Circumventing the Privity Rule in Malaysia

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Abstract: This article briefly introduces the privity rule and its application in Malaysia which has created difficulties in relation to contracts made for the benefit of third parties. This article then investigates how Malaysian courts circumvent the privity rule to ensure that justice prevails. The mechanisms examined include among others agency, trust, tort and estoppel. This article argues that the application of these mechanisms rule are not adequate to resolve the difficulties caused by the privity rule and concludes that a statutory reform to create third party rights in contract law is required.

1. Introduction

The privity rule which stipulates that no benefit can be conferred to a third party who is not a party to the contract has long been regarded as "an anachronistic shortcoming that has for many years been regarded as a reproach to English private law".[1] The problems created by the privity rule which prevent third parties from enforcing a contract made for their benefit are widespread.[2] Particularly, the privity rule denies the contracting parties from fulfilling their intention to benefit a third party. A number of the Commonwealth countries had undertaken statutory reform of the privity rule and recognised third party rights in contract law. The notable reform was that undertaken by the English Parliament which resulted in the enactment of Contracts (Rights of Third Parties) Act 1999.[3] Besides, the High Court in Australia and the Supreme Court in Canada had also created exceptions to the privity rule.

In Malaysia, the privity rule is deeply entrenched in the legal system. The Malaysian courts had applied the doctrine in a variety of cases involving variety of situations. In the recent case of *Razshah Enterprise Sdn Bhd* v *Arab Malaysian Finance Bhd*,[4] Abdul Malik Ishak JCA in the Court of Appeal[5] stated that:

> Our Contracts Act 1950 (Act 136) has no express provision pertaining to the doctrine of privity of contract. In fact, *Kepong Prospecting* gives the gloom picture that the doctrine still applies in Malaysia. Indeed Mohamed Dzaiddin J (who later rose to be the Chief Justice of Malaysia) relied on *Kepong Prospecting* and aptly said in *Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1988] 1 MLJ 269, at p 271:
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> It is clear that the English doctrine of privity of contract applies to our law of contract.[6]

In *Razshah Enterprise*, the defendant company guaranteed a loan taken by one of its directors from the plaintiff. The director (borrower) failed to pay for the loan and the plaintiff sued the defendant to enforce the guarantee. The defendant sought to counterclaim the plaintiff's action based on two letters[7] written by the plaintiff to the director (borrower). The plaintiff attempted to strike out the counterclaim. One of the arguments relied by the plaintiff was that the defendant had no *locus standi* to bring the counterclaim as it was not a party to the loan agreement. The Court of Appeal rejected the plaintiff's argument because the agreement involved was a guarantee

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[1] As per Lord Diplock in *Swain* v *Law Society* [1983] 1 AC 598, at 611.
[2] The list of difficulties created by the privity of contract rule is well discussed in England, Law Reform Commission's Report No 242, *Privity of Contract: Contracts for the Benefit of Third Parties* (1996). In Malaysia, these difficulties have been discussed in Edwin, Clarence, "Contracts for the Benefit of Third Parties – Will Our Common Law See the Demise of Privity of Contract?" [2000] 4 *Malayan Law Journal* i-xxi.
[3] Other recent reforms include the Contracts (Privity) Act 1982 enacted in New Zealand and the s.56 Law of Property Act 2000 enacted in Northern Territory of Australia.
[4] [2009] 2 MLJ 102.
[5] In Malaysia, the highest court is the Federal Court, followed by the Court of Appeal and the High Court.
[6] At 119 (*Razshah Enterprise*).
[7] These two letters stated that the plaintiff agreed to restructure payment of the outstanding amount of the loan, reduced interest rates for the loan and extended the repayment due date. The plaintiff failed to comply with the changes to the term loan agreement found in these two letters.

agreement where the defendant's liability was dependent on the amount owed by the director (borrower). Thus, the defendant had the locus standi to bring the counterclaim which if successful, would reduce the amount of its liability.

No effort has been undertaken to reform the privity rule in Malaysia despite the many difficulties created by the rule. However, the Malaysian Parliament had created ac hoc exceptions to the privity rule[8] throughout the years and there are a number of common law mechanisms available to the courts to evade the rule. The purpose of this article is to examine the common law mechanisms that had been utilized or referred to by the Malaysian courts to circumvent the privity rule and determine whether the present legal position is satisfactory.

The common law mechanisms discussed in this article include (i) liberal construction as to who is a party to the contract, (ii) collateral contracts, (iii) agency, (iv) trust (v) tort or negligence, (v) estoppel and (vi) remedies for breach of contract.

2. Difficulties Created by the Privity Rule to Contracts Made for the Benefit of Third Parties

There are two classic cases[9] which neatly illustrate the difficulties caused by the application of the privity rule to contracts made for the benefit of third parties. The first case discussed is *Tweddle* v *Atkinson*,[10] where a contract was made between the plaintiff's father and his future father-in-law (defendant) to make payments of money to the plaintiff upon his marriage. It was stated in the agreement that the plaintiff "has full power to sue the said parties in any court of law or equity for aforesaid sums hereby promised and specified." Both the original contracting parties had passed away and the defendant's administrator of estate did not fulfil the contractual obligation of paying a sum of money to the plaintiff. The plaintiff brought an action to claim payment intended for him under the contract. The plaintiff stated that he had ratified and assented to the agreement shortly after the agreement was created.

The court held that the plaintiff's action must fail because he was not a party to the contract and consideration of the contract did not move from him. It is very clear that the outcome of this case was inconsistent with the contracting parties' intention as evidenced by the term of the agreement allowing the plaintiff to enforce the contract.

In *Beswick* v *Beswick*,[11] the deceased transferred his business of a coal merchant to his nephew in return for the nephew's promise that the deceased would be appointed as a consultant to the said business and after his death, the nephew would pay annuity to the deceased's wife. After the death of the deceased, the nephew refused to make payments to the widow after making the first payment. The widow brought an action against the nephew in her capacity as administratrix and also in her personal capacity for specific performance of the agreement. The House of Lords in a unanimous decision held that the widow could not enforce the contract in her personal capacity even though the contract was clearly intended to benefit her because she was not privy to the contract.[12]

3. Liberal Construction as to who is a Party to the Contract

If the courts adopt a more liberal interpretation of the contract and decide that a third party acquires the status of a contracting party, he can then enforce the contract. In Malaysia, the determination of the issue as to who is a party to a contract rests generally on the participation in the formation of contract and construction of the terms of contract. A person who participates in the contract in any capacity other than that of the promisor and promisee is not considered to be a contracting party.[13] The fact that the performance of the contract is intended for a third party is not important.[14] Thus, a third party who does not participate in the formation of the contract or named as a party to the contract is not entitled to enforce the contract.

