

## **THE RISE AND FALL OF CAVEAT EMPTOR IN MALAYSIAN SALE OF GOODS CONTRACT**

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### **ABSTRACT**

The sale of goods contract in Malaysia was governed by three main legislations that are the Contract Act 1950, the Sale of Goods Act 1957 and the Consumer Protection Act 1999. These three existing Acts have their own ways in regulating dealings between contracting parties by providing rights and obligations towards them when entering the contract. However, these Acts are still not adequately in providing protection to the buyers and consumers from being manipulated in the economic market game by the manufacturer and dealer of the products. The doctrine of caveat emptor which being introduced by the common law had put the burden on buyers to reasonably examine goods before they purchase it and take responsibility for its condition. This article is to show on how the doctrine of caveat emptor which being adopted into the Malaysian sale of goods law in protecting the buyer's rights with regard to the purchased items that come to the dissatisfaction of the purchaser or consumer in the sale of goods contract. The study using content analysis method to analyze how this doctrine had affected the consumer's rights. The analysis highlights the provisions of law regarding the contract terms of contract stated which had been included in these three Acts which aims to protect consumers in Malaysia.

**Keywords:** caveat emptor, contract, consumer, manufacturer, Malaysia

### ***KEBANGKITAN DAN KEJATUHAN CAVEAT EMPTOR DALAM KONTRAK JUALAN BARANGAN DI MALAYSIA***

#### ***ABSTRAK***

*Kontrak jualan barangan di Malaysia ditadbir oleh tiga statut perundangan yang utama iaitu Akta Kontrak 1950, Akta Kontrak Jualan Barangan 1957 dan Akta Perlindungan Pengguna 1999. Ketiga-tiga Akta ini masing-masing mempunyai kaedah tersendiri dalam mengatur urusan pihak-pihak yang berkontrak dengan memperuntukkan hak serta kewajipan ke atas mereka ketika memasuki kontrak. Walaubagaimanapun, Akta-Akta ini masih belum menyediakan peruntukan yang memadai untuk memberi perlindungan kepada pembeli dan pengguna iaitu pihak yang dimanupulasikan dalam permainan pasaran ekonomi oleh pengeluar atau pengedar produk. Doktrin caveat emptor yang telah diperkenalkan oleh common law telah meletakkan bebanan ke atas pembeli untuk memeriksa secara munasabah barangan yang ingin dibeli sebelum membuat pembelian dan bertanggungjawab terhadap keadaan barang tersebut selepas pembelian. Artikel ini bertujuan untuk menunjukkan bagaimana doktrin caveat emptor yang telah dimasukkan ke dalam undang-undang kontrak jualan barangan Malaysia yang memberi perlindungan terhadap hak-hak pembeli berkenaan dengan pembelian barangan yang memberikan ketidakpuasanhati pembeli atau pengguna dalam kontrak jualan barangan. Kajian*

*ini menggunakan kaedah analisa bahan ilmiah dalam menganalisa bagaimana doktrin ini memberi kesan kepada hak-hak pengguna. Analisa ini juga akan menyatakan peruntukan-peruntukan undang-undang tentang terma-terma kontrak yang disediakan oleh ketiga-tiga Akta ini dalam memberi perlindungan kepada pengguna di Malaysia.*

**Kata kunci :** *caveat emptor, kontrak, pengguna, pengilang, Malaysia*

## **INTRODUCTION**

In the 18<sup>th</sup> and 19<sup>th</sup> century, the economic theories have placed the contracting parties as an economic unit that should have equal bargaining power accompanied with the freedom in making any decisions. Throughout this century, contract law has adopted the principle of freedom of contract and *caveat emptor*. The principle of contractual freedom that has been practiced since ancient times in the first place was to give freedom to the parties to make fair dealing in their contracts. However, several changes have occurred in which the principle of contractual freedom is no longer appropriate as there is inequality of bargaining power between the parties. This principle has been misused by traders in inserting the terms in favour of one party or one-sided and only benefit the merchant.

