Fairline Shipping Corporation v Adamson

QUEEN'S BENCH DIVISION AT WINCHESTER
KERR J
18th, 19th OCTOBER, 8th NOVEMBER 1973

Contract – Offer and acceptance – Acceptance – Acceptance by silence – Offer by defendant to plaintiffs – Novation of contract – Offer by defendant to take over third party's contract with plaintiffs – Acquiescence but no response to offer by plaintiffs – Whether defendant bound by contract – Whether defendant liable for breach.

Negligence – Duty to take care – Circumstances in which duty arising – Bailment of goods – Assumption of duty of care by third party – Bailment of goods to company – Director of company – Assumption of duty of care by director with respect to goods – Personal liability of director for damage to goods.

A company ('GM Ltd') operated a cold store as part of its business of buying and reselling game and meat products. Only on very rare occasions did GM Ltd use the premises to store goods which did not belong to it. In September 1971 the defendant bought the freehold of the store, it being a term of the agreement that he would grant a lease of the store to GM Ltd. The defendant also acquired a 50 per cent holding in GM Ltd, which was in financial difficulties, and became its managing director. The business of buying and selling the company's products remained under the management of other directors. By January 1972 it was clear that GM Ltd was in serious financial difficulty and probably could not be saved. From that time on the defendant was only concerned with the liquidation of the business. No lease of the cold store to GM Ltd was executed although in January GM Ltd paid some £3,000 to the defendant, representing a year's rent in advance. A typist employed by GM Ltd at the store was discharged in January and thereafter, apart from the directors, the only person on its payroll was an assistant employed by the defendant to look after his interests. From January onwards the financial and secretarial side of the business was conducted by the defendant and his assistant, with the help of the defendant's secretary who did the necessary typing, from other premises owned by the defendant. Correspondence on behalf of GM Ltd was, however, typed on that company's headed notepaper and not on the defendant's personal notepaper. At the beginning of March the plaintiffs' agent contacted V, a director of GM Ltd, and arranged with him, on behalf of GM Ltd, for a consignment of meat, vegetable and fat products to be stored at the cold store. V informed the defendant who raised no objection to the arrangement. The consignment was delivered into the store on 14th March. Subsequently the defendant realised that there was nothing in writing to confirm the arrangement and on 23rd March a letter was written to the plaintiffs' agents on paper carrying the defendant's letterhead and signed by his secretary 'for' him. The letter read: 'I confirm the arrangement regarding the storage of goods in my premises . . . I understand there is a 12·1/5 ton involved and the rent per calendar month as agreed with your Representative is £5 per ton per month and £5 per ton per part month. My invoice for £61·00 being the first months rental due will be sent to you on or around the 14th April, 1972'. The plaintiffs' agents received the letter and accepted it without querying why it had not come from GM Ltd; the defendant was known to them as a businessman of substance. An invoice was sent to the plaintiffs' agents by the defendant on 14th April. While the plaintiffs' consignment was in the store no steps were taken to check on the temperature of the chamber in which the goods were stored. On occasion the defendant visited the store to show round prospective purchasers of the premises; he heard the refrigeration machinery

working and assumed all was well. On 16th April it was discovered that one of the fans distributing cold air into the chamber had broken down and the contents of the chamber had thawed. The plaintiffs brought an action against the defendant for breach of contract and/or negligence, alleging (i) that the defendant's letter of 23rd March and the plaintiffs' acquiescence operated as a novation between the defendant and the plaintiffs' agents of the original contract with GM Ltd, and (ii) that the defendant was a bailee of the goods or liable in negligence in the same way as a bailee.

Held – (i) In order to constitute a contract the acceptance of an offer had to be communicated to the offeror and the uncommunicated acceptance of the offer could not have the effect of binding the offeror. Accordingly, if the defendant's letter of 23rd March constituted an offer by the defendant to take over the contract from GM Ltd, the absence of any response by the plaintiffs' agents to that offer could not be construed as an acceptance capable of binding the defendant. Such a result could only flow from an estoppel operating against the offeror and the plaintiffs' cause of action could not be founded on estoppel. Accordingly the claim in contract failed (see p 974 *h* and *j* to p 975 *a*, post); *Felthouse v Bindley* (1862) 11 CBNS 869 applied.

