

## CONTRACT

### *Third Party Rights — Two Recent Cases*

Two recent cases, one in the House of Lords and one in the High Court, provide some clarification of the position of third party beneficiaries to contracts.

In *Beswick v. Beswick*<sup>1</sup>, the defendant contracted to employ his uncle "old Peter Beswick" in an advisory capacity, at £6.10.0 per week until his death<sup>2</sup>, and if his wife survived him, to pay her a further £5 per week in consideration for the sale of Peter Beswick's coal business. Peter Beswick died intestate soon after and his wife (the plaintiff) took out letters of administration. She sued the nephew, as administrator and in her personal capacity, for breach of the agreement to pay the £5 per week. In the County Court Palatine<sup>3</sup>, Burgess V.-C. refused her claim on all grounds. The Court of Appeal (Lord Denning M.R., Danckwerts and Pearson L.J.J.) reversed that decision and granted specific performance: both Lord Denning M.R. and Danckwerts L.J. also found for Mrs. Beswick in her personal capacity under section 56 (1) of the Law of Property Act 1925<sup>4</sup> and Lord Denning M.R. expressed the view that she was entitled to judgment at common law. The House of Lords unanimously upheld the decree of specific performance and rejected the statutory claim. Lord Denning's views about the common law were not pressed, but their Lordships made it quite clear what their fate would have been. The Court of Appeal also rejected the claim that Peter Beswick had made himself trustee of the promise, and this was not pursued before the House of Lords.

In *Coulls v. Bagots Executor & Trustee Co.*<sup>5</sup>, the appellant and her husband were signatories to an agreement expressed to be "Between A. L. Coulls (the husband) and O'Neil Construction Pty. Ltd.", whereby, in consideration for certain quarrying rights over 50 acres of land owned by Mr. A. L. Coulls, the Company promised to pay royalties at a minimum of £12 per week for 10 years, with an option for another 10 years at the same rate. The money was to be paid to A. L. Coulls and D. S. Coulls (the appellant) jointly, and to the survivor of them. The High Court held by 3 to 2 (Owen, Taylor, and McTiernan JJ. : Barwick C.J. and Windeyer J. dissenting) that the agreement was, on its true construction, merely one between the Company and A. L. Coulls, and that the last paragraph operated as a revocable mandate by A. L. Coulls to the construction company to pay the royalties to D. S. Coulls. Such a mandate was revoked by the death of A. L. Coulls. The majority therefore held that the respondent Company (being the deceased's executor) was entitled to the royalties. Barwick C. J. and Windeyer J. dissented, holding that the

1. [1967] 2 All E.R. 1197 (H.L.) See nn. 3 and 4 for lower court decisions.

2. The element of personal service was ignored as *de minimis*.

3. [1965] 3 All E.R. 858.

4. [1966] 3 All E.R. 1; [1966] Ch. 538.

5. Law of Property Act 1936-1966 (S.A.), s.34 (1); Conveyancing and Law of Property Act 1884-1940 (Tas.), s.66 (3); Property Law Act 1958 (Vic.), s.56 (1), Conveyancing Act 1919-1962 (N.S.W.), s. 36 (c).

6. (1966) 40 A.L.J.R. 471.

promise was made to A. L. and D. S. Coulls as joint promisees and that (in the words of the learned Chief Justice) "it cannot lie in the mouth of [the promisor] in my opinion, to question whether the consideration which he received for his promise moved from [both promisees] or as between themselves, only from one of them"<sup>7</sup>. Owen and Taylor JJ. agreed that if Mr. and Mrs. Coulls had been joint promisees then the survivor of them could have sued. McTiernan J. expressed no opinion.

It is convenient to discuss the issues raised by these cases against some typical fact situations.

1. *A promises to pay money to C in return for consideration provided by B. A does not pay.*

(a) C's rights (if any) to enforce the contract.

