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Remedies For Breach Of Implied Guarantees In A Contract Of Supply Of Services Under The Malaysian Consumer Protection Act 1999

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ABSTRACT

The inclusion of provisions relating to a supply of services in the Consumer protection Act 1999 (the CPA) is very significant in the development of the law of services which previously has been left behind compared to the law on sale of goods. With the main aim of protecting consumers against sub-standard, defective or ineffective services, the CPA creates a number of statutory implied guarantees. The Act also introduces an entirely different remedial scheme for breach of the guarantees which are supposed to offer new and more practical remedies to consumers. Adopting the method of content analysis, this paper focuses on examining the nature and types of remedies available for consumers in cases of services failure. It analyses the extent to which these remedies are adequate in compensating consumers' loss, dissatisfaction or disappointment. The central of discussion is on Part IX of the CPA which deals with the rights of consumers against suppliers in respect of guarantees in the supply of services. A new regime of statutory remedies appears to be more practical and useful to the consumer particularly the right to demand the supplier to rectify the failure in the services. Nevertheless, after scrutinizing the CPA in depth, it is discovered that the remedial scheme is hampered by many limitations and is not necessarily more favourable to the consumer in all cases. The paper thus offers some recommendations to remedy the present flaws in the CPA for the betterment of consumers in Malaysia.

Keywords: Law, consumer protection, remedies, supply of services.

Introduction

Malaysian legal systems have provided various rights to consumers in cases of defective and unsatisfactory services which can be found under contract law, tort law as well as the Consumer Protection Act 1999 (CPA). The most common remedies claimed by consumers are performance of the service, refund of the money paid and damages. The first two remedies are usually claimed under contract laws. In fact remedies such as specific performance and an award of an agreed sum are available only for breach of contract and are not available in tortious claims (Burrows, A., 1994). However, the main drawback of the law of contract is that it only provides for the remedy of specific performance or remedy of repairing the defect in limited circumstance where damages are inadequate (*Falcke v Gray*) and the performance does not require constant supervision by the courts (*Ryan v Mutual Tontine Westminster Chambers Ass*). In the case of contract of services, it is difficult to think of any case where services can be considered as unique and damages are inadequate in order to award specific performance. On the other hand, in many instances, the consumer wishes to compel the service provider to perform the contract rather than to claim for the monetary compensation. Similarly, where the service provider has performed the work but it is defective and the consumer wishes the service provider himself to remedy the defect.

The CPA that came into force on 15 November 1999 represents a milestone in consumer protection in Malaysia. It has several important provisions, some of which are more beneficial than those found in the law of contract and law of tort since its objective is specifically to protect the interest of consumers. By the enactment of the CPA, it is hoped that all the shortfalls under the contract laws and the tort laws can be remedied including the rights to get redress in cases of services failure. The CPA is applicable to both goods and services but the provisions on services are very significant because previously the laws regulating the service industry seems to be left behind compared to goods. The aim of this paper is to analyse the extent to which the CPA provides adequate remedies to consumers of defective or unsatisfactory services. It first provides an overview of the application of the CPA and follows by a brief discussion on the guarantees in a contract of supply of services. The rest of the paper devotes to the discussion on remedies under Part IX of the CPA with special emphasis on their adequacy and practicality. Some references will be made to the application and development of the law in

this area in other jurisdictions such as New Zealand, Australia and United Kingdom for the purpose of comparison.

The Application of the Consumer Protection Act 1999:

The CPA is only applicable to consumer services transactions which satisfy certain requirements. The main requirements are that the party injured must be a consumer, a service must be among the services covered under the Act and it must be supplied by a commercial supplier. Section 3(1) defines a consumer as “ a person who -

(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;”

It is clear from the definition that a consumer can either be the one who buys or uses the services. The ideal part of the definition is that there is no contractual relationship required between the consumer and the service provider. Therefore the CPA imposes new statutory obligations on suppliers of services to protect the end-users of their services regardless of whether they are their customers or not. However this obligation does not extend to professionals who are regulated by any written law and healthcare services providers since they are outside the ambit of the CPA (Section 2(2)).