(ii) Although the evidence was insufficient to establish that the defendant was a bailee of the goods, his liability to the plaintiffs in negligence was not necessarily excluded as a matter of law on the ground that there was no contract with him and that he was not a bailee having a right to the legal possession of the goods. In the circumstances the defendant owed a duty of care to the plaintiffs since, at the relevant time, GM Ltd could only perform its duties in relation to the goods through its directors and the only director who had concerned himself in any way with the goods after delivery was the defendant. The letter of 23rd March showed that the defendant regarded himself, and not the company, as concerned with the storage of the goods. The defendant had therefore assumed a duty of care to the plaintiffs in respect of the storage of their goods in his premises and, in consequence of his breach of that duty, the goods had been damaged. The plaintiffs were therefore entitled to judgment (see p 975 *h* and p 976 *e* to *g*, post); *Adler v Dickson* [1954] 3 All ER 397 and *Morris v C W Martin & Sons Ltd* [1965] 2 All ER 725 applied.

Notes

For the mode of acceptance so as to constitute a contract, see 8 Halsbury's Laws (3rd Edn) 72, 73, para 126, and for cases on the subject, see 12 Digest (Reissue) 81-86, 419-444.

For cases in which a duty of care arises, see 28 Halsbury's Laws (3rd Edn) 7, para 4, and for cases on the duty to take care, see 36 Digest (Repl) 12-22, 34-89.

Cases referred to in judgment

Adler v Dickson [1954] 3 All ER 397, [1955] 1 QB 158, [1954] 3 WLR 696, [1954] 2 Lloyd's Rep 267, CA, 12 Digest (Reissue) 50, 259.

Felthouse v Bindley (1862) 11 CBNS 869, 31 LJCP 204, 6 LT 157, 142 ER 1037; *affd* (1863) 1 New Rep 401, 7 LT 835, Ex Ch, 39 Digest (Repl) 482, 307.

Morris v C W Martin & Sons Ltd [1965] 2 All ER 725, [1966] 1 QB 716, [1965] 3 WLR 276, [1965] 2 Lloyd's Rep 63, CA, Digest (Cont Vol B) 30, 151*a*.

Action

By a writ issued on 4th August 1972 the plaintiffs, Fairline Shipping Corporation, brought an action against the defendant, Brian Adamson, claiming damages for breach of contract and, in the alternative, negligence. The facts are set out in the judgment of Kerr J.

Martin Tucker for the plaintiffs.

John Spokes QC for the defendant.

Cur adv vult

8th November. **KERR J** read the following judgment. In this action the plaintiffs claim damages for negligence or breach of contract due to damage suffered by a large quantity of ship's provisions owned by them which were not kept under adequate refrigeration. The consignment was stored in the defendant's cold store at 36 Castle Way, Southampton, from 14th March 1972. By 17th April it had become apparent that due to the machinery not working properly a large part of the consignment, which consisted mostly of meat, vegetable and fat products, had gone bad. The quantum of the plaintiffs' loss has been agreed at £3,143·78 and is not in issue. The defendant denies liability on two grounds. First and foremost, he contends that he was not the bailee or otherwise responsible for the goods, but that the sole responsibility in contract and tort lay with a company called Game & Meat Products Ltd (to which I will refer as 'Game & Meat') of which he was the managing director. Secondly, he denies that the damage occurred as the result of breach of contract or negligence by anyone.

The main issue in the case concerns the position of Game & Meat in relation to these goods and to the defendant. For this purpose it is necessary to set out certain background material and events which occurred some time before the goods arrived in the store.