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[8] Insurance Act 1996 (Act 553) involving life insurance contracts where the insured's spouse and children are the beneficiaries, Road Transport Act 1987 (Act 333) involving compulsory motor insurance policy for road accidents, Civil Law Act 1956 (Revised 1972) (Act 67) in relation to assignments, Bills of Exchange Act 1949 (Revised 1978) (Act 204) on enforceability of negotiable instruments by a third party and Consumer Protection Act 1999 (Act 599) for situations involving defective products.

[9] These two cases had been referred to in Malaysian judicial decisions.

[10] (1861-73) All ER 369.

[11] [1968] AC 58.

[12] Nonetheless, as widow in her capacity as the administratrix of the deceased's estate was entitled to an order for specific performance to compel the nephew to perform his obligation under the contract.

[13] *Borneo Housing Mortgage Finance Bhd* v *Personal Representatives of the Estate of Lee Lun Wah Maureen* [1994] 1 MLJ 209.

[14] *Punca Klasik Sdn Bhd* v *Foh Chong & Sons Sdn Bhd* [1998] 1 CLJ 601.

Nonetheless, the High Court in *Parimala a/p Muthusamy* v *Projek Lebuhraya Utara-Selatan* adopted a very liberal approach in determining who are parties to the contract.[15] In *Parimala*, the plaintiffs were passengers in a motorcar driven by the deceased along the highway at the time of accident. The deceased died on the spot after hitting a stray cow which had found its way to the highway through a breach in the fencing system. The plaintiffs claimed damages for injuries that they suffered as a result of the accident. The High Court allowed the plaintiffs' claim based on the common law tort of negligence[16] and breach of statutory duty.[17] However, Suriyadi J went on to hold that there was also a breach of contract by the defendant. The moment a ticket was extracted at the toll gate, a contract was struck between the plaintiffs and the defendant. There was an implied warranty that the highway would be safe for the use of the deceased and the plaintiffs.

Syed Alsagoff has rightly pointed out that it is difficult to understand how the plaintiffs were in a contractual relationship with the defendant.[18] Following the facts of *Parimala*, the deceased who purchased the toll ticket was clearly one of the contracting parties. On the contrary, the plaintiffs had done nothing to indicate that they were parties to the contract. Neither could it be argued that the deceased and the defendant intended the plaintiffs to be parties to their contract. Hence, it is not surprising that there is no subsequent case which applies *Parimala* although it was referred to without disapproval in *Mohamad Khalid bin Yusuf* v *The Datuk Bandar Kuching Utara*.[19]

It is submitted that the courts in deciding whether to elevate the status of a third party to that of a contracting party should take into account the contracting parties' intention. Only if the contracting parties intend the third party to enjoy the status of a contracting party, should it be justified for the courts to do so. Otherwise, it will amount to a situation where the contracting parties are unable to determine the scope of their liability. This goes against one of the hallmark characteristics of a contract, to respect the freedom of contract of the contracting parties.

4. Collateral Contracts

The utility of collateral contracts in assisting the third party to evade the doctrine was acknowledged by Abdul Malik Ishak J in *Oriental Bank Bhd* v *Uniphoenix Corp Bhd*[20] where the learned judge stated that "The collateral contract provides a means of avoiding the rule as to the privity of contract."[21] The third party argues that a collateral contract is created alongside the main contract entered into by the promisor and promisee. The parties to the collateral contract are the promisor and the third party. The promisor promises the third party that he will perform the main contract. If the promisor fails to perform the main contract, the third party is entitled to sue him for breach of the collateral contract. However, in order to invoke the creation of a collateral contract, the third party must provide consideration and prove that the promisor and himself intend to create legal relations. These two requirements prove to be hurdles to third parties especially in situations where they are not aware that a contract has been created for their benefit or that no communication passes between them.

5. Agency

The utilisation of the agency mechanism[22] to evade the privity rule involves the promisee acting as an agent on behalf of the third party whom he intends to benefit when he enters into the contract with the promisor. As such, the third party is entitled to enforce the contract against the promisor. In *The Golf Cheque Book Sdn Bhd* v *Nilai Springs Bhd*,[23] Gopal Sri Ram JCA stated that:

> But it is central to the doctrine of privity of contract that the parties to the contract are contracting on their own behalf and not as the agent of some third party, be that third party a

[15] [1997] 5 MLJ 488. 'Projek Lebuhraya Utara-Selatan' refers to the North-South Highway Project in English.
[16] In *Parimala*, despite having knowledge that the area had experienced broken fences where animals had escaped and strayed on to the road and being aware of the potential dangers, the defendant had not found it fit either to take extra measures or give special attention to that spot to alleviate any disaster. Thus, the defendant was liable for tort of negligence for the injuries suffered by the plaintiffs.
[17] The statutory duty under the tort of negligence was imposed based on the duties imposed by the Highway Authority Malaysia (Incorporation) Act 1980, s.11(1) and the Road Transport Act 1987, s.88.
[18] Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia*, 2nd Edition, (MLJ, 2003) at 149.
[19] [2007] 5 MLJ 414 at 427-428.
[20] [2005] 7 MLJ 315.
[21] At 332 (*Oriental Bank*). The device of collateral contract is a well-established principle in Malaysia. It was discussed in *Tan Swee Hoe Co Ltd* v *Ali Hussain Bros* [1980] 2 MLJ 16; *Kluang Wood Products Sdn Bhd* v *Hong Leong Finance Bhd* [1994] 4 CLJ 141; *Foo Lian Sin* v *Ng Chun Lin* (CA) [2006] 1 MLJ 457; *Bank Bumiputra Bhd* v *Malek & Joseph Au* [1995] 4 MLJ 251.
[22] Agency is governed in Part X of Contracts Act 1950 (Revised 1974) (Act 136).
[23] [2006] 1 MLJ 554.

