

PRIVITY OF CONTRACT

PORT LINE LTD. v. BEN LINE STEAMERS LTD.

Equity developed the doctrine of *Tulk v. Moxhay*¹ in relation to land as a modification of the common law rule of privity of contract. Provided certain conditions were fulfilled, the burden of negative covenants restricting user passed to the purchaser of the particular land to which they were annexed, despite the fact that he was not a party to the original contract and irrespective of whether he took with notice of the covenant. The question has remained, however, and been frequently posed and argued: "Does a similar type of doctrine apply to chattels; that is, in what circumstances, if any, can conditions be fixed to chattels so as to bind them in the hands of a succession of acquirers?" No comprehensive or finally acceptable answer has been found by either judges or legal writers to this problem. The reason for this has apparently been the common habit on the part of judges dealing with such questions, of allowing their analysis to be determined by a particular, preconceived end in view. Judges have seemed to ask themselves: "Do we think it is a good thing for restrictive conditions to run with chattels, even within prescribed limits?" Their answer to this has moulded their handling of the issues involved and has led to a rather uncritical jumbling together of the available analogies. An impression one frequently receives from the cases is that the court, having once made up its mind on the facts before it, is at a loss to find a justification for its decision and, while referring vaguely to a number of relevant principles, makes no systematic choice between them.

The only case to give an extensive review of the law relating to covenants affecting the user of chattels, as laid down by Knight-Bruce, L.J. in *De Mattos v. Gibson*^{1a} and by the Privy Council in *Lord Strathcona S.S. Co. v. Dominion Coal Co.*,^{1b} is *Port Line Ltd. v. Ben Line Steamers Ltd.*,² although even there the review is scarcely comprehensive. *Port Line v. Ben Line Steamers Ltd.* is nevertheless important as the most deliberate judicial pronouncement on the subject to date. As a decision of a judge of first instance, it does not of course bind Australian courts as does the Privy Council decision in the *Strathcona Case*. Its significance is mainly illustrative of the unhelpful results of judicial attempts to present disinclination to follow a particular decision as the necessary result of impartial analysis. The significance of *Port Line Ltd. v. Ben Line Steamers* in this respect is perhaps enhanced by the fact, as the present writer respectfully sees it, that Diplock, J. does not appear to have understood what the Privy Council purported to do in the *Strathcona Case*.

Scope of the Doctrine of Privity of Contract prior to the Strathcona Case

When a situation arises calling for determination of the scope of the doctrine of privity of contract, any of the following questions can be asked:

- (a) Is the rule in *Tulk v. Moxhay*³ applicable?

¹ (1848) 2 Ph. 774.

^{1a} (1858) 4 De G. & J. 276, 282.

^{1b} (1926) A.C. 108.

² (1958) 1 All E.R. 787.

³ (1848) 2 Ph. 774.

(b) Does the situation fall within those decisions establishing that conditions fixing the maximum or minimum price at which a chattel may be sold do not run with the chattel so as to bind subsequent acquirers, not parties to the original contract creating the condition?

(c) Is a trust created so as to constitute the relationship of trustee and cestui que trust between one of the parties to a contract and a third party?

(d) Is there any other principle governing the running of restrictive conditions with chattels?

Controversy, then, has centred on the extent to which the doctrine of privity of contract has been qualified, if at all, by the operation of some principle or principles falling outside heads (a), (b) or (c) above. A further complication arises because the decisions which have suggested that there is at least one such principle, have all concerned ships and it has been disputed whether it is necessary to draw a distinction here between ships and other chattels. The basis of the problem has been the interpretation and effect to be given to a *dictum* of Knight-Bruce, L.J. in *De Mattos v. Gibson*.⁴ In the course of his judgment upholding the grant of an injunction to restrain the mortgagee of a ship, who had acquired his mortgage with knowledge of an existing charter-party, from interfering with the performance of the charter, Knight-Bruce, L.J. said:⁵

Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.

The gist of this is that covenants restricting the user of chattels will bind a subsequent acquirer of the chattel provided he takes with knowledge of the covenant. Whether such a principle represents the law or not has been argued before later courts, some holding that it does, others that it does not. In *Port Line v. Ben Line Steamers Ltd.*,⁶ Diplock, J. refused to treat Knight-Bruce, L.J.'s *dictum* as stating the law correctly, but if one is to judge by his discussion of it, it may be thought (with respect) that he rather misunderstood its application.