It is first of all quite clear that C cannot himself sue at common law for the promisor's breach of contract. That this proposition is even necessary to state since the case of *Midland Silicones v. Scruttons*<sup>8</sup> is due to the amazing but unfortunately fruitless efforts of Lord Denning. In this case he allowed Mrs. Beswick to recover in her personal capacity at common law: nevertheless it appears that her counsel conceded before the House of Lords that the point was untenable. In such summary manner is the learned Master of the Rolls dismissed! As Lord Upjohn explained, the case of *Dutton v. Poole*<sup>9</sup>, on which Lord Denning has chiefly relied, must be taken to have been overruled as long ago as 1861.

Little was said in *Beswick v. Beswick*<sup>1</sup> about C's right to sue in equity, but by a marked tightening in judicial opinion, a trust will only be found where it is quite clear that the parties expressly intended not to reserve the power to alter or vary the agreement between themselves<sup>10</sup>. That the courts have not created "revocable trusts" in situations such as that in *Beswick* is a pity<sup>11</sup>: it seems fairly clear now that little can be expected from the law of trusts in relation to third party contracts.

Although, then, C cannot himself (in the absence of an express declaration of trust) sue A, the prevailing modern view is that C is

7. *Id.* at 477.

8. [1962] A.C. 446. The last of a long line of cases of similar effect of which *Price v. Easton* (1883) 110 E.R. 518; *Tweddle v. Atkinson* (1861) 121 E.R. 762; *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.* [1915] A.C. 847; *Wilson v. Darling Island Stevedoring Co.* (1956) 95 C.L.R. 43; are among the better known. See also *Re Sinclair* [1938] 1 Ch. 799.

9. (1678) 85 E.R. 523.

10. The earlier cases—e.g. *Gregory v. Williams* (1817) 36 E.R. 224; *Lloyd's v. Harper* (1880) 16 Ch. D. 290, are reviewed at some length by Professor Corbin in (1936) 40 Law Quarterly Review 39. The new view is represented by *Re Schebsman* [1944] Ch. 83; *Vandepitte v. Preferred Accident Insurance Corp.* [1933] A.C. 70; *Green v. Russell* [1959] 2 Q.B. 226; cf. *Beswick v. Beswick* [1966] Ch. 538 at 555 (Lord Denning M.R.), 561 (Danckwerts L.J.), and 564-565 (Pearson L.J.)

11. The suggestion came from Fullagar J.'s judgment in the *Wilson Case* (*supra* n. 8), with which Dixon C.J. concurred, and which received the express approval of the House of Lords in *Midland Silicones v. Scruttons* [1962] A.C. 446.

entitled "*sui jure*" to the performance which has been promised to be made to him<sup>12</sup>. Thus money once paid under a third party contract to C becomes his own: he is not accountable for it to the promisor or anyone else<sup>13</sup>. A second consequence is that the promisee (B) cannot sue the promisor (A) in money due and payable to himself, because the money is not due to him but to C, the third party<sup>14</sup>. That C's right is unenforceable is due only to a "mechanical defect in our laws"<sup>15</sup>; a "mere defect in procedure"<sup>16</sup>. Of the judges in *Beswick* only Lord Upjohn seemed to take a more conservative view: "It is a fallacy to suppose that (C) is [sc. by specific performance in her favour] obtaining additional rights: B is entitled to compel A to carry out the terms of the contract"<sup>17</sup>. Thus we have something to be hopeful for: it is easier to cure defects in procedure than to create substantive rights, whether by the judges or Parliament. Finally, it is clear that section 56 (1), whatever its effect is, does not help the third party to enforce the contract personally<sup>18</sup>.

(b) B's right to enforce the contract.

It has never been doubted that B (the promisee) is entitled to the performance of the contract according to its terms<sup>19</sup>. A third party contract is not void<sup>20</sup>: it would be surprising if by deciding to benefit a third party by his agreement, the promisee thereby deprived himself of his right to enforce the contract.