> disclosed or an undisclosed principal. Because it is a well established principle that agency is an exception to the privity doctrine. (emphasis added)[24]

The agency mechanism was applied in a number of cases by Malaysian courts to sidestep the privity rule.[25] For instance, in *The Viva Ocean*,[26] a dispute arose due to the damage of a cargo. The fault was attributable to the shipowner who argued that it was not liable as it was not privy to the contract of carriage entered into by the cargo owner and the carrier. It was held by the High Court that the shipowner could be sued as the carrier entered into the contract as an agent on behalf of the shipowner. This was due to a clause in the contract of carriage which read as follows:

> IDENTITY OF CARRIER: If the ship is not owned by or chartered by demise to Dooyang Line Company Ltd or the line or company by or on behalf of whom this Bill of Lading is issued (as may be the case notwithstanding anything that appears to the contrary), this Bill of Lading shall take effect only as a contract with the Owner or demise Charterer as the case may be as principal made through the agency or said carrier or line, who acts as agent only and shall be under no personal liability whatsoever in respect thereof.

The agency principle is also relied upon in circumstances where the third party is seeking to rely on exclusion clauses found in contracts to which he is not privy to. In *Ramachandran a/l Mayandy* v *Abdul Rhaman bin Ambok*,[27] Abdul Malik Ishak J in explaining the liability of a principal for the tortious act of its agents stated that the principal can rely on the exclusion clause in a contract entered into by the agent which limits the tortious liability of the agent as decided in *Scruttons Ltd* v *Midland Silicones*.[28] In *Midland Silicones*, Lord Reid held that a third party can rely on an exclusion clause in a contract to which he is not a party to if the following requirements are satisfied:

> (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.[29]

Lord Reid's judgment as quoted above (hereinafter referred to as Lord Reid's principle of agency) has led to the use of Himalaya Clauses intended to allow third parties to a contract of carriage of goods to rely on its terms to defend themselves in an action brought against them.

In *ABDA Airfreight Sdn Bhd* v *Sistem Penerbangan Malaysia Bhd*, Abdul Malik Ishak J in the addendum written in this case stated that:

> Where, however, the contract contemplates that the carrier will continue to have some responsibility for the goods after the completion of the carriage, i.e. as bailee, any immunities from liability conferred by the contract may operate to protect him in his capacity as bailee, and may extend to protect, in appropriate cases, his servants or agents (Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd, The New York Star [1980] 3 All ER 257. (emphasis added)[30]

It is unclear as to the scope of the Lord Reid's principle of agency applicable in Malaysia. In England, the use of the Himalaya Clauses is limited to contracts of carriage of goods only. In *Ramachandran*, Abdul Malik Ishak J had referred to *Midland Silicones* without any restriction to the scope of this principle, thereby suggesting that it has a wider application in Malaysia, particularly, where the facts of *Ramachandran* did not involve any

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[24] At 559 (*Golf Cheque*).
[25] *Interschiff Schiffahrtsagentur Gmbh* v *Southern Star Shipping & Trading Pte Ltd*. [1984] MLJ 342; *The Viva Ocean* [2004] 2 AMR 284; *Wong Yan Mok* v *Indo-Malaya Trading Co* [1975] MLJ 147; *Tara Rajaratnam* v *Datuk Jagindar Singh* [1983] 2 MLJ 127 and *Anika Insurance Brokers Sdn Bhd* v *Public Bank Bhd* [2004] 6 MLJ 268.
[26] [2004] 2 AMR 284. This case involved imposition of burden to a third party via the principle of agency.
[27] [1997] 4 MLJ 237, at 246. The facts of this case do not deal with reliance of third parties on an exclusion clause.
[28] [1962] AC 446.
[29] At 474 (*Midland Silicones*).
[30] [2001] 3 MLJ 641 at 704.

contracts of carriage of goods. Yet, this case alone could not be a good indication that Lord Reid's principle of agency is applicable to all types of contracts.

6. Trust

The trust mechanism is one of the more popular mechanisms utilised by the Malaysian courts in circumventing the privity rule. The promisee acts as the trustee who enters into a contract with the promisor for a third party. If the promisor breaches the contract, the promisee can sue the promisor for breach of contract and recover the losses suffered by the third party. If the promisee fails to sue the promisor, the third party can enforce the contract against the promisor by joining the promisee as a defendant.[31]

One of the requirements to prove the existence of a trust is to prove that there is an intention to create a trust (certainty of intention). It is not necessary for the settlor to use the 'word' trust. The settlor does not need to know that he is creating a trust at the time it is created as long as the effects that he intends are similar to the effects of a trust[32] that is he intends to divest ownership in the subject matter of the trust to the beneficiary. However, a mere intention to benefit a third party is insufficient.[33] The intention to create a trust can be expressed or inferred.

In Malaysia, the courts sometimes stress on the need to find a clear express intention of the contracting parties to create a trust. At other times, they could easily determine the existence of an intention to create a trust based on the intention of the contracting parties to benefit the third party. This inconsistency is illustrated in a number of cases.

In *Malaysian Australian Finance Co. Ltd.* v *The Law Union & Rock Insurance Co Ltd*,[34] the applicant was the owner of a motor vehicle (caterpillar tractor) who entered into a hire-purchase agreement with Choong. Choong entered into a contract for an insurance policy with the respondent to insure the tractor against losses as required under the hire-purchase agreement. The insurance policy contained a clause which acknowledged that the applicant was the owner of the motor vehicle insured in the insurance policy and any money payable under the policy shall be paid to the owner. An issue arose whether the owner had the right to institute a claim in its own right to recover damages for the loss of the tractor against the respondent as the contract of insurance was created by Choong and the respondent.

