Verikatara'ma'ya* (1881) ILR 4 Mad 137.

⁷⁴ This is the view of Phang and Samuel as explained in Chapter 2, Part VI(B)(1).

Such argument is also applicable to contracts made for the benefit of third parties. Without the third party's existence, the promisee will not enter into a contract with the promisor and the latter will not be able to earn extra profit. Thus, in these situations, the promisor is very willing to enter into the contract knowing very well that the benefit is intended for the third party. Seen in this light, it is not offensive to make the promisor liable for his own failure to perform the obligations which he has undertaken.

V. Statutory Exceptions to Doctrine of Privity in Malaysia

Due to judicial insistence on the doctrine of privity, Parliament has seen the need to intervene by passing various statutory exceptions to override the rule that no benefit can pass to a third party to a contract. This part undertakes to (i) identify the statutory exceptions to the doctrine created by the Malaysian Parliament, (ii) assess the scope of these exceptions, (iii) examine the judicial attitude in applying these exceptions and (iv) assess the adequacy of the existing exceptions in relation to contracts made for the benefit of third parties. The statutory exceptions discussed in this chapter can be classified into the following categories:

- A. Insurance contracts
 - (i) Life Insurance contracts - S.23 Civil Law Act 1956⁷⁵ and Part XIII of the Insurance Act 1996⁷⁶
 - (ii) Third party risks motor insurance policies – s.96 Road Transport Act 1987

- B. Statutory Assignment – s.4(3) Civil Law Act 1956

⁷⁵ (Revised 1972) Act 67 (hereinafter referred to as 'CLA 1956').

⁷⁶ Act 553 (hereinafter referred to as 'IA 1996'). The law discussed is only in relation to non-Muslim.

- C. Commercial transactions
 - (i) Bills of exchange – s.29 Bills of Exchange Act 1949⁷⁷
 - (ii) Bills of Lading Act 1885

- D. Consumer transactions – Consumer Protection Act 1999⁷⁸

A. Insurance Contracts

This part examines the statutory exceptions created in relation to life insurance and third party risks motor insurance policies.

1. Life Insurance Contracts - Part XIII Insurance Act 1996

This part examines the (i) scope of Part XIII IA 1996 and (ii) difficulties arising from its restrictive scope. The purpose of a life insurance contract is to provide protection to close family members or relatives in the event of death of the insured. The nominated beneficiary is not a party to this contract created by the insured and the insurance company. Complicacy arises if the insured dies leaving behind a huge amount of debts. According to the doctrine of privity, only the insured's personal representative is entitled to enforce the insurance policy. The proceeds of the policy remain the insured's property. The personal representative has to use the proceeds of insurance to satisfy the insured's debts of the creditors. He may even squander the proceeds away or he may be slow or fail to enforce the insurance policy. The beneficiary will have no recourse either in enforcing the insurance policy on her own account or in preventing the actions of the personal representative. This defeats the insured's intention to benefit his beneficiary in the event of his death.

⁷⁷ (Revised 1978) Act 204 (hereinafter referred to as 'BEA 1949').

⁷⁸ Act 599 (hereinafter referred to as 'CPA 1999').

As a result, statutory trusts of insurance policies are introduced as a solution to this problem. In Malaysia, these statutory trusts are originally provided by s.23 CLA 1956. Today, s.23 is superseded by s.166 IA 1996⁷⁹ found in Part XIII IA 1996.⁸⁰ Although s.23 CLA 1956 is not abolished, it no longer has any application to life insurance policies. This is the effect of s.172 IA 1996 which provides that Part XIII IA 1996 cannot be excluded by the contracting parties and applies to a policy effected under s.23 CLA 1956.

Under s.166 IA 1996, the trust created by this section is a trust over the monies paid by the insurer and not a trust of the policy insurance. According to s.165(1) IA 1996, the insurer is required to pay the policy monies to the nominee upon receiving notice of a claim in writing by the nominee. Any monies paid under the policy will be held under a trust for the benefit of the protected persons stated in s.166(1) IA 1996. These monies will not form part of the deceased's estate.⁸¹ The IA 1996 does not state clearly whether the nominee has a right to enforce the insurance policy but such right should be implied from Part XIII IA 1996.⁸²

⁷⁹ Section 166 IA 1996 provides that:

- (1) A nomination by a policyowner, other than a Muslim policyowner; shall create a trust in favour of the nominees of the policy monies payable upon the death of the policyowner; if
 - (a) a nominee is his spouse or child; or
 - (b) where there is no spouse or child living at the time of nomination, the nominee is his parent.
- (2) Notwithstanding anything to the contrary; a payment under subsection 1 shall not form part of the estate of the deceased policyowner or be subject to his debts.

⁸⁰ In *Shumuga Vadevu S Athimulam v The Malaysian Co-operative Insurance Society Ltd* [1999] 1 CLJ 231, it was held that s.23 CLA 1956 has been rendered superfluous in view of the provisions of the IA 1996, which should be given effect to. Section 166 IA 1996 will apply if the insured dies after the IA 1996 came into effect on 1 January 1997.

⁸¹ Section 166(2) IA 1996.

⁸² Dass, Santhana S, *Law of Life Insurance in Malaysia*, (Alpha Sigma, 2000) (hereinafter referred to as 'Dass'), at 436.

(i) Scope of s.166 IA 1996

This part discusses the (i) situations where s.166 is applicable and (ii) ambiguity arising from the application of s.166.

(a) Situations where s.166 is Applicable

Firstly, the insurance policy must be effected on the insured's life.⁸³ Secondly, s.166 only applies to spouse and children of the insured and parents of unmarried insured who are named as beneficiaries of the policy. Section 166 also covers situations where unmarried insured named their fiancé as beneficiary but the creation of any interest for the fiancée must be expressed to be contingent on marriage.⁸⁴ In order to qualify as a spouse of the insured, it must be proven that there is a valid marriage between them and that the marriage is subsisting at the time of death of the insured. 'Children' is defined in s.2 IA 1996 which covers legitimate children,⁸⁵ adopted children⁸⁶ and illegitimate children.

Thirdly, the policy must be expressed for the benefit of the spouse or children. In Malaysia, this requirement is satisfied by naming the spouse and/or children as beneficiaries.⁸⁷

⁸³ Section 162 IA 1996. This includes whole life policies, life policies which cover critical illnesses, endowment policies and personal accident policies; Dass, at 312.

⁸⁴ Dass, at 312.

⁸⁵ This refers to a child born within the lawful wedlock of the parties. It does not matter if he is fathered or mothered by a different spouse of the insured; *Re Browne's Policy* [1903] 1 Ch. 188. It also includes any children born during the subsistence of a marriage or within 280 days of the dissolution of marriages; s.112 Evidence Act 1950 (Act 56). An illegitimate child who acquires legitimacy due to the subsequent marriage of his parents in accordance with Legitimacy Act 1961 (Revised 1971) (Act 60) is also a legitimate child.