The doctrine of *caveat emptor* and contractual freedom which follows from the doctrine of laissez-faire, probably superior if the contracting parties stand with the same tall and sit with the same low. The freedom of contract includes freedom of the contracting parties to determine whether to enter into the contract or not, who is the contracting parties and the terms of the contract. If individuals are given full freedom to determine and select the terms of the contract to be entered, this makes it easy for the supplier of goods to know and providing any supplies either in the form of a product or service required and requested by the buyer (Azimon & Sakina, 2008). As consumers, they should be more careful before entering into a contract and is responsible to protect themselves. With the emergence of the new market ideology of 'consumer welfarism', the government has begun to take initiatives to provide protection to consumers by enacting the Consumer Protection Act 1999 which is now is trying to overrule the doctrine of *caveat emptor* that be regarded as burdensome to the buyer or consumer.

If we can see as to the technical expertise, some products are only located on the knowledge of the manufacturer, making the later to sell or supply to the general public is just selling the product alone, without any knowledge about what their skills. This sometimes causes hardship to the consumer or the supplier or the seller itself (Suzanna & Sakina, 2008). Kessler describes this situation as follows: "Customers are often not able to predict, shop around for better terms, either because the author of the standard form of contract has a monopoly (natural or artificial) or because all competitors use the same clause. Contractual intent is a... controlled by the terms set by the stronger party, the terms of which the consequences are... should be understood, only vague." We also have the phrase *caveat venditor* and this means the opposite of *caveat emptor*, it means "let the seller beware". And the result of this is that it means that unless a seller explicitly disclaims liability for anything, it will be held liable for any defective goods. This only applies where legislation states so, in other words, it is the complete opposite of *caveat emptor*.

The law regarding sale of goods contract in Malaysia was administered by many statutes. However, there are three main statutes which governing the sale of goods contract in Malaysia that are the Contract Act 1950, Sale of Goods Act 1957 and also the recent statute is Consumer Protection Act 1999. This article is about to look the application of the doctrine of *caveat emptor* in Malaysian sale of goods contract and how this doctrine operates in that contract.

## **THE CONCEPT OF CAVEAT EMPTOR**

*Caveat emptor* is derived from the Latin maxim which means that "Let the buyer beware". In the context of commercial users, *caveat emptor* means that the buyer is responsible to protect themselves with the experience and skill in negotiating contract terms. The word "caveat" is often used by itself just to mean a warning. *Caveat emptor* was the general doctrine at common law in the sale of chattels. "Let the buyer beware" is generally applied where there is no express warranty and no fraud on the part of the seller inducing the sale (Walter, 1965-1966). It applies in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, the seller is guilty of no fraud and is neither the manufacturer nor the grower of the article sold (Walter, 1965-1966). What it means is that the buyer takes on the risk regarding the quality or condition of the property purchased.

The doctrine in other words, gives the buyer a right to investigate whether the goods to be purchased are free from any defect before the actual agreement is completed, so as to protect him from any future risk arising from a defective product. Jowitt's Dictionary of English Law (1977), explains that a purchaser or buyer must be on the alert since he has no right to remain in ignorance of the fact that what he is buying belongs to someone other than the vendor, and that any purchaser who fails to investigate the vendor's title does so at his own risk. The doctrine of *caveat emptor* however, does not imply any obligation on the seller to point out defects in the goods to be sold. He is, therefore, only under the duty to allow the buyer or purchaser to investigate the goods himself and nothing more (Mohd. Ma'sum Billah, 1998)

However, in non-consumer situations, the doctrine of *caveat emptor* still can often apply. For instance, when buying real estate the buyer is expected to be proactive in order to make sure that there are no defects hidden or otherwise in the real estate and that they are not subjected to any kind of fraud or scam. Also, in buying used goods, like a used car, often the buyer has the risk, bears the burden of making sure that he or she gets what she bargained for or what she paid for and that there are no defects in the car because they will not be able to return the car and get money back because of the doctrine of *caveat emptor*. The buyer, in this case, has the option before any sale and purchase agreement whether to carry out such an inspection on the goods to be sold or not. The buyer is, then, at liberty whether to exercise this means of protection against any defective goods or not.