It was held that the owner was entitled to make the claim on the insurance contract. The owner's right under the contract of insurance was "co-extensive" with the rights of the hirer who contracted with the respondent. This conclusion was reached on the basis that the owner was a party to the contract of insurance. Alternatively, if the owner was not a party to the contract, the trust mechanism was applicable to assist him. Mohamed Azmi J relied on the Halsbury's Laws of England,[35] which stated that:

> There may be a trust of a contract. If one of two contracting parties contracts expressly as trustee for another person, that third person can enforce the trust. A clear intention to create such a trust must be shown to render it enforceable. (emphasis added)[36]

It was held that the respondent should be regarded as a trustee or agent for the owner because the insurance policy was created for his benefit. This conclusion was reached as the respondent had promised to pay the proceeds of the insurance to him directly.[37] The learned judge appeared to treat a promise of direct payment to the third party coupled with an intention to benefit him were sufficient to create a trust. This seems to be in line with the old English cases such as *Tomlinson* v *Gill*,[38] *Gregory and Parker* v *Williams*,[39] *Fletcher* v *Fletcher*[40] and

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[31] *Vandepitte* v *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70 (PC).
[32] Hayton, David and Charles Mitchell, *The Law of Trusts and Equitable Remedies*, 12th Edition, (Sweet & Maxwell, London, 2005) at 154; Martin, Jill E., *Hanbury & Martin: Modern Equity*, 17th Edition, (Sweet & Maxwell, London, 2005) at 95.
[33] Wan Azlan Ahmad and Paul Linus Andrews, *Equity and Trusts in Malaysia*, (Sweet & Maxwell Asia, 2005) at 23.
[34] [1972] 2 MLJ 10.
[35] 3rd Edition, Vol 38 at 822.
[36] At 12 (*Malaysian Australian Finance*).
[37] At 12 (*Malaysian Australian Finance*).
[38] (1756) Ambler 330. In this case, the defendant promised a widow that if she allowed him to be the administrator of her husband's estate, he would pay off debts owed by the deceased. The plaintiff, one of the creditors of the deceased, was entitled to sue the defendant for payment of debt as the widow entered into the agreement with the defendant as a trustee for the creditors.
[39] (1817) 3 Mer 582. In this case, Parker owed money both to Gregory and Williams. He agreed with Williams to assign him the whole of his property, if Williams would pay the debt due to Gregory. Williams failed to pay Gregory. Both Gregory and Parker were allowed to sue Williams for breach of contract as Parker was held to be a trustee for Gregory as a result of the contract between Parker and William.

Lloyd's v *Harper*[41] as the terms of the insurance policy created by the insurer and Choong never mentioned about the creation of a trust. The trust device was used to enable the owner to sue. A contrary view can be taken as Mohamed Azmi J also referred to the requirement of proving a clear intention to create a trust. There was no express intention to create a trust in this case but since it dealt with a contract of insurance, it may be easier to infer an intention to create a trust. Yet, this point was not discussed in the judgment.

In *G R Nair* v *Eastern Mining & Metals Co Sdn Bhd*,[42] a case dealing with group insurance policy intended to cover losses suffered due to employees' injuries, it was held that no trust was created between the employer and the employees. As such, the employees had no right to enforce the insurance policy. In discussing the creation of an express trust, the learned judge referred to the English cases such as *Vandepitte* v *Preferred Accident Insurance Corporation of New York, Re Sinclair's Policy*[43] and *Green* v *Russell*[44] which held that an intention to benefit a third party by direct payment of proceeds of insurance policy was not sufficient in creating a trust. These English cases represent the current and stricter approach compared to the old English cases mentioned in the preceding paragraph. Applying these cases to *G R Nair*, since there was no mention of any trust in the insurance policy, no trust was created.[45]

On the contrary, in *Bank Bumiputra Malaysia Bhd* v *Mohamed Salleh*,[46] Gopal Sri Ram JCA expressed the following view in relation to group insurance policy:

> In the absence of an agreement to the contrary, under the ordinary principles that govern the law of trusts, any employee would be able to lodge a claim, as a beneficiary of the policy, against MNI. This would cause great difficulties to the insurer because it will then be faced with a multitude of claims. To avoid such a result, there is inserted in the relevant policy the following clause:
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> > The insurers shall be entitled to treat the insured as the absolute owner of the Policy and shall not be bound to recognize any equitable or other claim to or interest in the Policy.
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> > The effect of this clause is that the person such as the respondent cannot recover anything under the policy from MNI directly. However, the appellant is entitled to receive any benefit due to the respondent. Once received, it will hold the monies as trustee for the respondent. This then is what a group insurance is all about. (emphasis added)[47]

Gopal Sri Ram JCA took the view that employees protected under group policy insurance are beneficiaries under a trust though they do not pay any contribution to the insurance policy. They can sue the insurance company but for the term which prohibits them from doing so. The question is how such trust arises. The learned judge merely supported his argument by relying on the "ordinary principles governing the law of trust" but did not provide any authority for his conclusion. The existing legal authorities seem to point to the other direction. In *Vandepitte* or *Re Sinclair's*, the beneficiary named under the insurance policy failed in his or her attempt to argue that a trust existed. In fact, the learned judged referred to *Re Schebsman*[48] which supports the need to prove a clear intention to create a trust. *G R Nair* was not referred to in *Mohamed Salleh*. In terms of the doctrine of precedent, the Court of Appeal is not bound by a High Court decision. But it will achieve consistency in the law if Gopal Sri Ram JCA had referred to *G R Nair* and provided more explanation to justify the different approach that he took.

Mohamed Salleh was applied in subsequent cases.[49] One such case which deserves a discussion is *Mahfar bin Alwee* v *Jejaka Megah Sdn Bhd*[50] which applied *Mohamed Salleh* to a situation outside insurance cases. In

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[40] (1844) 4 Hare 67. In this case, the settlor created a covenant that upon his death, his personal representatives would transfer a sum of money to the trustees upon trust for his surviving sons. This constituted a valid trust in favour of the surviving son. Accordingly, the son could enforce the covenant.

[41] (1880) 16 Ch 290. In this case, the contract involved was an ordinary contract of guarantee created by a father to guarantee any losses created by his son as an underwriting member of Lloyd's. The son was declared bankrupt and Lloyd's was entitled to enforce the guarantee provided by the father to recover losses suffered by persons who dealt with his son as a trust was imposed and Lloyd's was the trustee for these persons whom the guarantee was intended to benefit.

[42] [1974] 1 MLJ 176.

[43] [1938] Ch 799.

[44] [1959] 2 QB 256. The facts of *GR Nair* were similar to *Green* v *Russell*. The case of *Green* v *Russell* was followed by Abdul Malek J in *Anuar bin Ismail* v *Tan Sri Tan Chin Tuan* [1992] 1 MLJ 155.