Between 1858 (the year in which *De Mattos v. Gibson*⁷ was decided) and 1926, the year in which the Privy Council adopted Knight-Bruce, L.J.'s *dictum* as the basis of its decision in *Lord Strathcona S.S. Co. v. Dominion Coal Co.*,⁸ the law relating to the running of restrictive covenants with land had crystallised and come to be known as the rule in *Tulk v. Moxhay*.⁹ With respect to chattels, it had been decided that one type of condition could not be imposed on chattels so as to bind successive takers. *Taddy and Co. v. Sterious and Co.*¹⁰ and *McGruther v. Pitcher*¹¹ held that conditions fixing the maximum or minimum price at which goods could be sold did not run with those goods. The judgments in both these cases dealt shortly with the point at issue, namely the effect of the price-fixing condition, and give no support for the general proposition Scrutton, L.J. deduced from them in *Barker v. Stickney*¹² where he said that "the purchaser of a chattel is not bound by mere notice of stipulations made by his vendor unless he himself was a party to the contract in which the stipulations were made".¹³

⁴ (1858) 4 De G. & J. 276.

⁶ (1958) 1 All E.R. 787.

⁸ (1926) A.C. 108.

¹⁰ (1904) 1 Ch. 354.

¹² (1919) 1 K.B. 121.

⁵ *Id.* 282.

⁷ (1858) 4 De G. & J. 276.

⁹ (1848) 2 Ph. 774.

¹¹ (1904) 2 Ch. 306.

¹³ *Id.* 131.

The Strathcona Case

By the time the *Strathcona Case*¹⁴ was decided there were these three rules¹⁵ relating to restrictive covenants, available. Although the facts in that case fell squarely within Knight-Bruce, L.J.'s *dictum*¹⁶ and although the Board expressly relied on this as governing the situation, the judgment is, unfortunately, written in such a way that it is impossible to work out with any confidence whether the Board treated Knight-Bruce, L.J.'s *dictum* as the sole reason for its decision, or whether it imported elements from the rule in *Tulk v. Moxhay*¹⁷ and the law of trusts as equally necessary reasons. The vagueness of the judgment on these points has been responsible for the various opinions as to what it in fact decided, and in particular has made it impossible to tell whether the Board regarded the principle behind Knight-Bruce, L.J.'s *dictum*¹⁸ as being sufficient of itself to justify the decision.

In the *Strathcona Case*¹⁹ a vessel was chartered in 1914 by the owner to the respondent for a period of ten years. A series of changes of ownership culminated in the appellant's taking title to the ship in 1920. Apart from the question whether the original charterparty between the respondent and the owner had been frustrated by a period of requisition during the war, the issue before the court was whether the respondent was entitled to an injunction restraining the appellant from using the ship in a way inconsistent with the terms of the charterparty. The Board in deciding for the respondent and rejecting the appellant's contention that the absence of privity of contract on its part exempted it from liability to observe the terms of the charterparty, held that the facts were governed by the *dictum* of Knight-Bruce, L.J.²⁰ But it evidently felt there was some need to distinguish the cases dealing with price-fixing conditions, especially in view of Viscount Haldane's observation in *Dunlop Pneumatic Tyre Company Ltd. v. Selfridge and Company Ltd.*²¹ that "only a person who is a party to a contract can sue on it. Our law knows nothing of a *ius quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property or, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*".²² However, it does not seem that it was essential for the Board to make this distinction since conditions fixing prices are not conditions going to the user of a chattel, as contemplated by Knight-Bruce, L.J., and therefore would be irrelevant as far as the point in issue in the *Strathcona Case*²³ was concerned. Nor should the wide terms of Lord Haldane's *dictum*²⁴ have occasioned much trouble, particularly as it appears referable to the question whether a stranger to a contract can sue one of the parties to the contract in order to protect a benefit given by the contract, and not to the question whether a party to a contract can compel a stranger to observe the terms of the contract.

As it was, the distinctions adopted by the Privy Council forced it into an untenable and contradictory position. It found two ways of distinguishing the price-fixing cases. The first was to contrast the fact that these cases held that persons acquiring chattels with notice of restrictive conditions affecting them were not bound by those conditions with their finding, on the facts before them, that the appellant had accepted a specific obligation to respect and carry out

¹⁴ (1926) A.C. 108.

¹⁵ I.e., the doctrine of *Tulk v. Moxhay*; the principle of Knight-Bruce, L.J.; and the principle of the price-fixing cases.

¹⁶ (1858) 4 De G. & J. 276 at 282.

¹⁷ (1848) 2 Ph. 774.

¹⁸ (1858) 4 De G. & J. 276 at 282.