⁸⁶ This applies to adoptions which follow the requirements of the Adoption Act 1952 (Revised 1981) (Act 257).

⁸⁷ *Re: Man bin Mahat Deed* [1965] 1 MLJ 1; *Re: Kathirvelu Deed* [1971] 2 MLJ 165; *Bahadun bin Hahi Hassan Deed* [1974] 1 MLJ 14. These decisions were decided on s.23 CLA 1956. However, it is submitted that these principles are equally applicable to s.166 IA 1996 to uphold Parliament's intention of benefitting the insured's family.

Similarly, no special words to create a trust or the drawing up of a trust deed is necessary. The insured need not be aware of the application of s.166 to his policy. Such flexible approach taken by judges is to ensure that more statutory trusts are created for the protection of the beneficiary under s.166. However, nomination under s.166 has to comply with s.163(1) IA 1996⁸⁸ which requires the policy owner to fill a special nomination form given by the insurer. The policy owner (assured) must state in writing the name, date of birth, identity card number or birth certificate number and address of the nominee. Strict compliance with these requirements reduces the number of persons to be protected under s.166 as naming beneficiaries as a class such as “my children” is not possible anymore.⁸⁹ It will exclude any child who is not born at the time the policy is created. This is a drawback of s.166 compared to s.23 CLA 1956.

Section 163(3)(a) IA 1996⁹⁰ requires the insurer to prominently display a clause in the insurance policy that the assured has to assign the benefits of the insurance policy to his nominee who does not fall within the categories stated in s.166(1) if he intends the nominee to receive the money under the insurance policy beneficially. This is a precaution taken by the Parliament to remind the assured of the inability of his nominee to enforce the policy. Thus, he has to take an additional step to ensure that his intention to benefit the nominee is

⁸⁸ Section 163(1) provides that:

A policy owner who has attained the age of eighteen years may nominate a natural person to receive policy moneys payable upon his death under the policy by notifying the licensed insurer in writing the name, date of birth, identity card number or birth certificate number and address of the nominee—

- (a) when the policy is issued, or
- (b) after the policy has been issued, together with the policy for the licensed insurer’s endorsement of the nomination on the policy.

⁸⁹ Dass, at 340. Under s.23 CLA 1956, appropriate drafting of the policy can extend the definition of ‘children’ to include any child born after the policy is created.

⁹⁰ Section 163(3)(a) provides that:

The licensed insurer shall prominently display in the nomination form that the policy owner has to assign the policy benefits to his nominee if his intention is for his nominee, other than his spouse, child or parent, to receive the policy benefits beneficially and not as an executor.

achieved. If he fails to assign the right to enforce the insurance policy, he will be deemed not to intend the nominee to receive the money beneficially.

(b) Ambiguity Arising from Application of s.166

Section 166 also does not make any mention as to what happens if the insured nominates both the protected persons under this section and those who are not as beneficiaries of the policy.⁹¹ For example, the insured nominates his wife and mother to benefit from the insurance policy. The wife is a protected person under s.166 but the mother is not. There are two opposing views to this matter under English law. Applying the view of MacGillvray & Parkington on *Insurance Law*,⁹² in the example mentioned above, no statutory trust is created for the wife and mother. A broader view is provided by the authors of Houseman and Davis on *Law of Life Assurance*⁹³ that a statutory trust exists for the benefit of the wife but not for the mother. The broader view is consistent with the legislative intention of protecting spouse and children. Given the liberal view of judges in this area of the law, it is likely that the broader view will be adopted in Malaysia.⁹⁴

(ii) Difficulties Arising from Restrictive Scope of s.166 IA 1996

The scope of s.166 is limited. It only applies to insurance policies effected on the insured's life. Other kinds of insurance policies are excluded. Categories of beneficiaries are limited

⁹¹ Similar ambiguity is found in s.23 CLA 1956.

⁹² 10th Edition, (Sweet & Maxwell, London, 2003), at 702. This is based on *Re Parker's Policy* [1906] 1 Ch 526.

⁹³ 11th Edition, (Butterworths, London, 1994), at 378. This is based on *Re Clay's Policy Assurance* [1937] 2 All ER 548. This view is also supported in Clarke, Malcolm A., *The Law of Insurance Contracts*, 3rd Edition, (LLP, 1997), at 143.

⁹⁴ Dass, at 319.

to spouses, children and parents (for unmarried policy owner). Not every person within these categories qualifies to fall within the statutory exceptions. For spouses, s.166 only applies to couples who are legally married in accordance with the law of Malaysia. Adopted children which do not fulfill the requirements of the Adoption Act 1952 are left out by s.166. Likewise, parents (for married policy owner), cohabitees, stepchildren, godchildren⁹⁵ and other relatives or friends whom the insured wishes to protect are not covered by s.166.

The limited scope of s.166 may be defended on the basis that its main purpose is to provide protection for spouse and children in the event of the insured's death. This represents the majority of problems caused by the doctrine of privity in life insurance contracts which justify legislative intervention. But s.166 is not sufficiently wide and cannot apply to situations where the insured desires to benefit those who fall outside s.166. The exclusion of these beneficiaries equally defeats the intention and expectation of the insured.⁹⁶

It is submitted that in relation to the beneficiaries who do not qualify under s.166, there are three possible alternative legal mechanisms for them to enforce the policy. However, there are a number of difficulties faced by the beneficiary in relying on these alternative mechanisms.

⁹⁵ *Re Sinclair's Policy* [1938] Ch 799. In this case, the insured nominated his godson as the person entitled to the policy moneys on maturity. It was held that the godson was not entitled to enforce the insurance policy.

⁹⁶ For eg., in *Re Sinclair*, at 803-804, Farwell J held that it was undoubted that the insured's intention was to benefit his godson, but in accordance to the doctrine of privity, no right to sue on the insurance policy was to be conferred to the godson. Thus, the insured's intention was defeated.

Firstly, the beneficiary can argue that the insured has created a common law trust in his favour. Such argument was successfully used in *Kishabai v Jaikishan*.⁹⁷ In this case, the deceased took out a life insurance with an insurance company against his life for the sum of \$50,000. After the deceased's death, there was a dispute as to who was entitled to the monies payable under the insurance policy. It was held by BTH Lee J that no statutory trust was created for the insurance policy as the beneficiary (insured's nephew) did not fall within the class of persons stated in s.23 CLA 1956. However, a common law trust was created due to the clear wordings found in the endorsement to the insurance policy.⁹⁸ The endorsement showed that the deceased had a clear intention to create a trust in favour of the nephew.

Compared to s.166, it is more difficult to prove the existence of a common law trust. There must be clear evidence in the insurance policy or in any endorsement to it that the insured intends to create a trust. Words which are sufficient to create a trust under s.166 may be insufficient to create a common law trust.

