DIRECTOR OF POSTS AND TELEGRAPHS v. *ABBOTT*[1] AND THE DEFENCE OF EXECUTIVE NECESSITY

In the recent action for damages for breach of contract, *Director of Posts and Telegraphs* v. *Abbott*, the facts were these: Abbott, the plaintiff, made written application on November 24th, 1971, to the PMG's department for telephone service at an office into which he planned to move on January 4th, 1972. His application contained the phrase, "Must be installed by 4 January for sure". Between Christmas and New Year the department installed some equipment at Abbott's new office, but his service did not become operative by January 4th, 1972. The reason for this was that PMG linesmen were on strike at the time and the department chose not to use other people to perform the striking linesmen's job of connecting Abbott's equipment to the telephone system. Abbott's service was finally made operative on February, 3rd, 1972, as soon as the strike had ended.

On these facts the Full Court of the Supreme Court of South Australia, reversing the Local Court of Adelaide, held, by a two to one majority, that the defendant was not liable.

Bright J., whose judgment was concurred with by Walters J., held: (1) that the department had accepted Abbott's offer of a contract by its conduct of having its employees install equipment at Abbott's new office; (2) that the acceptance prior to January 4th, 1972, of an offer containing the phrase, "Must be installed by 4 January for sure", did not mean that the department had promised to have Abbott's service operative by that date; (3) that there was instead only an implied promise by the department that the service was to begin within a reasonable time; (4) that the department had fulfilled this implied promise, taking into account the delay caused by the strike.[2]

It is submitted that holdings (2), (3) and (4) were wrong and that they took the shape they did only because of the majority's desire to find the defendant not liable in the circumstances which had arisen.

To deal first with the holding that the department had not promised to have Abbott's service operative by January 4th, 1972, Bright J. attempted to support his conclusion by reference to the presumed intention of the parties. First, he suggested that it had not been Abbott's intention that the contract contain a term whereby the department promised to have the service operative by January 4th, 1972. He characterized the insertion of the crucial phrase in the offer as "an intimation of what the respondent wanted, and wanted very much, but nothing more".[3] The only evidence he offered to justify this conclusion was that between the specified date and the date on which the service finally became operative, "the respondent,

[1] (1974) 2 A.L.R. 625.

[2] The dissenting Judge, Sangster J., was prepared to accept holding (1) (although he believed that the contract had been formed on the date Abbott had made his application for service), because he believed that the outcome of the case was the same regardless of which date of formation were used. He disagreed with holding (2).

[3] (1974) 2 A.L.R. 625, 631.

although repeatedly pointing out the difficulties he was experiencing, never said that he would hold the appellant legally responsible".[4] It is well established, however, that the subsequent conduct of a party to a contract is not admissible to establish his intention at the time of contracting.[5] It is submitted that there is nothing in the facts as stated by Bright J. which can overcome the reasonable inference that Abbott intended it to be a term of the contract that the service was to begin by January 4th, 1972.

Secondly, the learned judge suggested that it had not been the department's intention in accepting Abbott's offer to promise that the service would be operative by January 4th, 1972. He said[6]

> ". . . it is not clear to me that any part performance by the appellant evinced an intention by the appellant to be legally bound, come what may, to have the service available on the stated day."

It is well established, however, that, as Blackburn J. said in *Smith* v. *Hughes*[7]

> "If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party . . ., the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

It is submitted that if Abbott's offer is reasonably interpreted as containing a term requiring a promise by the department to begin service by January 4th, 1972, as it has been argued it should be, then it is clear that the department, by accepting the offer, made such a promise regardless of what its intentions were.

Failure to fulfill this promise should have been actionable in damages unless the department could point to some rule whereby its failure, which would otherwise have constituted a breach, did not constitute a breach in the circumstances which had arisen. Is there any such rule? Clearly not, if we consider the defendant *qua* contractor, rather than *qua* Crown contractor. The general rule, repeated by Bright J. in *obiter*, is that when a party to a contract promises performance by a specific date the occurrence of a strike cannot provide an excuse for late performance unless the contract expressly so provides.[8] The learned judge stated that, assuming the department had promised to perform within a specified time[9]

> "It is in the same position as any other commercial business operator whose deliveries are delayed beyond the due date by a strike but are

[4] Ibid.

[5] See, e.g. *Schuler* v. *Wickman*, [1973] 2 W.L.R. 683 (H.L.). At most, the plaintiff's failure to say that he held the defendant liable could be construed as an election to affirm the contract after breach, assuming the defendant's failure to have the service operative by January 4th, 1972, were a breach of condition. See Cheshire and Fifoot, *Law of Contract* (3rd Australian ed.: Butterworths 1974), p. 673. However, since the plaintiff was only suing for damages, his silence was legally irrelevant in any event.

[6] (1974) 2 A.L.R. 625, 632.

[7] (1871) L.R. 6 Q.B. 597, 607.

[8] See, e.g. *Halsbury's Laws* (4th ed.), "Building Contracts", para. 1233.

[9] (1974) 2 A.L.R. 625, 637.

