

## NOTES OF CASES

### SPECIFIC PERFORMANCE OF CONTRACT IN FAVOUR OF STRANGER

#### *Beswick v. Beswick*<sup>1</sup>

The decision of the House of Lords in *Beswick v. Beswick* appears to be tolling the death knell of hopes entertained by some judges and academic lawyers, of circumventing the common law doctrine of privity of contract by resorting to section 56(1) of the Law of Property Act, 1925. However the champions of the cause in favour of the person who receives the benefit of a contract for which he has given no consideration and to which he is not a party, are not left entirely bereft, for in the instant case the House has not decided conclusively as to whether the contracting party may recover substantial damages on behalf of such third party where a breach of the contract has occurred. Moreover, the House has in the case at hand allowed the administratrix of the contracting party to succeed in a claim for specific performance. The question thus arises as to whether this is an indirect acknowledgment by equity of the rights of the third party.

The facts of this case are quite brief. The late Peter Beswick, the respondent's deceased husband, by an agreement dated March 14th, 1962, assigned to Joseph, his nephew, the appellant, his business as a coal merchant in consideration of Joseph employing Peter as a consultant for the remainder of his life at a weekly salary of £6.10s. 0d. For the same consideration Joseph further agreed to pay, in the event of Peter's death, to his widow, an annuity of £5 per week. Peter Beswick died on November 30th, 1963 and the respondent is the administratrix of his estate. Since the death of her husband, the respondent had received only one payment of £5 from the appellant. She brought a suit in her personal capacity as well as in the capacity as administratrix of her husband's estate before the Vice-Chancellor of the Chancery Court of the County Palatine of Lancaster claiming £175 arrears of annuity and for an order for specific performance of the continuing obligation to pay the annuity. Her case at first instance<sup>2</sup> failed but she succeeded before the Court of Appeal.<sup>3</sup> From this decision, the nephew appealed to the House of Lords. It is of interest to note that although the majority in the Court of Appeal granted specific performance to the widow in both capacities, nevertheless the general proposition that she had a right in her personal capacity to sue under the contract was not pursued on this further appeal. Thus there were only three issues before the House.

The first issue raised was as to the scope of section 56(1) of the Law of Property Act, 1925, viz. whether it has the effect of reversing *Tweddle v. Atkinson*<sup>4</sup> so as to entitle the respondent to sue personally and recover the benefit provided for her in the contract although she was not a party to it. The House rejected such wide interpretation and found for the appellant on this point. Much has been written and undoubtedly will be written on the subject of section 56(1), and it is not proposed to consider the House's decision on this issue in this note as it has no bearing on the local scene.

The second and third issues were concerned with the remedies to which the respondent in her capacity as administratrix was entitled, more specifically whether

1. [1967] 3 W.L.R. 932.
2. [1966] 3 All E.R. 858.
3. [1966] 3 W.L.B. 396.
4. (1861) 1 B. & S. 393.

she was entitled to merely nominal damages or substantial damages, and in any case whether she could obtain specific performance of the contract. The House was unanimous in their opinion that the respondent should be granted a decree of specific performance, and in view of their decision on this point they did not determine conclusively the question regarding the *quantum* of damages. One<sup>5</sup> of the five Law Lords who heard the appeal did not consider the question at all; and of the other four, two<sup>6</sup> adverted to the topic by assuming that the damages recoverable by the respondent would be purely nominal, one<sup>7</sup> was of the opinion that damages may be substantial but that "it [was] not necessary ... to consider the amount of damages more closely since this [was] a case in which ... the more appropriate remedy [was] that of specific performance,"<sup>8</sup> and another<sup>9</sup> did discuss the issue and concluded that even though substantial damages might be recovered in some circumstances, the respondent in the instant case was entitled to merely nominal damages.

Ever since Lush L.J. in *Lloyds v. Harper*<sup>10</sup> said:

... I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself.<sup>11</sup>

There has been a little controversy<sup>12</sup> on this point which to date has not been resolved. It is therefore a matter of some regret that when the opportunity did present itself to the House the issue was not accorded more attention.

