

THE LAW YEAR

CONTRACTS

The past year has seen attacks on two important doctrines in the law of Contract — one old, another new. While the final outcome of the attack on the old doctrine of privity of contract is still in doubt, the newer doctrine of the fundamental breach appears to have succumbed.

Despite the failure of previous attacks on the doctrine of privity in 1962 in the House of Lords decision in *Scruttons v. Midland Silicones*,¹ Lord Denning has returned to the fray in the case of *Beswick v. Beswick*.² Peter Beswick was a coal merchant with no premises but only a truck and some equipment. He transferred the good will of his business, including his truck and equipment, to his nephew in 1962, since he wished to retire and make some provisions for himself and his wife if she should survive him. The nephew in return promised to employ Peter Beswick as consultant for life at a salary of 6 pounds 10 shillings per week, and after his death to pay his widow 5 pounds per week for her life, this payment "to be charged on the said business." The nephew duly took over the business but after Peter Beswick's death in 1963, he refused to make any but the first of the weekly payments to the widow. In 1964, the widow took out Letters of Administration to Peter Beswick's estate, and then sued the nephew as Administratrix and in her own right, claiming arrears of annuity, a declaration that the nephew was bound to pay in accordance with the agreement, and specific performance of his undertaking to pay her the annuity. The English Court of Appeal upheld her claim.

While all three learned judges held that the action could be brought by the personal representative of the promisee, there was a division of opinion as to whether a third party could enforce a contract made for his benefit. Lords Denning and Danckwerts stated that the widow's claim could be supported by Section 56 (1) of the English Law of Property Act,³ though as Dr. Cheshire has so pertinently remarked, "It is at least questionable if so cardinal a doctrine of the law of contract has been destroyed by a single

1. (1962) A.C. 446.

2. (1968) 3 A.E.R. 1.

3. "A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument," U.K. 1925, c.5.

section in a Property Act."⁴ In any event, the Manitoba Law of Property Act contains no provision similar to Section 56 (1).⁵ It is therefore Lord Denning's other line of attack which is the more interesting to us. He stated that while at common law a third party could not "as a rule" sue "alone in his own name", a promisee can sue the promisor and the third party could "bring an action in the name of the contracting party just as an assignee used to do."⁶ He went on to suggest that the promisee and the third party could sue as co-plaintiffs and if the promisee refused to sue the third party could simply join him as a co-defendant.

The result of the appeal of this decision to the House of Lords is still awaited, and so a detailed discussion of this line of attack would be premature. In any event, *Beswick v. Beswick* points out very clearly the need for some modification of the old doctrine of privity. Is it too much to hope that the House of Lords will use their new discretion in refusing to be tightly bound by their own previous decisions?

The new doctrine, however, of the fundamental breach was, during this past year, given the *coup de grace* by the House of Lords in the case of *Suisse Atlantique Societe D'Armement Maritime S.A. v. N.V. Rotterdamsche Colen Centrale*.⁷ The facts of that case briefly were that on 31st December, 1956, the respondents agreed to charter a vessel from the appellants for the carriage of coal from the United States (East Coast) to Europe, the vessel returning in ballast between each voyage. The charter was to remain in force "for a total of two years consecutive voyages." Fixed periods of laytime were provided within which the respondents were obliged respectively to load and discharge the vessel on each voyage and demurrage was payable, subject to certain exceptions, at the rate of 1,000 dollars a day. Between October 16, 1957, and the end of the charter the vessel made eight round voyages whereas the appellants alleged that a further six voyages could have been performed if the loading and discharging had been completed within the laytime or a further nine voyages if the respondents had loaded and discharged the vessel with reasonable despatch.

In the House of Lords, the appellant shipowners contended that the charterers by their deliberate delays were in fundamental breach of the contract and therefore that the shipowners, for their part, were entitled to repudiate and the charterers, for theirs,

4. Cheshire & Fifoot, *The Law of Contract* (6th Ed.) p. 391.

5. R.S.M. 1954, c.5.

6. *Supra*, note 2, at p. 7.

7. (1966) 2 W.L.R. 944.

were disentitled to rely on the demurrage clause as limiting their liability. The House of Lords dismissed the appeal mainly on the ground that the shipowners had been given no contractual right to a certain number of voyages. Having decided this, however, their Lordships all went on to consider the question of a fundamental breach, even though they pointed out that the doctrine only applied to exception clauses and the demurrage clause being an agreed damages clause, did not fall within this category. Strictly therefore what they had to say in this regard was *obiter*.