The defendant has a number of different business and property interests in Southampton. His private address was originally 74 London Road, but he subsequently moved into a private hotel operated by him at 15 Lawn Road, Southampton. His main business interest appears at all times to have been that he owned and operated a club know as the Silhouette Club at St Michael's Square, which is just round the corner from the cold store in Castle Way. Until September 1971 the freehold of the club and of the cold store had been owned by a company called Vernon & Tear Ltd. This was one of the companies in what was referred to in the evidence as 'the Vernon Group'. The moving spirits of the Vernon Group for present purposes were Messrs Vernon senior and junior, one of the companies in the group of which they were both directors being Game & Meat. As the name indicates, the business of Game & Meat was the buying and reselling, largely to the Continent, of game and meat products. This required the storage of such products under refrigeration between their purchase and resale, and Game & Meat used the cold store in Castle Way for this purpose. There does not appear to have been any lease of the cold store by Vernon & Tear Ltd to Game & Meat at any time. Since both companies were in the same group the matter was evidently dealt with informally, and I understand that no rent was ever paid by Game & Meat, though certain entries were made in the accounts of the two companies reflecting the right of Game & Meat to use the premises. On only rare occasions had the premises been used for the storage of goods which did not belong to Game & Meat, and until the arrival of the consignment in question this had not happened for many months and was not part of the ordinary business of the company.

The Vernons were evidently members of the Silhouette Club and friends of the defendant. By September 1971 it had been agreed that certain business transactions should be carried out between them and the defendant. The defendant bought the freehold of the Silhouette Club from Vernon & Tear Ltd, and by a contract dated 16th September 1971 he also bought from this company the freehold of the cold store in Castle Way, together with the refrigerating units in it. It was a term of this contract that on completion the defendant was to grant a lease of the cold store to Game & Meat for two years at the yearly rent of £3,000, either party having the right to determine the lease by a three months notice given on or after 31st March 1973. However, for reasons to which I must refer in a moment no such lease was ever granted. At the same time it was also decided that the defendant should acquire an interest in Game & Meat. It was then already known that Game & Meat was in financial difficulty; the company ultimately went into voluntary liquidation on

24th April 1972, shortly after the discovery of the damage to the consignment in question. The defendant evidently agreed to attempt to procure additional finance for Game & Meat, but I understand that this did not materialise, or at any rate not to a sufficient extent. In return he acquired a 50 per cent shareholding in Game & Meat, and from September 1971 he became its managing director. The business of buying and selling the products of the company however remained under the management of the Vernons. From the autumn of 1971 onwards the defendant began to concern himself actively with the financial affairs of Game & Meat and asked his accountant to carry out an investigation. He also asked an employee of his, a Mr Buckingham, to concern himself with the accounts and records of Game & Meat which had got into a confused state. Mr Buckingham described himself as a company administrator and had considerable experience in the keeping of books and records and general accountancy matters. Until some time in December 1971 Mr Buckingham had been employed by the defendant or by one of his companies at the Silhouette Club. From December 1971 until the end of March 1972, when he also concerned himself with the affairs of Game & Meat on behalf of the defendant, his salary was paid by Game & Meat. I am however satisfied that this was little more than a convenient financial arrangement between the defendant and the Vernons, and that the bulk of Mr Buckingham's time and work continued to be devoted to the personal interests of the defendant. He agreed in evidence that his position in Game & Meat was in reality that of a watchdog on behalf of the defendant's interests. By about January 1972 it had become clear that Game & Meat was in serious financial difficulty and could probably not be saved. I do not accept that this was not appreciated until late March or April 1972. In January 1972 the typist employed by Game & Meat in the cold store was discharged. Apart from the directors (one of whom was also the company secretary) and Mr Buckingham, Game & Meat then had no other person on its payroll. When goods were brought in or taken out of the cold store this was done by outside labour. From about January onwards the business of Game & Meat consisted solely in the acquisition and disposal of the season's stocks, and this was dealt with by the Vernons. Mr Buckingham's functions were limited to trying to chase up debtors and to deal with the increasing pressures from creditors, but this only occupied him for a short period on each day. Insofar as correspondence was necessary for this purpose I conclude on balance that this was carried out under the letterhead of Game & Meat, as one would expect. For this purpose Mr Buckingham spent a short period of each day in the office accommodation at the cold store; for the remainder of the day he worked in the Silhouette Club round the corner in the same way as before. After the dismissal of the typist employed by Game & Meat, a Mrs Hawkins, who was employed by the defendant as his secretary in the Silhouette Club, used to do whatever typing was necessary on behalf of Game & Meat. Having seen her, the defendant and Mr Buckingham in the witness box I conclude that for this purpose she also used the letterhead of Game & Meat and not the defendant's personal letterhead. Both she and Mr Buckingham had considerable experience in commercial correspondence and fully appreciated the difference between writing on the company's notepaper and on the defendant's personal notepaper. I do not accept the evidence that the latter was used indiscriminately because the company's notepaper was often unavailable. The evidence relating to this aspect was scanty and unsatisfactory but it does show that the company still used its own letterhead, with its registered address at Canute Road, Southampton, in April 1972. Although Mrs Hawkins said that she kept a Game & Meat file of correspondence at the Silhouette Club, this was not produced either on discovery or in evidence; nor were any of the accounts of Game & Meat produced. I do not accept the evidence on behalf of the defendant suggesting that the company's notepaper was not readily available or was not used for the company's business in the normal way. I think that this was a distortion of the facts in an attempt to explain away the use of the defendant's personal notepaper in relation to these goods, as mentioned hereafter.