Fitz Gibbon L.J. In Wallis v. Russell said:

*"Caveat Emptor does not mean in law or Latin that the buyer must 'take chance'; it means that he must 'take care'. It applies to the purchase of specific things, e.g., a horse or a picture, upon which the buyer can and usually does, exercise his own judgment; it applies also whenever the buyer voluntarily chooses what he buys; it*

*applies also whereby usage or otherwise it is a term of the contract, express or implied, that the buyer shall not rely on the skill or judgment of the seller. But, it has no application to any case in which the seller has undertaken, and the buyer has left it to the seller, to supply goods to be used for a purpose known to both parties at the time of sale."*

The general principles which govern the doctrine of Caveat Emptor however, can be highlighted as follows (Mohd Ma'sum Billah, 1998) :

- (1) The seller is under an obligation to allow the buyer to inspect the goods so as to ensure that they are free from any defect before the conclusion of the sale and purchase contract;
- (2) The seller is under no obligation to disclose to the buyer any existing defect on his goods and, hence, the seller has a right to remain silent;
- (3) The buyer has no right to return the goods or seek damages for any defect found in the goods after the conclusion of the said sale and purchase agreement. This is because, as far as the doctrine of Caveat Emptor is concerned, the buyer has been given full rights and liberty to inspect the goods before the agreement is concluded and any defect found after the conclusion of the said agreement due to careless inspection on behalf of the buyer will not bind the seller in any way;
- (4) The seller is also under no duty to inform the buyer of his mistake in his inspection of the quality of the goods to be sold.

## **THE HISTORY AND DEVELOPMENT OF CAVEAT EMPTOR DOCTRINE**

Caveat emptor has existed since the middle age and has been governing the world market from the ancient time by using a barter system until to the new era commercial i.e by internet access. By the end of the 17th century, caveat emptor has been applied in the law of England and the United States (Nor 'Adha & Sakina, 2011). The first time that this phrase appeared in print seems to have been in 1534, and it related to horse trading. Wrote Fitzherbert in his Boke of Husbandrie: "If he be tame and have ben rydden upon, then caveat emptor." The phrase was taken up by the text writers, popularized by Coke and Blackstone, and preached as gospel by early American appellate jurists (Charles T. LeViness, 1942-1943).

The ideology of caveat emptor was popular with the common folk. It denoted to them that they could stand their own ground with the tricks of the merchants. They justified their new-found doctrine by the elemental formula of Christian marriages, that party must accept each other for better or for worse. From horse-trading and the marriage mart, the doctrine of caveat emptor quickly spread to other fields. But the doctrine was more than a mere rule of trade (Charles T. LeViness, 1942-1943). It became also a rule of personal conduct and political thought. Let each man be strong and keen, capable of taking care of himself. With the advent of the Eighteenth Century the spirit of individualism was intense and there was a growing trend to laissez-faire. The great Blackstone, whose writings so influenced the circuit riders in young America, provided an out for the merchant "against defects that are plainly and obviously the

object of one's senses," and attributed liability to the seller only for a "defect that cannot be discovered by sight and is a matter of skill or collateral proof." (Charles T. LeViness, 1942-1943).

The nature and spirit of this doctrine has truly spread in the commercial field. Previously, the doctrine was applied in the more simple sale and purchase contracts which rendered the seller under an obligation to allow the buyer to carry out an inspection on the goods to be sold to ensure that they were free from unknown defects. Now, we find the spirit of this doctrine is applied in a much wider scope involving manufacturers and consumers. Hence, consumers now have the right to reject goods sold to them and rescind the contract based on the defect found in the products after the sale agreement if manufacturers purposely conceal these defects. The consumers affected may thus claim for damages (Mohd. Ma'sum Billah, 1998).

The greatest challenge to the laissez-faire system came at the beginning of the 20<sup>th</sup> century, when attacks on the legitimacy of the prevailing system begun, demanding the shift in commercial transactions affecting consumers (Sakina et.al, 2011). Inequality of economic power in the marketplace, thus contributes to economic efficiency. There is inadequate information on product quality to enable informed choices to be made by consumers, inadequacy of resources on the part of the consumers, and the disparity of bargaining power between traders and consumers. All these coupled with the inadequacy of the institutional framework to meet challenges in the global market resulted in a high level of market exploitation (Sakina & Rahmah, 2004).