Under the CPA a supplier is a person who supplies goods or services in trade (Section 3(1)). The definition also includes several other persons as suppliers namely, those who become a transferee (assignee) either by assignment or operation of law, a financier who provides finance to a consumer, a seller who assigns goods to a financier and an agent where that other person is not supplying in trade. The employer is also ‘vicariously liable’ when his employee does not exercise reasonable care in supplying the services. Therefore, the definition of supplier is extensive enough to cover lots of situations. Services is defined in section 3(1) of the CPA to include “any rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under any contract but does not include rights, benefits or privileges in the form of the supply of goods or the performance of work under a contract of service;”

It is evident from the above definition that the term ‘services’ is defined broadly to include ‘any’ contract except in the two occasions mentioned above. Therefore, there are three types of services that are clearly within the ambit of the CPA. Firstly, are pure services which do not result in any tangible products, such as parking and entertainment. Secondly, are services which produce tangible products such as a tailor who produces dresses or a dentist who produces dentures. Thirdly, are services associated with the supply of goods or materials which are normally provided by a skilled tradesman such as a plumber, an electrician and a repairer, all of whom will use some material article in addition to their skill and expertise. However, the definition clearly excludes services which are merely incidental to the supply of goods. Understandably, the rationale behind this exclusion is that it has been covered under Part V and Part VI of the CPA and other law on sale of goods.

Implied Guarantees in a Contract of Supply of Services:

Before any remedies under Part IX of the CPA can be claimed, consumers must establish that the supplier has breached one of implied guarantees under Part VIII. The CPA provides four implied guarantees in respect of the supply of services namely, implied guarantee as to reasonable care and skill, implied guarantee as to fitness for particular purpose, implied guarantee as to time of completion and implied guarantee as to price. Nevertheless, it is not the aim of this paper to discuss thoroughly these implied guarantees since it concerns more with the rights granted to consumers in when these guarantees are breached. Furthermore only guarantee as to reasonable care and skill and fitness for particular purpose are directly concerned with a standard and quality of services. Section 53 imposes on service providers the important duty to exercise a reasonable care and skill in performing the service. They could be in breach of this duty if they performed their services below the skill, competence and diligence of other suppliers who specialize in the same field of services. However section 53 has been criticised for its failure to guarantee that the service will perfectly achieve the desired result since the main concern of the section is the reasonableness of the service provider’s conduct, and not the condition or outcome of his service (Naemah, A, 2004).

This loophole has recently been rectified by the CPA (Amendment) Act 2010 and a phrase “ ...any material supplied in connection with such services will be fit for the purpose for which it is supplied” is added to the section. On the other hand section 53 may now overlap with an implied guarantee under section 54 which requires that the service and any product resulting from the services to be reasonably fit for any particular

purpose and is of such nature and quality that it can reasonably be expected to achieve any particular result. The section seems to place a very heavy obligation on the service provider since he has to guarantee that not only his service would be fit for a consumer purposes but it will also achieve the desired result. However the consumer must make known to the supplier the particular purpose for which the services are required or the result that the consumer desires to achieve. Thus consumers who know precisely what they want and convey detailed instructions to the supplier are entitled to demand perfection under this guarantee. However a service provider cannot be blamed for the failure of the service to achieve the intended outcome if it is caused by factors beyond his control, for example the fault of other persons (not his agent or sub-contractor) or an act of God (section 58).

Remedies for Breach of Guarantees:

The remedies provided against the supplier of services under Part IX are largely parallel with the remedies available under Part VI in respect of supply of goods. However the remedies available will depend on whether the failure in the service is remedial or substantial. In cases of remedial failure such as defective repair of a car, the service provider must remedy the failure within a reasonable time (section 60(1)(a)). If the service provider refuses or fails to remedy the failure within a reasonable time, a consumer may remedy the failure elsewhere and later claim the cost from him. A consumer also has the option of canceling the contract (section 60(3)). A substantial failure is a failure that cannot easily be remedied within a reasonable time to make the product resulting from the services fit for the particular purpose or to achieve the particular result. A failure is also of a substantial character if the product resulting from the services is unsafe (section 62). In such cases, a consumer may cancel the contract or obtain from the service provider damages for any reduction in the value of the product resulting from the services (section 60(1)(b)). In addition the service provider may also be responsible to compensate a consumer for any consequential loss resulting from both types of failure (section 60(2)). The following sections provide detailed discussion on the three remedies that may be claimed by aggrieved consumer for breach of implied guarantees in a contract of supply services; namely rectification of the failure, cancellation of contract and claiming damages in the form of reduction in the value of product and damages for consequential loss.

