In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011: No 98

BETWEEN:-

SJ CONSTRUCTION LTD

Plaintiff

-and-

(1) CALVIN SIMONS
(2) NATHALIE ADDERLEY

Defendants

JUDGMENT

(In Court)

Date of hearing: 6th and 7th October 2014, 9th December 2014
Date of judgment: 15th January 2015

Ms Simone N Smith-Bean, Charter Chambers Bermuda Ltd, for the Plaintiff

Mr Edward I King, Edward Ishmael-King Barristers and Attorneys, for the Second Defendant

The First Defendant did not appear and was not represented

Background

1. The Plaintiff is a construction company. It seeks judgment against the Second Defendant for unpaid invoices in respect of building works which it carried out at the property known as 2 Scenic Heights Lane in Southampton ("the Property"). The amount claimed is $169,103.73, together with costs and interest. The Plaintiff has previously obtained summary judgment against the First Defendant for the same amount, but he is a man of straw. The Second Defendant disputes liability.

2. The First and Second Defendants are brother and sister. The Property was formerly owned by their mother. In around 2006 she was diagnosed as having Alzheimer's disease. She moved in with the Second Defendant and executed a power of attorney in her favour, so that the Second Defendant could help her manage her affairs.

3. The First Defendant, who gave evidence for the Plaintiff, described himself as a "*speculative contractor*" who bought, developed and sold property, although he said that he did not do any construction work in the course of business. He had suggested to the Second Defendant that they renovate the Property, which included three apartments for letting to tourists, to increase its rental income for their mother. The renovation work was to include two additional apartments.

4. The Second Defendant agreed. She persuaded their mother to add the First and Second Defendants' names to the Property so that they could raise a mortgage against it in order to fund the renovations. There is no suggestion that the First or Second Defendants thereby sought or obtained any beneficial interest in the Property.

5. The First Defendant approached Capital G Bank (now Clarien Bank) ("the Bank") on behalf of both Defendants and their mother to request a mortgage. At the First Defendant's behest, the borrower was to be a company called Ocean Terrace Ltd ("the Company") to which the Property was to be transferred. The Company had not yet been incorporated.

6. In March 2008 the Bank authorised a loan to the Company of $876,000. The amount was calculated on the following basis: $336,000 to repay the existing mortgage against the Property with another lender; $373,500 to carry out the renovations; $37,350 as a 10% contingency amount in case of cost overruns; $106,665 to convey the Property to the Company; and $21,565 estimated closing costs. This came to $875,080, which the Bank rounded up to $876,000 in case of any unforeseen expenses.

7. In May 2008 the Bank agreed to lend an additional $17,000 to pay the outstanding fees of the architects whom the First Defendant had engaged on the project.

8. The First Defendant advised the Bank that the works to be performed were to convert the garage into a bedroom, add a studio apartment, and split two bedrooms into two units, so as to create a total of seven units for tourist accommodation. He also advised the Bank that he would be the contractor on the project through what he described as his "company", Signature Homes, although I accept the Second Defendant's evidence that that was simply a trading name. All the monies were lent on the basis of those representations.

9. In or around October/November 2008, the attorneys for the Defendants advised the Bank that the Company would not in fact have the power to own any property. The Property therefore remained in the names of both Defendants and their mother, and they became the Borrowers. They signed a mortgage facility letter on 8th November 2008. The Defendants signed on behalf of the Company as guarantor, although it had not yet been incorporated.

10. The mortgage facility letter contained a requirement that the Borrowers provide the Bank with a copy of the approved plans and an undertaking by the Borrowers not to make changes to the plans that would incur any cost overruns without the prior written approval of the Bank.

11. On 16th December 2008 the Borrowers and the Bank executed a deed of mortgage ("the Mortgage Deed") conveying the Property to the Bank as security for the mortgage loan.

12. The Defendants finally incorporated the Company on 28th January 2009. They were both directors. They intended that once the renovations were complete the Company would manage the apartments at the Property.

13. The Company in its capacity as "*owner*" entered into a written agreement dated 4th March 2009 with "*Signature Homes*" as "*contractor*" whereby the contractor, ie the First Defendant, undertook to carry out renovation work on the Property ("the Agreement"). I accept that the parties to the Agreement did enter into it on or about that date, and note that Karen Brown, the Head of Lending at the Bank, gave evidence that the First Defendant had supplied the Bank with a copy of the document sometime in 2009.