During the twentieth century, consumer protection has become increasingly necessary as the number of goods and services available has grown dramatically. The common law, which has operated in the area of contracts and torts for hundreds of years, offers some protection to consumers. State and federal legislation in this area has also been passed and consumers are well protected against unfair business practices and faulty goods and services. This is a very old rule and it was the general rule for everything until modern times. However, these days, in both UK and the US as well as most other common law countries, there's a lot of modern consumer legislation and this usually provides that the consumer is entitled to a refund, an exchange or a credit for goods that are defective.

## **DOCTRINE OF CAVEAT EMPTOR IN MALAYSIA**

Historically, the doctrine of *caveat emptor* or 'let the buyer beware', originally had no place in English law. This doctrine has evolved around the 18<sup>th</sup> and 19<sup>th</sup> century and demonstrate the evolution of implied terms. In Malaysia, there are many statutes governing the sale of goods. However, there are three main statutes governing the sale of goods in Malaysia that are Contract Act 1950, Sale of Goods 1957 and the recent statute was Consumer Protection Act which had been regulated to protect the consumer's rights. The applicability of this doctrine in Malaysia under the laws of English common law through the provisions of the Civil Law Act 1956. As Best C.J ruled in *Jones v. Bright* (1928) 5 Bing 533; 130 ER 1167 as follows: 'In the general scale of horse, the seller only warrants it to be an animal of description it appears to be, and nothing more, and, if the purchaser makes no inquiries as of its soundness or qualities, and it turns out to be unsound and restive, or unfit for use, he can't recover against the seller, as it must be assumed that he purchased the animal at a cheaper rate.' (Goldring, Maher, McKeough &

Pearson, 1998). However, at the end of the 19th century, Sale of Goods Act 1893 was enacted in England, provides some important exceptions to the doctrine of caveat emptor. (Nor 'Adha & Sakina, 2011). The following were recognized exceptions to the rule of caveat emptor under Common law (S.S.H. Azmi, 1992) :

- i. Where the seller contracts to supply articles which he manufactures or produces, or in which he deals, and which is used for a particular purpose, so that the buyer necessarily trusts to the skill and judgment of the manufacturer or dealer, in such cases, there is an implied warranty that the goods shall be fit for that particular purpose.
- ii. Where the seller supplies goods manufactured by himself, or in which he deals, but the buyer did not have the opportunity of inspecting the same, it is an implied term of the contract that the buyer shall supply merchantable article, or where the goods of specified description are sold and the buyer has no opportunity to inspect, it is an implied condition that the goods shall be merchantable under that description.
- iii. Latent defect, rendering the articles as unfit for particular purposes or making it unmerchantable is no excuse. The duty to supply goods fit for particular purpose or goods of merchantable quality is absolute.

The concept of *caveat emptor* is no longer suitable as a basis for the formulation of trade law. In England, Sale of Goods Act 1893, by providing some implied terms as the obligations of the seller, is a precursor to legal measures divert attention from the doctrine of caveat emptor. However, in Malaysia now, *caveat emptor* still looked strong foothold in the sale of goods law than in England. This implied terms contained in section 14 and section 17 of the Sale of Goods Act 1957. The *caveat emptor* still seems well established in the law against the sale of goods in England as be referred in the case of v Datuk Yap Pak Leong Sababumi (Sandakan) Sdn Bhd [1997] 1 MLJ 587, Court of Appeal upheld the application of implied terms in the Sale of Goods Act 1957 in circumstances involving the sale between the seller and buyer of goods (Sakina, 2009).

Sale of Goods Act 1957, a glimpse, perhaps giving the impression that this Act limits the contractual freedom of the parties with lists, inter alia, the implied term set out in sections 14 to 17, which is the obligation of the seller. However, the provisions which allow sellers to exclude all implied terms contained in section 62, is clear to restore the contractual freedom of the contracting parties, especially the sellers which in reality are dominating the sale of goods transactions (Sakina et.al, 2011). The introduction of large-scale use of lead users face when entering the information gap for sale of goods transactions. Lack or absence of information, based on the Shaik Mohd Noor Alam, "will make the incorrect choice position and would interfere with an individual's utility function, which means that the utility maximization would not be efficient. A serious lack of information not only can lead to irrational choices, but also have an impact on the ability of transactions." Therefore, the basic doctrine of *caveat emptor* as legislation affecting the sale of goods is no denying users can manifest injustice to the user. Buyer and consumer contracts in Malaysia are governed mainly by the Contracts Act 1950, the Sale of Goods Act 1957 and the Consumer Protection Act 1999.