Rectification of the Failure (Repair):

The CPA brings the law in line with reality by giving consumers practical and preferable remedy in the form of repair or making good of the defect within a reasonable time. Previously, this remedy was a matter of business practice rather than the law. This remedy has advantageous to both parties since the consumer obtains what he has originally contracted for and the supplier eventually obtains the full price. Nevertheless, in some circumstances, it seems unfair to compel a consumer to return to the original supplier to remedy the defects especially in a situation where the consumer has a previous bad experience with the supplier. It can be seen in a New Zealand case of *Norton v Hervey Motor Ltd* where the plaintiff had previously purchased a Commodore from the defendant and when the vehicle was returned for a service check, the vehicle's paintwork was accidentally damaged and it was repaired by the defendant. However she was not satisfied with the repair work and as a result a dispute arose between them. In an attempted resolution, she agreed to purchase a Nissan Navara. However, after 10 days of taking delivery of the Navara, she noticed defects in the vehicle's paintwork. Recalling her previous experience with the defendant, she decided to reject the car. The Court held that the existence of a warranty to repair the defect was readily enforceable and cannot be ignored at the plaintiff's option. The decision seems unfair to the consumer since she has to deal with the same supplier with whom she has lost confidence. Even though the case is one of sales of goods, the same problem could arise in the supply of services.

In contrast, in *Harrison v Ken Stout Motors*, the plaintiff had sent her car to second garage where the engine was again reconditioned. She wanted to cancel the contract with the first garage and claimed refund for the payment that she had already made. The plaintiff had placed considerable reliance upon the New Zealand Consumer Guarantees Act 1993 (CGA) in her claim. The defendant argued that all he was obliged to pay was the cost of rectifying the faulty workmanship and not to refund the money. The Court held that the CGA was not helpful in this case and therefore awarded repayment of contract sum based on the remedies under the law of contract. Although there was no clear explanation why the Court did not apply the CGA, one can see that the remedy of cancellation under the law of contract in certain cases is better rather than asking the defendant to remedy the failure. Therefore, it turns up that the CPA provides weaker remedies compared to the law of contract in this regard and this should not be the case. Comparatively, section 11N(3) of the United Kingdom Supply of Goods and Services Act 1982 (SGSA) provides that the remedy of repairing the failure cannot be imposed if that remedy is disproportionate in comparison to other remedies such as rescission. Therefore, it is submitted that the remedy provided in section 60(1)(a) of the CPA, namely to remedy the defect, should be given to consumers as a matter of option rather than as the principal remedy. Consumers should be allowed to

choose either to ask the same supplier to repair the defect or allow him to go to other supplier of his choice and then claiming from the former the payment for making good of that defect.

The CPA, however, seeks to balance the interests of both parties by specifying that the supplier must remedy the defect within a reasonable time. If he fails to do so, the consumer is given the option of either having the failure repaired elsewhere and obtaining all reasonable costs incurred or cancelling the contract (Section 60(3)(b)). Nevertheless, a reasonable time is a question of fact and there are many reasons that make the repair longer but it may still be regarded as within a reasonable time. It is detrimental to a consumer in the case where the time taken to complete the repair causes inconvenience to him. It is thus more appropriate if the remedy of rectifying the failure to be given only in a situation where it does not cause any inconvenience to the consumer. In addition, there is no clear provision in the CPA as to whether the consumers can be asked to pay extra charges for the cost of replacement materials or spare parts to remedy the defect. Comparing the CPA with the remedies as stated in section 11N of the SGSA (UK), it seems that the latter provides better protection to consumers. It clearly states that the right to remedy the defect must be applied within a reasonable time and it must not cause significant inconvenience to consumers. Even though what constitutes significant inconvenience is also a question of fact, at least there is room for the consumers to set aside this remedy and opt for other remedies. Section 11N also makes it clear that the supplier must bear any cost incurred in remedying the defect and cannot charge the consumer for this. The same provision should be adopted into the CPA to provide better remedies to consumers.

Cancellation of Contract:

Section 60(1)(b) provides that “Where the failure is one that cannot be remedied or is of a substantial character within the meaning of section 62, the consumer may-

- i. subject to section 61, cancel the contract for the supply of the services in accordance with section 63; or
- ii. obtain from the supplier damages in compensation for any reduction in the value of the product resulting from the services below the charge paid or payable by the consumer for the services.”

It is clear that there are two situations which give options to consumers to cancel the contract under the CPA namely; if the failure is one that cannot be remedied or is of substantial character. The instances of substantial failure as stated in section 62 are confined to the failure in ‘the product resulting from the services’. The problem is that there is no definition of the word ‘product’, whether it includes intangible product such as excitement and enjoyment. It seems unreasonable and impractical to confine the meaning of a product in the context of services to material products since most outcomes of services are intangible. Thus, ‘the product resulting from the service’ should be interpreted widely to cover any output or outcome of services in whatever form.

