THE DOCTRINE OF PRIVITY OF CONTRACT AND ACHIEVING REDRESS FOR A CONSUMER

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Abstract

Rights and remedies are correlatives. They go hand in hand. Where one has a right, any injury or violation of that right does not go un-redressed. Therefore there is the need for a consumer whose right has been violated to have it redressed. The commercial position of the consumer in relation to the transaction based on which the right was violated should not be elevated to the position of denying the consumer such a right to remedy. The aim of this paper is to look at the hardship posed by the privity doctrine where the consumer is not in direct contractual relationship with the manufacturer/producer when an injury has occurred and how the doctrine could be applied for the consumer to be fully redressed.

Introduction

According to Sagay, 1993, a contract is an agreement which the law will enforce or recognize as affecting the legal rights and duties of the parties. Also, the American Second Restatement of the Law of Contract (1979) has described a contract as a promise or a set of promises the performance of which by law in some way recognizes as a duty or the breach of which the law gives a remedy. A contract is an agreement between parties, which creates mutual legal obligations between them identifiable with the essential ingredients of offer, acceptance, consideration and intention to enter into legal relations. When all those elements co-exist, parties have created a valid and enforceable contract between them (Green Finger Agro-Industry Ltd v. Yusuf, 2003). So persons of full age and sound mind are bound by any agreement lawfully entered into by them, (Okonkwo v. C.C. B. (Nig) Plc, 2003).

For a contract to be enforceable by a party, that party must have furnished a consideration which is the third basic element in a contract of sale which the Sale of Goods Act called the price. The basic feature of the doctrine of consideration is reciprocity. It is something of value in the eyes of the law which must be given for a promise or actual transference of good for the transaction to be enforceable as a contract. In a simple contract of sale of goods, the seller’s consideration is the promise of transfer or actual transfer of his title in the goods or possession of them to the buyer. The buyer’s consideration is the money he pays or promises to pay for the goods. The transfer of title to the goods or possession of them to the buyer represents a benefit to him moving from the
seller. Reciprocally, the promise to pay money or actual payment represents a benefit to the seller moving to the buyer.

**Contractual Liability**

A contract, as is known, relates to only the parties engaged in the relationship to the exclusion of all others. In the same vein, any contractual liability ensuing therefrom, should naturally concern the parties without bringing in a third party with whom the party imputing the liability did not contract. In effect, liability in contract lies within the contractually related group. So, responsibilities or obligations arising under a contract cannot be imposed on any other person except the parties to it. It follows that only those who have furnished consideration in the contract can bring an action on it. Therefore, no one can sue or be sued on a contract unless he is a party to it. This posture of privacy of contractual relationship is referred to as the principle or doctrine of privity of contract. The principle was first enunciated by the House of Lords in Tweddle v. Atkinson, 1861 and affirmed by the House of Lords in Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge and Co. Ltd, 1915. In the Dunlop case there was a contract dated 12\(^{th}\) October 1911 by which Dew & Co agreed to purchase a quantity of tyres and other goods from Dunlop. By this contract, Dew & Co undertook not to sell at prices below the current listed prices except to genuine trade customers to whom they could sell at a discount. The contract provided that such discount would be substantially less than the discount that Dews themselves were to receive from Dunlop. Where such sales took place, Dews undertook, as the agents of Dunlop, to obtain from the customer a written undertaking that he similarly would observe the terms so undertaken to be observed by themselves. On 2\(^{nd}\) January 1912 Selfridge agreed to purchase goods made by Dunlop from Dew & Co, and gave the required undertaking to resell at the current list of prices. Selfridge broke this agreement and Dunlop sued for breach of contract. The House of Lords held that the agreement of 2\(^{nd}\) January 1912 was between Selfridge and Dew only and that Dunlop was not a party to that contract. In the body of the judgment, Lord Haldane propounded the doctrine thus:

My Lords, in the Law of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right in personam to enforce the contract.

The English Court after laying out the doctrine in the above case had it confirmed in Scrutton Ltd. v. Midland Silicones Ltd, 1962 when it observed that a person not a party to a contract cannot sue on it, even if it purports to be made for his benefit.