Secondly, the beneficiary may rely on the concept of 'privity to consideration' found in *Manonmani Shanmugavelu v The Great Eastern Life Assurance Co Ltd*.⁹⁹ In this case, the plaintiff (the deceased's mother), was the named beneficiary of a policy insurance issued by the defendant. After the deceased's death, the defendant released the monies under the

⁹⁷ [1981] 2 MLJ 289.

⁹⁸ In the endorsement to the insurance policy, it was stated that:

This policy is effected under section 23 of the Civil Law Ordinance, 1956 Federation of Malaya and the Trustees or **Trustee for the time being hereof shall hold this policy and all monies assured hereby or payable hereunder in trust for Jaikishan Rewachand**, nephew of the Assured.

The present Trustee for the purposes of the said Ordinance is the said Jaikishan Rewachand. and the power of appointing new Trustees hereof shall be vested in the Assured during his lifetime. (emphasis added)

⁹⁹ [1991] 3 CLJ 272 (Rep).

policy to the Official Administrator. The plaintiff filed an application to determine whether she was entitled to the monies payable under the policy. The defendant challenged the application on the ground that the plaintiff had no locus standi to bring the action as there was no privity of contract between them.

The terms of the policy in which the plaintiff was the named beneficiary did not indicate that the assured intended to create a trust.¹⁰⁰ However, Eusoff Chin J decided in favour of the plaintiff and held that:

. . . though the plaintiff was not a party to the contract between the deceased and the defendant, she was certainly **privity to the consideration**, has a claim on the money and is entitled to sue the defendant for its payment to her. (emphasis added)¹⁰¹

With due respect, the phrase “privity to the consideration” is a new concept introduced by the judge which does not rest on any authority. It is also not in line with the strict approach in determining the existence of a trust in favour of the nominee.¹⁰² This approach has been criticised in an article where it is stated that:

He, however, arrived at this conclusion by an anomalous reasoning which he did not support with authority. He proceeded on the basis that there was no statutory provision preventing the insurers from paying the money to the assured. By the same token, one might argue that there is no statutory provision compelling payment by the insurers to the beneficiary.

¹⁰⁰ The policy in which the plaintiff was the named beneficiary contained the following clause:

To Whom Payable:

The company shall pay the moneys hereby assured to the executors . . . or to the beneficiary named above if then living, ...unless prevented by an assignment or other act or thing done or suffered to be done by the assured in his life time and provided there is no statutory or other restrictions to the contrary. Provided always that the assured may...at any time by writing signed by him and delivered to the company revoke the appointment of the beneficiary named herein and may appoint another beneficiary... (emphasis added).

The words used in the above clause were not sufficient to prove the creation of a trust.

¹⁰¹ At 273 (Manonmani).

¹⁰² Dass, at 431. Otherwise, the ease of invoking the application of the concept ‘privity to the consideration’ will render the trust principle redundant.

...

He came to this conclusion on the ground that while the mother was not a party to the contract she was *privity to the consideration*. It is unclear as to how the judge came to this conclusion and whether there can be in law a distinction between privity of contract and privity of consideration.¹⁰³

Eusoff Chin J also did not provide an explanation as to the meaning of “privity to the consideration” and how the plaintiff satisfied this requirement. All that was provided in his judgment was that the plaintiff was the assured’s mother. The learned judge also distinguished *Kepong Prospecting Ltd. v Schmidt*¹⁰⁴ from the facts of *Manonmani* as they were totally different.¹⁰⁵ However, the differences were not so material as to justify the rejection of the doctrine of privity in *Manonmani*.

The decision of *Manonmani* represented justice to the insured and his mother as the outcome was in accordance with his intention to benefit his mother. But due to the weak justification offered, there is no subsequent reported case which applies the principle of “privity to the consideration”. It is unlikely that it will be followed in the future.¹⁰⁶

Thirdly, the beneficiary can enforce the policy if the insured assigns the policy to him. The introduction of s.163(3)(a) IA 1996 is intended to encourage the insured to assign his policy to his beneficiaries. However, the usefulness of s.163(3)(a) may be limited. There is no requirement for the assured to sign any assignment form at the time the insurance policy is created. Section 163(3)(a) also does not require the insured to be advised specifically on the problems his nominee may face if s.166 is not applicable. As a result, the insured, the

¹⁰³ Jeremiah, Stanley and Joanna Rasamalar Jeremiah, “Nominated Beneficiaries Under Life Policies: Bound To Benefit?” [1994] 3 *MLJ* i-viii, at pvii.

¹⁰⁴ [1968] 1 *MLJ* 416. This case was discussed earlier in this Chapter Part III.

¹⁰⁵ At 272 (*Manonmani*).

¹⁰⁶ Under s.23 CLA 1956, parents of the insured are not covered. Today, s.166 IA 1996 extends protection to parents of unmarried insureds.

majority being lay persons, may not appreciate the importance of assignment. If no assignment is effected, the beneficiary has no right to claim the proceeds of the policy.

2. Third Party Risks Motor Insurance Policy - S.96 Road Transport Act 1987

Third party risks motor insurance policy is made compulsory in Malaysia by virtue of s.90(1) RTA 1987.¹⁰⁷ This policy is intended to ensure that the victim of a road accident caused by the negligence of the policy owner will be compensated for his losses irrespective of the financial position of the policy owner. Since the insurance contract is between the policy owner and his insurer, the victim who is a stranger to the contract cannot sue the insurer directly for compensation. Proceeds of the insurance policy belong to the policy owner. If the policy owner is insolvent, any payment made under the policy may be used to pay off his debts. The victim may not be able to obtain compensation from the promisor. To prevent this from happening, Parliament has passed s.80(1) Road Traffic Ordinance 1958 which is now replaced by s.96(1) RTA 1987.¹⁰⁸

¹⁰⁷ Section 90(1) RTA 1988 reads:

Subject to this part, it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such policy of insurance or such security in respect of third party risks as complies with the requirements of this Part.

¹⁰⁸ S.96(1) provides that:

If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

Section 96(1) allows the victim to a road accident to pursue an action against the insurer for recovery of damages.¹⁰⁹ This part examines the limitations imposed on the application of s.96(1) and the judicial approach adopted in determining claims under s.96(1). Generally, there are three limitations on the scope of s.96(1) as follows:

(a) Road accidents

Section 96 is only applicable if the damages are suffered as a consequence of a road accident.¹¹⁰ It is not applicable to other kinds of accidents which do not occur on the road.

(b) Death or personal injuries

The victim can only claim for damages arising from death or bodily injury.¹¹¹ Damages suffered due to property damage are excluded.¹¹² The fact that the insurance policy covers property damage makes no difference. This position of the law is seen clearly in *QBE Insurance Ltd v Dr. K. Thuraisingam*¹¹³ and *Pacific & Orient Insurance Co. Sdn Bhd v Lee Yin Siong*.¹¹⁴ In these cases, there was a clause in the respective insurance policy that

¹⁰⁹ In *Rafiah Bt. A. Bakar v East West-UMI Insurance Bhd*, [1993] 1 CLJ 431, at 433, James Foong J (as he then was) commented that:

The plaintiff's claim under s.96 of the RTA is an entitlement provided for under the statute and it is mandatory upon the defendants as insurers to pay a judgment order so obtained. As stated earlier, this right is an exception to the rule on privity and allows the plaintiff to proceed directly against the insurers. This right only flows one way and that is in favour of the plaintiff in this case.