14. The Agreement purported to be a standard form American Institute of Architects document. Having heard the critical observations about the form of the Agreement made in evidence by Edward Pereira, the architect engaged by the Plaintiff in relation to the Property, I conclude that it was most probably a pirated copy, but nothing turns on that. The agreement was signed on behalf of the Company by both Defendants.

15. When cross-examined, the Second Defendant appeared to accept that the fact that the Company was not the owner of the Property somehow invalidated the Agreement. I disagree. I am satisfied that as both Defendants had signed the mortgage facility letter they would both have known when they incorporated the Company and signed the Agreement that the Company was not going to own the Property. I am therefore satisfied that the Agreement was not an oversight – although the description of the Company as "*owner*" was mistaken. To be clear, under the Agreement the First Defendant agreed with the Company that he would renovate the Property as contractor.

16. The Agreement provided that the Company should pay the First Defendant a "contract sum" of $459,000 for the performance of the contract. I take the contract sum to be the budget for carrying out the renovation to the Property. This figure is very close to that of $459,520.31 which was drawn down from the loan account on 16th December 2008 to redeem the existing mortgage on the Property and pay legal fees and other expenses. However the monies available for renovations were only $427,850 (ie $373,500 to carry out the renovations; $37,350 as a contingency amount; and $17,500 as architect's fees).

17. Both Defendants gave evidence that they had agreed that the First Defendant could draw a salary of $6,000 per month for his role on the project. In light of the Agreement I infer that the Second Defendant gave her agreement on behalf of the Company. The First Defendant initially accepted in evidence that he was paid that sum, then stated that he was not, but that he was paid $500 per week, although not every week. The First Defendant made a number of drawdowns from the loan monies, many of which were certified for payment by the independent project manager whom the Bank had stipulated must be hired. Although I was not referred to a breakdown of the monies which were drawn down, I infer that they included whatever the First Defendant paid himself, and that he paid himself something. I am therefore satisfied that the Company agreed to and did pay the First Defendant for his role as contractor under the Agreement.

18. Sometime later in 2009 the First Defendant made an oral contract with Steven Pacheco, the president and manager of the Plaintiff, whereby the Plaintiff would renovate the Property. Mr Pacheco gave oral evidence that the First Defendant told him that the Property belonged to him, ie the First Defendant, his sister and mother, and that he would be contracting on their behalf. In his witness statement he had merely said that the First Defendant had told him that he, ie the First Defendant, and his sister were undertaking renovations to the Property, which they owned, and that he, ie the First Defendant, would be the contact for the project.

19. Mr Pereira said in evidence that the First Defendant did not state that he was instructing the Plaintiff on behalf of himself and his sister but that he, Mr Pereira, had assumed that was the case because the First Defendant had mentioned that he and his sister were the joint owners of the Property. The conversation took place at a site meeting before the Plaintiff started any work at the Property. This account is consistent with the account in Mr Pacheco's witness statement. I conclude that it is most likely what the First Defendant told both Mr Pacheco and Mr Pereira, ie that the Defendants were joint owners of the Property but not that he was instructing the Plaintiff on behalf of them both.

20. The First Defendant, who was called as a witness for the Plaintiff, gave evidence that he instructed the Plaintiff on behalf of the Company but that, as is common ground, he did not mention that to Mr Pacheco. Indeed Mr Pacheco did not learn of the existence of the Company until the start of these proceedings. The Plaintiff, as noted above, has already obtained summary judgment against the First Defendant, and the Second Defendant, although not bound by that finding, does not dispute her brother's liability.

21. The evidence of the First Defendant was that he instructed the Plaintiff after discussion with the Second Defendant and with her agreement. Whereas the evidence of the Second Defendant was that she was not made aware of the Plaintiff's involvement with the project until some months later. I prefer the evidence of the Second Defendant as I did not find the First Defendant a reliable witness. When confronted with various significant documents which bore his signature, his stock response was to say that he didn't remember them. At one point he even said that he had never seen the Agreement before. He also said that he knew nothing about Signature Homes. I found that his evidence on these points was not credible, which undermined his credibility in general.