## **Contracts Act 1950**

Contracts Act 1950 does not contain any provisions dealing specifically about the contents or the terms of a contract. No provision is made regarding the terms and obligations of the parties to the contract. The Act also is silent as to whether the parties are strictly bound by the terms of the contract or whether the apparent specific terms may be implied (Suzanna et.al, 2011). The Contracts Act 1950 attempts to codify only the basic principles of contract law.

### **Standard form contract**

Although the concept of the free market (market individualism) have been set aside with the existence of the concept of 'consumer welfarism' in which the concept of fairness and equality of the two contracting parties i.e. the principle of contractual freedom is still not put aside as a whole. The impact of globalization and creativity in commerce at this time has now produced a standardized contract form which can be defined as a contract that includes the features in which one party has a strong negotiating power, the provision of the contract is made by one party without the consultation and it is a contract-based practice of 'to accept or decline ' (Azimon & Sakina, 2008). This standard form of contract has caused injustice and thus suppress the consumer because the consumer does not have the negotiating power and had to choose whether to accept the entire contract or reject the whole contract and refuse from entering the contract. However, in this modern era, almost all vendors using the standard form of contract and cause the consumer has no choice but to accept the contract.

According to Thommy Thomas, this balanced consulting practice does not occur in commercial transactions for consumers due to its nature which does not give space to the consumer to use their power of negotiation in placing the terms that can provide interest and benefit to consumers. However, this standard form of contract was seen as a necessary because of its characteristics that are less time and financial resources of both contracting parties. Therefore, government intervention is necessary in order to control the standard form contract is from oppressive consumer. For example, the State of Israel has had its own statutes to regulate the standard form contract, i.e. the Standard Form Contract Act 1982. The Act has provided a list of contract terms can be regarded as unfair, unreasonable and unilateral form of selection. The Israel court also granted broad authority to maintain, cancel or amend any of the terms that are considered unfair that contained in this standard form contract. In Malaysia, despite the 1999 Consumer Protection Act that was enacted to protect consumers, but this act cannot regulate the form and content of this standard contract. Thus, the doctrine of caveat emptor still applied in the sale of goods contract.

### **Exclusion clause**

Consumers commercial contracts to date clearly show the use of unfair clauses which are labeled as 'exemption', 'exclusion' or 'exception' or 'disclaimers', to exclude, restrict, limit the rights, duties, liabilities and remedies that may arise under the law. By definition, the exclusion clause of liability means "any clause in the contract or the terms of the notice to give meaning to limit, exclude or modify any liabilities, duties or remedies that might, otherwise, arising from relationships recognized by law between the parties.

The exclusion clause is one clause contained in the standard form contract which is becoming more widespread uniform use in the market. David Yates said, the exemption clause included in the standard form contract is considered as a weapon of oppression towards consumers since its terms are not subject to negotiation between the contracting parties (Sakina et.al, 2011). In this circumstance, the buyer has to be aware when they enter into the contract with the other party either seller or supplier as they always inserting the exclusion clause to exclude or limit their liability. The government has to enact or to provide the rule to govern the unfair terms contract in order to protect the buyers.

### **Section 17 of Contract Act 1950**

Section 17 of the Contract Act 1950 was applied to the sale of goods contract. In this section, it provides that the seller has no obligation to disclose the defects of the goods. Mostly, the seller will not notify or disclose the defect on goods to the consumer before or during a purchase is made. Thus, in this situation, the buyer should be aware or inspect the goods before he or she decide to purchase the goods.

