CONTRACTS BY A PERSON WITH HIMSELF

STEWART v. *HAWKINS*

Stewart v. *Hawkins*[1] is a recent liberal decision involving the interpretation for the first time of s.72 of the Conveyancing Act, 1919-1954, (Act No. 6, 1919 (N.S.W.) as amended). Section 72 validates in certain circumstances contracts having the same person both as promisor and promisee:

> S.72. (1) A covenant, whether express or implied under this or any other Act, or an agreement made by a person with himself and another or others shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been made with the other or others.
>
> (2) This section applies to covenants or agreements made or implied before or after the commencement of this Act.

Clearly on its face, the section applies to covenants or agreements by one person alone, of the one part, with another or others, of the other part (i.e. by X with X and C). But the question in *Stewart* v. *Hawkins* was whether s.72 comprehended also covenants or agreements made by a *person jointly with another or others*, of the one part, with himself and another or others, of the other part (i.e. by A and X jointly with X and C jointly, as, for example, a purported agreement between two partnerships, each having a common partner).

At common law, a promise by a person to himself was regarded not as a contract but, at best, as a unilateral declaration.[2] From this rule there was drawn the illogical refinement, that a joint contract between A and X on the one hand and X on the other, or A and X on the one hand and X and C on the other, was absolutely void.[3] The objection at common law to such contracts was one of substance and not merely based on the procedural rule that a man cannot be at the same time plaintiff and defendant.[4]

Despite its obvious importance, the construction of the remedial legislation in s.72, and the corresponding English provision, s.82 of the Law of Property Act, 1925 (Eng.), (15 Geo. 5, c.20) had unfortunately never previously received proper judicial consideration at all.[5] Text-writers had, however, advanced certain views. Professor Glanville Williams, for example, in his treatise *Joint Obligations*[6] considered that the effect of s.82 was to provide that a contract between A and B on the one hand and B and C on the other, or between A and C on the one hand and C on the other, should operate as one between A and C. But, he thought, if the operation of s.82 on a joint promise by A and B with B and C is that B should drop out of the obligation on both sides, difficulties would arise as to contribution; for A apparently could not obtain contribution from B, since in law B has made no contract, although he might conceivably be liable in quasi-contract.

The facts in *Stewart* v. *Hawkins* were that the plaintiffs C and X claimed from the defendant A, £4,317/15/6 for debt. The defendant A pleaded as to £3,525/18/2 (part of the money claimed) that he was never indebted as alleged in that the said sum arose from transactions between the defendant A and X the secondnamed plaintiff jointly as partners, on the one hand, with the plaintiffs X and C jointly as partners, on the other hand. It later transpired that what the defendant intended to allege by the plea was that no debt ever arose by reason of the fact that the transactions relied upon as creating it were agreements between two partnerships with a common partner.

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[1] (1960) S.R. (N.S.W.) 104.
[2] See G. Williams, *Joint Obligations* (1941) 47.
[3] *Ellis* v. *Kerr* (1910) 1 Ch. 529; *Napier* v. *Williams* (1911) 1 Ch. 361.
[4] *Mainwaring* v. *Newman* (1800) 2 Bos. and Pul. 120.
[5] The legislation was only touched on in *Napier* v. *Williams, supra; Ridley* v. *Lee* (1935) 1 Ch. 591; *Bonsor* v. *Musicians' Union* (1954) 1 Ch. 493.
[6] *Op. cit.* at 47.

The matter first came before Hardie, J.[7] on the plaintiff's application under s.61 of the Common Law Procedure Act, 1899 (N.S.W.)[8], (Act No. 21, 1899 (N.S.W.) as amended), to strike out the plea as disclosing no defence. His Honour held that it was by no means clear that s.72 applied to the case where a person jointly with another or others, on the one hand, made a contract with himself and another or others, on the other hand. Therefore, without prejudice to the plaintiff's right to demur, the plea would not be struck out. In his Honour's opinion the court had no power to fill in any gaps disclosed in legislation.[8a] Therefore, if the legislature intended s.72 to apply here, it would have used some such concluding formula as — "as if the covenant or agreement had been made with, or by and with, the other or others", or would have inserted after "by a person" some such words as "jointly with another or others". Also s.21(b) of the Interpretation Act, 1897 by which words in the singular are deemed to include the plural, was not to the point here.[9]

The plaintiffs subsequently demurred to the plea on the ground that it disclosed no defence at law. The Full Court[10] (unanimously) held that s.72 applies to a covenant or agreement made by A with X of the one part with X and C of the other part, rendering it valid; and that an agreement between two partnerships, each having a common partner, is valid and legally enforceable under it.