> subsequently accepted. It was agreed by all counsel that such a delay gave rise to a claim for damages."

It will later be argued that this characterization of the defendant as being "in the same position as any other commercial business operator" who promises delivery by a specific date was right, although not for the reason given by Bright J. However, at this stage it is merely submitted that it was only the learned judge's belief that the defendant would have been in the same position as any private contractor if it had promised service by a specific date that led him to hold that the defendant had, instead of making an express promise, made and fulfilled only an implied promise to begin service within a reasonable time.

Now, the leading case on the effect of strikes on promises to perform within a reasonable time is *Hick* v. *Raymond and Reid.*[10] In that case the owner of a ship sued the consignee of its cargo for damages for failure to perform an implied contractual promise to discharge the cargo within a reasonable time after the docking of the ship at London. The normal time for discharge was six days, but here the operation took over a month because of a general strike by London dock workers. The House of Lords found in favour of the consignee, holding that he had performed within a reasonable time, taking into account the delay caused by the strike. It was thought crucial, however, that, as the Lord Chancellor, Lord Herschell, said[11]

> ". . . throughout the whole of the time during which the discharge ceased . . . it was not possible for the respondents . . . to obtain the necessary labour in any other way."

This was not the situation in *Abbott's* case, since the Court accepted that the department could have found other people to perform the striking linesmen's job. Furthermore, it was always open to the department to settle the dispute with its linesmen and thus again be in a position to perform, a course not open to the defendant in *Hick's* case, since the strikers there were not his employees.

Thus it is submitted that, even if the defendant had only promised to begin service within a reasonable time, Bright J. should have ignored the fact that performance had been delayed by a strike when deciding whether the department had fulfilled its promise, unless there were some special rule that such delays can be taken into account when the Crown is promisor. Bright J. did not, however, rest his conclusion on any special rule applicable to the Crown, but treated the matter as though such delays were always taken into account. It is submitted that this was wrong and was motivated by a desire to allow the Crown to avoid liability in the circumstances which had arisen.

Thus, to sum up the argument so far, it has been submitted that the defendant had promised to have Abbott's service operative by January 4th, 1972, and that its failure to do so ought to have rendered it liable in damages if it were to be treated no differently than a private contractor

[10] [1893] A.C. 22.
[11]]1893[A.C. 22, 28.

who fails to fulfill such a promise. Having foreseen the Court's proceeding along these lines rather than along those it did, the defendant had anticipated that its only chance of success lay in its convincing the Court that it ought to be treated differently than a private contractor. Accordingly, it had argued the applicability of the defence of executive necessity to the circumstances of the case. The rationale of this defence is that the Crown's freedom of action for the public good must never be impaired by contractual promises it has made. The defendant's argument was that if it had connected Abbott's telephone during the strike the public would have suffered, because the strike would have widened and the whole telephone system would have been closed down. Implicit in the argument was that it had only felt free not to fulfill its contractual promise to Abbott (and thus to maintain the public good) because it believed that it would not be liable in damages if it did not fulfill its promise in the circumstances.

Now, the defence of executive necessity was first given effect to in the *Amphitrite* case,[12] in which it availed the Crown in an action for damages. The criticism has been made,[13] however, that the Crown does not require an immunity from liability to pay damages for failure to perform contractual promises in order to preserve its freedom of action for the public good—all it needs is immunity from the remedies of specific performance and injunction. It has been argued that knowledge by the Crown that it would be liable in damages for breach of contract if it pursued a certain course of action would be unlikely to deter it from pursuing that course if it were necessary in the public interest to pursue it.[14] In the rare case in which the damages would be intolerable, the Crown could either arrange for legislation removing the other contractor's cause of action or ensure that the monies necessary to satisfy a judgment obtained by the other contractor were never appropriated.

Accepting this criticism of the executive necessity defence (for which there is, admittedly, no support in the cases), it is submitted that the defence should not have availed the defendant in *Abbott's* case, since Abbott was seeking only damages. Thus the outcome of the case should properly have been that the defendant was liable for its failure to connect Abbott's telephone service by January 4th, 1972.[15]

In view of what has been argued above about the executive necessity defence, it is interesting to speculate what the result of the case would have

[12] [1921] 3 K.B. 500. Bright J. stated, 636-37, that that case was decided on the ground that there had been no contract at all between the Crown and the suppliants, by which I assume is meant that there had been no intention on the part of the Crown to enter into a contract. *Contra*, e.g., P. W. Hogg, *Liability of the Crown* (Australia: The Law Book Co. Ltd 1971) p. 129. The latter view is preferred, but the question of which is right is unimportant to the present discussion.

[13] P. W. Hogg, op. cit. 129 ff.

[14] In *Abbott's* case the damages were less than $400. Can it be suggested seriously that the Crown would have connected Abbott's telephone and thus brought about the closing down of the whole telephone system if it had believed that otherwise it would have had to pay Abbott $400?