¹¹⁰ Section 91(1)(b) provides that:

a policy of insurance must be a policy which insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road.

¹¹¹ Section 91(1)(b) RTA 1987.

¹¹² Nik Ramlah Mahmood, *Insurance Law in Malaysia* (Butterworths, 1992), at 235.

¹¹³ [1982] CLJ (Rep) 705.

¹¹⁴ [1983] CLJ (Rep) 690.

the insurer was obliged to indemnify the insured for any liability of property damage. In both cases, the Magistrates allowed recovery of compensation for property damage. On appeal, the judgement of the Magistrates were overturned as liability for property damage was not within the scope of s.75(1)(b) Road Traffic Ordinance 1958.¹¹⁵ In these two cases, the High Court held that the Magistrates' had taken an erroneous interpretation of the Road Traffic Ordinance 1958 in deciding that the insurer's duty to indemnify extended to the duty to pay the victim for property damage sustained. Since s.75(1)(b) was not complied with, the victims in these cases had no right to sue the insurer to recover the damages that they suffered.

On the contrary, in *The People's Insurance Co (M) Sdn Bhd v Syarikat Kenderaan Melayu Kelantan Bhd (No 2)*,¹¹⁶ the High Court held that a third party can claim damages for property damage suffered in a road accident. Suriyadi Halim Omar J (as he then was) reached this decision on two grounds. Firstly, the introduction of s.96 requires judges to be extra careful in considering a claim excluding the application of s.96 as this section is intended to protect third parties.¹¹⁷ As such, *QBE Insurance* which was decided under the old law should not be applicable. Secondly, the inequity of position between the plaintiff (victim) and defendant (insurer) requires a benevolent approach to be adopted by the courts in favour of the plaintiff. Suriyadi Halim Omar J commented in his judgment that:

It is also indisputable that insurance companies are generally in a superior position as compared to the individual, lofty enough to make the life of an incapacitated third party extremely miserable by the employment of delaying tactics. The unfortunate individual who now may be suffering financial or physical afflictions, and who normally will depend substantially on insurance handouts to see him through his handicapped lifetime and while awaiting that handout, will invariably have to go through

¹¹⁵ Predecessor of s.91(1)(b).

¹¹⁶ [2001] 1 CLJ 510.

¹¹⁷ At 514 (*People's Insurance*).

untold miseries. His family similarly cannot but experience the same indignities. On those premises, it is incumbent upon the court, due to the inequities of strength, to ensure that some equilibrium is maintained, in the form of a continuous vigilance over the matter before it and ensuring that the interest of every individual is not compromised.¹¹⁸

With due respect, the two grounds proffered by the learned judge are untenable. Firstly, this decision seems to fly across the clear wordings of s.91(1)(b) which is identical to its predecessor of s.75(1)(b) Road Traffic Ordinance 1958.¹¹⁹ Thus, it can be argued that Parliament's intention to limit the scope of s.96 to damages suffered from death or bodily injuries remains unchanged. *QBE Insurance* and *Pacific & Orient Insurance* (the latter case was not cited by the judge) are still good law.

Secondly, the learned judge's sympathy with the victim in his inability to cope with his daily life due to the injuries suffered in a road accident promptly reflects the Parliament's intention to allow him to have a direct cause of action against the insurer. Surely, in relation to property damage, such sympathy will lose its weight for the miseries suffered by the victim in this situation are less than the miseries suffered by a victim of serious bodily injuries.

There is no other reported case which allows claims for property damage under s.96 RTA 1987. Thus, it is likely that *The People's Insurance* case will not be followed in future cases.¹²⁰

¹¹⁸ At 515 (*People's Insurance*).

¹¹⁹ Section 75(1)(b) Road Traffic Ordinance reads:

. . . insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road.

¹²⁰ In *Tan Tok Nam v Pan Global Insurance Sdn Bhd* [2002] 3 MLJ 742, a case decided under the Road Traffic Ordinance 1958, the judge followed *QBE Insurance*. *The People's Insurance Co* was not mentioned in *Tan Tok Nam*.

(c) Excluded persons

A claim under s.96 is not available to certain groups of people as laid down in s.91(1)(aa) and (bb).¹²¹ Firstly, s.91(1)(aa) provides that employees who are injured in a road accident in the course of their employment¹²² have no right to claim any compensation from the insurer under the motor insurance policy purchased by their employers.

Nonetheless, if the insurance policy covers liability incurred by an authorised driver as if he is the insured, the insurer can still be sued as the employee cannot be said to be in the employment of the unauthorised driver (who is most likely an employee of the insured). This is seen in *Lim Eng Yew v United Oriental Assurance Sdn Bhd*.¹²³ In this case, the plaintiff was employed by the lorry owner, who purchased a motor insurance policy from the defendant. This policy covered liability incurred by an authorised driver of the insured. The plaintiff was seriously injured in a road accident while travelling in the lorry due to the negligence of a fellow employee (the lorry driver). After obtaining a judgment against the lorry driver, the plaintiff sought to enforce the judgment against the defendant by relying on s.80(1) Road Traffic Ordinance 1958. The defendant denied liability by relying on the terms excluding liability found in the insurance policy which were similar to the provisions of s.91(1)(aa) and (bb). The defendant argued that its liability was excluded by the policy since the plaintiff was injured in the course of his employment. This argument was rejected by the court. Since the indemnity in the insurance policy covered liability of an authorised

¹²¹ Section 91(1)(cc) RTA 1987 also exclude claims involving contractual liability.

¹²² Section 91(1)(aa) RTA 1987 provides that “liability in respect of the death out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such person arising out of and in the course of his employment” is excluded. This was applied in *Saw Poh Wah v Oi Kean Hang* [1985] 2 MLJ 387.

¹²³ [1989] 1 MLJ 454. The defendant’s appeal was rejected by the Supreme Court in *United Oriental Assurance Sdn Bhd v Lim Eng Yew* [1991] 1 MLJ 429.

driver, s.91(1)(aa) did not exclude the plaintiff's claim as he was not employed by the lorry driver who was the authorised driver of the insured.

Secondly, s.91(1)(bb) excludes any liability to passengers suffered as a result of road accidents.¹²⁴ The proviso to s.91(1)(bb) provides that the victim can claim damages from the insurer if (i) he is a passenger in a contract of hire or reward or (ii) he suffers the injuries or death in by reason of or in pursuance of a contract of employment.