[45] Similarly, in *Kishabai* v *Jaikishan* [1981] 2 MLJ 289 and *ESPL (M) Sdn Bhd* v *Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422, the High Court and the Court of Appeal respectively stated that a trust is only created if there is an intention to create a trust. In both cases, the court held that a trust existed as the contract between the parties involved expressly shown that there was an intention to create a trust.

[46] [2000] 2 CLJ 13.

[47] At 15 (*Mohamed Salleh*).

[48] [1944] Ch 83.

[49] *Poominathan Kuppusamy* v *Besprin Stationers Sdn Bhd* [2003] 3 CLJ 118 and *Tan Guat Lan* v *Aetna Univeral Insurance Sdn Bhd* [2003] 5 CLJ 384.

Mahfar bin Alwee, the plaintiff purchased a house from a developer which failed to deliver the house within 24 months as stipulated in the contract. The construction project later fell into the hands of the first defendant who took a project loan from the second defendant to complete construction of the houses. The plaintiff alleged that the first and the second defendants did not protect the plaintiff's interest in the house as the ultimate beneficiary nor complete the construction of the house. It was also alleged that the second defendant had permitted the first defendant to commit a breach of the sale and purchase agreement. The second defendants argued that it was not privy to the sale and purchase agreement and cannot be sued by the plaintiffs. From this perspective, the plaintiff attempted to impose a burden on a third party (second defendant) to the contract. However, the plaintiff contended that his claim against the second defendant was based on the project loan agreement executed by the defendants for the plaintiff's benefit.

Low Hop Bing J in this case refused to dismiss the plaintiff's action against the second defendant. The learned judge stated that:

> In my judgment, the factual background as alluded above does demonstrate that the second defendant is not a complete stranger to the housing project in which the plaintiff is one of the purchasers of one of the houses . . . such project . . . to revive, complete and deliver the houses to the purchasers, who are the ultimate beneficiaries upon completion and delivery of the houses to them including the plaintiff.
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> The project loan agreement was undoubtedly executed for the benefit of, inter alia the plaintiff. It is clear to me that there is a reasonable cause of action based on an implied trust of the plaintiff. Support for my view may be found in the Court of Appeal judgment in Bank Bumiputra Malaysia Bhd v Mohamed Salleh. (emphasis added)[51]

Thus, it was held that the second defendant owed fiduciary duties to the plaintiff to ensure completion and delivery of the house to him. It appears that Low Hop Bing J imposed an implied trust based on the fact that the project loan agreement was made for the benefit of the plaintiff. The intention of the contracting parties to create a trust was not discussed at all. The case did not mention the terms of the loan agreement as to whether the term expressly stated any benefit to the plaintiff. Without such reference, arguably, the plaintiff was an incidental beneficiary.[52] It is difficult to argue that there was a clear intention to benefit the plaintiff specifically.

The Court of Appeal in *Ramli bin Shahdan* v *Motor Insurer's Bureau of West Malaysia*[53] held that an implied trust arose from the contract between the Motor Insurer's Bureau and the Minister of Transport to compensate victims of road accidents where defendants (negligent drivers) were uninsured. PS Gill JCA referred to *Tomlinson* v *Gill* and *Gregory and Parker* v *William* and stated that:

> Against this backdrop we can say with equanimity that when a contract as in our present instance is made between the first respondent and second respondent for the benefit of the appellants, then the second respondent can sue on the contract for the benefit of the appellants, and recover all that the appellants would have recovered as of the contract had been made by the appellant himself.54 Implicit in this proposition of ours, is the fact that if the second respondent fails in his duty, the appellants as beneficiaries under the implied trust, may successfully maintain an action against the first respondent and second respondent as joint defendants. The issue of locus of the appellants to sue, is for purposes of this appeal cadit quaestio.[55]

The first query on the decision of the Court of Appeal in *Ramli Shahdan* is in relation to the requirements to be satisfied in order to create an implied trust. From the above quotation by PS Gill JCA, it seems that all that is necessary to prove is an intention of the contracting parties to benefit the third party. There was no discussion on cases such as *Vandepitte*, *Green* v *Russell* and *Re Schebsman* in PS Gill JCA judgment. It is unlikely that the Minister of Transport in entering the contract with the Motor Insurer's Bureau intends to create a trust for all the possible victims of road accident which fall within the contract. As such, it is possible to argue that the approach taken by PS Gill JCA is similar to the approach taken in *Tomlinson* v *Gill*. It is worthy to note that Gopal Sri Ram JCA who had earlier in *Mohamed Salleh* discussed about the strict approach (no trust will be created unless a clear intention to create a trust is proven) concurred with PS Gill JCA's judgment.

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[50] [2004] MLJU 107.
[51] At 7 and 8 (*Mahfar*) according to the pagination provided by *Lexis.com Research System*.
[52] It should be noted that even in countries which recognise third party rights, an incidental beneficiary is not entitled to sue the contracting parties.
[53] [2006] 2 MLJ 116.
[54] This part of the judgment was very similar to the decision of *Lloyds* v *Harper* although this case was not expressly mentioned.
[55] At 130 (*Ramli Shahdan*).

From the cases explained above, it can be argued that the requirement of an intention to create a trust may be satisfied if the contracting parties intend to benefit the third party. Such cavalier approach may leads to justice as the intention of the contracting parties to benefit the third party is given effect to. However, such approach is undesirable. It is inconsistent with the general law of trust which requires more to be proven other than an intention to benefit the third party. Besides, the inconsistent approach adopted by the courts where in some cases, a stricter approach is adopted in determining the existence of an intention to create a trust leads to uncertainty and confusion in the law.

7. Tort of Negligence

If a third party suffers losses due to the promisor's breach of contract, the former may sue the latter under the law of tort of negligence. In order to succeed, the third party must prove that the promisor owes a duty of care to him which has been breached and caused losses to him which are not too remote. The ability of the tort of negligence to assist the third party increases with the expansion of claims for pure economic loss which is the usual type of loss suffered by the third party when the promisor breaches a contract.

In Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon,[56] the Federal Court held that pure economic losses are recoverable under the tort of negligence but the courts must exercise caution in extending the law to claims of pure economic losses. The Federal Court adopted the three stage test in Caparo Industries plc v Dickman[57] in determining the existence of a duty of care. However, the Federal Court stated that the local courts must also consider s.3 Civil Law Act 1956 where adoption of the English common law must be suitable to the 'public policy' and the 'local circumstances' to decide whether it is fair, just and reasonable to impose a duty of care. Similarly, in Ng Wu Hong v Abraham Verghese TV Abraham,[58] the High Court held that a legal action to recover pure economic loss in tort related to contract can be brought successfully if the various requirements of the tort of negligence can be satisfied.

The major difficulty faced by a third party in relying on the tort of negligence to sue the promisor is in imposing a duty of care owed by the promisor. The law in relation to duty of care is constantly developing. There are different approaches that can be adopted by the courts in determining whether the promisor owes the third party a duty of care. Besides, the issue on whether a duty of care exists depends largely on the facts of each case. The courts may also not in favour to resort to the tort of negligence mechanism to circumvent the privity rule as this amounts to using tort law as a backdoor to claims prohibited by contract law. Although in recent years, there has been more interaction between contract law and tort law, the courts may continue to exercise caution for fear of eroding further the equilibrium between tort law and contract law. The tort of negligence mechanism may also be unsuitable in instances where there is an intentional act or omission in breaching the contract rather than negligence. The scope of the tort of negligence should not be strained merely to reduce the difficulties created by the privity rule.

8. Estoppel

The doctrine of promissory estoppel can be relied on to circumvent the privity rule. The doctrine of promissory estoppel states that a person (A) who has made a representation to another person (B) is not allowed to resile from his representation where B has relied on the representation to his detriment. Once A promises to forgo certain legal rights that he enjoys against B, A is not entitled to assert those legal rights against B.[59]

The doctrine of promissory estoppel can assist a third party to claim a benefit intended for him[60] by the contracting parties if the promisor has represented to him about the benefit. If the third party has relied on the representation and it is unconscionable to allow the promisor to resile from his promise, the doctrine of promissory estoppel will prevent the promisor from going back on his words. Thus, although the third party is not privy to the contract made between the promisor and the promisee, he is still entitled to enforce the benefit against the promisor. However, for the doctrine of promissory estoppel to effectively circumvent the privity rule, this will

[56] [2006] 2 MLJ 389. *Majlis Perbandaran Ampang Jaya* was followed by the Federal Court in *The Co-Operative Central Bank Ltd* v *KGV & Associates Sdn Bhd* [2008] 2 MLJ 233.

[57] [1990] 1 All ER 568. The three requirements are firstly, the harm suffered must be reasonably foreseeable, secondly, there must be sufficient proximity between the plaintiff and the defendant and thirdly, it must be fair, just and reasonable to impose a duty of care.

[58] [2007] 1 LNS 138.

[59] This refers to the doctrine of promissory estoppel as propounded by the House of Lords in *Hughes* v *Metropolitan Railway Co* [1877] 2 App Cas 439, which was again popularised by Denning J in *Central London Property Trust Ltd* v *High Trees House Ltd.* [1947] KB 130.

[60] The possibility of utilisation of the doctrine of promissory estoppel in by-passing the doctrine of privity had been stated by Mason CJ and Wilson J in *Trident General Insurance Co Ltd* v *McNiece Bros Pty Ltd* [1988] 165 CLR 107 at 140 and *Principles of Contract Law* by Paterson, J, Andrew Robertson and Peter Heffey (Australia, Lawbook Co, 2005) at 187.

entail the use of this doctrine to create a new cause of action for the third party where none exists before. At first sight, this approach goes against one of the limitations of the doctrine of promissory estoppel, that it can only be used as a 'shield' and not as a 'sword'. It must be noted that a plaintiff is entitled to utilise this doctrine but only in relation to the establishment of the requirements to a cause of action which he has against the defendant.[61] However, due to recent cases, it may now be possible to rely on the doctrine of promissory estoppel to create a cause of action for the plaintiff.

In Waltons Stores (Interstate) Ltd v Maher,[62] the Australian High Court has for the very first time decided that the doctrine can be used to create a cause of action for the plaintiff to sue the defendant. In Waltons Stores, Maher, the owner of a commercial property negotiated with Waltons, a retailer who was interested to lease the building to be built on the land which was specially suited to Waltons' need as a retailer. Maher assumed that a valid contract for the lease would be created[63] and demolished the existing building on the land and started building operations. After a few months, Waltons refused to enter into a lease agreement. Maher could not bring an action for breach of contract as no valid contract was created between them. Thus, Maher brought an action against Waltons relying on the doctrine of estoppel to prevent Waltons from denying that a valid contract was created. One obstacle faced by Maher was that he was relying on the doctrine to create a cause of action which did not exist in the first place.

The High Court of Australia held that Maher was entitled to succeed and granted damages to him. Three of the five judges (Mason CJ, Wilson and Brennan JJ) held that the doctrine of estoppel can be relied on to create a cause of action. According to Brennan J, this would arise if:

> . . . the promisor induces the promisee to assume or expect that the promise is intended to affect their legal positions and he knows or intends that the promisee will act or abstain from in reliance on the promise, and when the promisee does so act or abstain from action and the promisee would suffer detriment by his action or inaction if the promisor were not to fulfil the promise.[64]

Mason CJ and Wilson J (joint judgment) held that departure from the rule that estoppel doctrine is used as a shield is justified only if it is unconscionable to allow the representor to turn back on his promise. If this is proven, the doctrine can be used to enforce voluntary promises. To prove such unconscionability, the learned justices provided the following guideline:

> As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more is required. Humphreys Estate suggests that this may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption to his detriment to the knowledge of the first party.[65]

Waltons had been referred to in numerous decisions in Malaysia, notably the case of *Boustead Trading (1985) Sdn Bhd* v *Arab-Malaysian Merchant Bank Bhd*,[66] where Gopal Sri Ram JCA[67] had undertaken the task to liberalise the doctrine of promissory estoppel in Malaysia. There is a Malaysian case which had directly applied *Waltons*. In *Curvet Transport SA* v *Shapadu Trans-System Sdn Bhd*,[68] the plaintiffs negotiated with the defendant to provide transportation services (carriage of goods by sea) to the defendant. The defendant's group manager and senior manager had accepted the plaintiffs' quotation and informed them that the contract would be awarded to them save for some formalities to be fulfilled. The defendant was informed that a vessel was on its way to South Korea to be ready for loading of the first shipment. The defendant later awarded the contract to another company on the reason that the plaintiffs did not meet the pre-requisite that the successful contracting party must be a Bumiputra company to be first registered with the Ministry of Finance, Malaysia.

