Contract to Sell Unascertained Goods. No Passing of Property, No Equitable or Restitutionary Relief

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the result differed merely because the parties took the convenient course of having X deliver directly to Z. (Compare the similar position under section 25(1) of the Sale of Goods Act 1979, where it has been held to make no difference whether goods are delivered by the seller to the buyer and by him to the sub-buyer, or collected directly from the seller by the sub-buyer: *Four Point Garage* v. *Carter* [1985] 3 All E.R. 12.) The only slight difficulty remaining is that the position of Z now apparently differs according to whether he is a bailee of the goods (when he can rely on the terms of his contract with Y, assuming X has assented to them) or whether he merely works on the goods without taking possession of them (when he cannot: if he could, cases like *Scruttons* v. *Midland Silicones* [1962] A.C. 446 would have been decided differently). But such distinctions are perhaps to be expected in the common law: bailment has always provided a useful let-out from the more awkward rules of privity of contract, but in the absence of it the latter must presumably prevail.

ANDREW TETTENBORN

CONTRACT TO SELL UNASCERTAINED GOODS—NO PASSING OF PROPERTY, NO EQUITABLE OR RESTITUTIONARY RELIEF

OVER a thousand members of the public in New Zealand were persuaded by colourful sales literature to buy gold from Goldcorp Exchange Ltd. as an investment. Goldcorp promised to deliver the gold at any time on seven days' notice, or to buy it back from the customer at a currently advertised price, and meantime to store the gold for the customer free of charge. Each customer, on paying the price of his purchase, was given a certificate in which he was described as the "owner" of the gold he had bought; and the company promised to hold stocks of gold sufficient to answer all of its commitments. But the gold was described as being held "on a non-allocated basis", and in fact no gold was ever appropriated to any particular contract, nor were the company's stocks maintained at anything like the level needed to meet its obligations. Furthermore, it had given its bank a floating charge which was secured over all its assets, including its stocks of gold. When the bank appointed receivers, and the customers learned not only that the company had insufficient gold in hand to meet its commitments, but also that the bank asserted a prior right to what gold the company did have, they were understandably very indignant, and took their claims to court. The case, originally known and reported as *Liggett* v. *Kensington* [1993] 1 N.Z.L.R. 257 (N.Z.C.A.), eventually reached the Privy Council, whose ruling is reported as *Re Goldcorp Exchange Ltd.* [1994] 3 W.L.R. 199.

The trial judge (Thorp J., 17 October 1990, unreported) managed to find in favour of a few individual investors who could point to some act amounting to an appropriation of particular gold to their contract, and also upheld the claims of one group which had dealt with another company, Walker & Hall, that was later taken over by Goldcorp. This company had behaved responsibly and had meticulously set aside bullion equivalent to what it had sold (albeit storing it *en masse*); but following the take-over Goldcorp had put this into its common stock. The finding that there had been a sufficient appropriation to pass title to these customers, so that they had a proprietary interest in the resulting mass, was no doubt somewhat indulgent, but was not the subject of appeal. But Thorp J. found against the great bulk of customers who were asserting claims in respect of the undifferentiated amount of gold held by the company when it went into receivership. The New Zealand equivalent of section 16 of the Sale of Goods Act 1979 was a total answer to their claim. This states that where there is a contract for the sale of unascertained goods, no property is transferred to the buyer unless and until the goods are ascertained. As Lord Mustill in the Privy Council explained, no other conclusion is consistent with common sense: in the very nature of things, there cannot be a title to anything unless it is known what that title relates to. For the same reason, no title in equity can be created by the sale: on this point, their Lordships "ventured to find irresistible" the reasoning of Atkin L.J. in *Re Wait* [1927] 1 Ch. 606 at 625–641.

All this is trite law, and if further confirmation were needed, it was ready to hand in the analysis of Oliver J. in *Re London Wine Co. (Shippers) Ltd.* [1986] P.C.C. 121. Here the facts were similar to Goldcorp except that it was wine, not gold, which the company's customers were persuaded to buy as an investment and leave in its hands to be stored in bulk. In that case, too, arguments based on the creation of a trust failed, as well as others based on an alleged estoppel. The Privy Council also dismissed suggestions that any proprietary claim could be related to the collateral promises made by the company, or that a trust in favour of the purchasers (or "floating" bailment) was created as and when the company later acquired gold and put it into stock. All these contentions (and another, based on an alleged fiduciary relationship) were inconsistent with the factual position and the agreement of the parties, which plainly contemplated that the company's stock would be turned over in the course of its business and that the delivery of gold, if requested by a customer, could be made from any source. A further argument, that the court should declare a "remedial constructive trust" in favour of the customers, based on the justice of the case as seen after the event, rightly received short shrift. There are always losers in any insolvency, and it would make a

mockery of the law if the courts were to assume a power to disregard accrued proprietary rights and allocate them elsewhere simply because an insolvency has supervened.