The effect of cancellation is that a consumer shall be entitled to obtain from a supplier a refund (section 64(1)(a)). It seems that the protection is better than the contract law since under the latter there is no hope of recovering anything unless it was established that there was a total failure of consideration. It can be seen in *Hazlinda bte Hamzah v Kumon Method of Learning Centre* in which the appellant was entitled to claim for a partial refund of the payment when she dissatisfied with the services of the learning centre. Gopal Sri Ram JCA, in delivering his judgement acknowledged the fact that the consumers were always in a very disadvantaged position under the contract law and therefore allowed the claim of the appellant for a refund under the CPA even though there was absent a total failure of consideration and she had in fact received some benefit. However cancellation will not take effect until it is made known to the supplier or, where it is not reasonably practical to communicate with the supplier, before the consumer indicates his or her intention to cancel the contract. Unless the contract expressly provides that cancellation is to be in writing, cancellation may be made known either by words or conduct indicating an intention to cancel (section 63).

Nevertheless, the remedy of cancellation is not easily or practically invoked in the service industry since in many occasions the works have been carried out and cannot be easily returned to the supplier. Thus under section 64, a court or the Tribunal may order that the supplier to retain the whole or any part of the money paid or other consideration provided by the consumer. Similarly section 65 gives a court the power, in any proceeding or on an application, to make various orders granting relief if it is just and practicable to do so, including an order to permit a supplier to retain part or all of the money paid in respect of services. Hence where a service has been performed and a consumer has gained benefit or advantage from the service, it is very unlikely that he will get a full refund. It appears that the effect of cancellation is not too great to the consumer since in many occasions he still has to pay for the unsatisfactory services which he has been deemed to receive some benefits from the work done. In this respect the remedy of cancellation under the CPA is comparable with the position under the contract law when the consumer chooses to affirm the contract in the case of fundamental breach. It seems to reflect that the CPA does not provide a salient and a better remedy than those under the contract law in providing compensation to consumers.

Damages:

The CPA provides damages to consumers in the situations where the failure is one that cannot be remedied or is of substantial character within the meaning of section 62. The damages can be in the form of compensation for any reduction in the value of the product resulting from the services (section 60(1)(b)(ii) or compensation for any consequential losses (Section 60(2)).

i) Compensation for any Reduction in the Value of the Product:

In the situation where the failure is one that cannot be remedied or is of a substantial character, the consumer can claim for any reduction in the value of the product resulting from the services below the charge paid or payable by the consumers for the services (section 60(1) (b)(ii)). This is perhaps the most appropriate remedy in cases where a cancellation of the contract is not possible due to the fact that the services have been completed by the supplier. For example, consumers only discovered the 'defect' in the services rendered by travel agents after they came back from a holiday. Obviously there is no way the contract could be cancelled. This remedy allows the consumer to claim the difference between the value of the services and the diminished value of the defective services. Nevertheless, the wordings of section 60(1)(b)(ii) are rather ambiguous. It provides that "the consumer may obtain from the supplier damages in compensation for any reduction in the **value of product resulting from the services** below the charge paid or payable by the consumer for the services." It is not clear whether the word 'product' includes intangible product since the outcome of the services can be in an intangible form such as 'excitement' in the travel, entertainment or recreation services. In addition, the section may also be interpreted to include the reduction in the value of the goods itself. For example, in a situation where the consumer sends his car for a repair which cost him RM300 but due to poor workmanship of the garage, it causes reduction to the value of the car. If the interpretation of the word 'product' also includes 'the goods,' the consumer can only claim reduction of the agreed charge paid or payable by the consumers for the services which is RM300 even though the defect causes the reduction in the value of the car more than this amount. Nonetheless, this should not be taken as a correct interpretation of this provision. Thus, the suggestion is to replace the word 'product' with 'services' which is already defined under the CPA to avoid any confusion in the interpretation.

Another problem in this respect is that by excluding the compensation for reduction in the value of the product in a situation where the supplier has remedied the defect puts a consumer in a detrimental position (Section 60(2)). This is because the CPA is silent on what it means by remedying the failure. The issue arises as to what extent the supplier should remedy the defect? Is it enough just to do the best that he can to make good of the defect? What would happen in the case where the consumer suffers loss through a reduction in the value of the product resulting from the services, even though the supplier has claimed that he has already remedied the defect? For example, due to negligence of the mechanic, the vehicle had involved in an accident and resulted in reduction in the value of the car. The garage may repair the defect as best as he can but in doing so the value of the vehicle may be reduced. In this situation the consumer cannot claim damages for the reduction in the value because of the limitation in section 60(2). Therefore, in order to materialise a better protection to consumers, it is submitted that the limitation should be taken out from the CPA.