Owen and Ferguson, JJ. reasoned thus.[11] Although s.72 in terms referred to a covenant or agreement made by one person with himself and another or others, *yet a person nevertheless covenants or agrees whether he does so alone or jointly with another or others.* Hence, where a plaintiff seeking to enforce a joint obligation sues one only of two or more joint contractors, proof at the trial of a joint contract would sustain an allegation that the defendant contracted and would be no variance. Proving that another person also contracted, does not negative that the defendant himself contracted. On this reasoning, a promise made by A and X jointly to X and C is embraced within s.72 as being "an agreement made by a person with himself and another". This wider interpretation would not involve difficulties as to contribution, as the agreement would not be interpreted as if one of the joint contractors had not contracted. Section 72 is concerned with the enforcement of promises which otherwise would be invalid and unenforceable. The section merely validates the agreement, but does not convert it into some other agreement. So construed, the rights and obligations of the joint contractors *inter se* were not affected.[12]

Conclusions

The Full Court approach raises certain logical difficulties. An agreement by A and X with X and C is doubtless, *in point of substance,* an agreement by X with X and C. The fact that another has also contracted is, in terms of the policy of the section, nothing to the point. However, if the matter is considered in terms of what was literally expressed (which the court did not do), then an

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[7] (1956) 73 W.N. 527.

[8] S.61 provides: "If any pleading is so framed as to prejudice, embarrass or delay the fair trial of the action, the opposite party may apply to . . . a judge to strike out . . . such pleading, and the judge shall make such order respecting the same and also respecting the costs of the application as the . . . judge thinks fit."

[8a] See *Malor and St. Mellons Rural District Council* v. *Newport Corporation* (1952) A.C. 189.

[9] S.21 provides: "In all Acts the following words shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them . . .
(b) words in the singular shall include the plural . . ."

[10] (1960) S.R. (N.S.W.) 104. [11] *Id.* at 106.

[12] As to the procedural aspect of enforcement of a covenant or agreement, Sugerman, J. (at 108) thought that s.72 did not authorise an action in the form *A and X*, plaintiffs, v. *X and C*, defendants. In the case of covenant or agreement by X with X and C, the appropriate action would be C, plaintiff, v. X, defendant; if by A and X jointly with X and C, the action would be by C, plaintiff, v. A and X defendants.

agreement by A and X with X and C is clearly not an agreement by X with X and C. It will be seen, therefore, that there is essential to the court's conclusion the somewhat bald and unacknowledged assumption that s.72 simply cannot be construed as having expressly described every party to the covenants or agreements susceptible of validation by it.

However, the decision was a liberal and realistic one and can be justified on pragmatic grounds. Section 72 is remedial legislation designed to destroy an awkward common law rule which was allowed to "disfigure the law of a great mercantile nation".[13] For this reason, the courts should be eager to apply the provision as generously as practicable. And in particular, its application should be extended, as a matter of clear legislative intendment, to transactions involving two or more joint contracting parties on *both* sides of the contract. Such transactions are, significantly, more common than those described by the direct words of the section only[14] — for example, the transfer of a mortgage on the appointment of new trustees where there is a continuing trustee, or (as here) an agreement between two partnerships with a common partner.

It is felt, with respect, that the opinion of the Full Court, that s.72 merely validates the covenant or agreement, is to be preferred to Glanville Williams' more extreme view that the section transforms an agreement between A and X and X and C into an agreement between A and C. Not only does the former construction commend itself from the practical viewpoint in that it avoids the problems concerning contribution outlined above — by regarding the legislation as only affecting procedural enforcement as between the parties without prejudice to questions of account between the common party and the co-promisee or co-covenantee. But it also springs more readily from the language of the section itself. For s.72 provides that the agreement shall be construed, not *as* an agreement made with the other or others, but in like manner *as if* the agreement had been made with the other or others.

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COMPANY LAW: PRE-EMPTIVE RIGHTS ARTICLE *LYLE & SCOTT* v. *SCOTT'S TRUSTEES*

Perhaps the most outstanding feature of a proprietary company lies in the fact that there must be some restriction placed on the right of members to transfer their shareholdings. Section 37(1)(a) of the Companies Act, 1936 (Act No. 37, 1936 (N.S.W.)), expressly requires that a proprietary company must restrict the freedom of transferring shares; it does not, however specify what the nature of the restriction should be. There is thus left to the person drafting the articles of a proposed company a considerable discretion as to what type, and what degree of restriction will be placed on the right to transfer shares in the company. By regulating the way in which shares will be transferred, the person drawing the articles can regulate the structure of the company; i.e. if there are a large number of restrictions the company will tend to be closely knit and conservative in membership, and conversely, if there are few restrictions, it will be rather more fluid both in its membership and in its policy. Private companies often consist of large family concerns or expanded partnerships forced to incorporate, and such companies by their very nature tend to be discriminating in their selection of members. Despite the limited number of members, it is not unusual for such companies to be large business concerns, and thus attractive targets for a takeover bidder, and frequently, in order to protect the conservative nucleus (usually the directors) from the loss of control to an outsider, a pre-emptive rights clause is inserted in the articles of the company.

[13] G. Williams, *op. cit.* at 47.
[14] I.e., by one person *alone* of the one part with another or others of the other part.