

TAB 2

Tobin Tractor (1957) Ltd. v. Western Surety Co., 1963 CarswellSask 42

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1963 CarswellSask 42
Saskatchewan Court of Queen's Bench

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Tobin Tractor (1957) Ltd. v. Western Surety Company

Disbery, J.

Judgment: May 9, 1963

Counsel: *W. M. Elliott*, for plaintiff.

E. R. Gritzfeld, for defendant.

Subject: Contracts

Headnote

Guarantee and Suretyship — Contractor's Performance Bond — No Right in Materialman to Sue Surety on Bond — Lack of Privity.

Where a contractor is obliged by an owner to enter into a performance bond, a materialman cannot sue the surety for non-performance; he is not a party to the contract and is without remedy at common law. In equity he is also without remedy unless the contract creates a constructive trust in his favour, which was not the case under the contract in question herein. Authorities extensively reviewed.

It is, however, regrettable that a surety, in consideration for a cash premium, may issue its performance bond conditioned to answer for debts to be incurred by a contractor in carrying out his work, and then, when debts have been so incurred and left unpaid, may advise creditors that it cannot be compelled to honour its undertaking because there is no privity between the surety and the creditors. No doubt materials and labour are often supplied in erroneous reliance upon such a performance bond.

Disbery, J.:

1 This is a special case stated under O. XXIV of the Rules of Court to obtain the opinion of the court on certain questions of law which arise out of the facts as agreed to by counsel and the documents which form part of the case.

2 The rural municipality of Rosemount No. 378, hereafter referred to as "the municipality," desired to construct approximately five miles of municipal grid road and called for tenders for such work. One, Lloyd W. Bennell, hereafter referred to as "the contractor," submitted the successful tender and, accordingly, on May 16, 1959, a contract to construct said strip of roadway was entered into between the municipality and the contractor. This contract contained, *inter alia*, the following covenants, the relevant portions of which are as follows:

(14) Payment by contractor for labour, etc.

The Contractor shall promptly pay for all labour expended, services given and materials and supplies used in, upon, in respect of, or about the construction of the work, or any portion thereof, including any sum due for the labour or services of any sub-contractor, foreman, workman, labourer or other person ... the payments in respect of such labour, services, materials and supplies to include without prejudice to the foregoing generality all sums for:

(b) The use, rent of [obviously misprint for 'or'] hire of:

(1) Wagons or other plant or machinery;

(2) Motor power equipment of any kind;

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trust for the use and benefit of the plaintiff as a person coming within the provisions of sec. 14 of the contract; and, of course, being based thereon, the benefit of the collateral surety bond entered into by the defendant. Thus the plaintiff contends that it is a *cestui que trust* of such benefits and the municipality the trustee thereof. Learned counsel cited and I have read and considered the following authorities in support of this contention, namely: *Dutton v. Poole* (1678) 3 Keb 786, 2 Lev 210, 83 ER 523; *Tomlinson v. Gill* (1756) Amb 330, 27 ER 221; *Gregory and Parker v. Williams* (1817) 3 Mer 582, 36 ER 224; *Lamb v. Vice* (1840) 6 M & W 467, 9 LJ Ex 177, 151 ER 495; *Robertson v. Wait* (1853) 8 Exch 299, 22 LJ Ex 209, 155 ER 1360; *Fletcher v. Fletcher* (1844) 4 Hare 67, 14 LJ Ch 66, 67 ER 564; *Lloyd's v. Harper* (1880) 16 Ch D 290, 50 LJ Ch 140; *Les Affrêteurs Réunis Société Anonyme v. Walford (London) Ltd.*, [1919] A.C. 801, 88 L.J.K.B. 861 (commonly known as "Walford's case"); *Smith v. River Douglas Catchment Board*, *supra*; *Drive Yourself Hire Co. (London) Ltd. v. Strutt*, *supra*; *Faulkner v. Faulkner*, *supra*; *McCannell v. Mabee McLaren Motors Ltd.*, [1926] 1 W.W.R. 353, 36 B.C.R. 369; *Metropolitan Loan Co. v. Canada Security Assur. Co.*, *supra*. In the *McCannell* case, *supra*, Macdonald, C.J.A. said, at p. 357:

... this is not a case of a third party suing on a contract made by others for his benefit

25 The case is therefore not an authority with respect to constructive trusts. In passing, it is interesting to note that the learned authors *Cheshire and Fifoot* in their *Law of Contracts*, 5th ed., at p. 375, state with reference to the English cases that: "Any attempt to reconcile these decisions seems doomed to failure." Be this as it may, prior to the decision of *Tweddle v. Atkinson*, *supra*, instances can be found in the common-law courts where third-party beneficiaries enforced contracts to which they were strangers, while in the court of equity, chancery, the device of constructive trust was resorted to where the evidence permitted it; and in that way the blockade imposed by the doctrine of privity was overcome. Thus we find Lord Wright in the *Vandepitte* case, *supra*, saying, at p. 579:

... a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party.