¹⁹ (1926) A.C. 108.

²⁰ *Id.* 117.

²¹ (1915) A.C. 847.

²² *Id.* 853.

²³ (1926) A.C. 108.

²⁴ (1915) A.C. 847, 853.

the terms of the charterparty, that is had taken a conveyance of the ship *sub conditione*.²⁵ This suggests that, on the Board's view, the contract between the owner and the appellant incorporated as a term the appellant's obligation to observe the terms of the original owner's charter to the respondents in such a way that the respondent was constituted a cestui que trust of the benefit of the term. On this interpretation the respondent would be able to enforce the terms of the charterparty whether a question of user was involved or not, and it would be unnecessary to rely on Knight-Bruce, L.J.'s *dictum*. The second way was to stress the importance of that part of the *Tulk v. Moxhay* principle stipulating that the persons seeking to enforce the negative restrictions must have an interest in the subject-matter. Accordingly to the Board, "in regard to the user of land or of any chattel an interest must remain in the subject-matter of the covenant before a right can be conceded to an injunction against the violation by another of the covenant in question".²⁶ Presumably the Board felt that in the price-fixing group of cases the person seeking to enforce the restriction had no interest in the chattel as it had passed out of his possession. However, not only is it hard to differentiate the price-fixing case from Knight-Bruce, L.J.'s *dictum* in this way, since no reference to interest at all was made by Knight-Bruce, L.J., but it seems impossible to distinguish the type of interest the Board thought the respondent held in the ship by reason of its charterparty, from the type of interest the creator of a condition fixing the price of chattels could be said to possess by reason of the creation of that condition. Apart from this, the Board made no attempt to specify the exact interest required.

Comment on the Strathcona Case

The attempts made since the *Strathcona Case*²⁷ to extract a principle from it, underline the ambiguity of the judgment. Although the Privy Council, on the assumption that it regarded Knight-Bruce, L.J.'s *dictum* as good law, could have relied on it alone, they introduced two variations²⁸ leaving it uncertain whether the *dictum* was to apply only in cases where the person seeking to enforce the equity had both an interest in the subject-matter of the covenant, and in addition, had taken title *sub conditione*, or whether all or any of these were alternative grounds. It is unfortunate that a detailed examination was not made of the scope and consequences of each. In these circumstances, the differing opinions of both judges and academic writers are to be expected. Each opinion, especially when directed to the expression of a policy rather than a comprehensive statement of the position, has still been able to take some portion of the *Strathcona* judgment as its basis.

In *Clore v. Theatrical Properties Ltd.*²⁹ Lord Wright treated the *Strathcona Case* as laying down the same principle as that framed by Knight-Bruce, L.J. in *De Mattos v. Gibson*.³⁰ He approved the remark of an earlier judge that, despite what was said by Knight-Bruce, L.J., it is not true as a general proposition that the purchaser of property with notice of a restrictive covenant affecting the property is bound by the covenant.³¹ This view, approved by Lord Wright, is a misconstruction of Knight-Bruce, L.J.'s principle which specified covenants relating to user only. Lord Wright further went on to state that the reasoning of the Privy Council applied only to "the very special case of a ship".³² Lord Greene in *Greenhalgh v. Mallard*³³ took a rather disapproving view of the

²⁵ (1926) A.C. 108 at 116.

²⁷ (1926) A.C. 108.

²⁸ (1936) 3 All E.R. 483.

²⁹ (1936) 3 All E.R. 483 at 490-91.

³⁰ (1943) 2 All E.R. 234.

³¹ *Id.* 125.

³² *Ibid.*

³³ (1858) 4 De G. & J. 276.

³⁴ *Id.* 491.

"novel" and "revolutionary"³⁴ principle expressed by Knight-Bruce, L.J. and thought that both *De Mattos v. Gibson*³⁵ and the *Strathcona Case*³⁶ would need very close examination if matters raised by them ever came up for decision.³⁷ In contrast to these views, Denning, L.J. in *Bendall v. McWhirter*³⁸ adhered to the principles he regarded as being laid down in *De Mattos v. Gibson*³⁹ and the *Strathcona Case*;⁴⁰ "at any rate," he said, "with regard to a contractual licence to use chattels".⁴¹ He emphasised this principle confining it to instances of user, but leaving out all reference to notice, although he probably intended the principle to operate only subject to notice. He said that "when the owner of goods agrees to allow another to use them or when he lets them out on hire, the agreement is binding not only on the original owner but also on his successor in title";⁴² and he went on to emphasise the necessity of finding an interest in the subject-matter of the contract. This did not mean, Denning, L.J. thought, that the person wishing to enforce the contract must have "a legal estate to be protected. Possession or actual occupation of the land or chattel is sufficient".⁴³ Denning, L.J.'s approval of Knight-Bruce, L.J.'s *dictum* cannot then be pushed too far, since in all the cases raising the question of its application the plaintiff's interest, whatever it was, consisted neither of a legal estate in nor actual possession or occupation of the ship. Although the nature of the interest required before the equity can be involved remains a mystery, it is important to see that Denning, L.J. confined the operation of Knight-Bruce, L.J.'s *dictum* to covenants relating to user.