This principle is in full application in Nigeria being a common law country since our laws are partly made up of common law principles. The doctrine
received its initial judicial blessing in the country in Chuba Ikpeazu v. African Continental Bank Ltd 1965 where the appellant entered into an agreement with one William Emodi, a debtor of the respondent bank, under which agreement, the appellant (who was at that time the bank’s solicitor) was to run Emodi’s business with the intention that all proceeds should be paid into the bank until Emodi’s debt was completely liquidated. The appellant managed Emodi’s business for some time, and then under a new agreement with Emodi, he handed back the business to the latter, without the knowledge of the bank. The bank now sued the appellant as guarantor of Emodi’s debt to it relying on a deed under seal containing the agreement between Emodi and the appellant; to which the bank was not a party. The court held that not being a party to the agreement, the bank could not acquire rights under the deed based on which it could sue Emodi.

Generally the courts rely on this basic principle of law of contract in the assessment of liabilities. They do not by it, hold that a party not part of a contract should be held responsible for any loss(es) arising from such a contract, although there are exceptions to this principle, such as covenants running with the land. According to Sagay the application of the doctrine of privity of contract was so inconvenient in the case of contracts affecting land that special exception was created by the court in this regard. Thus there was established a rule in Tulk v. Moxhay 1848, to the effect that a restrictive covenant voluntarily accepted by a purchaser of land as part of a contract of sale will in certain circumstances bind persons who subsequently acquire the land. Among these exceptions are contracts for the hire of a chattel particularly charter parties, insurance contracts and the like.

The Problem Posed by the Application of the Doctrine of Privity of Contract.

The doctrine of privity of contract which found expression in Tweddele v. Atkinson, 1861 and became assimilated into our judicial system in Chuba Ikpeazu v. African Continental Bank Ltd 1965, excludes a third party not privy to a contract from liability or suing to enforce a right under it. The doctrine as old as it may seem is still as efficacious now as it was when it was first enunciated. The courts therefore still maintain the sanctity of contract insisting that a contract is binding only on parties thereto and not on third parties (Agbareh v. Mimra,2008). The doctrine being one of exclusion, cannot apply to a non-party who may have unwittingly been dragged into the contract with a view to making him a shield or scope-goat against the non-performance by one of the parties (UBA Plc v. Jargaba 2007). Therefore the general rule is that a contract cannot confer or impose obligations on strangers to it. It affects only parties to it (Borishade v. N.B.N. Ltd 2007). It is not stricto sensu enforceable against a person not part of the contractual agreement.

The adherence to this doctrine has been justified for the reason that it makes for certainty especially as regards a defendant. According to Monye 2003,
it creates a provision of possible claimants and thus prevents a defendant from being taken unawares.

These advantages of its application notwithstanding, it is a dead blow in the sphere of product liability. A purchaser and/or consumer of a defective product cannot maintain an action in contract against a manufacturer where such a purchaser did not buy the product directly from the manufacturer but through intermediaries or where the consumer is not the purchaser who dealt directly with the manufacturer. It thus provides a defaulting manufacturer with a shield against the attack from a consumer who has suffered from the defect in the manufacturer’s product and leaves the injured consumer with no remedy.