The difficulty posed by the proviso to s.91(1)(bb) is in relation to the scope and meaning of the phrase 'by reason of or in pursuance of a contract of employment'. This issue was discussed extensively in *Union Insurance (M) Sdn Bhd v Chan You Young*.¹²⁵ In this case, the respondent was involved in a car accident while she was travelling to work in her husband's car driven by her son. She was seriously injured. She succeeded in a legal action against her son and her husband. The husband was sued as he was the insured in the relevant insurance policy concerning the car. The terms excluding liability of the insurer found in the insurance policy were identical to s.91(1)(aa) and (bb). The appellant (insurer) argued that the respondent had no right to sue them as she was travelling in the car as a passenger. She had not entered into any contract of hire with her son or husband. She was also not travelling as a passenger 'by reason of or in pursuance of a contract of employment.'

¹²⁴ Section 91(1)(bb) states that liability suffered by passengers is excluded "except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise." In *Sinnadorai v New Zealand Insurance Co Ltd* [1969] 1 MLJ 183, the plaintiff who was a passenger in a car driven by the insured was not allowed to enforce the judgment obtained against the insured.
¹²⁵ [1999] 1 MLJ 593.

The appellant's argument was rejected by both the High Court¹²⁶ and the Court of Appeal. The trial judge held that the proviso to s.91(1)(bb) applied because at the time of the accident, the respondent was travelling to go to work. Thus, she was travelling as a passenger in connection with her contract of employment. The Court of Appeal in a judgement delivered by Abdul Malek Ahmad JCA agreed with the findings of the trial judge. Abdul Malek Ahmad JCA also rejected the reminder by the appellant's counsel that the proviso should not be applicable as the respondent was travelling to work on a transport arranged by herself, which was not under any arrangements, express or implied by her employer.¹²⁷

Both the High Court and the Court of Appeal took a liberal interpretation of s.91(1)(bb) which was not warranted by the express wordings of the section and the existing legal authorities.¹²⁸ The reason behind the liberal approach adopted was provided by Abdul Malek JCA where he referred to the trial judge's decision which stated that:

An unreasonably strict construction should not be adopted in construing the policy as it will result in manifest injustice to the husband, insurance companies should not offer, with impunity, seemingly wide coverages to their customers but only to deny liability on tenuous grounds when a claim is actually made. This should not be the case and this court will not countenance it.¹²⁹

¹²⁶ [1996] 2 MLJ 118.

¹²⁷ At 607 (*Chan You Young*).

¹²⁸ Dass states that the Court of Appeal's judgment in *Chan You Young* was wrongly decided in his article entitled "Union Insurance (M) Sdn Bhd v Chan You Young" [2002] 1 MLJ clviii obtained from *Lexis.com Research System*. The decision of the Court of Appeal in *Chan You Young* seems to be inconsistent with a string of legal authorities (*Tan Keng Hong v New India Insurance Co Ltd* [1978] 1 MLJ 97, *Vandyke v Fender; Sun Insurance Office Ltd (Third Party)* [1970] 2 Q.B. 292, *Nottingham v Aldridge (The Prudential Assurance Co Ltd, third party)* [1971] 2 All ER 751 and *United Oriental Assurance Sdn Bhd v Lim Eng Yew* [1991] 3 MLJ 429) which provided that the proviso to s.91(1)(bb) was only applicable if the employer had one way or the other arranged for the plaintiffs to be carried in the motor vehicle involved in the accident or the journey undertaken by the plaintiffs was connected to their contract of employment.

¹²⁹ At 607 (*Chan You Young*).

It is submitted that although it is important for judges to ensure that justice is served, yet it is equally important for judges to comply with the statutory provisions provided by Parliament.

B. Assignment of a Chose of Action

This part examines the (i) types of assignment and requirements to effect an assignment and (ii) scope of assignment. A chose in action is a type of personal property which can only be claimed or enforced by a legal action and not by taking physical possession.¹³⁰ Thus, any benefit arising from a contract which can be enforced by taking a legal action against the parties to the contract is a type of chose in action. Assignment refers to the process where the contractual rights (right to sue) can be transferred to another person who is not a party to the original contract. The effect of such an assignment is to place the assignee in the shoes of the assignor so that the former can enforce the contract.

If one of the contracting parties wants the third party to benefit from the contract, all he has to do is to assign the contractual right to the third party. As a consequence, the third party is able to enforce the contract, thus subverting the doctrine of privity. This can be seen in *Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pulau Pinang*¹³¹ where a dispute arose between a landowner (first defendant) and a sub-lessee (plaintiff). The owner appointed the second defendant as arbitrator as the agreements for the lease and sub-leases provided that disputes should be settled through arbitration. The sub-lessee contended that they were not bound by the arbitration agreement by contending that there was no privity of contract

¹³⁰ *Torkington v Magee* [1902] 2 KB 427, at 430, per Channell J.

¹³¹ [1988] 1 MLJ 269.

between the landowner and them. The sub-lessee was not a party to the lease agreement created by the landowner and the lessee. The landowner was not a party to the sub-lease agreement created by the lessee and the sub-lessee. The plaintiffs applied to set aside the purported appointment of the second defendant to act as an arbitrator. Mohamed Dzaidin J (as he then was) found that the sub-lease was actually an assignment of the lease by the lessee to the sub-lessee. Thus, the sub-lessee stepped into the shoes of the lessee and was bound by the terms of the lease. Equally, the plaintiff could also claim any benefits arising from the lease. Accordingly, the plaintiff's application was dismissed.

1. Types of Assignment

Two types of assignment are discussed, statutory assignment and equitable assignment.

(i) Statutory Assignment

Section 4(3) CLA 1956¹³² allows contracting parties to assign contractual rights to another person. To assign any rights under s.4(3) CLA 1956, three requirements must be satisfied.¹³³

- (a) The assignment must be absolute.
- (b) The assignment must be made in writing.

¹³² Section 4(3) provides that:

Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

¹³³ *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365.

- (c) Written notice must be given to the debtor or any person to whom the assignor is entitled to claim any benefit under the contract.

Absolute assignments refer to assignments which transfer all benefits under the contract to the assignee (third party). The assignor (promisee) will not retain any rights under the contract.¹³⁴ The assignment must be made in writing. It can be created on behalf of the assignor. Written notice must be given to the other contracting party (promisor). Such notice cannot be given before the assignment takes place.¹³⁵ Section 4(3) CLA 1956 does not prescribe a time limit within which notice must be given to the promisor. However, it must be given before the assignee takes out a writ to enforce the contract.¹³⁶ There is no specific form of formalities required to create an assignment.

In addition, the assignor must intend that the contractual right shall become the property of the assignee. In determining this intention, the court will look for substance rather than the words used in the agreement to assign the rights.¹³⁷ The assignee does not need to provide any consideration for the assignment. The promisor's consent need not be obtained.¹³⁸ If all the requirements of a statutory assignment are satisfied, the assignee can sue the promisor in his own name.

¹³⁴ There are many difficult issues relating to the determination as to whether the assignment is absolute or by way of a charge which is beyond the scope of this thesis.