Recent writers on the law of contract have experienced similar difficulties in explaining the effect of the *Strathcona Case*.⁴⁴ The latest editor of Anson,⁴⁵ writing after the decision in *Port Line Ltd. v. Ben Line Steamers Ltd.*⁴⁶ referred to some of the criticisms made by Diplock, J., but concluded that the case was nevertheless rightly decided, although he suggests "It only applies where there is actual knowledge by the subsequent purchaser at the time of the purchase of the charterer's rights, the violation of which it is sought to restrain. Constructive notice is insufficient. The charterer's only remedy is by way of injunction."⁴⁷ Chitty,⁴⁸ without going into details, confines the operation of the *Strathcona Case* to ships and rejects the extension of Knight-Bruce, L.J.'s *dictum* to chattels generally. Mr. J. W. Wilson⁴⁹ has pointed out that doubts have been held whether the *De Mattos v. Gibson*⁵⁰ and the *Strathcona Case*⁵¹ decisions remain valid even in the case of a ship. In any event, he considers that both cases are confined to instances where an injunction is sought to restrain a mode of user of a ship inconsistent with a continuing interest retained by the applicant for the injunction. Cheshire and Fifoot cannot find what they term a "sound and adequate *ratio decidendi*"⁵² and state that "the reason upon which the Privy Council based their judgment is patently indefensible",⁵³ meaning by this Knight-Bruce, L.J.'s *dictum* and the doctrine of *Tulk v. Moxhay*.⁵⁴ They argue that the doctrine of *Tulk v. Moxhay* came to be based on a "proprietary interest", that the Privy Council, while recognising the necessity for the existence of such an interest, were unable to find it on the facts before them, and that in fact no independent interest could be constituted by a claim arising from

³⁴ *Id.* 239.

³⁵ (1926) A.C. 108.

³⁶ (1952) 2 Q.B. 466.

³⁷ (1926) A.C. 108.

³⁸ *Id.* 481-82.

³⁹ (1926) A.C. 108.

⁴⁰ W. R. Anson, *The Principles of the Law of Contract* (21 ed. 1959 by A. C. Guest).

⁴¹ (1958) 1 All E.R. 787.

⁴² 1 Chitty on *Contracts* (21 ed. 1955) 65-66.

⁴³ J. F. Wilson, *Principles of the Law of Contract* (1957) 315-17.

⁴⁴ (1858) 4 De G. & J. 276.

⁴⁵ G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract* (4 ed. 1956) 378.

⁴⁶ *Ibid.*

³⁵ (1858) 4 De G. & J. 276.

³⁷ (1943) 2 All E.R. 234 at 239.

³⁹ (1858) 4 De G. & J. 276.

⁴¹ (1952) 2 Q.B. 466 at 482.

⁴³ *Id.* 482.

⁴⁷ *Op. cit.* 346.

⁵¹ (1926) A.C. 108.

⁵⁴ (1848) 2 Ph. 774.

the very contract sought to be enforced against the third party. Cheshire and Fifoot conclude by accepting the *Strathcona* decision as expressing a special rule applicable to the one case of ships.

It can be quite easily seen that these criticisms reflect their authors' hopes as to what the law ought to be, rather than a characterisation of the fluidity of the law as it actually is. There is nothing in the *Strathcona Case*⁵⁵ to suggest that the principles laid down there are applicable only to ships or that an injunction is the only remedy available where a breach of the restrictive covenant is complained of by a third party.⁵⁶ On the contrary, the language used by the Privy Council indicates that the principles adopted are of application to chattels generally. Certainly, Knight-Bruce, L.J.'s *dictum* is phrased in the widest terms and the only exception noted by the Board as cutting down its generality was the doctrine of *Tulk v. Moxhay*. Cheshire and Fifoot's remark that "no sound or adequate" *ratio decidendi*⁵⁷ can be found in the *Strathcona Case*⁵⁸ merely illustrates their dislike of the decision, and their analysis of the interest required amounts to no more than a replacing of the Board's interpretation of the interest relevant in cases of chattels by their own.