22. Mr Pacheco began work at the Property in or about July 2009. That same month the Second Defendant left the island for an extended vacation and did not return until late November 2009. Before leaving, on 5th June 2009, both

Defendants signed an authorisation instructing the Bank to change the loan account from a "*joint and*" account to a "*joint or*" account. This meant that the First Defendant could draw down monies from the account without the specific authorisation of the Second Defendant, although in point of fact the Bank had unaccountably been permitting him to do that anyway even before the authorisation was signed.

23. The Second Defendant asked her son-in-law, Ricky Raynor, to keep an eye on the Property while she was away. He went off island himself for a few weeks, but on his return in October or November 2009 he noticed that construction work was underway. He ascertained that the contractor was SJ Construction and spoke to Mr Pacheco, whom he knew socially, by telephone. Mr Raynor gave evidence that Mr Pacheco was surprised to hear that the Property had another owner besides the First Defendant, but Mr Pacheco's evidence was that he already knew that and that what surprised him was to learn that the Second Defendant was Mr Raynor's mother-in-law. Mr Raynor reported back to the Second Defendant. I accept her evidence that this was the first she knew of the Plaintiff's involvement with the project.

24. On her return to Bermuda the Second Defendant met Mr Pacheco, twice at the Property and once at her house. The meetings took place during December 2009 through January 2010. Her husband, Erwin Adderley, who is a former Director of Planning, was present at the home meeting. He also met Mr Pacheco at the Property.

25. The Second Defendant gave evidence that she was concerned when she learned from Mr Pacheco that the work carried out by the Plaintiff included work that was not shown on the plans for the project. This was work that had not been budgeted for and which she had not agreed that the First Defendant should carry out. It is common ground that the additional work was carried out on the instructions of the First Defendant. I accept Mr Pacheco's evidence that some of the additional work, specifically reinforcing the retaining wall to the swimming pool, was necessary in order

for the project to proceed. The Bank was informed of the work to the pool after the event, but did not treat it as an event of default as the loan was being serviced at the time.

26. Going into the meetings, Mr Pacheco was concerned that the Plaintiff was not going to get paid. He had broken the renovation down into stages, and prepared a budget for each stage. When that stage was complete, he had submitted the relevant invoices to the First Defendant for payment. He billed on a cost and charge basis, but with a cap set at the amount for which he had budgeted.

27. When Mr Pacheco first met the Second Defendant, he had only received two payments, both directly from the First Defendant: a cheque dated 18th August 2009 for $13,000 and one dated 11th June 2009 for $25,145. The invoices giving rise to both payments had been approved by the project manager. They had not been – and were not required to be – approved by the Second Defendant, although the project manager had copied his written approvals to her. However the amount of the Plaintiff's outstanding invoices was in excess of $300,000.

28. Mr Pacheco gave evidence that he spoke to the First Defendant after the first meeting, and told him that the Second Defendant wanted information. He stated that the First Defendant said to give the Second Defendant any information that she asked for as she had as much to do with project as he did. From this I infer that, at any rate prior to that conversation, Mr Pacheco did not believe that the Second Defendant was a party to his contract with the First Defendant: if he had, he would not have asked the First Defendant before supplying information to the Second Defendant.

29. I need not give a detailed account of what was said at the three meetings, which took place during December 2009 through January 2010. Those present have differing recollections of them. This is not surprising, particularly given the passage of time and the conflicting interests at play. The Second Defendant or her husband told Mr Pacheco that the monies from

the Bank were used up and that further financing from the Bank was unlikely to be forthcoming, but that it might be possible to obtain financing through one of their grandchildren who worked at another bank. They expressed an interest in the possibility of completing the project and wanted to know how much this would cost. Mr Pacheco supplied them with a copy of his outstanding invoices.

30. However I am satisfied that the Second Defendant did not say anything that could reasonably be construed as an acceptance of personal liability for the cost of the project or any part thereof. I am also satisfied that Mr Pacheco did not say anything from which the Second Defendant could reasonably have concluded that he thought that she had accepted personal liability.

31. Both Defendants nonetheless signed a written authorisation dated 18th December 2009 for the Bank on behalf of the Company to pay $200,000 to the Plaintiff for services rendered. The payment was made directly by the Bank and not via the First Defendant. The payment was based on the invoices submitted by Mr Pacheco. The invoices did not give a detailed description of the work done, and so did not distinguish between the work that appeared on the approved plans for the project and the work that did not.