Their Lordships, however, were unanimous in stating that the question of whether an exception clause was applicable where there was a fundamental breach of contract was one of the true construction of the contract and there was no rule of law that an exception clause could never excuse a fundamental breach. The expression "fundamental breach" simply means that type of breach which entitles the innocent party to treat a contract as repudiated. If he does so, the whole contract including the exception clause is at an end and no reliance can be placed on the clause. If, however, he elects to affirm the contract, the clause continues and it is a question of construction of the contract as a whole whether or not the clause was intended to give exemption from the consequences of the fundamental breach. Such an intention must, however, be expressed in clear and unambiguous terms.⁸ The old and well known rules of construction, of course, come in to effect and Lord Upjohn stressed that:

"where there is a breach of a fundamental term the law has taken an even firmer line for there is a strong, though rebuttable, presumption that in inserting a clause of exclusion or limitation in their contract the parties are not contemplating breaches of fundamental terms and such clauses do not apply to relieve a party from the consequences of such a breach even where the contract continues in force. This result has been achieved by a robust use of a well known canon of construction, that wide words which taken in isolation would bear one meaning must be so construed as to give business efficacy to the contract and the presumed intention of the parties, upon the footing that both parties are intending to carry out the contract fundamentally."⁹

It can be seen from the above that while the concept of fundamental breach as a substantive rule of law has now been rejected by the House of Lords, none of the learned Law Lords denied that there are such things as "fundamental terms" and "fundamental breaches". One of the most recent Canadian decisions on the fundamental term doctrine is *Canadian-Dominion Leasing Corporation v. Suburban Superdrug Ltd.*¹⁰ This was a

8. See Law Notes (1966), Vol. 85, pp. 155-157.

9. *Supra*, note 6, p. 68.

10. (1966) 55 W.W.R. 396.

decision of the Appellate Division of the Supreme Court of Alberta just prior to the above *Suisse Atlantique* case. The Appellant leased to the Respondent a machine for the term of five years, which broke down after a very short period of time. The Court held that the Appellant could not rely on the exception clauses in the lease since "the Respondent was entitled to receive under the lease agreement a selector capable of self propulsion for at least a reasonable period of time. This he did not receive."¹¹ The decision, it is submitted, would have been the same even after the *Suisse Atlantique* case and applying the principles therein mentioned. As Professor Coote, speaking of the *Suisse Atlantique* has said: "It is submitted that there is no need for panic measures. It was one of the ironies of fundamental breach that it caused lawyers to overlook and the Courts to delay developing a very potent and more soundly based alternative means available to them for the containment of unreasonable exception clauses."¹²

In the realm of mistake there have been two interesting recent decisions, the one Canadian, and the other English, where the concept of equitable mistake set out by Lord Denning in *Solle v. Butcher*¹³ has been applied. In the Canadian case of *Ivanochko v. Sych*,¹⁴ the Appellant agreed to sell a house and chattels to the Respondent for \$20,000.00. Two years after an agreement had been executed, it was discovered that the monthly payments were insufficient to pay the interest on the outstanding balance of the purchase price, and unless the instalments were increased, the agreement would never be paid up. There was no mistake however, as to the essential terms of the contract. Mr. Justice Woods, in granting rescission of the agreement,¹⁵ applied Lord Denning's statement in *Solle v. Butcher* that:

"A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to the facts or as to their relative and respective rights, provided that misapprehension was fundamental and the party seeking to set it aside was not himself at fault."¹⁶

The second recent decision is *Grist v. Bailey*,¹⁷ the facts were that the Defendant had agreed to sell a house to the Plaintiff for the sum of 850 pounds. There was a term in the agreement which provided that "the property was sold subject to the existing tenancy thereof." The contract was therefore entered into on

11. *Id.*, p. 405.

12. (1967) *Aust. L.J.* p. 347.

13. (1950) 1 *K.B.* 671.

14. (1967) 58 *W.W.R.* 663.

15. *Id.*, p. 635.

16. *Supra*, note 12 at p. 693.