Rejection of the Strathcona Case in the Port Line Case

In *Port Line Ltd. v. Ben Line Steamers Ltd.* a motor vessel was chartered in November 1954 to the plaintiffs by Silver Line Ltd. under a charter estimated to terminate in September 1957. In February 1956 the vessel was sold by Silver Line Ltd. to the defendants under an arrangement whereby it was chartered back to the Silver Line Ltd. for a period coextensive with that which the existing charter had left to run. The charter back from the defendants to Silver Line Ltd. contained a clause providing that in the event of requisition of the vessel by the Government, the charter would automatically be terminated. The original charter from Silver Line Ltd. to the plaintiffs contained no clause relating to a possible requisition. While the defendants were aware of the existence of this charter from Silver Line Ltd. to the plaintiffs, they had never inspected it, and the only knowledge they could be said to have of its terms was "constructive", although this expression was not used by the court. During the Suez crisis the vessel was requisitioned for a period of approximately three months and the question before the court was the determination of the respective rights of the plaintiffs and the defendants regarding the compensation paid to the defendants as owners on account of the requisition. The main contention⁵⁹ of the plaintiffs was that throughout the relevant period they had a valid and subsisting contract with Silver Line Ltd. and that by virtue of that contract they were entitled as against the defendants on the principle laid down in the *Strathcona Case*⁶⁰ to have the vessel used for the carriage of their goods.⁶¹

⁵⁵ (1926) A.C. 108.

⁵⁶ It may be that an injunction is the only remedy where Knight-Bruce, L.J.'s *dictum* is relied on, but not where the parties establish a relation of trustee and cestui que trust.

⁵⁷ *Op. cit.* 378.

⁵⁸ (1926) A.C. 108.

⁵⁹ As stated by Diplock, J., *id.* 793.

⁶⁰ (1926) A.C. 108.

⁶¹ The Compensation (Defence) Act, 1939 (2 & 3 Geo. 6, c. 75) printed in 3 *Halsbury's Statutes* (2 ed.) 988, provides in s.4 for the amounts payable as compensation in respect of the requisition or acquisition of vessels, vehicles and aircraft. Section 4(1) (a) insofar as it relates to vessels provides for the payment of "a sum equal to the amount which might reasonably be expected to be payable by a person for the use of the vessel . . . during the period of the requisition, under a charter or contract of hiring whereby he undertook to bear the cost of insuring maintaining and running the vessel . . .". Subsection 3 of s.4, relied on by the plaintiffs in this action provides insofar as it relates to vessels: "Where, on the day on which any compensation accrues due by virtue of paragraph (a) of subsection (1) of this section, a person other than the owner of the vessel . . . is, by virtue of a subsisting charter or contract of hiring, the person who would be entitled to possession of, or to use the vessel, . . . but for the requisition, the person to whom the compensation is paid shall be deemed to receive it as a tribute for the first mentioned person".

Diplock, J. first considered whether the contract between Silver Line Ltd. and the plaintiffs had been frustrated by the requisition of the vessel. After considering a number of the suggested tests for frustration, he held that the contract had remained alive,⁶² but went on to stress that it was a contract between the plaintiffs and Silver Line Ltd., not between the plaintiffs and the defendants. "There was no privity of contract between the plaintiffs and the defendants", he said. "On what ground therefore can they assert against the defendants all or any of the contractual rights they had against Silver Line, or any statutory rights which they would have had against Silver Line by virtue of the existence of such contractual rights?"⁶³ The tenor of Diplock, J.'s judgment indicates strong disapproval of Knight-Bruce L.J.'s *dictum* on which the plaintiffs relied to establish an equity to offset the doctrine of privity of contract. Nowhere, however, does Diplock, J. consider what the *dictum* means and he makes no distinction between enforcing a covenant which specifies a user of the vessel and enforcing a prohibition which prevents the vessel being used in a manner inconsistent with the plaintiff's prior right. It is this latter situation only that is covered by Knight-Bruce, L.J.'s *dictum*. He did towards the end of his judgment state that if the *Strathcona Case*⁶⁴ was rightly decided, it merely gave the plaintiffs a right to restrain inconsistent user by the defendants,⁶⁵ but his previous treatment of Knight-Bruce, L.J.'s *dictum* suggests that he conceived it as going beyond this. Otherwise it is difficult to see why he emphasised the reluctance with which it had been followed in later cases, and its eclipse until its revival in the *Strathcona Case*.⁶⁶ Certainly, if confined to cases of restraint of inconsistent user the principle is not at variance with the price-fixing cases, which do not go to user at all, and no reasons were adduced by Diplock, J. to show why on this ground it was wrong in law. It would have been sufficient if Diplock, J. had simply distinguished the two cases on the facts, since the question in the *Strathcona Case*⁶⁷ related to restraint of inconsistent user whereas a different question arose in the *Port Line Case*.⁶⁸