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[61] This is seen in a number of cases. First, in *Teh Poh Wah* v *Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 where estoppel was pleaded to prevent the defendant from denying that she had given authority to the husband to enter into transactions on her behalf. In *Rakka @ Kanniah a/l Samayan* v *Subramaniam* [2004] 7 MLJ 198, estoppel was used to prevent the defendant from denying the right of the plaintiff to rely on a particular document to establish the plaintiff's case.

[62] (1988) 164 CLR 387.

[63] This assumption was based on a form of Deed of Agreement for lease which was sent by Waltons' solicitors to Maher. Maher's solicitor also sent the Deed which was duly executed by Maher stating that he would start the building operations in a few days' time in order to meet the dateline set by the agreement.

[64] At 424 (*Waltons*).

[65] At 406 (*Waltons*).

[66] [1995] 3 MLJ 331.

[67] JCA refers to Judges of Court of Appeal.

[68] [1999] 4 MLJ 150.

It was held by Kamalanathan Ratnam J that there was indeed a concluded contract between the plaintiffs and the defendant. Alternatively, if there was no concluded contract between the parties, the defendant was clearly estopped and precluded from denying that there was a valid and concluded binding contract between the parties. The learned judge arrived at his decision by relying on *Waltons* (which bore similar facts to the present case) and observed that:

> The Waltons Stores case was cited by our Federal Court in the case of Boustead wherein Gopal Sri Ram JCA stated that the doctrine of estoppel had been applied in the Waltons Stores case to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent and to create binding obligations where none previously existed. (emphasis added)[69]

In *Curvet*, the High Court awarded damages to the plaintiff to compensate for the plaintiff's expectation loss as a result of the defendant's breach of contract.[70] Damages awarded to the second plaintiff comprised of the loss of commission which would be earned if there was no breach of contract by the defendant.

In *Tropical Profile Sdn Bhd* v *Kerajaan Malaysia (Jabatan Kerja Raya)*,[71] Low Hop Bing J held that in situations where no privity existed between the plaintiff and the defendant, the former can still sue the defendant if there are facts which raises the application of the doctrine of promissory estoppel. This supports the contention that the third party can use the doctrine to create a cause of action to enforce the benefit intended for him. Some academics also come to this conclusion after reviewing *Boustead*.[72]

Yet, *Curvert* and *Tropical* are merely High Court decisions. As such, the legal position in Malaysia is not settled and awaits further clarification from the higher courts. In the recent case of *Sanmaru Overseas Marketing Sdn Bhd* v *PT Indofood International Corp*,[73] Abdul Malik JCA referred to *Boustead* and stated that:

> While the Court of Appeal in Low v Bouverie [1891] 3 Ch 82 establishes the principles that estoppel cannot be used as a cause of action but merely serves as a rule of evidence, the Australian High Court in Waltons Stores (Interstate) Ltd v Maher and another (1988) 76 ALR 513 goes to the extent of allowing a plaintiff to utilise estoppel as a substantive cause of action. The Federal Court in Boustead makes no mention of whether estoppel can constitute a substantive cause of action notwithstanding the fact that it cited the Waltons Stores case in its judgment. Lord Wright, delivering the judgment of the Privy Council in Canada and Dominion Sugar Company, Limited v Canadian National (West Indies) Steamships, Limited [1947] AC 46 at p 55, succinctly said:
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> > There was, perhaps, a time when estoppels were described as odious and as such were viewed with suspicion and reluctance. But in modern times the law of estoppel has developed and has become recognised as a beneficial branch of law. That great lawyer Sir Frederick Pollock has described the doctrine of estoppel as 'a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence'. (emphasis added)[74]

Abdul Malik Ishak JCA in Sanmaru took a narrow interpretation of *Boustead* in relation to the issue as to whether the doctrine of promissory estoppel can create a new cause of action. However, it can be contended that the learned agreed that a more flexible approach should be taken in applying the doctrine, thereby suggesting that the doctrine can create a new cause of action if the facts of the case warrants such necessity. Unfortunately, the learned judge did not clarify the position that he took in this matter.

It must be noted that in relation to situations where the promisor makes a promise to the third party that direct payment will be made to him, the High Court in *Malaysian Australian Finance* held that the third party can

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[69] At 161 (*Curvet*).

[70] Kamalanathan Ratnam J relied on promissory estoppel as an alternative argument to decide in favour of the plaintiffs. Damages granted to the first plaintiff comprised of the loss of profits which the plaintiff would obtain if the defendant performed the contractual obligation. Damages awarded to the second plaintiff comprised of the loss of commission which would be earned if there was no breach of contract by the defendant.

[71] [2008] 1 CLJ 513.

[72] Matta, A.M, "Promissory Estoppel: The Unchained Doctrine" [1999] 2 *MLJ* lxviii-cii and George, Mary, "Equitable Estoppel: Is 'Palm Tree Jusctice Back?" (1999) *Journal of Malaysian Comparative Law* 105-132.

[73] [2009] 2 MLJ 765.

[74] At 800 (*Sanmaru*).

enforce the contract, applying the legal position in India.[75] The third party's right is justified in the doctrine of estoppel.[76]

Even if the third party is entitled to utilize the doctrine of promissory estoppel to enforce the promise against the promisor, there are other complications involved. Firstly, third parties may not be able to prove that the promisor makes a promise to them. Thus, promissory estoppel is not applicable where the third party does not know that a contract has been made for his benefit or where the third party knows the existence of such contract but no promise is made to him. Knowledge about the existence of the contract may come from the promisee who may even makes a promise to the third party that a contract is created for his benefit. This is likely as usually there is connection between the promisee and the third party which justifies the making of the contract for the latter's benefit. Here, the third party has no cause of action as the promisee is not the party who breaches the promise. The promisor cannot be made liable through the doctrine as he has made no promise to the third party unless it could be argued that the promisee is acting as his agent, which is unlikely in most of the situations. Secondly, there are uncertainties as to the scope of unconscionability protected by the doctrine of promissory estoppel. Particularly, it is questionable whether the courts will decide that the promisor (representor) has acted unconscionably if the third party does not suffer any detriment or that there is no change of position by the third party as a result of the promise.