17. (1966) 2 *A.E.R.* 875.

the basis that the property was subject to a Rent Act protected tenant who could not be evicted. According to expert evidence if there had been no such tenancy, the vacant possession value of the property would have been 2,250 pounds. Just prior to the completion of the sale, it was ascertained that the original protected tenant and her husband were both dead at the date of the contract, and that there was resident in the property a son of the former tenant who had no protection under the Rent Acts. Not unnaturally, therefore the Defendant was now refusing to complete on the original terms. Mr. Justice Goff also cited Lord Denning's dictum in *Solle v. Butcher* mentioned above, and decided that here too the mistake was sufficiently "fundamental" for the Defendant to be granted relief in equity, and he was prepared to order rescission of the contract either unconditionally or (if as requested by the Plaintiff) on the terms that the Defendant enter into a fresh contract at a proper vacant possession price.

It is noteworthy that the doctrine of equitable mistake propounded in *Solle v. Butcher* and under some suspicion ever since has now suddenly found adherents almost simultaneously on both side of the Atlantic.

The one other area in the law of Contracts which deserves some mention at this time is that of covenants in restraint of trade, if for no other reason than that a fairly large number of reported contract cases this year seem to touch on this subject. Generally, however, the decisions turn on questions of fact and tend to reiterate the old and familiar principles. Just two might be mentioned in this regard — *Northern Messenger (Calgary) Ltd. v. Frost, Harrington, Loos, et al.*,¹⁸ and *American Building Maintenance Co. Ltd. v. Shandley*.¹⁹ Both these cases emphasize the rule that *prima facie* all covenants in restraint of trade are illegal and unenforceable, but that this presumption may be rebutted, although it is clearly harder to rebut where the relationship between the parties is that of employer and employee (as it was in these cases) than where it is that of vendor and purchaser.

Interesting developments in the law of contract are at present taking place in England, including the passing of the new Misrepresentation Act (dealing with the problems of rescission for innocent misrepresentation),²⁰ and the setting up of a very able committee to advise the Law Commission on a possible contract

18. (1966) 56 W.W.R. 412.

19. (1966) 58 D.L.R. 525.

20. The Act came into force on April 22, 1967; see *Misrepresentation Act, 1967*, 117 *The New Law Journal*, 413.

code.²¹ It is to be hoped that our own Law Reform Commissions and legislatures will also take up the challenge here to bring 19th century contract law into line with 20th century social conditions.

C. H. C. EDWARDS.*

DOMESTIC RELATIONS

When faced by two persons who wish to invoke the matrimonial jurisdiction of the courts but who have entered into a valid polygamous marriage the most important question to be asked is whether the marriage is actually polygamous or just potentially polygamous. A further question and one which has had little discussion, is whether it is necessary that there be two or more wives at the time of the petition for the marriage to be actually polygamous, or whether all that is necessary is that at some time during the marriage there has been more than one wife. In a recent decision, *Imam Din v. National Assistance Board*,¹ a man had contracted a valid polygamous marriage with a woman in Pakistan in 1948. At this time he already had a wife, but she died in 1949. In 1966 an action came before the English High Court concerning the marriage in 1948 and the court had no hesitation in holding that it was an actually polygamous marriage despite the fact that at the time of the proceedings in question there were only two parties to the marriage. This suggests that the rule is "once actually polygamous always polygamous."

The distinction between actually polygamous marriages and potentially polygamous marriages is of great importance because if the marriage is actually polygamous the law takes little cognizance of it. If it is merely potentially polygamous, however, the courts have taken the attitude that it is possible for a change of circumstances to turn the marriage into something so like marriage as we know it, that we will regard it as monogamous and allow the parties recourse to the matrimonial courts. There has been a gradual relaxing in the type of change of circumstances required for this purpose² but the law was still a little vague until the recent case of *Ali v. Ali*.³ Mr. and Mrs. Ali contracted a valid polygamous marriage in India in 1958, and later that year moved to England, where Ali had in fact resided since 1954. In 1959

21. Law Notes (1967), Vol. 86, p. 74.

*Dean, Faculty of Law, University of Manitoba.

1. (1967) 2 W.L.R. 257.

2. For a review of the development prior to *Ali v. Ali* see (1966) 2 Man. L.J. 113.

3. (1966) 1 All E.R. 664.