32. The payment left $121,378.81 outstanding. The Plaintiff carried out further work on the Property before abandoning the project in January 2010, having concluded that he was unlikely to be paid anything further. I surmise that this work was included in further invoices submitted by the Plaintiff which brought the arrears up to $169,103.73. This is the principal sum for which the Plaintiff now claims.

33. The Bank was not willing to provide any further finance for the project and the Borrowers were unable to repay the mortgage. The Bank foreclosed due to mortgage arrears and on 12th April 2012 it obtained an order for the possession and sale of the Property. But for the Defendants' family the story had a happy ending. In 2013 Mr Adderley and his grandsons bought the Property from the Bank, thereby ensuring that it remained in the family.

However neither Defendant has retained any interest in the Property. From the Plaintiff's point of view the ending was not so happy: the family has obtained the benefit of the Plaintiff's work but the Plaintiff has been left very substantially out of pocket.

The Plaintiff's claim

34. It is a fundamental principle that only a person who is a party to a contract can sue on it. See Dunlop Pneumatic Tyre Company Limited v Selfridge and Company Limited [1915] AC 847, HL, *per* Viscount Haldane LC at 853. This is known as privity of contract. There are, however, certain exceptions. See Chitty on Contracts, Thirtieth Edition, at para 37-225. On the face of it, there was no privity between the Plaintiff and the Second Defendant. The Second Defendant did not contract with anybody; the Company contracted with the First Defendant; and the First Defendant contracted with the Plaintiff.

35. Ms Smith-Bean, counsel for the Plaintiff, sought to get round this difficulty in a variety of ways. First, she submitted that the First Defendant was acting as an agent of the Second Defendant. Thus, she submitted, he entered into the contract not only on his behalf, but on behalf of the Second Defendant also. The Second Defendant did not in fact appoint the First Defendant as her agent, but Ms Smith-Bean relied upon the doctrine of ostensible authority. This was explained by Diplock LJ (as he then was) in Freeman & Lockyer v Buckhurst Park Properties (Magnal) Ltd [1964] 2 QB 480, EWCA, at 503:

> An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship

> so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

36. In the instant case the Second Defendant did not make, whether directly or indirectly through the First Defendant, a representation to the Plaintiff that the First Defendant was contracting with it on her behalf, let alone one that she intended to be acted upon by the Plaintiff. I therefore find that the First Defendant did not act as an agent with the Second Defendant's ostensible authority.

37. Mr King, counsel for the Second Defendant, raised in order to dismiss the possibility that his client might have ratified the First Defendant's actions. The classic expression of the doctrine of ratification is to be found in Bird v Brown (1850) 4 Exch. 786, per Rolfe B at 798 – 799.

> If A. B., unauthorised by me, makes a contract on my behalf with J. S., which I afterwards recognise and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be; or, if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal, at his option, and has the same equities against me, if I sue, which he would have had against A. B.

This statement was approved by Viscount Simonds, delivering the judgment of the Privy Council, in Commercial Banking Co of Sydney v Mann [1961] AC 1 at 12. Ratification may be implied from conduct, and the adoption of part of a transaction operates as a ratification of the whole transaction. See In re Mawcon Ltd [1969] 1 WLR 78, Ch D, *per* Pennycuick J at 83 B.

38. I do not accept that by authorising the Company to pay $200,000 to the Plaintiff the Second Defendant agreed to admit that the Plaintiff had carried out any work with her authority. The payment was made by the Company not by her. Moreover, the fact that the Company authorised payment of invoices to the value of $200,000 did not imply that it would authorise payment of any further invoices. I therefore find that the Second Defendant did not ratify the Plaintiff's work.

39. Ms Smith-Bean submitted in the alternative that the Second Defendant had acquiesced to the expenditure which the First Defendant had authorised. Acquiescence is an equitable doctrine. In Blue Haven Enterprises Ltd v Tully [2006] UKPC 17, Lord Scott, giving the judgment of the Privy Council, gave a comprehensive overview.