9. Remedies for breach of contract

If the promisor breaches a contract made for the benefit of third parties, the promisee is entitled to sue him for breach of contract and apply to court for specific relief (specific performance and injunction). This will ensure that the contract is performed for the benefit of the third party. In Malaysia, specific performance and injunction are governed by the Specific Relief Act 1950 (Revised 1974) (Act 137) (hereinafter referred to as 'SRA 1950'). In *Ramli bin Shahdan* v *Motor Insurer's Bureau of West Malaysia*,[77] the Court of Appeal unanimously held that a promisee is entitled to specific performance to enforce a contract made for the benefit of third parties. The Malaysian courts are willing to exercise their discretion where necessary to grant specific performance to do justice in cases that come before them.[78] The injustices created by the privity doctrine to contracts made for the benefit of third parties will be taken into account by the courts. Although the cases deal mostly with specific performance, the same approach will be taken in dealing with injunction since the principles governing these two remedies are similar.[79]

10. Evaluation

Despite the fact that there are a number of common law mechanisms to redress the problems created by the privity rule, it is submitted that the existing position in Malaysia in relation to the privity rule is unsatisfactory due to the following reasons. The scope of each of the exception is limited and cannot apply to all contracts made for the benefit of third parties. The rationale of recognising third party rights is to respect the contracting parties' intention. However, the common law mechanisms will not apply merely because there is an intention to benefit the third party. To invoke the application of any of these mechanisms, the separate set of requirements of each of the

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[75] *Muddala Venkatareddi Naidu* v *Dharwada Venkata Varaha Varasimharao* AIR 1935 115; *Ramaswami* v S.S. *Krishnasa & Sons*, AIR 1935 Mad 905; *Mst. Kali* v *Ram Autar*, AIR (32) 1945 Oudh 65; *B.K. Mukherjee* v *Manoranjan Mitra* AIR (29) 1942 Calcutta 251.

[76] This method is labelled as 'Acknowledgement and Estoppel' in *Mulla Indian Contract & Specific Relief Acts*, 12th Edition, (Butterworths, 2001) at 129.

[77] [2006] 2 MLJ 116.

[78] Abdul Malik Ishak J held in *Mawar Awal (M) Sdn Bhd* v *Kepong Management Sdn Bhd* [2005] 6 MLJ 132 at 141 that "The relief of specific performance is liberally and generously granted so long as the circumstances warrant it." Abdul Malek Ahmad FCJ (Federal Court Judge) in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd* v *Arab-Malaysian Prima Realty Sdn Bhd* (FC) [2003] 3 MLJ 257, at 272-273 stated that "Being essentially equitable relief (specific performance), there is a **fairly wide discretion** available to the trial judge to determine where the balance of justice lies when making up his mind" (emphasis added). The 'balance of justice' consideration is also adopted by the courts in determining whether to grant an interlocutory injunction or in cases involving breach of negative covenant; *Medlux Overseas (Guersey) Ltd* v *Faber Medi-Serve Sdn Bhd* (CA) [2001] 4 CLJ 192.

[79] According to s.52(2) SRA 1950, the court shall be guided by the rules and provisions contained in Part II of SRA 1950 (these rules govern the granting of specific performance). There is no reported case which discusses the possibility of the injunction remedy to circumvent the harshness of the privity doctrine.

mechanisms has to be satisfied.[80] Due to the various requirements imposed by the common law mechanisms, the law discriminates between different third parties who are intended to benefit from the contract. For instance, in relation to some mechanisms such as collateral contract and promissory estoppel, lack of knowledge of the existence of the contract will defeat the application of these two mechanisms.

In addition, the expansion of the scope of the common law mechanisms also strains the proper scope of the common law mechanisms and causes artificiality. Put simply, the common law mechanisms are not originally intended to resolve the difficulties created by the privity rule. These mechanisms are creatively manipulated by the courts in the given circumstances to ensure that the contracting parties' intention and fairness are achieved. Uncertainty in the law will ensue as there will be guesswork done on how the courts will decide a case relating to contracts made for the benefit of third parties i.e., which type of mechanism will be used and the scope given to the mechanism. From the analysis of cases dealing with the privity rule in Malaysia, none of the cases involved any argument to persuade the courts to create further exceptions to the privity rule which is specially designed for creating third party rights based on the contracting parties' intention. Perhaps, there is a fear of wastage of cost and time in bringing such arguments but the courts are not willing to make any changes to the law. Unfortunately, at present, there is no legislative attempt to institute any reform to the privity rule similar to that undertaken by the English Parliament which culminated into the enactment of the Contracts (Rights of Third Parties) Act 1999.

11. Conclusion

In conclusion, the common law mechanisms that are currently available to the Malaysian courts in their encounter with the privity rule are only applicable in limited situations. In a case involving a contract made for the benefit of third parties, the courts are still tied by the shackles of the privity rule. Third parties will be turned away and prevented from enforcing contracts made for their benefit if their cases do not fall within any of the established common law mechanisms. The application of these mechanisms, particularly the trust mechanism, is far from satisfactory. From an examination of the judicial decisions in Malaysia, there is yet to be any decisions which create a specific exception to the privity rule as seen in Australia[81] and Canada.[82] Nonetheless, the best solution to the present difficulties caused by the privity rule is to undertake a statutory reform to allow for the creation of third party rights. This argument is based on two main reasons. First, the courts may be reluctant to undertake a judicial reform of the privity rule for fear of usurping the legislative powers of the Parliament. Secondly, even if the Federal Court, the highest court in Malaysia is committed to make changes to the privity rule, the opportunity to do so may be hard to come by as cases involving contracts made for the benefit of third parties may not reach the Federal Court.

[80] For instance, to apply the trust mechanism, the third party must prove that the three certainties such as certainty of intention, certainty of subject matter and certainty of objects.
[81] *Trident General Insurance Co Ltd* v *McNiece Bros Pty Ltd* [1988] 165 CLR 107.
[82] *London Drugs Ltd* v *Kuehne & Nagel International Ltd* [1992] 3 SCR 299.