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Is Fudhuli (Unauthorised Agent) Contract Valid in the Eyes of English Law?

In its literal meaning, fudhuli refers to a person who interferes in matters that is of no concern of his/her. Technically, fudhuli is one who disposes of someone's rights and obligations without prior legal permission or authorization. In this sense, a fudhuli could not be a guardian (wali), principal (muwakkel), or agent (wakeel) in a contract, as all these people must have an established right or a prior authorization for disposal. The behaviour of a fudhuli is subject to various juristic rulings, depending on the transaction itself (i.e., sale, lease, etc). Hence, it refers to an unauthorised act performed by an agent (unauthorised agent). Shari'ah does not allow anyone to deal with the property of another person without prior permission. The Hanafites and Malikites hold that the acts of unauthorized agent depend on the ratification and approval of the owner of the property. The Shafites, Hanbalites and Zahirites hold that the contract is not valid. How is this similar to the legal position in Malaysian law or English law? Section 135 of Contract Act 1950, which inherit the spirit of English law, define an agent as a person employed to do any act for another or to represent another in dealings with third persons, while a principal is the person for whom such act is done or is so represented. Apart from any authority given by the principal expressed by his words or in writing, expression that denotes authority may also exist in the following situations:

(i) All such powers or acts as are necessary or proper to execute the express authority;

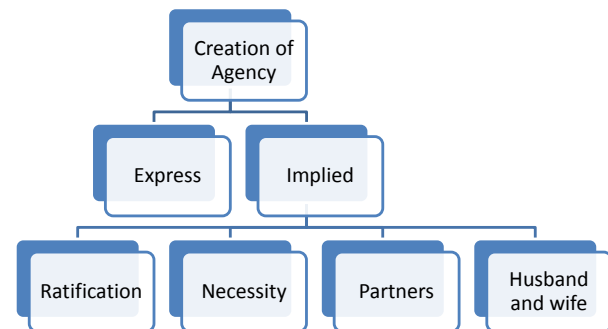
- (ii) the circumstances of the case;
- (iii) the custom or usage of trade; and
- (iv) the situation and conduct of the parties.

However, in certain circumstances where the principal does not give an explicit authority, implied authority may be presumed to exist, and the principal must be liable for the acts of the agent. These two situations may arise:

(i) Where a principal by his words or conduct, leads a third party to believe that the agent has authority. Section 190 of the Contracts Act 1950.

(ii) Where the agent had authority to act, but that authority was terminated by the principal without notice to third party.

In brief, an agency can be created through five methods, either by way of express and implied as shown in Table 1 below:



As clearly indicated in the table, agent by ratification is covered under section 149 of the Malaysian Contract Act 1950. This is where an agent does an act for the principal, however, the principal has no knowledge or does not give authority to do so to the agent. In such case the principal may elect to ratify or to disown the agent's act. If he elects to ratify them, it has the effect as if they had been performed with authority. Ratification can only be done in the following conditions:

(i) It must be an invalid or unauthorised act of an agent.

(ii) Agent expressly acts as an agent for the principal and not under his own name. In *Keighley Maxted & Co. v. Durant (1901)*, R, Keighley's agent was authorised to buy wheat for the company at a certain price but bought them at a higher price from D. R bought in his own name but intended to buy for Keighley. Keighley agreed with R to take the wheat at that price but failed to take delivery. The court held that Keighley was not liable because the agent bought it in his own name and Keighley did not ratify it.

(iii) The principal must have contractual capacity at the date of the contract and at the date of ratification. In *Kelner v. Baxter (1866)*, at the time the agent entered into the transaction with the third party, the principal's company was about to be formed. The court therefore held that the company had no contractual capacity to make the contract since it did not exist at that time.

(iv) The principal must at the time of ratification have full knowledge of all material facts unless it can be shown that he intends to ratify the contracts, whatever the facts may be;

- (v) the principal must ratify the agent's act entirely;
- (vi) the ratification must not cause injury to a third party. Section 153 provides that the ratification of an agent's act must not result in a third party to suffer damages or terminate his right or interest; and
- (vii) the ratification must be made within a reasonable time.