As I have already mentioned, the proposed lease from the defendant to Game & Meat was never executed; nor were any steps ever taken to put this in train. Mr Martin Vernon, who gave evidence, said that this was merely an administrative oversight, but I do not accept this. The defendant virtually admitted in evidence that the reason why no lease was ever executed was because Game & Meat's financial position was such that it was doubtful whether it was really in his own interest, and possibly also in the interest of Game & Meat, to pursue this proposal. But if Game & Meat was heading for disaster, then it was clearly in the defendant's interest to salvage as much as he could for himself, and I think that in view of his close association with the Vernons, and the efforts which he had made on behalf of the company, they raised no objection to this. I think that it was in these circumstances and against this background that Game & Meat paid two sums of £1,560 each to the defendant by means of two cheques, respectively dated 4th and 20th January 1972, signed by one of the Vernons and the defendant himself. This total sum of £3,120 was intended to include the rent said to be payable by Game & Meat for the cold store in respect of the first year, presumably up to 16th September 1972, the balance of £120 being irrelevant for present purposes. It was said on behalf of the defendant that although no lease had ever been executed or set in train, it had been orally agreed that the whole of each year's rent was to be payable in advance. I do not believe that any such agreement was ever made. I think that this payment was made because Game & Meat undoubtedly had the use of the cold store for the company's business, and because the proposal that the defendant should grant a formal lease to the company provided some justification for a payment of £3,000 at a time when the company was still able to make such a payment but when the likelihood of its being able to do so in the future was more than doubtful.

I am satisfied that by January 1972 neither the defendant nor the Vernons nor Mr Buckingham expected Game & Meat to survive more than a few months, and that they were thereafter only concerned with the liquidation of the season's business.

This is my assessment of the background position, and one then comes to the events relating to the plaintiffs' consignment of provisions in March and April 1972. This had been discharged from a vessel in Southampton and was due to be loaded on another vessel about six weeks later. Pending such reloading it was necessary to find refrigerated storage for the consignment. The plaintiffs' agents who took delivery of the consignment were a company of ship's agents named Keller Bryant & Co Ltd. It was not disputed that Keller Bryant acted in all respects as agents for the plaintiffs, and the plaintiffs' right to sue as principals both in contract and in tort was admitted. The refrigerated stores normally used by Keller Bryant were unavailable at the time, and Keller Bryant accordingly enquired from the port health authority whether they could suggest some other store. The port health authority mentioned the name of Game & Meat and the cold store in Castle Way, and a Mr Stafford, the stores superintendent of Keller Bryant, accordingly telephoned to Game & Meat on about 3rd March to enquire whether they could store this consignment. This call was received by Mr Martin Vernon at the offices of the cold store in Castle Way. In the course of this telephone conversation Mr Vernon was speaking on behalf of Game & Meat and Mr Stafford also understood him to be speaking on behalf of the company. No one in Keller Bryant had dealt with Game & Meat before or had until then known anything about the company; nor did anyone concerned in Keller Bryant know anything about any connection between the defendant and Game & Meat or that the defendant was the owner of the cold store in Castle Way. Mr Stafford explained that storage was required for about five to six weeks and described the general nature of the consignment. Mr Vernon agreed to store the goods in Castle Way at a rate of £5 per ton per month and on the basis that Keller Bryant would provide the necessary labour for the movement of the consignment into and out of the cold store. Mr Vernon also informed Mr Stafford that the key to the cold store could be obtained from the Silhouette Club, and I am satisfied that this is where it was normally kept.

On 14th March the goods were delivered into the cold store. The person in charge on behalf of Keller Bryant was a Mr Broom who arrived at the cold store with one of the lorries transporting the goods. I accept Mr Broom's evidence as to what then happened. He found the store locked, but obtained the key from someone who got it from the Silhouette Club, probably Mr Buckingham. The labour engaged by Keller Bryant arrived a little later and the goods were then moved into one of the refrigerated chambers in the store. Mr Buckingham was in the cold store while this was being done, but no receipt for the goods was issued, and on the evidence no one can be said formally to have taken delivery of the goods, either on behalf of Game & Meat or on behalf of the defendant. However, Mr Broom certainly considered that the goods were being delivered to Game & Meat. The refrigerated chamber had two doors, one through which the goods were moved in and the other leading into an adjoining refrigerated chamber. One or more representatives of the port health authority were also present, and when all the goods had been moved in, the door through which they had been moved in was sealed by the port health authority. The other door was not sealed. I am satisfied that this was done so that people could not walk through the refrigerated storage space and so that its contents should only be exposed to the refrigerated atmosphere of that and the adjoining chamber. Mr Broom and the lorries then left.

Prior to the arrival of the goods Mr Martin Vernon had informed the defendant about the arrangements which he had made relating to their storage and the defendant had raised no objection. Mr Vernon knew about the unsealed entrance to the chamber, and by looking at the goods he was able to form an approximate estimate of their weight, amounting to a little over 12 tons, of which he informed the defendant or Mr Buckingham shortly thereafter. It was then realised by the defendant or Mr Buckingham, or both, that there was still nothing in writing to confirm the arrangements under which the goods had been stored. It was in these circumstances that a significant letter was written to Keller Bryant on 23rd March. I am satisfied that this was dictated to Mrs Hawkins either by the defendant or by Mr Buckingham with the knowledge and approval of the defendant. Having considered the evidence of these witnesses and seen them in the witness box I do not accept that the defendant knew nothing about this letter. It was typed by Mrs Hawkins on the defendant's personal and business notepaper, with his name printed at the top, after she had altered his printed address from 74 London Road to 15 Lawn Road. It bore the defendant's and her dictation codes and was in the following terms:

> 'Dear Sirs, I confirm the arrangement regarding the storage of goods in my premises at 36, Castle Way; I understand there is a 12.1/5 ton involved and the rent per calendar month as agreed with your Representative is £5 per ton per month and £5 per ton per part month. My invoice for £61·00 being the first months rental due will be sent to you on or around the 14th April, 1972. Yours faithfully, [signed:] A. Hawkins (Mrs) for [the defendant].'

Neither of the Vernons had anything to do with the writing of this letter and there was no evidence that they knew about it. I am satisfied that it meant exactly what it said. I do not accept that it was due to an oversight that it came to be written in the first person singular and on the defendant's notepaper, instead of emanating from Game & Meat and under their letterhead. The defendant, Mr Buckingham and Mrs Hawkins were all experienced in the writing of business letters and appreciated perfectly well the difference between a letter from the defendant personally, such as this, and a letter from the company. I think that the reason why the letter was written in these terms and on the defendant's notepaper was that the affairs of Game & Meat had by then reached a stage when the defendant wanted to treat the storage of these goods in his cold store as his own venture. Whether Mr Martin Vernon so regarded this transaction when Mr Stafford spoke to him on the telephone on or about 3rd March I do not know, but I doubt it. It may well be that he came to

acquiesce in this arrangement between that date and 23rd March, by which time it must have been even clearer that the company's days were numbered. Alternatively it may be that Mr Martin Vernon never gave any real thought to the matter. There was no evidence, and certainly none that I accept, that either of the Vernons took any interest in the storage of these goods after the telephone call on or about 3rd March, apart from Mr Martin Vernon informing the defendant that the goods were due to arrive and thereafter informing the defendant or Mr Buckingham of their approximate weight for the purpose of computing the storage charges.