#### Action for Damages

The only point disputed here is whether B can ever be entitled to more than nominal damages for A's breach. It is fairly clear now that cases may arise in which substantial damages are in order.<sup>21</sup>

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12. *Re Stapleton-Bretherton* [1941] 1 Ch. 482; *Re Schebsman* [1944] Ch. 83; *Beswick v. Beswick* (*supra* n. 4).
  13. Cf. the position under the Statute of Frauds—another unenforceable right: *Thomas v. Brown* (1876) 1 Q.B.D. 714 per Quain J; *Perpetual Executors v. Russell* (1931) 45 C.L.R. 146.
  14. *Viles v. Viles* [1939] S.A.S.R. 164; *Beswick v. Beswick* (H.L.) (*supra* n.1) at 1201 per Lord Reid.
  15. *Beswick v. Beswick* (H.L.) (*supra* n.1) at 1213 per Lord Pearce.
  16. [1966] Ch. 538 per Lord Denning M.R.
  17. *Beswick v. Beswick* (H.L.) (*supra* n.1)
  18. What the effect of s.56 (1) actually is is still far from clear; of the diverse interpretations offered by their Lordships, only that of Lord Upjohn seems particularly convincing, but that is outside the scope of this essay.
  19. *Hohler v. Aston* [1920] 2 Ch. 420; *Re Stapleton-Bretherton* [1941] 1 Ch. 482; *Beswick v. Beswick* (H.L.) (*supra* n.1).
  20. *Beswick v. Beswick* (H.L.) (*supra* n.1) at 1201 per Lord Reid.
  21. Per Windeyer J. in *Coulls v. Bagot's Executor & Trustee Co.* (1966) 40 A.L.J.R. 471 at 486-487, cited with approval by Lord Pearce in *Beswick v. Beswick* (*supra* n. 1) at 1214. See also per Lord Upjohn at 1221. The case of *West v. Houghton* (1879) 4 C.P.D. 197, which is cited in Cheshire & Fifoot: *Law of Contract* (Aust. ed., by J. G. Starke and P. F. P. Higgins, 1966) for the contrary proposition, does not, it is submitted, decide any more than that, on the facts, the plaintiff was only entitled to nominal damages. *Viles v. Viles* (*supra* n. 14), also cited, was an action for money due and is therefore not in point.

Of the judges in *Beswick v. Beswick*<sup>1</sup> only Lord Hodson did not in clear terms favour this proposition, and it is submitted that his statement that no more than nominal damages can be recovered has reference only to the facts of the case before him. Of course, it may well be, as Dr. Glanville Williams has pointed out<sup>22</sup>, that on normal common law principles for the assessment of damages the promisee will quite often not be able to show damage to himself. But that is a fundamentally different proposition.

### Specific Performance

In most cases a much better remedy than damages will be specific performance. The possibility of such a decree was recognized by Sargant J. in *Hohler v. Aston*<sup>23</sup> and there is some earlier authority<sup>24</sup>. Nevertheless specific performance has been rather overlooked. From the third party's point of view, it suffers from the manifest defect that he has no means of compelling the promisee to sue for specific performance. In practice this may not often be a problem, but while it remains law the third party can hardly be said to have a right enforceable by himself.

In *Beswick* there was little discussion, either in the Court of Appeal or the House of Lords, of the basis for a decree of specific performance. Nevertheless it appears that their Lordships adopted the broad view enunciated by Kay J. in *Hart v. Hart*<sup>25</sup>: "When an agreement for valuable consideration has been partially performed, the Court ought to do its utmost to carry out that agreement by a decree for specific performance." In addition, specific performance was in this case a means of avoiding multiplicity of action<sup>26</sup>. Generally, it would seem that third party contracts which have been executed on one side will in fairness to all concerned, and whenever possible, be specifically enforced. This may mean generally a broadening of specific performance jurisdiction: in any event it is a useful remedy in the sphere of third party contracts.

### Money due to a third party.

There is absolutely no authority to support or deny the validity of an action by the promisee for money due and payable to the third party<sup>27</sup>. If it is accepted that the action for money due is a kind of

22. (1944) 7 Modern Law Review 123 at 135.

23. [1920] 2 Ch. 420.