Analysis of the Judgment in the Port Line Case

One central criticism that can be made of Diplock, J.'s reasoning is his failure to separate the grounds for decision in the *Strathcona Case* and to treat separately the consequence of or remedies implied by each ground. In his analysis of the *Strathcona Case* he has confused the grounds and the consequences so that while one conclusion he arrives at may be true if one ground is applied, it is not true if another is. An excellent illustration of this confusion appears in his treatment of the notice required to give rise to the operation of Knight-Bruce, L.J.'s *dictum*. He points out that the facts in the *Strathcona Case* constituted not a case of mere notice of the existence of a covenant affecting the use of the property sold, but a case of acceptance of the property expressly "*sub conditione*", that is, in such a way that the respondents became constructive trustees of the property. He goes on to say that although this might suggest that the *ratio decidendi* of the case might be taken to be concerning trusts, "an examination of Lord Shaw's opinion as a whole seems to indicate that the Board accepted the full doctrine of Knight-Bruce, L.J. as respects chattels, namely that mere notice does give rise to the equity . . .".⁶⁹ However, Diplock, J. later in his judgment remarked:

⁶² (1958) 1 All E.R. 787, 794.

⁶⁴ (1926) A.C. 108.

⁶⁵ (1958) 1 All E.R. 787 at 800, and even then it is not clear that he was referring specifically to Knight-Bruce, L.J.'s *dictum*.

⁶⁶ (1926) A.C. 108.

⁶⁸ (1958) 1 All E.R. 787.

⁶³ *Id.* 795.

⁶⁷ *Ibid.*

⁶⁹ (1958) 1 All E.R. 787 at 796.

The Board in the *Strathcona Case*, beyond saying that that case was not one of "mere notice", did not discuss what kind of notice to the purchaser of the charterer's rights gives rise to the equity, for example, whether at the time of his acquisition of his interest in the vessel he must have actual knowledge of the charterer's rights against the seller, the violation of which it is sought to restrain, or whether "constructive notice" will suffice.⁷⁰

He concluded that Knight-Bruce, L.J.'s *dictum* did not prescribe the introduction of the doctrine of constructive notice into commercial matters.⁷¹

Although Diplock, J. appears to have recognised that three different situations with regard to notice are brought out by the facts of the *Strathcona* and *Port Line Cases*, namely, actual knowledge plus express acceptance, actual knowledge *simpliciter*, and constructive knowledge of the terms of the charter,⁷² he has made no explicit differentiation and has thus not been able to give independent consideration to each type of case. If he had done this, it is submitted that he might have recognised that the *Strathcona Case* and the *Port Line Case* raised two quite distinct problems regarding notice. The *Strathcona Case* dealt with both "mere notice" and actual knowledge plus acceptance of the terms of the charterparty in question; the *Port Line Case* with constructive notice, and the former decision could only properly have been treated as relevant by Diplock, J. if he had considered that Knight-Bruce, L.J.'s *dictum* was intended to cover cases of constructive notice. As Diplock, J. is quite clear that the expression "reason and justice" as used by Knight-Bruce, L.J. does not authorise the introduction of the doctrine of constructive notice into commercial matters,⁷³ it is difficult to see why so lengthy a treatment was given to the *Strathcona Case* and in particular why Diplock, J. felt bound to hold it was wrongly decided. A similar lack of discrimination between issues marks the learned judge's discussion of the remedy given in the *Strathcona Case*.⁷⁴ He recognises that the position of the respondents as constructive trustees would import that remedies other than the injunction sought for were available to the appellants, such as the right to an account, the making of a vesting order or the appointment of a new trustee.⁷⁵ Yet he contends that the only remedy in the Board's view was the purely negative injunction, and does not give the obvious explanation that an injunction was given in that merely because it was the appropriate remedy, and that whereas it may be the only remedy possible under the Knight-Bruce, L.J. *dictum*, it may not be the only remedy available to one in the position of *cestui que trust*.