> 22. The foundation stones of the principle espoused by Blue Haven were laid by Ramsden v Dyson (1866) LR 1 HL 129 and Willmott v Barber (1880) 15 Ch D 96. Both were cases in which a claimant sought to establish a proprietary interest in someone else's property on the ground that he (the claimant) had spent money on the property in the belief that it was his and that that belief had been encouraged by the true owner passively standing by without intervening. In Ramsden v Dyson Lord Cranworth said, at pp 140–141:
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> > "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented."
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> And in Willmott v Barber Fry J famously stated the five so-called probanda that a claimant should endeavour to establish. He said, at pp 105–106:

> "A man is not to be deprived of his legal rights unless he has acted in such a way at would make it fraudulent for him to set up those rights. What then are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly the plaintiff must have expended some money or must have done some act (not necessarily on the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. It he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

In both the passage cited from Lord Cranworth's speech and the passage cited from Fry J's judgment, the necessity for showing the defendant to be guilty of unconscionable behaviour clearly appears. Lord Cranworth uses the word "dishonest". Fry J speaks of "fraud". Subsequent case law has reduced the rigidity of Fry J's apparent insistence that each of the five probanda be established to the letter. In Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note) [1982] QB 133 , 151–152 Oliver J (as he then was) said,

> "the more recent cases indicate, in my judgment, that the application of the Ramsden v Dyson … principle — whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really

> immaterial — requires a much broader approach which is directed at ascertaining whether, in particular circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."
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> 23. Oliver J's concentration on unconscionable behaviour on the part of the defendant rather than on the Willmott v Barber five probanda was implicitly approved by Lord Templeman in giving the judgment of the Privy Council in Attorney General of Hong Kong v Humphrey's Estate (Queen's Gardens) Ltd [1987] AC 114, 123 and is referred to in Snell's Equity, 31st ed (2005), para 10.16 as "the most important authoritative modern statement of the doctrine". Their Lordships are of the same opinion. Fry J's five probanda remain a highly convenient and authoritative yardstick for identifying the presence, or absence, of unconscionable behaviour on the part of a defendant sufficient to require an equitable remedy, but they are not necessarily determinative.
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> 24. Oliver J's reference to "proprietary estoppel, estoppel by acquiescence, estoppel by encouragement" might appear to suggest that in every case the claim must be based on some species of misrepresentation made by the defendant. But Oliver J's key that unlocks the door to the equitable remedy is unconscionable behaviour and although it might be difficult to fashion the key without a representation by the defendant it would not, in principle, necessarily be impossible to do so.

40. Turning to the facts of the instant case, I shall assume, without deciding, that Mr Pacheco carried out further building works after receipt of the $200,000 payment in the belief that the Second Defendant had agreed to pay for them. I am satisfied that the Second Defendant was unaware that he held any such belief, and that nothing that she said or did, including authorising payment of the $200,000 by the Company, could reasonably be construed as encouraging him in that belief. I therefore find that she did not act

unconscionably if she did not make clear to Mr Pacheco that she would not assume personal liability for the renovation works. Although it was her evidence, which he disputed, that she did make this clear. It follows that I do not accept that by authorising the payment of $200,000 the Second Defendant acquiesced to the work carried out on the instructions of the First Defendant.

41. In Blue Haven Enterprises Ltd v Tully the appellant's original case before the Board was argued as one of proprietary estoppel by acquiescence. However in his oral submissions the appellant's counsel argued instead that the respondent had been unjustly enriched. Likewise, Ms Smith Bean submitted that the Second Defendant should be held liable in restitution as she has been unjustly enriched by the renovations which the Plaintiff carried out.

42. Lord Scott held at para 20 that in cases of both acquiescence and unjust enrichment the underlying principle was the same:

> The critical question is not whether [the respondent] has been enriched at [the appellant's] expense but whether the circumstances in which that enrichment came about place [the respondent] under an equitable obligation to compensate [the appellant] accordingly.

43. It follows that as the Second Defendant did not acquiesce to the work carried out by the Plaintiff she has not been unjustly enriched at his expense. Moreover, it is difficult to see how the Second Defendant was enriched, given that she has never had any equitable interest in the Property and that under the Mortgage Deed the legal title to the Property passed to the Bank.

44. There is a further point. As Mr King, who appeared for the Second Defendant, pointed out, restitution will not generally lie against a defendant who has benefited from the plaintiff's services rendered pursuant to a contract to which the defendant was not a party. See MacDonald Dickens & Macklin (a firm) v Costello [2012] QB 244, EWCA, *per* Etherton LJ, giving the judgment of the Court, at para 30. As Etherton LJ stated at para 23:

> The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation.