When an agent's act, which was originally not valid, is ratified by his principal, the ratification has these effects:

- i. The principal is liable for such act;
- ii. the ratification will validify entirely or wholly the act of the agent;
- iii. the ratification has a retrospective effect;
- iv. ratification must be made within a reasonable time

According to section 140 of the CA 1950, an agent may be appointed by implied appointment whether verbally or based on the conduct of a principal. *Summers v. Solomon* (1857) laid down a principle that when a person, by his words or conduct, holds out another person as having authority to act for him, he was liable for that person's act as if he had appointed him as his agent. Other relevant cases on this issue are *Ryan v. Pilkington* (1959) and *Chan Yin Tee v. William Jacks & Co. (Malaya) Ltd.* (1964). The relationship between a husband and wife also gives a presumption of implied agency. A husband (principal) is liable for any debts made by his wife (agent) with a third party; except if:

- (i) The husband expressly forbids his wife to pledge his credit;
- (ii) the husband expressly warned tradesman not to supply his wife with goods or credit;
- (iii) the husband had sufficiently provided for the wife;
- (iv) the husband had given sufficient allowance to the wife; and
- (v) the goods ordered by the wife was unreasonable, taking into consideration her husband's income.

In *Miss Gray v. Catcard* (1922), where a wife was supplied with clothes to the value of £215, the husband was able to prove that his wife was given allowance for £960 a year. Therefore, the husband is not responsible for the wife's loan. Implied agency is usually formed in partnership businesses. Section 7 of the Partnership Act 1961 provides that partners are agent to each other and to the partnership firm when contracting in the course of the partnership business. In *Mercantile Credit Co. Ltd. v. Garrod* (1962), partner A sold a car to a finance company and credit the sales money into the partnership account without the consent of partner B. The finance company took action when they found out that there was fraud in the sales. The court held that B was entitled to recover the money from A. Fudhuli is discussed under the concept of wakeel or wakalah (Agency). The evidence of permissibility is derived from the Qur'an, authentic tradition of the Prophet (s.a.w), and ijma' of jurists. The following as the concise proof on this:

"Let, then, one of you go with these silver coins to the town, and let him find out what food is purest there, and bring you thereof [some] provisions".

It has been narrated from sound and authentic source that the prophet practiced wakalah. Imam al-Bukhari, al-Thirmidhi, abu Daud and Ibn Majah narrated that the messenger of Allah authorized Urwah al-Bariqi to purchase goat for sacrifice (al-Udhhiyah). Besides, he delegated Amr bin Umayyah in marrying Ummu Habibah while she was in Habashah.

Another type of agency that might seem to be similar to fudhuli contract is creation of agency by way of necessity. In an emergency, an agent has authority to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances. The case of *Great Northern Railway C v. Swaffield* (1874) should be jointly referred to with the above provision. A horse was sent by train and the owner was not there to receive it. The railway company decided to put it in a stable for the night. The court held that the railway company acted as an agent by necessity. However, before an agency by necessity can be accepted, three (3) conditions must be fulfilled:

(i) It must be impossible to contact principal to get further instructions from the principal. An example of this would be in *Springer v. Great Western Railway & Co.* (1921). The railway company which took care of the delivery of the tomatoes decided to sell them locally when they were found to be bad due to the delay in delivery. The company did not communicate with the plaintiff, i.e. the principal. The court held that the railway company were liable to the principal on the sale because they should have communicated with him and asked for his instructions as soon as the goods arrived and at the time they decided to take such action.

(ii) The act is done due to actual and definite necessity. In *Prager v. Baltspiel Stamp & Heacock Ltd.* (1924), owing to the occupation of Romania by the German forces, it was impossible for the agent to send the skins to Plaintiff or to communicate with him, his principal. The agent acted in selling them, which had increased in value in 1917 and 1918. The court held that the skins were not likely to deteriorate in value if properly stored. Therefore, there was no necessity for them to be sold. The agent thus was liable for his act.

(iii) The agent acts in good faith.

In light of the above and in conclusion, agency law covers the application of fuduli contract. Agency is similar to wakalah contract in Shariah. Many Islamic finance utilise wakalah as part of their products. Eventhough our law requires an agent to obtain an authority to do every lawful thing which is necessary in order to do the act, the ratification allows certain contracts to pursue after the ratification. The same applies as to the Fudhuli contract, even, many scholars have held it to be void, but it is mauquf (stopped) upon consent and ratification made by the principal, the contract is to be valid.

1. Al-sharbini, al-Khatib, Mughni al-muhtaj, v2, pg.15, al-Bahuti, Kashshaf al-Qina', vol2, pg.11, and IbnHazm, al-Muhalla, vol.8, pg.503.