¹³⁵ *Perwira Affin Bank Bhd v ACP Industries Bhd* [2000] 8 CLJ 455.

¹³⁶ *UMW Industries*. It was also held in this case, at 371 that notice given after a writ is taken is not detrimental to the assignee. This is so as since the requirements of s.4(3) are not satisfied, the assignee is considered to be an equitable assignee. In this situation, the assignor has to be made a party to the proceedings to enable the assignee to enforce the contract. Furthermore, if notice is not given promptly this may affect the priority of competing assignments on the same subject matter.

¹³⁷ *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405 and *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp* [1995] 1 MLJ 401.

¹³⁸ Unless otherwise provided in the contract.

(ii) Equitable Assignment

The law also recognises equitable assignments. Unlike statutory assignment under s.4(3) CLA 1956, the assignee of an equitable assignment may not be able to sue in his own name. He must join the assignor as a party to the action. If the assignor refuses, the assignee has to name the assignor as a co-defendant.

An equitable assignment occurs where the assignor fails to satisfy any of the requirements as stipulated in s.4(3) CLA 1956.¹³⁹ No particular form is necessary to create a valid equitable assignment. There is no requirement that the transaction must purport to be an assignment or uses the language found in an assignment.¹⁴⁰ All that is necessary to create an equitable assignment is a clear intention to assign the contractual benefit to the assignee.

2. Scope of Assignment

Generally, assignments are applicable to all kinds of contract. But there are certain rights which cannot be assigned. For example, contracts involving personal skill or confidence cannot be assigned unless with the promisor's consent. This refers to contracts where the promisor intends or willing to perform the services for the promisee only.¹⁴¹

The original parties to the contract can expressly agree not to assign the contractual benefit to others. An assignment which is in breach of the express prohibition of assignment is

¹³⁹ In *Khaw Poh Chuan v Ng Gaik Peng* [1996] 1 MLJ 761, the Federal Court held that an equitable assignment will arise if the required notice under s.4(3) is not given. This case was followed by the Court of Appeal in *RHB Bank Bhd v Chew Him Fah* [2004] 3 CLJ 22.

¹⁴⁰ Phang-Cheshire, at 724.

¹⁴¹ See Peel, Edwin, *Treitel - The Law of Contract*, 12th Edition, (Sweet & Maxwell, 2007), at 738-740.

ineffective against the promisor.¹⁴² The assignee is not allowed to bring a legal action for breach of contract against the promisor.¹⁴³

C. Commercial Transactions

The statutory exceptions discussed in this part are found in the Bills of Exchange Act 1949 (hereinafter referred to as 'BEA 1949') and the Bills of Lading Act 1855 (hereinafter referred to as 'BOL 1855').

1. Bills of Exchange Act 1949

A bill of exchange transaction usually involves three parties. The first party involved is the drawer, the person who draws up the bill or gives instructions on the bill. The second party involved is the drawee, the person responsible to make payment to the payee according to the instructions of the drawer. The third party is the payee, the person entitled to payment under the bill. Negotiable instruments may sometimes be transferred from the payee to another person.

The contract to make payment is created between the drawer and the drawee in favour of the payee or another person who has obtained the negotiable instrument from the payee. Thus, the contract is made for the benefit of a third party (payee or subsequent holders of the instruments). In accordance with the doctrine of privity, the payee would have no right to enforce the contract.

¹⁴² *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262.

¹⁴³ *Linden Gardens Trust Ltd. v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85.

Section 38(1) BEA 1949 avoids the privity rule¹⁴⁴ by allowing the payee and any person whom the instrument is negotiated to and who is deemed to be a ‘holder in due course’ to enforce the bill of exchange against the drawee. Section 30(2) BEA 1949 provides a presumption that every holder¹⁴⁵ of a bill is deemed to be a holder in due course. Thus, a person who wants to enforce the bill only needs to show that he is the holder of the bill. This presumption can be rebutted by the defendant by proving that the title to the bill is defective. If the presumption is rebutted, the holder has to prove that he is a holder in due course according to s.29 BEA 1949 if he wants to bring a legal action on the bill.

Section 29(1) provides that a ‘holder in due course’ refers to holders who obtain negotiable instruments which are “complete and regular on its face, for value and in good faith¹⁴⁶ and without notice of any defects in title of prior parties to the instrument.”¹⁴⁷ The element of good faith has been discussed in *Ng Kim Lek v Wee Hock Chye*.¹⁴⁸ It was held that a holder is not acting in good faith only if he has actual notice as to the defects of title or if he closes a blind eye to the obvious. Mere negligence, even if gross negligence in itself is insufficient if the holder does not suspect that something is amiss.¹⁴⁹

¹⁴⁴ *Development & Commercial Bank Bhd v Brimal Sdn Bhd* [1991] 3 MLJ 187.

¹⁴⁵ This is defined in s.2 BEA 1949 which states that “holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

¹⁴⁶ Section 95 BEA 1949 states that “A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.”

¹⁴⁷ Poh, Chu Chai, *Law of Negotiable Instrument*, 6th Edition (Lexis Nexis, Singapore, 2007), at 500-501. The title to the bill will be defective if the person who negotiates the bill obtains or accepts the bill by fraud, duress, or force and fear or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as to amount to fraud; s.29(2) BEA 1949.

¹⁴⁸ [1971] 1 MLJ 148.

¹⁴⁹ As per Syed Agil Barakbah J, at 149 (*Ng Kim Lek*).

Besides, anyone who takes a bill from a holder in due course irrespective of whether he himself has given value, will have the same rights as a holder in due course¹⁵⁰ and is able to maintain a cause of action to recover payment on the negotiable instrument.

Section 29(1) was applied in *Overseas Chinese Banking Corporation Ltd v Woo Hing Brothers (M) Sdn Bhd.*¹⁵¹ In this case, one Frankie purchased watches from the respondent by tendering 21 traveller's cheques issued by the appellant. It transpired that the 21 traveller's cheques were stolen property and therefore, Frankie had no title to the traveller's cheques. The court in this case had to decide whether the respondent had a right to enforce the traveller's cheques against the appellant. Zakaria Yatim J held that the contract for the traveller's cheques was between the purchaser of the cheques and the issuing bank. Thus, the respondent was not a party to the contract and was not entitled to sue under the law of contract.¹⁵² Nonetheless, the respondent was allowed to rely on the law of negotiable instruments and was entitled to sue the appellant based on s.29(1) and s.38(1) BEA 1949. The learned judge held that the respondent who was a *bona fide* holder of the travellers' cheques in due course was entitled to payment by the appellant.

2. Bills of Lading Act 1885

This part examines the applicability and the scope of the Bills of Lading Act 1855. In a contract of carriage of goods by sea, the shipowner usually issues a document known as the

¹⁵⁰ Section 29(3) BEA 1949 provides that:

A holder (whether for value or not) who derives title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

This section was applied in *Hon Chee Enterprise v British Markitex Ltd.* [1982] 1 MLJ 149 where it was held that the drawer of the bill had the right to enforce the bills of exchange after the bills were returned to the drawer without any endorsement in favour of the drawer.