ii) Compensation for any Consequential Loss:

The consumer can obtain from the supplier the consequential damages whenever he has suffered loss from the supplier's unjustified failure to perform the services. This remedy is available in all situations and it can be cumulated either when the supplier has remedied the failure under section 60 or when the consumer has cancelled the contract pursuant to section 62. The good part of the provision is that to claim for consequential damages, the requirements are that the loss must be proved to be a result or consequence of the failure. There is no issue of proving 'reasonable foreseeable' damage or damages according to ordinary usual of things. Consequential damages can cover both pecuniary and non-pecuniary loss. Therefore, it includes any physical injury to the consumer, damage to his property, cost of transportation, disappointment, mental distress, inconvenience and loss of wages. In *Harrison v Ken Stout Motors Ltd*, the consequential damages claimed by the plaintiffs were mental distress and loss of wages. In this case, Mrs Harrison purchased the car and registered it under the name of Miss Harrison, her grandchild. Miss Harrison sent the car for reconditioning of the engine to the defendant and there were twelve areas where the defendant's work was proven to be defective. It took 6 months to settle the dispute. The Court held that Miss Harrison could claim for loss of wages due to the fact that lots of her time was taken to negotiate with the defendant, arranged tests and organised final repairs. The Court also held that damages for mental distress can be awarded where a party to a contract should have known when the contract was made that the breach would cause distress. Compensation for inconvenience, discomfort, mental distress and humiliation were also awarded in the Malaysian case of *Subramaniam a/l Paramasivam & 2*

Ors v Malaysian Airline System Bhd in which the Court stated that unlike commercial transactions that involved the fulfilment and enforcement of bargains for which non-pecuniary losses were irrecoverable as being too remote, but the transactions which were personal, social and family interests belonged to a class in which non-pecuniary loss could be awarded. Thus, it shows that the courts are willing to award non-pecuniary losses in consumer transactions as opposed to commercial transactions. This approach is definitely good for consumer protection. Unfortunately the claim has to be brought to the ordinary court since the Tribunal for Consumer Claims does not deal with a claim arising from personal injury or death (section 99(3)). This may include other claims for non-pecuniary loss.

Conclusion:

The CPA is specifically designed to protect consumers and its enactment is hoped to provide a comprehensive code for this purpose. As far as the remedies for service failure are concerned, the CPA provides a new regime of statutory remedies by providing consumers with various remedies, ranging from a simple repair up to the cancellation of contract, depending on the nature and extent of failure. Obviously the provisions on the available remedies are intended to overcome the inadequacy of remedies under the existing law of contract and tort of negligence. However the discussion above reveals that there are several loopholes in Part IX of the CPA that need to be remedied for a better protection to consumers. Despite the practicality of the remedy of rectification of failure, it may not fair in certain occasions to compel the consumer to return to the original supplier to remedy the defects especially if the consumer has a previous bad experience with the supplier. The CPA only allows the consumers to have the failure remedied elsewhere if the supplier fails to remedy the performance within a reasonable time. It would be more useful for consumers if this remedy to be given as a matter of options rather than being the principal remedy. The consumers should be allowed either to require the same supplier to repair the defect or to go to other supplier of his choice and then claiming from the former the payment for making good of that defect. There is also a need to have a provision that the right to remedy the defect can only be applied within a reasonable time and it must not cause significant inconvenience to consumers. The CPA also should make it clear that the supplier must bear any cost incurred in remedying the defect.

The circumstances under which the remedy of cancellation of a contract of services can be exercised by aggrieved consumers appear to be very limited. Thus the phrase 'the product resulting from the service' in section 60(b)(ii), section 60(2) and section 62 need to be interpreted widely to cover any output or outcome of services in whatever forms including the intangible products, so that more opportunities for cancellation are available to consumers. Since damages in the form of reduction in value of the services is the most practical and perhaps preferable remedy in cases of completed services, any ambiguities and difficulties of interpretation caused by the wordings of section 60(1)(b)(ii) need to be rectified. It is also recommended that the consumers should be allowed to claim damages through a reduction in the value of the services which is proved to be a result of the failure even though the suppliers have remedied the defect. Therefore, it is suggested that the limitation under section 60(2) is taken out from the CPA. On a final note, despite any uncertainties and shortcomings of the provisions relating to remedies under the CPA, the law does offer additional remedies and protection to consumers of unsatisfactory, sub-standard or defective services. The law on services under the CPA should be seen as the first major step for further development of legal protection for consumers in the modern market dominated by services industry.

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