Diplock, J.'s overall conclusions⁷⁶ on the *Strathcona Case* are difficult to accept even granted his premisses:

The difficulty that I have found in ascertaining its *ratio decidendi*, the impossibility which I find of reconciling the actual decision with well-established principles of law, the involved and to me insoluble problems which that decision raises combine to satisfy me that it was wrongly decided. . . . If I am wrong in my view that the case was wrongly decided, I am certainly averse from extending one iota beyond that which, as I understand it, it purported to decide. In particular I do not think that it purported to decide (1) that anything short of actual knowledge by the subsequent purchaser as at the time of the purchase of the charterer's rights, the violation of which it is sought to restrain, is sufficient to give rise to the equity; (2) that the charterer has any remedy against the

⁷⁰ *Id.* 797.

⁷¹ *Ibid.*

⁷² *Ibid.* The terms contrasted by Diplock, J. are "actual knowledge" and "constructive notice", the point of his criticism of the *Strathcona Case* being that the expression "mere notice" might be "constructive notice" only or notice in the sense of "actual knowledge".

⁷³ *Id.* at 797.

⁷⁴ (1926) A.C. 108.

⁷⁵ (1958) 1 All E.R. 787 at 797.

⁷⁶ *Id.* 797-98.

subsequent purchaser with notice except a right to restrain the use of the vessel by such purchaser in a manner inconsistent with the terms of the charter; (3) that the charterer has any positive right against the subsequent purchaser to have the vessel used in accordance with the terms of his charter.

Two reasons are here advanced by Diplock, J. in support of his opinion that the *Strathcona Case* was wrongly decided.

Firstly, he emphasises the difficulty of ascertaining the *ratio decidendi*. What does he mean by this? It is unnecessary here to go into the theories concerning the nature of the *ratio decidendi*, but it seems that Diplock, J. has not consistently developed the implications of his statement. If he accepts the view that the *ratio decidendi* of a case is the rule of law considered essential by the judge for his decision in that case, then he has hardly done justice to the Privy Council by declaring it difficult to find such a rule (and this may include a number of rules), and in any case he has not explained how his inability to find a rule implies that the *Strathcona Case* was wrongly decided. If, on the other hand, Diplock, J. takes the *ratio decidendi* to be the rule of law for which a case is of binding authority—and this the context suggests is what he meant—then he has contradicted himself by setting forth three propositions for which it is authority. He admits that this is the first time the *Strathcona Case* has come up for extensive review by an English court but instead of spelling out a rule for which the case could be said to be a binding authority, and rejecting that as wrong in law, he has deduced the incorrectness of the decision from the lack of a *ratio*. What he means is that he can find no *acceptable ratio*, but he has presented his unwillingness to follow the *Strathcona Case* as a compulsion not to follow it. By virtue of the doctrine of *stare decisis* itself, Diplock, J. had a choice, yet despite this, his preference, once made, was treated as though from the first it was the only course available. Secondly, Diplock, J. refers to the irreconcilability of the *Strathcona Case* with well-established principles of law. Presumably, although it is by no means clear, he is referring to the principle of the price-fixing cases and the doctrine of constructive notice. As has been pointed out already, on the one hand, the comparison with the price-fixing cases is inaccurate, and on the other hand, the *Strathcona Case* did not purport to deal with constructive notice.

The argument by which Diplock, J. concludes⁷⁷ that the principles of the *Strathcona Case* confer on the plaintiffs no right "to possession of, or to use, the vessel" within the meaning of the relevant statutory provision determining the method of apportionment of compensation in cases of requisition, is a good example of the dangers of attributing one meaning to a term such as "right" without paying attention to the differing contexts in which it is used. In this respect Diplock, J.'s reasoning illustrates the advantages of the approach to jurisprudence recently advocated by Professor Hart.⁷⁸ This approach stresses the need for clarity in the use of the vague generalisations commonly used in legal discussion, and advocates an investigation of legal expressions in relation to the context. We are not to ask the question, "What is a right?", but the question "In what circumstances will the sentence 'A has a right to do B' hold true?" and similar questions appropriate to the various legal contexts in which the word "right" appears. Diplock, J. has here argued that the original charterer of the vessel has no remedy against the purchaser except a right to an injunction,

⁷⁷ *Id.* at 800. He assumes that the principle of the *Strathcona Case* might give the plaintiffs a right to restrain inconsistent user of the vessel by the defendants but that "this is not sufficient to bring them within the section as a person who by virtue of a subsisting charter would be entitled to use the vessel." The relevant section is set out in full n. 61 *supra*.