For restitution lawyers, the main interest in the case lay in another part of the decision of the New Zealand Court of Appeal, which had (by a majority) found for the customers who had bought "non-allocated" gold on a different—and certainly a novel—ground. Cooke P. and Gault J. held that Goldcorp had received its customers' purchase-money in a fiduciary capacity, and that the money was subject to a trust to finance the setting aside and holding of sufficient bullion for all the claimants: this entitled them to charges on the bullion assets in the vaults of the company in priority to the bank. But the Privy Council found formidable objections to this reasoning. First, there was nothing to support the finding of a fiduciary relationship: the parties' rights and duties were purely contractual. Secondly, there was no nexus between the moneys paid by the customers and the bullion in the vaults—an essential feature of any tracing claim. Thirdly, there was no evidence that the parties intended the purchase-money to be kept separate from Goldcorp's general funds. And, finally, the money was paid into an account which was at all material times overdrawn, which barred any attempt to trace.

Another recent case which raised related questions deserves brief mention. In *Re Stapylton Fletcher Ltd.* [1994] 1 W.L.R. 1181 the facts were very similar to *London Wine*, and many of the customers' claims failed (including an argument that there was a resulting trust of the purchase-money, where the company held none of the wine in question). However, where wine to answer particular customers' purchases had been physically segregated from the sellers' common stock, it was held that there had been an appropriation sufficient to pass title, even in cases where what was set aside represented the aggregate of a particular wine bought by several customers in separate transactions, and was not allocated to them individually. It was held that these buyers became tenants in common of the whole. This decision, which is similar to that in favour of the Walker & Hall customers in *Goldcorp*, no doubt achieved a just result, but it is hard to reconcile with the many leading commercial cases where a purely subjective "appropriation" has been held not to render goods "ascertained" within section 16 (*e.g. Carlos Federspiel* v. *Twigg* [1957] 1 Lloyd's Rep. 240).

None of the cases above (except *Re Wait*) was concerned with goods sold from an identified bulk. Here different considerations arise; and there is no practical or conceptual difficulty in reaching a conclusion that the seller and purchaser (or purchasers) should become tenants in common of the whole, either on the making of the contract or on payment of the price. Our law (unlike that in the United States)

has so far resisted accepting this result, but this is likely to change if the recommendations of the Law Commissions (*Sale of Goods forming Part of a Bulk*, HMSO, 1993) are implemented by legislation.

L.S. SEALY

A ROOF TOO FAR

THE opportunity to reverse the common law rule that the burden of a positive convenant cannot run with the land was presented to the House of Lords in *Rhone* v. *Stephens* [1994] 2 W.L.R. 429, but their Lordships declined to seize the moment, and instead reiterated that positive covenants affecting freehold land are not directly enforceable, except against the original covenantor. Thus, despite the long-standing and widespread criticism of the present rule, the law as stated in *Austerberry* v. *Oldham Corporation* (1885) 29 Ch.D. 750 is preserved in all its glory.

The case concerned a leaking roof. Part of the roof of Walford House covered Walford Cottage. On conveying the cottage, the owner of Walford House covenanted to keep the relevant part of the roof in wind- and water-tight condition; but when, in the fulness of time, the roof began to leak, the successor in title to Walford House denied liability.

Lord Templeman delivered the only reasoned speech. He began by affirming that the owner of Walford House was technically in breach of the convenant to repair. However, he then applied the common law rule that a person cannot be made liable upon a contract unless he is a party to it: thus the burden of the covenant had not passed to the present owner of Walford House, and she was not liable for the breach.

Turning his attention to equity, his Lordship stated that the burden of a restrictive covenant passes with the land because the covenantor's successors in title do not acquire the land without the restriction; this is not a matter of contract but of property law. "To enforce a positive covenant would be to enforce a personal obligation against a person who has not covenanted. To enforce negative covenants is only to treat the land as subject to a restriction." Lord Templeman adverted to the fact that the present law has been much criticised, not least by the Law Commission, but obviously thought that reform was a matter for Parliament after due and careful consideration.

So far, none of this is very surprising. The interest lies in the way Lord Templeman dealt with two further arguments, which concerned