After the Consumer Protection Act 1950 was enacted, there was a provision that protects the buyers and consumers. According to section 32 (3) Consumer Protection Act 1999 (CPA 1999), it provides that if any defects in the goods have been specifically drawn to the consumer before he agrees to supply the goods shall not be deemed to have failed to comply with the implied guarantee as to acceptable quality by reason only that the defect. However, there is no provision provided by CPA 1999 for the obligation of the seller to disclose latent defect.

Consumer Protection Act 1999 must contain provisions requiring suppliers to inform consumers about the defects of goods which may have an impact on the purchase of the products. The disclosure of defects must not exclude the implied guarantee of acceptable quality. Failure to notify the defects of goods should be classified as a fraud in which this provision may require and it must be consistent with section 17 of the Contracts Act 1950.

Sothi Rachagan propose the repeal of section 62 which allows the exclusion of implied terms in the Sale of Goods Act 1957, in section 62, allows the seller to put a real terms in the contract to avoid all of the statutory implied terms. Repeal of section 62 is intended to protect consumers. However, to date, the section is still formed part of the SOGA 1957 (Sakina et.al, 2011)

### **Malaysian Law on Sale of Goods**

The sale of goods contract in Malaysia was governed by two primary statutes, namely, the Contract Act 1950 and the Sale of Goods Act 1957 (SoGA 1957) . The Act is modelled upon the Indian Sale of Goods Act 1930 which has its origin in the English Sale of Goods Act 1893. The statute applies only to Peninsular Malaysia whereas for Sabah and Sarawak, the applicable governing statute was English Sale of Goods Act 1979 by virtue of Section 5 of the Civil Law Act 1956 (Sakina et.al., 2015). The Malaysian Sale of Goods Act 1957 contains several provisions on the obligations of traders under a contract for the sale of goods. However, this Act



is not comprehensive in providing adequate protection to the parties involved with the contract goods. Therefore, in 1999, the Malaysian Parliament passed the Consumer Protection Act with the aims of providing legal protection to consumers, creating new rights against suppliers and manufacturers (Sakina et.al., 2016).

The Sale of Goods Act 1957 provides several impliedly terms for sale of goods contract entered by the contracting parties in order to protect them from being manipulated by each other. The doctrine of *caveat emptor* was being adopted in SoGA 1957 to put the responsibility towards the buyer when making a contract with regard to quality and fitness of the goods. It shows that the law is not only aims to protect one side i.e. buyer but all parties in the contract. The general rule provided in Section 16(1) of SoGA 1957 was that the buyer should be more careful when entering into the contract as they cannot take actions against the sellers for the goods which does not meet their expectation or satisfaction. This doctrine of *caveat emptor* can be seen in several following provisions of the Act :

i. Section 15 – Sale by description

Under the section, where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale is also by sample, goods must correspond both with description and sample. According to Benjamin's Sale of Personal Property, sales by description may be divided into sales of unascertained or future goods or to which otherwise a description in the contract is applied of specific goods. This provision has partly resolved the problem associated with sale of specific goods.

ii. Section 16 – Implied condition as to quality and fitness

The section provides for two implied conditions, namely, that the goods must be reasonably fit for the purpose and that the goods must be of merchantable quality. The Act however fails to define the phrase 'merchantable quality'. In the case of *Cehave NV v Bremer Handelsgesellschaft MBH* [1976] QB 44, Lord Denning pointed out that among factors to be taken into account in assessing 'merchantable quality' includes the purpose for which goods of that nature are commonly bought, the description applied, the price and any other relevant circumstances.

iii. Section 17 – Sale by sample

The section provides that in the case of a contract of sale by sample, there is an implied condition that the bulk shall correspond with the sample in quality; the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

Under section 12 of SOGA, where there is a breach of an implied condition, the breach gives rise to a right to treat the contract as repudiated. As such the buyer may exercise his right to reject the goods. Nevertheless, where the term breached is only a warranty, the buyer is only entitled to a claim for damages. Where the seller is in breach of the implied terms under SOGA, a number of

remedies are available to the buyer, namely, damages for non delivery of the goods under section 57, damages for breach of warranty under section 59, or specific performance.