Where in a contract between A and B, A breaks his covenant to do something for the benefit of C, who is not a party to the contract, B being a party to the contract has a right to sue at common law for breach of contract. The only question is that regarding the measure of damages recoverable, if B has not personally suffered any losses consequent upon the breach, then unless B is contracting as trustee for C or unless C is recognised at law as having an interest, it is difficult to understand how the application of the ordinary rule for assessment of damages<sup>13</sup> could result in B obtaining substantial damages. It is conceivable that in some circumstances, B may personally sustain losses as a result of A's non-performance of the contract, *e.g.* where A, knowing that B is a creditor of C covenants with B to pay a sum of money to C. In such a situation if A should fail to perform, B would surely recover more than nominal damages. But it should be noted that such damages he would hold for himself and not for C.<sup>14</sup> Thus in the instant case it would appear that, as there was no trust<sup>15</sup> of the covenant by Peter Beswick, the respondent as his administratrix could not recover substantial damages. Furthermore even if she was in that capacity entitled to substantial damages, such would accrue to Peter Beswick's estate and not to her as beneficiary of the contract. However, in view of the House's decision, or lack of a decision on this point, perhaps the matter is still open to speculation.

Whilst the doctrine of privity of contract and the rule for assessment of damages do present serious obstacles to respondent's claim in her own right at common law,

5. Lord Upjohn.

6. Lords Reid and Hodson.

7. Lord Pearce.

8. [1967] 3 W.L.R. 982 at p. 949.

9. Lord Guest.

10. (1880) 16 Ch. D. 290.

11. *Ibid.*, at p. 321.

12. *Cf. West v. Houghton* (1879) 4 C.P.D. 197.

13. *Victoria Laundry (Windsor) v. Newman Industries* [1949] 2 K.B. 528.

14. There is no relationship of trustee and *cestui qui trust* between B and C, and C having no recognised rights on the contract to which he, B not a party there is no basis for making B a constructive trustee of the damages for him.

15. This was common ground between the two parties.

they may not be pertinent when the equitable remedy of specific performance is being sought, unless it can be shown that the proposition laid down in *Tweddle v. Atkinson*<sup>16</sup> ignores the existence of the third party not only as to capacity to bring an action but for all purposes whatsoever. This thankfully does not seem to have been the position even before this case. In *Re Schebsman*<sup>17</sup> the Court of Appeal did allow the third party beneficiary of a contract retain whatever money paid to her by the promisor under the contract. Thus unless there be some compelling reason either on principle or on authority to the contrary the tentacles of doctrine of privity of contract should not be extended to the detriment of the respondent in this case.

The House found 'abundant authority' for their decision in favour of the respondent. However it is of interest to note that of these only one, *Holder v. Aston*,<sup>18</sup> is squarely and affirmatively on the point. The others, *Keenan v. Handley*,<sup>19</sup> and *Drimmie v. Davis*,<sup>20</sup> do not positively support the decision as suggested by their Lordships, as they can be clearly distinguished and explained from other grounds. As regards *Keenan v. Handley*<sup>21</sup> the issue before the Court was whether there was on the facts a contract for valuable consideration to support the plaintiff's claim for specific performance of the covenant by the defendant to pay to her and their illegitimate child an annuity. It will be noticed that no question of privity of contract affecting her claim ever arose as the appellant was herself a party to the contract and there was consideration moving from her. However, as the performance of such covenant would also necessarily benefit the child, the case may be said to be a relevant authority. But it is submitted that this offers, at best, a precedent of the *sub silentio* category.

It would appear that despite the similarity of facts between the instant case and *Drimmie v. Davies*<sup>22</sup> the granting of the decree of specific performance in the latter case by the Irish Court of Appeal does not necessarily provide a good authority for the similar decision in the former. After a close scrutiny of the judgments delivered in that case, the fact emerges that the Lord Justices of Appeal, with the exception of one, were much influenced by three older cases, *Page v. Cox*,<sup>23</sup> *Murray v. Flavell*<sup>24</sup> and *Gandy v. Gandy*.<sup>25</sup> It would be noted that specific performance was granted to the plaintiff in each of those cases on the basis of a trust relationship existing between the plaintiff, a party to the contract, and the person who derived benefits under the contract to which he was not a party. However, Holmes L.J. without reference to any of these cases, did decide for the plaintiff simply on the ground that *Tweddle v. Atkinson*<sup>26</sup> did not apply in the circumstances. His judgment should bring to an end the search for precedent. It shows that one should not permit a very elementary principle to be obscured by a process of tortuous thinking which is not as logical as it purports to be.<sup>27</sup>

With *Tweddle v. Atkinson*<sup>28</sup> out of the way, there was no other impediment to prevent the respondent from obtaining her decree.<sup>29</sup>

16. (1861) 1 B. & S. 393.