24. Though specific performance was granted in *Keenan v. Handley* (1864) 10 L.T. (N.S.) 683 (Kindersley V.C.) it is by no means clear that the Court of Appeal approved of the course: see (1864) 10 L.T. (N.S.) 800. *Peel v. Peel* (1869) 17 W.R. 586 is a fairly difficult case (see per Salmon L.J. in *Beswick*, [1966] 3 All E.R. 1 at 15) and several of their Lordships preferred not to rely on it. *Drimmie v. Davies* (1898) 1 Ir. Rep. (C.A.) is some persuasive authority.

25. (1881) 18 Ch. D. 670 at 685: cited by Lords Hodson, Pearce & Upjohn.

26. See esp. Lord Upjohn at 1218-1219.

27. The case of *Viles v. Viles* (*supra* n.14) is not in point because the action there was money due and payable to the promisee.

specific performance at common law<sup>28</sup>, then on the analogy with specific performance in favour of a third party, the action might well lie. It is at least an interesting possibility.

2. *A promises B and C, in return for consideration in fact provided by B, to pay money to C.*

Where a promise is made to two persons, then at common law they are presumed to be joint promisees<sup>29</sup>. It is, subject to this presumption, a question of construction whether promisees are joint or several, or joint and several. In his treatise on "Joint Obligations", Dr. Glanville Williams said: "It is not too much to say that the rules for joint promises are unsatisfactory in almost every single respect"<sup>30</sup>. Most of these rules are the result of a rather metaphysical common law assumption that when two persons do something jointly, they may be treated as one person. The rule as to joint promisees enunciated in *Coulls' Case* is perhaps an exception to Dr. Williams' statement: it is no exception to the generalization that joint obligors are treated as one person. Thus, in common law theory, it is as pointless to enquire who among joint promisees in fact gave consideration as it would be to enquire which hand the promisor used to sign the contract. It is enough that the contract was signed. The judgments in *Coulls' Case* dealing with this point cite little or no authority. The only case cited (by Windeyer J.) is *Rookwood's Case*<sup>31</sup>, a very old case which is briefly reported on the point of forbearance as consideration. It does not appear that the judges actually considered the point about joint promisees, but they did allow the party who had not provided consideration personally, to sue. The case was decided before modern views of privity had been settled, and is thus scanty authority.

There can be few complaints about the rule, however. It enables C the joint promisee to sue personally, joining as co-plaintiff the other joint promisee B<sup>32</sup>. If B refuses to be joined, C, after tender of costs, may join him as co-defendant<sup>33</sup>. If provision is made for survivorship the better view seems to be that the survivor may sue on his own<sup>34</sup>. The rule might well assume considerable importance if it were possible to make third party beneficiaries "voluntary" joint promisees (provided always that does not infer a resulting trust as

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28. Cf. the persuasive article: "Specific Performance at Common Law," by H. K. Lücke in (1965) *University of Tasmania Law Review* 125.
  29. Cf. the position of joint tenants; Cheshire: *Modern Law of Real Property* (9th ed., 1962) 293 *et seq.*
  30. G. L. Williams: *Joint Obligations* (1949), 3.
  31. (1589) Cro. Eliz. 164; 78 E.R. 420.
  32. *Coulls' Case* (*supra* n.6) per Barwick C.J. at 477.
  33. *Ibid.*
  34. *Attwood v. Rattenbury* (1822) 6 Moo C.P. 579 at 584, and see *Halsbury* (3rd ed. 1952) vol. viii, 67, cited by Windeyer J. in *Coulls' Case* (*supra* n.6) at 483, *contra* Barwick C.J. at 477-478.

between the joint promisees)<sup>35</sup>. It should not be difficult to frame documents in such a way as to make the beneficiary a joint promisee, but it would be just as easy to make a declaration of trust. The real defect in the law is that the parties to home-made contracts, who know nothing either of trusts or joint promisees, are completely precluded from benefiting third parties. In the absence of judicial revolution, legislation seems necessary<sup>36</sup>.

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35. Nothing as to this was said by the High Court.

36. Cf. the remarks of Lord Reid in *Beswick v. Beswick* (H.L.) (*supra* n.1) at 1201. Law Revision Committee Report 1937, (cmd. 5449).

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