**Recommendation – The Need for Flexibility in the Application of the Doctrine of Privity of Contract.**

The common law doctrine of privity of contract once barred plaintiffs from suing in contract on any claim arising outside of a contractual relationship. Based on this rule, a contract affects only the parties thereto and cannot be enforced by or against a person who is not a party to it. Only parties to a contract can sue and be used on the contract. A stranger to the contract can neither sue nor be sued on it even if the contract is made for his benefit. In Makwe v. Nwukor 2001, one major exception admitted of this principle is a contract made by an agent on behalf of an undisclosed principal who is entitled to sue and liable to be sued on such a contract. Aside such exceptions the courts interpreted the laws adhering strictly to this principle. In the face of the breach of the rights of the consumer he can only sue the seller. Even this action is not open to the consumer unless he is also the buyer. Therefore a non-contracting party such as a member of the consumer’s family or a friend who suffered defect by the use of a product cannot sue the original seller unless the buyer can be construed as acting as the agent for the non-contracting party. So the doctrine of privity, is a severe limitation to the efficacy of the consumer’s enjoyment of his inalienable rights (Leder, 1980). But the courts have in many instances jettisoned the application of this principle where adherence would occasion harm and injustice (Macpherson v. Buick Motors Co, 1916). So Tom 1992 stated that there has been an assault on the privity doctrine which has swept through much of law of tort to free plaintiffs to press charges of negligence against even those with whom they have never had contractual relations. This assault has been sustained in the USA. According to Samet 1992, it has weakened the privity doctrine so that courts allow parties not in privity to sue in tort against offending defendants. This attitude of the courts is based on the element of foreseeability of harm (St. Paul Title C. v. Mejer, 1986). This element implies that where a third party or a person not in direct contractual relationship with a manufacturer suffers harm due to the product manufactured by the manufacturer, the manufacturer should be liable in negligence because he ought to have anticipated such a harm or injury occurring from the use of the defective product. It was on the basis of this that the American court of New
Jersey discarded the privity doctrine and found in favour of a wife of a purchaser of an automobile from the defendant company when the wife sustained injuries while driving the defective automobile even in spite of the fact that she was not the actual purchaser (Henningson v. Bloom Field Motor, 1960). In this way, justice was meted to the injured consumer. This will mean adherence to the time long hallowed common law maxim of *ubi jus ibi remedium*. Where it not so, the application of the privity doctrine would deny a plaintiff whose right has been violated, the access to justice. A consumer of DPK who has been charred by the inferno which engulfed the house while lighting a bush lantern would go unredressed by this privity doctrine. Declaring otherwise the court in Omoyinmi v. Ogunsiji 2008 postulated that

if a plaintiff has a right, he must of necessity have the means to vindicate it, and a remedy, if he is injured in the enjoyment or exercise of it, and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. The maximum *Ubi jus ibi remedium* is simply the Latin rendition of the above principle. The maxim is so fundamental to the administration of justice that where there is no remedy provided by common law or statute, the courts have been urged to create one. The courts cannot therefore be deterred by the novelty of an action.

By implication, a consumer has a right to the enjoyment of a product and if he is injured in course of exercising such a right, it will be untoward for the application of the privity doctrine to bar that right from having a remedy.

In this regard, the assertion that the law is an ass comes in handy. In this sense, the assertion is not derogatory to the law, but an expression used to convey the dynamic nature of the law as an instrument of social engineering. This is in the sense that the law is and has always remained flexible and readily acts in response to the dynamics of the society. In this way, the rigidity associated with common law has since become a thing of the past. For quite apart from the intervention of equity, judges or the courts have shifted away from that rigidity in their approach towards the application of the doctrine of privity.

Added to this, the legislature has since realized that statutory provisions constitute an effective instrument towards effecting the desired change on the state of the law. In keeping with this, the courts should be hesitant in strictly adhering to the rigid application of the principle of privity of contract where to do so will occasion injustice, hardship or produce manifest absurdity. Where therefore, the facts of a case establish a cause in a third party or in favour of an injured party in such a way that applying the principle will deny him redress, the court should be ready to apply the law in such a manner as to relax or come away from the rigidity of the doctrine and enable the injured get redress for the injury against the manufacturer despite the lack or want of contractual nexus between him and the manufacturer. From such judge-made laws, the legislature will be positively
influenced towards enacting laws that will give statutory backing to such otherwise unacceptable state of the law.

**Conclusion**

Just as the Latin maxim *ubi jus ibi remedium*, no common law doctrine should be encouraged to fly in the face of the remedy to be accorded the injured consumer. The right of the consumer to be redressed when injured, should be pursued and achieved by all and sundry irrespective of the existence and application of the doctrine of privity of contract. The courts in pursuance of this should rise to the occasion when required to do so. Also, our legislature should not hesitate to enact laws that will mellow down the effect of this doctrine. When this happens, the consumer will be the happier for it whether he is in direct contractual relationship with the manufacturer or not. It will also ensure that manufacturers who are always quick to invoke and rely on the doctrine in defence of suits from injured consumers will realize that the reliance on the doctrine is no longer a safe haven for them in their malfeasance. They will therefore, naturally sit up and become more diligent in the production of the goods which they put out in the market.

**References**


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