17. [1944] Ch. 83.

18. [1920] 2 Ch. 420 a case decided at first instance without reference to any authority whatsoever.

19. (1864) 2 De G.J. & S. 282.

20. [1899] 1 Ir. R. 176.

21. (1864) 2 De G.J. & S. 282.

22. [1899] 1 Ir. R.

23. 10 Ha. 163.

24. 25 Ch. D. 89.

25. 30 Ch. D. 57.

26. (1861) 1 B. & S. 393.

27. Cf. the decision in *Re Kay's Settlement* [1969] Ch. 329 where the Court ordered the trustees not to sue the settlor for the benefit of volunteers.

28. (1861) 1 B. & S. 393.

29. 396 See a note by G.H. Treitel on the Court of Appeal decision of *Beswick v. Beswick* [1966] 3 W.L.R.

However, it may be pertinent to inquire into the real basis on which the House granted the decree — was it granted because from the viewpoint of the respondent in her capacity as administratrix the common law remedy though available was inadequate, or was it because from the standpoint of the respondent in her personal capacity there was no remedy at common law, and therefore the common law itself was inadequate.

If the former was the motivating reason then this case does not offer much solace to other persons in the position of the respondent in her personal capacity. There may be circumstances in which the contracting party might have adequate remedies at common law *e.g.* they might be entitled to substantial damages. But, if it was for the latter reason that the respondent was granted the decree, then it would appear that equity is through the medium of specific performance circumventing the doctrine of privity of contract.

There is no doubt that the House allowed the respondent her claim because of the injustice that would otherwise ensue. In the words of Lord Reid:

[i]f that [nominal damages] were the only remedy available the result would be grossly unjust.<sup>30</sup>

It is however somewhat difficult to discern the precise reason why the House regarded the result as unjust. Lord Reid offered no explanation for his statement quoted above.<sup>31</sup> His judgment on this issue was concurred by Lord Guest. Lord Hodson stated:

The remedy at law is plainly inadequate ... as (1) only nominal damages can be recovered; (2) in order to enforce a continuing obligation it may be necessary to bring a series of actions whereas specific performance avoids multiplicity of actions.

This seems to indicate that he was considering the matter from the position of the respondent as administratrix. Lord Pearce appears to have regarded the matter from the same point of view.<sup>32</sup> However, although their Lordships seemed to be thinking of injustice from the standpoint of the respondent as administratrix, it cannot be said with any certainty that they did not take into account at all the fact that she was also the person beneficially entitled to the money claimed. Moreover Lord Upjohn, having referred to the decision in *Hohler v. Aston*,<sup>34</sup> said:<sup>35</sup>

This again shows the extent of the power of equity to assist the common law, limited only by canons of common sense and the practical limitations on the power to oversee and administer specific performance cases. So the power and indeed the duty in proper cases of the court of equity to make specific performance orders in favour of third parties at the instance of one of the controlling parties is not in doubt.

May it then be concluded that the House of Lords was in fact attempting to deviate from the harshness of the doctrine of privity? If this be so, it is submitted that the device available is in its very nature restrictive. It depends on the willingness of the contracting party to sue and on his giving valuable consideration for the contract. Thus the remedy of specific performance may act as a palliative to, but does not cure, the common law ill.

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30. [1967] 8 W.L.R. 932 at p. 936.

31. Lord Reid having assumed that the damages recoverable by the estate would be nominal concluded that such would be inequitable and "unless there [was] some technical objection" he would order specific performance. (*ibid.*, at p. 940).

32. *Supra* at p. 948.

33. "Why should the estate be barred from exercising its full contractual rights merely because in doing so it secures justice for the widow who, by a mechanical defect of our law, is unable to assert her own rights?" *ibid.*, at p. 950.

34. [1920] 2 Ch. 240.

35. [1967] 3 W.L.R. 932 at p. 959.