The letter of 23rd March in due course arrived on the desk of Mr Miller, an assistant director of Keller Bryant. He knew the defendant as the owner of the Silhouette Club and as a businessman of substance. He was quite content with the defendant's letter of 23rd March and it did not occur to him to query it in any way or to wonder why it did not come from Game & Meat. He merely concluded, rightly, that the goods were stored in the defendant's cold store and not in one owned by Game & Meat, but he was quite content with this arrangement because the cold store itself had been suggested by the port health authority.

When the defendant or Mr Buckingham on his behalf dictated the letter of 23rd March to Mrs Hawkins they also wished to ensure that the invoice for the first month's storage should be sent to Keller Bryant on or about 14th April. Mrs Hawkins was therefore instructed to make this out at the same time as she typed the letter of 23rd March. In accordance with the terms of that letter, she therefore also typed an invoice dated 14th April from the defendant on his own notepaper in the same way as the letter, asking for a cheque for £61 to be sent to his address at St Michael's Square.

On or about 31st March Mr Buckingham drew his last wages from Game & Meat and the company thereafter had no employees apart from its directors. No one appears to have taken any interest in the plaintiffs' goods in the cold store. There was evidence that Mr Martin Vernon had been there very little in March and only occasionally thereafter; there was no evidence that Mr Vernon senior or Mr Tear, the other directors on the notepaper of Game & Meat, ever went there during this period. The defendant went into the cold store from time to time for the purpose of showing it to prospective purchasers. I think that he said that he hoped to sell the cold store for conversion as an office block. Whenever he went there he heard refrigeration machinery running, apparently normally, and therefore assumed that all was well. There were no thermometers indicating the temperature inside the chamber in which the plaintiffs' goods were stored, and no attempt was made to check on their temperature by means of any portable thermometers which may have been available. I am satisfied that it is part of the ordinary precautions to be taken in a refrigerated store from time to time to carry out checks to ensure that the goods stored in it are maintained at a proper temperature; but no attempt to do so was made in the present case. The defendant did not even know that there was a second unsealed door giving access to the chamber. But even if all means of access had been sealed, I am satisfied that in any properly run refrigerated store the temperature inside a sealed chamber can and should be verified by means of fixed thermometers on the outside, indicating the temperature inside the chamber. Reliance on the noise made by the running machinery alone is not sufficient, as was shown by the events in this case.

The defendant had been showing a prospective purchaser around the cold store on Friday, 14th April, and all then seemed to him to be normal. On the same day Mrs Hawkins sent off the invoice for the first month's storage and this reached Mr Miller of Keller Bryant on the following day. I accept his evidence that if payment of this invoice had not been overtaken by events, Keller Bryant's cheque would have been made out in favour of the defendant personally, pursuant to its terms and those of the letter of 23rd March. The defendant and Mr Buckingham said that if this had happened the cheque would have been endorsed over to Game & Meat or

the proceeds paid over to the company. I am very doubtful about this, but it is my view in any event irrelevant to the issue of liability between the parties to this action. On Sunday, 16th April, the defendant noticed a large quantity of liquid fat and blood oozing into Castle Way from under the door of the cold store. He managed to get hold of an engineer, and it was then discovered that there had been a breakdown of one of the fans distributing cold air into the chamber, with the result that the contents had thawed. The machinery of the unit was still running, but the fan was frozen to such an extent that it was going to take about three days to thaw it out. I am satisfied that the fan must have broken down about a week before the damage was discovered and that the damage to the goods was due to negligence in failing to maintain any check at any time on the temperature within the chamber. On Monday, 17th April, the defendant telephoned Mr Miller of Keller Bryant and informed him of what he had discovered. He also told him that any claim would have to be addressed to Game & Meat but that this company was about to go into liquidation, as happened on 24th April. Mr Miller did not accept this, but contended that the contract was with the defendant personally, having in mind the letter of 23rd March. On the following day Mr Miller himself typed and sent a letter to the defendant and had it delivered to him by hand, informing him that any part of the goods not condemned by the port health authority would be removed from his premises at Castle Way on that day. I am satisfied that this was sent in an envelope addressed to the defendant personally. On 20th April the plaintiffs' solicitors sent a letter of claim, again in an envelope addressed to the defendant personally. The defendant subsequently contended that this letter had arrived in an envelope addressed to Game & Meat, which he purported to produce. When this was refuted by the plaintiffs' solicitors, he contended that Mr Miller's letter of 17th April had arrived in this envelope. Neither of these statements was true, and this episode, though not directly relevant to the issues, added nothing to the defendant's general credibility as a witness.