I see no reason to depart from that principle in the present case.

45. As a last throw of the dice, Ms Smith-Bean invited the Court to find that the facts of the case gave rise to an exception to the doctrine of privity. She relied on a line of cases dealing with exceptions to the common law rule that apart from nominal damages the plaintiff can only recover in an action for breach of contract the actual loss he has himself sustained. As to the existence of the rule, see The Albazero [1977] AC 774, *per* Lord Diplock at 846.

46. One such exception is the rule in Dunlop v Lambert (1839) 6 Cl & F 600 that a consignor of goods who had parted with the property in them before the date of breach could nonetheless recover substantial damages for the failure to deliver the goods. In The Albazero, Lord Diplock stated at 847 E – F that the rationale for the rule was that the parties were to be treated as having entered into the contract for the benefit of all persons who had or might acquire an interest in the goods before they were lost or damaged. He noted at 847 A – B that the Bills of Lading Act 1855 and subsequent developments in the law had much reduced the scope and utility of the rule where goods were carried under a bill of lading, but that the rule extended to all forms of carriage including carriage by sea itself where no bill of lading has been issued. He added:

> there may still be occasional cases in which the rule would provide a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it.

47. In St Martin's Property Corporation Ltd v Sir Robert McAlpine Ltd [1994] 1 AC 85 the House of Lords applied the rationale for the rule in Dunlop v Lambert to the very different context of a building contract. The first plaintiffs entered into a standard form building contract with the defendants to build a large development including shops, offices and flats. The contract provided that the first plaintiffs could not assign its benefit without the written consent of the defendants. The first plaintiffs subsequently assigned for full value to the second plaintiffs all their interests in the development, including, or so it was purported, the full benefit of all relevant contracts. However the defendants did not consent to the assignment. Part of the building work was later found to be defective and both plaintiffs sued for damages.

48. The House of Lords held that the purported assignment was invalid as it took place without the consent of the defendants. The second plaintiffs therefore had no cause of action against them. However the first plaintiffs were able to recover substantial damages for the second plaintiffs' loss. It was known to both parties to the building contract that the development would be occupied and possibly purchased by third parties, who would foreseeably suffer loss from any damage caused by the defendants' breach. As the first plaintiffs could not assign their rights under the contract without the defendants' consent, both parties were to be treated as having entered into the contract on the footing that the first plaintiffs would be entitled to enforce contractual rights for the benefit of third parties, like the second plaintiffs, who suffered from defective performance but could not acquire any contractual right to hold the defendants liable for the breach. *Per* Lord Browne-Wilkinson, giving the judgment of the House, at 114 G – 115 B.

49. Ms Smith-Bean submitted that in light of these authorities the Second Defendant, had the Plaintiff's work proved defective, could have sued the Plaintiff for breach of contract for any loss that she had sustained, and that by parity of reasoning the Plaintiff could therefore sue her for breach of contract for non-payment of its outstanding invoices.

50. This reasoning is hopelessly flawed. The general rule that a plaintiff can only recover damages for his own loss is separate and distinct from the doctrine of privity: the authorities upon which Ms Smith-Bean relies provide an exception to the former not the latter. The exception provides that in certain cases where A is in breach of contract with B, as a result of which C has suffered loss, B can recover damages for the breach from A on behalf of C, provided that C is unable to acquire any contractual rights against A. The authorities do not provide that where A has entered into a contract with B which benefits C, and A is in breach of contract, C can sue A for the breach. Still less do they provide that under such a contract A can sue C for a breach by B.

51. Moreover, in the instant case there was nothing to prohibit the First Defendant from assigning any contractual rights which he may have against the Plaintiff to the Second Defendant. Thus this is not a case where, if the Plaintiff's building work was defective and as a result the Second Defendant suffered loss, the First Defendant could sue him for breach of contract on her behalf. Further, the Plaintiff is not without a remedy for the First Defendant's breach of contract as it has obtained judgment against him. That the First Defendant apparently has insufficient assets to satisfy the judgment debt is nothing to the point.

52. In the circumstances it is not open to me to find that the Second Defendant is contractually liable to the Plaintiff for the debts of the First Defendant.

Conclusion

53. The Plaintiff's claim is dismissed. I shall hear the parties as to costs.

DATED this 15th day of January, 2015

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Hellman J