### **Merchantable quality**

Under the Sale of Goods Act 1957, the applicable quality standards is the 'merchantable quality'. However, Sale of Goods Act 1957 fails to define this standard. Merchantable quality have been applied for a long time without any effort to amend or introduce a statutory definition for it. The weaknesses highlighted by this standard in protecting consumers cause the expression merchantable quality' been changed to 'acceptable quality' in the Consumer Protection Act 1999. However, the criteria listed in section 32 (2) of the Consumer Protection Act 1999 in the determination of acceptable quality clearly match with the criteria used in these cases in the interpretation of merchantable quality.

Standard 'acceptable quality' as stated under section 32 is inferred from the English law of Sale and Supply of Goods Act 1999. Under English law, 'acceptable quality' was changed to 'satisfactory quality'. Application of the term 'satisfactory quality' set the higher standard and more consistent with the expectations of users than the standard acceptable quality. The phrase 'acceptable quality' has also been changed to avoid confusion with the concept of 'acceptance' under the Sale of Goods Act 1979. Therefore, this provision is to improve the provisions provided by the Sale of Goods Act 1957 where it provides wider interpretation which protect the consumers. The doctrine of *caveat emptor* had been overruled gradually through the provisions provided in Consumer Protection Act 1999.

### **Fitness for particular purpose**

This section shows the problem from several aspects. The problem lies in the burden of proof. Firstly, in terms of reliance on the expertise and judgment of the seller. If the buyer is able to prove that the buyer rely on the expertise and judgment of the seller, the seller shall be liable for defective goods. The problem is to what extent the disclosure must be made by the seller to put him responsible for the goods. The dependence will exist when the buyer informing the purpose of the goods purchased and then buyers rely on the expertise and judgment of the seller.

Under SOGA 1957, sales by description is provided under section 15. Under the contract of sale of goods, a claim for breach of the implied condition under section 15, require the buyer to prove that the sale is the sale by description. However, these provisions demonstrate the problem of definition in terms of the expression 'sale by description' and 'description'. Provisions relating to the sale by description is considered as gives rise to many problems.

There are two conditions that are regarded as 'sale by description', which involves the sale of goods or items you do not know the future; and sales involving specific goods purchased by the buyer to rely on the description that describes the item. Section 34 should be defined "sale by description" so that consumers understand what is a sale by description. 'Sale by description' should be defined as:

- a) involving the sale of goods there is a description on the package;
- b) sales involving statements made during the bargaining process, and
- c) sales involving the statements made in advertisements.

### **Consumer Protection Act 1999**

Although the Consumer Protection 1999 was enacted to protect the buyers and consumers, however, there are several provision that exclude the liability of supplier and manufacturer in certain circumstances that are provided in Part V, VI and VII.

Part V also provides several implied guarantees in the supply of goods to consumers as against a supplier of goods. The guarantees are as follows:

i. Section 32: Implied guarantee as to acceptable quality.

Section 32 introduces a new standard of quality in supply of goods. The concept of 'acceptable quality' incorporates the factors relevant in considering 'merchantable quality' in the Sale of Goods Act 1957. Under section 32(2), goods shall be deemed to be acceptable quality "(a) if they are- (i) fit for all the purposes for which of that type are commonly supplied; (ii) acceptable in appearance and finish; (iii) free from minor defects; (iv) safe; and (v) durable." In assessing acceptable quality regard should be had to the nature of the goods, the price, any statements made about the goods on any packaging or label on the goods, any representation made about the goods by the supplier or manufacturer, and all other relevant circumstances of the supply of goods.

However section 40 of CPA creates an exception in respect of the implied guarantee as to acceptable quality. Under this section there shall be no right of redress against the supplier of goods where, "(a) the manufacturer makes a representation in respect of the goods otherwise than by a statement on any packaging or label; and (b) the goods would have complied with the implied guarantee as to acceptable quality if that representation had not been made."

ii. Section 33: Implied guarantee as to fitness for the particular purpose.