These are the facts and I now turn to the question of liability, first in contract and then in tort. The plaintiffs' contention that the defendant is liable in contract was put on two grounds. They contended, first, that they oral contract made on the telephone on or about 3rd March between Mr Stafford and Mr Martin Vernon had been made by the latter on behalf of the defendant as undisclosed principal. I reject this because there is no evidence to suggest that Mr Martin Vernon then intended to contract otherwise than as a director of Game & Meat. Alternatively and mainly, the plaintiffs contended that the letter of 23rd March, together with the invoice of 14th April, and Keller Bryant's acquiescence in their terms, operated as a novation between the defendant and Keller Bryant as agents for the plaintiffs of the original contract concluded with Game & Meat. Faced with the difficulty of showing any acceptance of the terms of these documents by Keller Bryant, and the decision in *Felthouse v Bindley*[1], that silence cannot amount to an acceptance, they sought to overcome this in the following manner. The submitted that the letter of 23rd March, followed by the despatch of the invoice on 14th April, showed that the defendant intended or was content to treat Keller Bryant's silence as an acceptance of his having taken over the original contract with Game & Meat, and that this contract was accordingly thereafter binding on him. In this connection they relied on the comment on *Felthouse v Bindley*[1] in Chitty on Contracts[2], where it is suggested, as I understand it, that in such circumstances the offeror (the defendant) may be bound to the offeree (Keller Bryant as agents for the plaintiffs) even though he himself might not be able to hold the offeree to any contract. It seems to me, however, that such a result can only flow from an estoppel operating against the offeror and that such facts cannot give rise to any contract or fit into the settled law governing offer and acceptance. The plaintiffs' cause of action against the defendant cannot be founded on

1 (1862) 11 CBNS 869
2 23rd Edn (1968), vol 1, p 30, art 57

estoppel, and there is in any event no or no sufficient evidence of any reliance by Keller Bryant to give rise to an estoppel in the plaintiffs' favour. There is also no evidence of any tripartite agreement capable of supporting a novation of the original contract. I therefore hold that the plaintiffs' claim in contract fails.

In the alternative, the plaintiffs contended that they are entitled to succeed against the defendant in tort on the basis that he was either a bailee of the goods or liable in negligence in the same way as a bailee. Their submission can be summarised by saying that on the facts, supported or confirmed by the terms of the letter of 23rd March and the invoice of 14th April, the defendant was in all the circumstances to be regarded as having accepted responsiblity for the goods or as the person responsible for ensuring that care was taken in their storage. The defendant countered all these submissions on the basis that the only contract was with Game & Meat, that only the company could therefore be held to be the bailee, and that the defendant could accordingly not be under any personal liability.

I do not think that the defendant's contentions operate in law as a bar to the plaintiffs' claim. Let me take first the question of bailment. A defendant can be in the position of a bailee without any contract between him and the owner of the goods. On the facts of this case it is by no means clear whether Game & Meat or the defendant is to be regarded as the bailee of these goods by the time when the damage occurred in April. I do not think that Game & Meat ever had exclusive possession of the cold store and of its contents as against the defendant, except as regards goods owned by the company itself. Such exclusive possession would have resulted if a lease to this effect had been granted by the defendant to the company. But this did not happen, in my view as a matter of deliberate policy. Such exclusive possession is also inconsistent with the terms of the defendant's letter of 23rd March which in my view meant what it said, as already mentioned. It is quite possible, for instance, that at the time of the telephone conversation of 3rd March, and even at the time of the delivery of the goods on 14th March, Game & Meat was not only the intended bailee (as it obviously was) but also initially the actual bailee, but that afterwards there was a deliberate change in the arrangement as between the company and the defendant, which resulted and was reflected in the letter of 23rd March. The financial position of the company at this time and the letter of 23rd March would certainly be consistent with such an inference. But in my view the evidence is insufficiently clear to support the conclusion that the defendant had exclusive possession of the goods at the time when the damage occurred. I am also not persuaded by the proposition of counsel for the plaintiffs that by that time the case is to be regarded as one of a joint bailment of the company and the defendant. I do not think that the refinements of the concepts of legal possession and bailment are or should be determinitive of liability in the tort of negligence.