⁷⁸ For Professor Hart's views see "Definition and Theory in Jurisprudence" (1954) 70 *L.Q.R.* 37; "Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer" (1956) 105 *Pennsylvania L.R.* 953.

and therefore that the charterer has no positive right to use the vessel in accordance with the terms of the charter, that is, that there is no remedy of specific performance available. However, it does not follow that because the charterer has no right to use the vessel in the sense that he has no right to obtain a decree of specific performance, he has no right to use the vessel within the meaning of the compensation section. It might be open to Diplock, J. to conclude as a matter of construction of the section that the facts disclosed no right to use the vessel for the purpose of entitlement to compensation and he does appear to have so concluded.⁷⁹ Yet it is a *non sequitur* to deduce merely from the lack of a right to a decree of specific performance the lack of a right to use the vessel in the way contemplated by the section. Although the plaintiffs, in Diplock, J.'s phrase, had no "positive rights against the defendants to have the vessel used in accordance with the terms of their charterparty with Silver Line",⁸⁰ this only meant that they could not force the defendants to let them (the plaintiffs) use the vessel themselves. But, apart from the effect of the requisition, they would have been able to prevent anyone else in the world, including the defendants, from using the vessel. This suggests that they would have a right entitling them to a proportion of the compensation money.

Mr. G. H. Treitel thinks⁸¹ that while the decision will be welcomed, some scope should be found for the "reason and justice" of Knight-Bruce, L.J.'s *dictum*. He suggests⁸² that the *Port Line Case* has not blocked recognition of limited interests in chattels, since a satisfactory recognition can be achieved by an application of the principle laid down in *Lumley v. Gye*,⁸³ and developed in later cases. In *Lumley v. Gye*, a case dealing with a claim for damages in tort for procuring a breach of contract for personal service, Crampton, J. said:⁸⁴

It must now be considered clear law that a person who wrongfully or maliciously, or, which is the same thing, with notice, interrupts the relations subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law.

Certainly this principle, especially when construed in the wider context of contract, generally supports Mr. Treitel's suggestions to the extent that there may be a remedy in damages or an injunction available to a person complaining that his contract with another has been breached by the action of a third party. But it seems incorrect to think that by the operation of the *Lumley v. Gye* principle a third person "may be bound negatively not only by restrictive conditions but also by limited interests".⁸⁵ Firstly, it appears from the treatment of the subject in the leading modern case, *D. C. Thomson and Co. Pty. Ltd. v. Deakin*⁸⁶ that the *Lumley v. Gye* principle will only be available where there is: (1) knowledge of the contract on the part of the defendant; (2) action by the defendant with the specific intent of breaking the contract and of causing damage to one of the contracting parties; and (3) actual damage suffered by the plaintiff.⁸⁷

It hardly seems that the limited number of cases in which these conditions will be present to give the plaintiff a remedy are sufficient to justify the spelling out of a doctrine of limited interests from the *Lumley v. Gye* principle. Moreover, it seems to involve a confusion of legal categories to infer the existence of limited interests and restrictive covenants with respect to chattels from the

⁷⁹ (1958) 1 All E.R. 787 at 800; Diplock, J.'s conclusion on this matter is quoted *supra* n. 76.

⁸⁰ *Id.* 799-800.

⁸¹ G. H. Treitel, "Limited Interests in Chattels" (1958) 21 *Mod. L.R.* 433.

⁸² *Id.* 435.

⁸³ (1852) 2 E.L. & B.L. 215.

⁸⁴ *Id.* 224.

⁸⁵ (1958) 21 *Mod. L.R.* 433, 436.

⁸⁶ (1952) 1 Ch. 646.

⁸⁷ *Id.* at 681-82.

availability in certain circumstances of remedies in tort. Nor would there as yet appear to be any need to import the law of torts as a solution since it will be open to judges who have to deal with problems similar to that in the *Port Line Case* to distinguish that case on its facts as readily as Diplock, J. was able to distinguish the *Strathcona Case*. That case is, moreover, only a case of first instance in the United Kingdom.

Certainly, if the problems dealt with in the *Strathcona* and *Port Line Cases* ever come before an Australian court, it will still be open for the court to make a thorough re-examination of the scope of the doctrine of privity of contract as it relates to the running of restrictive covenants with chattels. Not the least significance which may then be drawn from Diplock, J.'s judgment is the importance of avoiding over-simplification and the need for more careful differentiation of the applicable principles in relation to different categories of facts and the results desired to be achieved.

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