Section 33 reproduces a substantial part of section 16 of the Sale of Goods Act 1957. Where goods are supplied to a consumer, there shall be an implied guarantee "(a) that the goods are reasonably fit for any particular purpose that the consumer makes known, expressly or by implication, to the supplier as the purpose for which the goods are being acquired by the consumer; and (b) that the goods are reasonably fit for any particular purpose for which the supplier represents that they are or will be fit." This provision does not however apply where circumstances show that the consumer does not rely on the supplier's skill or judgment; or it is unreasonable for the consumer to rely on the supplier's skill or judgment.

iii. Section 34: Implied guarantee that goods comply with description.

Under this section, "where goods are supplied by description, there shall be an implied guarantee that the goods shall correspond with description" and if goods are supplied by reference to

sample or demonstration model as well as by description, there shall be an implied guarantee that the goods shall correspond with samples as well as a description. Descriptions are mostly found on the packaging or labels attached to the goods. Goods are supplied by description in cases where a consumer has not seen the goods but is relying on the description alone. If a consumer has seen and examined the goods, the supply shall be by description if there is some description applying to them.

iv. Section 35: Implied guarantee that goods comply with the sample.

Where goods are supplied to a consumer by reference to a sample or demonstration model, there is to be an implied guarantee “(a) that the goods shall correspond to the sample or demonstration model in quality; and (b) that the consumer will have a reasonable opportunity to compare the goods with the sample or demonstration model.”

iv. Section 36: Implied guarantee as to price

Where the price for the goods is not determined by the contract, or to be determined in a manner agreed by the contract or left to be determined by the course of dealing between the parties, there shall be implied a guarantee that the consumer shall not be liable to pay to the supplier more than the reasonable price of the goods. Under section 36(4), ‘reasonable price’ shall be “a question of fact depending on the circumstances of each particular case.” Where there is a failure to comply with this implied guarantee, the consumer’s right of redress shall be to refuse to pay more than the reasonable price.

v. Section 37: Implied guarantee as to repairs and spare parts.

Section 37 imposes on the supplier as well as the manufacturers an obligation that reasonable actions have been taken to ensure that facilities for the repair of goods and the supply of spare parts are reasonably available for a reasonable period after the goods are so supplied. This section applies equally to imported goods as well as locally manufactured goods. The provision however shall not apply where reasonable action has been taken to notify consumers, at or before the time the imported or locally manufactured goods are supplied, that the manufacturer or the supplier or both do not undertake that repair facilities and spare parts will be available for those goods.

It can be seen in section 51 of CPA 1999 which provides the exceptions to rights of redress against manufacturers in respects of goods which fail to comply with the implied guarantee under section 32 and 34, where the failure is due to :

- a) An act, default or omission of, or any representation made by, a person other than the manufacturer; or
- b) A cause independent of human control, occurring after the good have left the control of the manufacturer.

The other provision that excludes the supplier and manufacturer’s liability is provided in section 40 of CPA 1999 with regard to the exception in respect of implied guarantee as to acceptable quality where :

- a) The manufacturer makes a representation in respect of the goods otherwise than by a statement on any packaging or label; and
- b) The goods would have complied with the implied guarantee as to acceptable quality if that representation had not been made.

Thus, although the Act protects the consumer and looks like it had overruled the doctrine of the *caveat emptor*, but this doctrine has still applied and alive in our legislation regarding the sale of goods and it does not protect the consumer as a whole.

## CONCLUSION

The doctrine of *caveat emptor* (Let the buyer beware) have been applied in Sale of Goods Act 1957 which was enacted based on the UK Sale of Goods Act 1893. After the amendments have been made to the Sale of Goods Act 1893, the law on the sale of goods in Malaysia still adopt the 1893 Act to which the doctrine of *caveat emptor* still applied in the contract of sale of goods. However, the doctrine of *caveat emptor* gradually began to fall when the government aware of the importance in protecting the consumers as the community who is always being manipulated by the supplier and manufacturer in the market world by enacting new legislation known as Consumer Protection Act 1999 in which the provisions provided more protection to the buyer, especially the consumers. However, the consumer's protection provided by this Act is not absolute protection as there are several provisions that excludes the liability of the supplier and manufacturer in this market world. Therefore, the buyer still has to be aware in purchasing the goods and the government has to take the good fast steps to solve the problems happen and to improve the provisions in the statutes to be more comprehensive in order to protect the consumers and provide justice to both parties in making their contracts.

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