¹⁵¹ [1992] 2 CLJ 1050.

¹⁵² The learned judge applied *Kepong Prospecting* in coming to this conclusion.

bill of lading to the seller. The bill of lading serves as evidence of the contract of carriage and as document of title to the goods carried by the shipowner. The bill of lading is also freely negotiable. As such, the bill of lading is usually transferred to the buyer (consignee) by the seller (consignor) before the goods are delivered to the buyer.

If goods are lost during transit or damaged in the course of carriage to the buyer due to the breach of contract of the shipowner, the legal issue is who is entitled to recover substantial damages for the loss sustained. According to the doctrine of privity, since the contract of carriage is created between the seller and the shipowner, only the seller is entitled to sue the shipowner. However, if the title, property or risk in the goods has passed to the buyer, which is usually the case, the general rule is that the seller is only entitled to sue for nominal damages. It is the buyer who suffers the loss. Since he is not privy to the contract of carriage, he is not entitled to sue the shipowner under the bill of lading. This creates a lacuna in the law as the person who suffers a loss cannot sue whereas the person who can sue suffers no loss. To overcome this lacuna, the English Parliament had passed the Bills of Lading Act 1855. Section 1 BOL 1855¹⁵³ allows the buyer/consignee or any subsequent indorsees of the bill of lading to sue the shipowner for breach of contract.

The case of *Owners of Cargo carried in the Ship 'Gan Cheng' v Owners and/or Persons Interested in the Ship 'Gan Cheng'*¹⁵⁴ provides the authority that the English Bills of

¹⁵³ Section 1 provides that:

Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights or suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

¹⁵⁴ [1998] 6 MLJ 468.

Lading Act 1885 is applicable in Malaysia by virtue of s.5(1) Civil Law Act 1956.¹⁵⁵ Section 1 BOL 1855 is only applicable in relation to contracts of carriage where a bill of lading is used. In other situations, where delivery orders or sea waybills are used, the Act has no application.¹⁵⁶ Moreover, s.1 is only applicable if two requirements are satisfied. Firstly, the property in the goods must have passed to the consignee or the subsequent indorsees of the bill of lading. Secondly, the passing of property must be due to the consignment or indorsement of the bill of lading.¹⁵⁷

D. Consumer Transactions - Consumer Protection Act 1999

If a product bought by a consumer is defective due to an act or omission of the manufacturer of the product, the consumer has no right to sue the manufacturer under the law of contract. The consumer is not privy to the contract of supply of the product between the manufacturer and the supplier.¹⁵⁸ Similarly, if the consumer receives a product as gift from his friends, he will not have recourse in the law of contract against both the seller and manufacturer of the product if it turns out to be defective.

¹⁵⁵ At 474 (*Gan Cheng*). In this case, the plaintiffs were consignees and indorsees of a bill of lading for a cargo which was shipped on board the defendants' ship, MV Gan Cheng ('the ship') from China to Malaysia. The plaintiffs claimed for losses suffered due to the damage caused to the cargo as a result of breach of contract of carriage by the defendant by alleging that the ship was not seaworthy. Kamalanathan Ratnam J stated that the plaintiffs' right to sue the defendants for breach of the contract of carriage arose from s.1 of the BOL 1855. Section 5(1) CLA 1956 allows for the application of English law in commercial matters which are administered in England at the date the Act comes into force. Section 5(1) CLA 1956 has been explained explained in this chapter, Part II.

¹⁵⁶ As such, in the England, the Parliament had enacted the Carriage of Goods by Sea Act 1992 which extends the right to sue in situations where sea waybills and delivery orders are used. It also does not matter that property in the goods does not pass to the consignee.

¹⁵⁷ *The "Jag Shakti"* [1986] 1 MLJ 197 and *The Delfini* [1990] 1 Lloyd's Rep. 252.

¹⁵⁸ Nonetheless, the buyer is protected by the Sale of Goods Act 1957 (Revised 1989) (Act 382) and the Contracts Act 1950 which he can utilise against the person who sells him the defective goods. However, where the seller is insolvent, the legal right against the seller becomes worthless.

The alternative action that the consumer can bring against the manufacturer is under the tort of negligence as established in *Donoghue v Stevenson*.¹⁵⁹ This case establishes that a manufacturer owes a duty of care to the end user of the product to ensure that the product is safe for his consumption or for his own use. However, it may be burdensome to the plaintiff (consumer) to prove all the elements of the tort of negligence. Normally, the difficulty faced by the consumer in discharging this burden is to prove that the manufacturer has not taken reasonable care in producing the product which renders the product dangerous.¹⁶⁰

In light of these difficulties, Parliament has passed the CPA 1999 introducing a strict liability tort¹⁶¹ on product liability found in Part X of this Act.¹⁶² A regime of strict liability on product liability will ease the burden of proof borne by a plaintiff in recovering damages from a defendant. As a result, the plaintiff who has no contractual relationship with the defendant is able to sue the defendant to seek compensation for the losses sustained. The persons whom the plaintiff can sue ranges from the manufacturer of the product,¹⁶³ retailer who purchases products of another and sell them under the retailer's 'own brand' to importers who import the defective products from other countries.¹⁶⁴ All that is necessary for the claimant to prove in order to succeed in his legal action is that the goods are

¹⁵⁹ [1932] AC 502.

¹⁶⁰ In England, as stated by W.V.H Rogers in *Winfield & Jolowicz on Tort*, 17th Edition (Sweet & Maxwell, 2007), at 444, judges have adopted a liberal view in favour of the plaintiff where the latter can succeed in proving breach of duty of care "by showing that the article is defective and that, on a balance of probabilities, the defect arose from the course of manufacture by the defendant". As a result, it is easier for the claimant to prove breach of duty of care without showing specifically who and at which line of processing where the defect is created.

¹⁶¹ Section 70(1) CPA 1999.

¹⁶² This adopted the Consumer Protection Act 1987 enacted by the UK Parliament.

¹⁶³ This includes persons who grow crop, extract or mine the product or those who add value to the product.

¹⁶⁴ Section 68(1) CPA 1999.

defective according to the Act¹⁶⁵ and this defect has caused him to sustain damages. The protection under Part X is strengthened by the fact that liability under this Part cannot be limited or excluded by any contract term, notice or any other provision.¹⁶⁶

The applicability of Part X is not limited to contracts made for the benefit of third parties. It applies generally to any person who suffers a loss due to defective products. However, the scope of Part X is limited. The CPA 1999 does not apply to certain types of transactions stated in s.2(2) CPA 1999 such as services provided by professionals who are regulated by any written law, to healthcare services provided or to be provided by healthcare professionals or healthcare facilities and to any trade transactions effected by electronic means unless otherwise prescribed by the Minister.