[15] This was the conclusion reached by Sangster J., the dissenting judge in *Abbott's* case, who also denied the availability of the executive necessity defence, but not for the reason given above. His reason seems to have been similar to that of Bright J., dealt with infra. See [1974] A.L.R. 625, 645.

been if Abbott, assuming his service had not yet been connected, had been seeking specific performance rather than damages. It is submitted that in that event he should not have been successful, but not because of the existence of the executive necessity defence. It is submitted that if the defence were no longer available in damages actions, as it has been argued it ought not to be, then it would be superfluous. It would confer on the Crown no protection in actions for specific performance or injunction which would not be available to it under the general law of contract.

When deciding whether to grant specific performance or injunction against any defendant, the court considers whether compliance with the order would lead to a breach of trust or contract by the defendant or cause hardship to third persons.[16] Thus, if specific performance had been sought by Abbott the Court should have refused it, not because of the defendant's Crown status, but because the Court would never grant specific performance against any monopoly supplier of an important service if to do so would mean that the supplier would be prevented from supplying the service to the public if it complied with the order.[17] Because of the Crown's constitutional relationship with the public, reliance on the considerations listed above would always serve the Crown in actions for specific performance or injunction as well as the defence of executive necessity could.

In fact, it would serve the Crown even better if it rendered redundant the mechanical approach Bright J. took toward the executive necessity defence in *Abbott's* case. It will be recalled that he had stated that if the defendant had promised service by January 4th, 1972, it was "in the same position as any other commercial business operator whose deliveries are delayed beyond the due date by a strike . . ." While it has been argued above that this conclusion is correct because Abbott was suing for damages, Bright J. did not rest this conclusion, which was *obiter* on the view he had taken of the case, on the remedy being sought. He would apparently have thought his reason for denying the availability of the defence just as appropriate if specific performance were being sought. The reason he gave for denying the defence's availability was that the Crown could point to no specific statutory or prerogative power not to connect telephones after having contractually promised to do so. He said[18]

> "It is important to state specifically the discretion which it is claimed was exercised by the Crown in the present case. It is said that the Crown had a choice between on the one hand using scab labour to connect the service on 4 January and thereby precipitating a general cessation of all telephone services, and on the other hand of delaying connection until the risk of such general cessation of services had disappeared. It is said that the choice not to precipitate that cessation was the exercise of a

[16] See I. C. F. Spry, *Equitable Remedies* (Australia: The Law Book Co. Ltd 1971) pp. 142-47, 186-88, 364-65, 369-70.

[17] Cf. *York Haven W. & P.* v. *York Haven Paper*, 201 F. 270 (C.C.A. 3d, 1912). There the Court refused to order specific performance of a contractual promise by a private power company because to do so "would result . . . in disabling it to furnish electric light and power through a wide and thickly settled region".

[18] Op. cit., 636.

> wise discretion in the public interest. It certainly was not a choice authorized by statute. Can it be said to be authorized by the prerogative? I think not. No specific area of prerogative authority was referred to."

It is submitted that Bright J.'s fruitless search for a specific statutory or prerogative power for the Crown not to connect a telephone after having contractually promised to do so was unwarranted and flowed from a failure to recognize the context in which an earlier statement of the executive necessity defence had been made. In *Commissioners of Crown Lands* v. *Page*,[19] Devlin L.J. had stated the principle thus[20]

> "When the Crown . . . is entrusted, *whether by virtue of the prerogative or by statute*, with discretionary powers to be exercised for the public good, it does not, when making a . . . contract . . . undertake . . . to fetter itself in the use of those powers . . ."

However, in that case Devlin L.J. was positing a situation in which the Crown had made a negative promise, a covenant for quiet enjoyment. Clearly, if the Crown resiles from that promise, it can only do so by committing some positive act. That positive act, said Devlin L.J., had to be authorized (as do all positive acts of the Crown) either by prerogative or statute. In *Abbott's* case, however, the situation is much different. Here the Crown has contractually promised to act. It resiles from that promise by remaining inactive. Surely, it is asking too much to expect to be able to find some specific prerogative or statutory power of the Crown to remain inactive. This is not the nature of such powers. It is submitted that if the executive necessity defence is to be retained in the specific performance and injunction situations, then it ought to be available when the Crown has made a positive contractual promise irrespective of whether the Crown can point to some specific prerogative or statutory power to act contrary to the promise. Otherwise, the defence puts the Crown in a worse position than it would have been in if it were a private contractor, able to rely on the general law relating to specific performance and injunction.

To sum up, then, it has been argued that the defendant contractually promised Abbott's service by January 4th, 1972, and that it should have been liable in damages for failure to fulfill this promise. If, on the other hand, Abbott had been suing for specific performance of the promise, he should have been unsuccessful. This result would have flowed from the application of ordinary equitable principles, but could also be achieved by the application of the executive necessity defence, provided that defence were not unduly restricted in the fashion Bright J. suggested it ought to be. In fact, given its proper scope the defence seems to be nothing more than some well-known equitable principles under a special name, applicable when the Crown is being sued for specific performance or injunction in a contract action.

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[19] [1960] 2 Q.B. 274.
[20] [1960] 2 Q.B. 274, 291 (emphasis added).
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