The real answer to the submission made on behalf of the defendant is in my judgment that the question of his liability in negligence to the plaintiffs is not necessarily excluded as a matter of law on the ground that there was no contract with him and that he is also not to be regarded as a bailee with a right to the legal possession of the goods. Depending on the facts, he may nonetheless owe a duty of care to the plaintiffs and be liable in negligence for breach of that duty. The fact that he was a director of Game & Meat and that the company was the contracting party does not necessarily exclude his personal liability. The legal position in this connection can be conveniently illustrated by reference to two cases, but such examples could easily be multiplied. In *Adler v Dickson*[1] the plaintiff's contract with the defendant's employers, although excluding all liability for negligence, nevertheless did not preclude her from recovering damages in negligence from the defendant, a servant of the company with which she had contracted, because he owed her a personal duty of care apart from his contractual obligations to his employers, and

1 [1954] 3 All ER 397, [1955] 1 QB 158

because he was held to be in breach of that duty. That was a case of personal injury, but I do not see why a case of damage to the plaintiff's property must be regarded differently in law. Take the facts of *Morris v C W Martin & Sons Ltd*[1]. In that case the plaintiff's fur coat was stolen by a servant of the defendants, who were sub-contractors and sub-bailees of the coat without any contractual or other nexus existing between the plaintiff and the defendants. The plaintiff recovered damages against the defendants for the loss of her coat because they were held responsible for the act of their servant. It is however clear that if she had chosen to sue the servant personally in the tort of conversion she would equally have succeeded, indeed with less difficulty. But would the position on this basis have been any different if instead of stealing the coat the servant had negligently caused or allowed it to be ruined in the process of cleaning it. If he had carelessly plunged it into a vat of green dye or left it in cleaning fluid for so long that it became destroyed by some foreseeable chemical action, could he not have been made liable in negligence as well as his employers? I do not see why it should follow as a matter of law that in such cases an action could only be maintained against his employers. A duty of care by somebody else's servant to the owner of goods, and a breach of that duty by a particular servant, may of course be much more difficult to establish than a wrongful conversion of the goods by such a servant. But this depends on the facts. Generally speaking, if an employer is liable to a plaintiff in tort on the basis of the doctrine respondeat superior, the servant can also be held personally liable, though in practice it is of course usually much more convenient and worthwhile to sue his employers. If this is the law as regards servants it cannot logically be more favourable to company directors.

It follows that in my view the crucial question in the present case is whether or not, on the facts, the defendant owed a duty of care to the plaintiffs in respect of their goods which were stored in his cold store, and, if so, whether he was in breach of that duty. In my view both limbs of this question are to be answered in the affirmative on the special facts of this case which I have already reviewed. Game & Meat could only perform its duties in relation to these goods through its human servants and agents. At the relevant time the only persons through whom these duties could be performed were the directors. The only one of these who concerned himself with these goods in any way after their delivery was the defendant. The letter of 23rd March dictated by him or on his behalf in my view reflected the true position, in that he regarded himself, and not Game & Meat, as concerned with the storage of these goods. On the facts of this case the defendant in my view assumed and owed a duty of care to the plaintiffs in respect of the storage of their goods in his premises and was in breach of that duty with the result that the plaintiffs' goods were damaged. I therefore give judgment for the plaintiffs against the defendant in the agreed amount of £3,143·78.

Judgment for the plaintiffs.

Solicitors: *Hepherd, Winstanley & Pugh*, Southampton (for the plaintiffs); *Lamport, Bassitt & Hiscock*, Southampton (for the defendant).

Deirdre McKinney Barrister.

1 [1965] 2 All ER 725, [1966] 1 QB 716