The scope of Part X is also limited in relation to the types of damage that are recoverable. Compensation is only recoverable for death or personal injury and any loss or damage to any property, including land.¹⁶⁷ Damages to property sustained due to the defective products are recoverable only if the property is not used for any business purposes.¹⁶⁸ Loss or damage to the defective product or any pure economic loss suffered is not recoverable.¹⁶⁹ Moreover, CPA 1999 is only applicable to consumer transactions.¹⁷⁰ The supplier of the goods and services to consumers must be someone who is dealing in the business or trade of supplying goods and services.¹⁷¹

¹⁶⁵ Section 67(1) CPA 1999 states that there will be a defect in the product if the safety of the product is not such as a person is generally entitled to expect.

¹⁶⁶ Section 71 CPA 1999.

¹⁶⁷ Section 66 (1) CPA 1999.

¹⁶⁸ Section 69(1)(c) CPA 1999.

¹⁶⁹ Section 69(1)(a) and (b) CPA 1999.

¹⁷⁰ This is due to s.2(1) CPA 1999 which states that the Act “shall apply in respect of all goods and services that are offered or supplied to one or more consumers in trade.”

Consumers are defined in s.3(1) CPA 1999 as referring to a person who:

E. Inadequacy of Existing Statutory Exceptions

Each of the statutory exceptions to the privity doctrine has a specific objective of its own that is to counter problems caused by the doctrine in a specific area of the law. As a result, the exceptions (except assignment) have limited scope. The application of each of these exceptions is confined to a special type of contract only. This conclusion is drawn from the discussion of the scope of these exceptions in this chapter.

For insurance contracts, only life and motor insurance policies are covered. Within these types of contracts, there are certain groups of persons or situations which fall outside the statutory exceptions. Similarly, for business transactions, the BEA 1949 is limited to the use of negotiable instruments and the BOL 1855 is confined to contracts of carriage of goods by sea involving bills of lading. The CPA 1999 is only intended to deal with the problems caused by the doctrine of privity in consumer protection in relation to situations involving defective products. Hence, the operation of the statutory exceptions may only apply to some of the contracts made for the benefit of third parties. There are many other such contracts which are still subject to the privity doctrine.

Although assignment applies generally to all types of contracts, it suffers from two weaknesses in dealing with contracts made for the benefit of third parties. With regards to these contracts, the contracting parties' intention to benefit the third party has been formed

-
- (a) acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and
 - (b) does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of -
 - (i) resupplying them in trade;
 - (ii) consuming them in the course of a manufacturing process; or
 - (iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land.

¹⁷¹ Section 3(1) CPA 1999.

at the time the contract is created. However, the benefit cannot be passed to the third party unless the promisee takes a further action to assign the benefit to the third party. This results in additional transaction cost.

Another inadequacy of assignment in solving the problems created by the doctrine of privity is the amount of damages an assignee can recover for breach of contract. It is a principle of law that an assignee cannot recover damages more than an assignor under the contract.¹⁷² The assignee's interest is merely derivative of the assignor's interest under the contract. In relation to contracts made for the benefit of third parties, this may be problematic to third parties (assignees) because the assignor usually does not suffer damages as a result of the breach of contract.¹⁷³ Accordingly, the assignor is only entitled to nominal damages. In such situations, assignment of the contract to the third party will not assist the third party in recovering the losses that he suffers.¹⁷⁴

VI. Conclusion

The doctrine of privity is rooted comfortably in the Malaysian contract law. Numerous decisions of the Federal Court had recognised and supported the application of the doctrine. There is no outright refusal to apply the doctrine by Malaysian judges. There is no direct challenge mounted against the doctrine by Malaysian judges compared to the English or Australian judges who had in some occasions voiced their dissatisfaction with the doctrine

¹⁷² *Bank of Commerce Bhd v Promet Development Sdn Bhd* (unreported) and *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331. In *Boustead Trading*, it was held that since the assignee in this case took the assignment subject to all rights of set-off which the debtor had against the assignor, the assignee was bound by the set-off and could not claim the amount of money which had been set-off against the money due from the assignor to the debtor.

¹⁷³ The result may be different if *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 is applicable in Malaysia. This case is explained in detail in Chapter 4, Part IV(A).

¹⁷⁴ The third party may seek to rely on other common law mechanisms to evade the doctrine of privity such as the tort of negligence to recover the losses suffered.

and the willingness to erode the doctrine when the need arises. In fact, not much discussion about the criticism of the doctrine is found in Malaysian cases except the Court of Appeal's decision in *Ramli Shahdan*. But this contains only a brief discussion on the difficulties caused by the doctrine. The lack of criticisms shown by Malaysian judges on the doctrine can be explained on the ground that most of the cases do not deal with contracts made for the benefit of third parties. The application of the doctrine in these cases yields no unfairness.

Ramli Shahdan also shows a relaxed attitude of the judges towards the doctrine in situations involving contracts made for the benefit of third parties. This may not amount to a direct confrontation with the doctrine as the Court of Appeal's decision was also supported by the imposition of a trust which is a well-established circumvention of the doctrine.

The responsive bargain theory, introduced in Chapter 2, arguably, is applicable in Malaysia. Thus, third party rights are justifiable in contract theory in Malaysia.

The statutory exceptions to the privity doctrine identified in this chapter are created as a result of the needs of the society to overcome the harshness created by the doctrine. This clearly illustrates that the law of contract in Malaysia faces problems created by the doctrine as other countries. Some of these statutory exceptions are wide enough to include contracts made for the benefit of third parties, especially insurance contracts. However, due to the limited scope of each exception, the Parliament's effort to solve the problems created by the doctrine of privity is clearly insufficient. As stated by Phang, Parliament's

intervention to circumvent the doctrine of privity “has offered only spasmodic and occasional relief.”¹⁷⁵

As a result, many contracts made for the benefit of third parties are left outside the statutory protection. Such discrimination between different types of contracts made for the benefit of third parties will leave many contracting parties disappointed and results in injustice. Judges have tried to provide a liberal construction on the statutory exceptions to widen the scope of these exceptions to allow more third parties to succeed in their legal action against the promisor. This approach is clearly seen in cases involving insurance claims.¹⁷⁶ This results in justice being served in more cases which leads to the perception that the doctrine of privity is not problematic. It must be emphasised that such position is not beneficial to the legal system in the long run when cases start piling up with diverse decisions reached by different judges. This affects the certainty and predictability of the law especially where the soundness of some of the decisions can be questioned.

¹⁷⁵ Phang (Cheshire), at 663. Edwin, Clarence, “Contracts for the Benefit of Third Parties – Will Our Common Law See the Demise of Privity of Contract?” [2000] 4 *MLJ* i-xxi, at pix.

¹⁷⁶ *Manonmani v Great Eastern Life Assurance Co. Ltd* and *The People’s Insurance Co (M) Sdn Bhd v Syarikat Kenderaan Melayu Kelantan Bhd (No 2)* where the judges in both decisions favoured the claimants rather than the insurance companies.