26 14 *Halsbury*, 3rd ed., pp. 556-7, states:

The doctrine of trusts applies also to contracts and where equity can spell out of a contract made between A and B for the benefit of C the construction that B intended to contract as trustee for C, even though nothing was said about any trust in the contract, C. is a *cestui que trust* under the contract and is allowed in equity to enforce it.

27 The defendant, on the other hand, maintains that the said contract is nothing more than a simple contract between the contractor and the municipality which, *inter alia*, contains a benefit for the plaintiff among its provisions; and such being the case, the doctrine of privity bars the plaintiff from enforcing it. The decision of this case therefore hangs upon the question of whether or not a constructive trust was created or whether the said contract is no more than a simple contract which contains a benefit for the plaintiff.

28 Romer, L.J. in *Green v. Russell; Re McCarthy*, *supra*, said at p. 531:

An intention to provide benefits for someone else and to pay for them does not in itself give rise to a trusteeship.

29 Were it otherwise, then every time a contract contained a third-party benefit the third party would, in the words of Street, J., "seek refuge under the shelter of an alleged trust in his favour," and the efficacy of the doctrine of privity would thus be for all practical purposes at an end.

30 The interpretation of either facts or documents must not be warped, distorted or given undue emphasis in order to find the existence of a constructive trust, where a reasonable and impartial interpretation would reveal that such a trust was neither intended nor created; and this must prevail no matter how much one might sympathize with the third-party beneficiary and wish to help him in the light of the circumstances. When all is said and done, when a third-party beneficiary claims to be a *cestui que trust* it lies upon him to prove the existence of the trust. Lord Greene, M.R. put the matter aptly in *In re Schebsman; Official Receiver v. Cargo Superintendents Ltd.*, [1944] 1 Ch. 83, 113 LJ Ch 33, where at p. 89 he is reported as follows:

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It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention. To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third. That dividing line exists although it may not always be easy to determine where it is to be drawn.

31 This statement received the approval of Romer, L.J. in *Green v. Russell; Re McCarthy, supra*, at pp. 531-2; and *Chitty on Contracts*, 22nd ed., sec. 906, states:

Equity leans against implying a trust for the benefit of a person not a party to the contract unless there is a clear intention to create one.

32 The courts refused to find a constructive trust in the following cases:

33 *Tweddle v. Atkinson, supra*: A covenant by Guy with John Tweddle to pay the plaintiff, William Tweddle, the sum of £200 even although the agreement specifically provided that the plaintiff be given full power to sue Guy for said sum should he default in payment, which he did.

34 *Faulkner v. Faulkner, supra*: A covenant by a mortgagor with the mortgagee to educate a third person.

35 *Vandepitte v. Preferred Accident Insur. Co. of N.Y., supra*, at p. 581: An automobile accident insurance policy in which the insurer covenanted that the indemnity was also available to third persons driving the automobile with the consent of the insured.

36 *Crown Bakery Ltd. v. Preferred Accident Insur. Co. of N.Y., supra*: So also our court of appeal in like circumstances.

37 *Metropolitan Loan Co. v. Canada Security Assur. Co., supra*: An indemnity bond entered into by two applicants for bailiffs' licences and by the defendant as their surety to indemnify the city of Winnipeg, "and every other person or corporation" against defaults by the bailiffs. The bailiffs failed to pay to the plaintiff who was "another corporation" moneys collected for the plaintiff by them.

38 *Green v. Russell; Re McCarthy, supra*: A group accident insurance policy entered into between Russell, as insured, and Yorkshire Insurance Co. Ltd. as insurer, in which Green was named as an employee beneficiary in the schedule thereto for a benefit of £1,000.

39 Having considered examples of cases where no constructive trust was found to have been created, it now becomes necessary to consider briefly the nature of a trust in order to then examine the contract now before me to ascertain if the contractor and the municipality have created a constructive trust in favour of the plaintiff as a *cestui que trust* thereof. A definition of a trust which has received the approval of Cohen, J. in *In re Marshall's Will Trusts*, [1945] Ch. 217, 114 LJ Ch 118, and of Romer, L.J. in *Green v. Russell; Re McCarthy, supra*, at p. 531, is to be found in *Underhill's Law of Trusts and Trustees*, 11th ed., p. 3, and is as follows:

A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or *cestuis que trust*) of whom he may himself be one, and any one of whom may enforce the obligation.

40 To establish the existence of a trust in this case the plaintiff must prove affirmatively that the contractor and the municipality intended to create a trust for the benefit of persons, such as the plaintiff, who would come within the ambit of said par. 14. See *Vandepitte case, supra*, at p. 579.

41 Again, could the said contract be altered or terminated without the plaintiff's consent? *Cheshire & Fifoot's Law of Contract*, 5th ed., at p. 375, deals with "the fundamental inconsistency between the concept of Trust and the concept of Contract" as follows: