IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2005 HCV 01124

BETWEEN	**CLAUDETTE EDWARDS**	**CLAIMANT**
AND	**QUEST SECURITY SERVICES LTD**	**DEFENDANT**

IN CHAMBERS

Mr. Rudolph Smellie and Miss Tamika Harris for the claimant

Mr. Jalil Dabdoub instructed by Dabdoub, Dabdoub and Company for the defendant

September 15 and 20, 2005

PRIVITY OF CONTRACT, DECLARATION, LOCUS STANDI AND APPLICATION TO STRIKE OUT CLAIM

SYKES J

1. Quest Security Services Limited (Quest) is asking the court to strike out this claim in which Miss Edwards is seeking declarations that the purported amendment of a contract between Quest and Guardian Life Limited (Guardian) is invalid or in the alternative that the purported change of beneficiary by Miss Lettera Thompson was procured by undue influence. Quest says that Miss Edwards is not a party to the contract and therefore cannot bring this or any claim concerning the contract. I should indicate that the claim against Guardian Life Limited, who was named as the second defendant, was struck out on September 9, 2005. I have set out the claim form in its amended form before the striking out of the case against Guardian.

THE CONTEXT

2. In April 2000, Quest entered into a contract of insurance with Guardian. By that contract, Guardian agreed to provide insurance coverage for the employees of Quest which would become payable on the occurrence of certain events such as death or injury to the employee. Clause 8 of the contract clearly states that the proposer (Quest) should not have any beneficial interest in the policy.

3. Quest employed Miss Lettera Thompson. She worked as an office helper. Unfortunately, she was diagnosed with leukaemia in 2003. In February 2005, her health significantly declined to the extent that she was hospitalised on February 5, 2005. At some point on February 5, Miss Lettera Thompson executed a change of beneficiary form naming Quest as the beneficiary. Before this change was effected, Miss Thompson had named Claudette Edwards, the claimant, as the beneficiary. The document is alleged to have been executed at the home of Mr and Mrs Joseph Dibbs, directors of Quest. Miss Thompson died on April 9, 2005.

4. Miss Edwards thereafter sought the assistance of counsel who launched this action. It is appropriate to indicate that Mr. Smellie who appeared for the claimant on this application to strike out is appearing in the matter for the first time.

THE CLAIM

5. After some uncertainty, the claimant finally formulated her claim in which she is seeking the following declarations and orders.

a. a declaration that the designation and appointment of the proposer, Quest Security Services Limited as the beneficiary under the Group Life Policy GCL 0004 is conflicting (sic) with the terms and conditions of the insurance policy contract;

b. a declaration that the issuing by Guardian Life Insurance Company Ltd of sums payable upon the death of the insured, Lettera Thompson, to Quest conflicts with the terms and conditions of the insurance policy contract;

c. an order that the contract of insurance should be specifically performed;

d. a declaration that the designation and appointment of the proposer, Quest Security Services Limited as the beneficiary under Group Life Policy number GCL 0004 is null and void;

e. a declaration that the Life Assurance Plan Certificate issued by First Defendant to the Second Defendant is ineffective since it identifies the Second Defendant as the beneficiary under Group Life Policy number GCL 004 (sic) before the change of beneficiary form was allegedly executed by the insured;

f. an injunction to restrain Guardian Life Insurance Company Limited by its servants or agents or otherwise howsoever from issuing any sum payable upon the death of Ms. Lettera Thompson, under Group Life Assurance Policy number GCL 0004 to Quest Security Services Limited;

g. Costs;

h. Such further relief as this Honourable Court deems fit.

6. In respect of the claim based on undue influence the claimant seeks the following declarations:

a. a declaration that Quest Security Services Limited is not entitled to any beneficial interest in the insurance policy number GCL 0004 of Ms Lettera Thompson, late of 7 Moresham Avenue, Kingston 10 in the parish of St. Andrew;

b. a declaration that the designation and appointment of Quest Security Services Limited as the beneficiary under Group Life Policy number 0004 is null and void;

c. an injunction to restrain Guardian Life Insurance Company Limited by its servants or agents or otherwise howsoever from issuing any sum payable upon the death of Ms. Lettera Thompson, under Group Life Assurance Policy number GCL 0004 to Quest Security Services Limited

d. Costs;

e. Such further relief as this Honourable Court deems fit.

7. The particulars of claim have not identified the person or persons whose conduct is to be attributed to Quest. This is not an insurmountable difficulty and can be solved by ordering the claimant to provide further information pursuant to rule 34 of the Civil Procedure Rules (CPR). Despite this defect, the gist of the claim amounts to this:

a. Miss Lettera Thompson was an unsophisticated woman – an office helper;

b. she was diagnosed with leukaemia - a potentially fatal illness;

c. she was subservient to her employer;

d. she reposed trust and confidence in her employer;
e. she was in deteriorating health in February 2005 to the point where she was hospitalised;
f. at some point on February 5, 2005, she found herself at the private residence of Mr and Mrs Dibbs, directors of Quest;
g. it was at the home of Mr. and Mrs. Dibbs that the change of beneficiary form was executed.

QUEST'S APPLICATION

8. Quest's application is grounded in rule 26.3(1) (c) of CPR. Mr. Dabdoub submitted that the claim as framed does not disclose any reasonable grounds for the claim and should be struck or alternatively, the claim is frivolous, vexatious and an abuse of the process of the court under the inherent power of the court. Mr. Dabdoub vigorously submits that Miss Edwards has no standing to bring this action because she is not a party to the contract between Quest and Guardian. In support of his submissions, he relies on *Denbow, Claude, Life Insurance Law in the Commonwealth Caribbean,* 1984 (Butterworths) at 112, 113 and 118, ***Beswick v Beswick*** [1968] A.C. 58 and ***Cleaver v Mutual Reserve Fund Life Association*** [1892] 1 Q.B. 147, ***National Commercial Bank (Jamaica) Ltd. v Raymond Hew and Clifton Hew*** (2003) 63 W.I.R. 183 and ***Royal Bank of Scotland v Etridge*** (No. 2) [2001] 3 W.L.R. 1021. The cases and text, submits Mr. Dabdoub, support the contention that only parties to the contract can sue on it. He said that Miss Thompson, were she alive, could not sue or enforce any provisions of the policy because of her

lack of privity, therefore Miss Edwards cannot be in a better position that her.

9. Mr. Dabdoub went as far as suggesting that even if he accepted that Miss Thompson were the victim of undue influence when she signed the form or worse, her signature was forged, no non-party to the contract could do anything about it except, possibly, the personal representatives of the deceased's estate.

THE APPLICABLE PRINCIPLES

10. Rule 26.3(1)(c) of the CPR states that court may strike out a statement of case or part of a statement of case if it appears to the court that the case or part thereof discloses no reasonable grounds for bringing a claim. This provision is clear enough. It is saying that a court may strike out a claim where, for example, the law as it currently stands is clearly against the contention of the party who is relying on the statement of claim that is the target of the striking out application. It follows from this that if there are developments in the area of law applicable to the targeted statement of case that suggest that once hallowed principles are being modified then it would not necessarily be appropriate to strike out the statement of case. I shall deal with the privity point now.

THE PRIVITY OF CONTRACT ISSUE

11. Mr. Dabdoub suggested that the cases he cited on the privity issue (***Beswick*** and ***Cleaver***) have conclusively settled the matter once and for all that non-parties to a contract have no standing to bring any claim concerning it. However, is this really

so? I am of the view that unless there is a decision from the Judicial Committee of the Privy Council on appeal from Jamaica or from the Court of Appeal of Jamaica that has precluded, irrevocably, a re-examination of the doctrine of privity in the context of insurance contracts generally and life and/or accident insurance contracts in particular then it is appropriate to see whether they are developments in other common law jurisdictions that may be of assistance. No case has been cited to me in which either the Privy Council on appeal from Jamaica or Court of Appeal of Jamaica has irreversibly said the privity of contract rule is so fundamental a rule that only Parliament can change the law or that the days of judicial modification of common law rules are long past. On the contrary, what the research reveals is growing judicial impatience with the rule and the tardiness of legislative intervention and but for the apparent timidity of counsel the judges would have acted long ago.

12. It is no secret that judges have sought to evade the doctrine of privity by unconvincingly speaking of a trust of a promise, principal/agent relationship, ratification by the principal or even unjust enrichment. The injustice of the rule moved Lord Reid, who was no judicial radical, to say in ***Beswick*** that "if one had to contemplate a further period of Parliamentary procrastination, this House might find it necessary to deal with this matter" (see page 72C) The "matter" to which he was referring was the privity of contract doctrine in respect of which the Law Revision Committee of the United Kingdom (1937) had recommended:

That where a contract by its express terms purports to confer a benefit directly on a third party it shall be enforceable by the third party in his own name.

13. At the time of ***Beswick,*** thirty one years had passed since the recommendation. Twenty seven years after ***Beswick*** it was the turn of Steyn LJ to express his despair in ***Darlington BC v Wiltshier Northern Ltd*** [1995] 1 W.L.R. 68. His Lordship described the inability of third parties to sue on contracts for their benefit as rule having "no doctrinal, logical or policy reason" (see ***Darlington BC at*** 76E). Between ***Beswick*** and ***Darlington,*** other judges lamented the lack of parliamentary activity as the following passage makes clear. I cannot improve on the felicity of expression of Steyn LJ and so I set it out in full. The learned Lord Justice said at pages 76G – 78C:

The genesis of the privity rule is suspect. It is attributed to Tweddle v. Atkinson (1861) B. & S. 393. It is more realistic to say that the rule originated in the misunderstanding of Tweddle v. Atkinson: see Atiyah, The Rise and Fall of Freedom of Contract (1979), p. 414 and Simpson, A History of the Law of Contract: the Rise of the Action of Assumpsit (1975), p. 475. While the privity rule was barely tolerable in Victorian England, it has been recognised for half a century that it has no place in our more complex commercial world. Indeed, as early as 1915, in Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd. [1915] A.C. 847, 855, when the House of Lords restated the privity rule, Lord Dunedin observed in a dissenting speech that the rule made

> *"it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce."*

Among the majority, Viscount Haldane L.C. asserted as a self-evident truth, at p. 853, that "only a person who is a party to a contract can sue on it." Today the doctrinal objection to the recognition of a stipulatio alteri continues to hold sway. While the rigidity of the doctrine of consideration has been greatly reduced in modern times, the doctrine of privity of contract persists in all its artificial technicality.

In 1937 the Law Revision Committee in its Sixth Report (Cmd. 5449, para. 41-48) proposed the recognition of a right of a third party to enforce the contract which by its express terms purports to confer a benefit directly on him. In 1967, in Beswick v. Beswick [1968] A.C. 58, 72, Lord Reid observed that if there was a long period of delay in passing legislation on the point the House of Lords might have to deal with the matter. Twelve years later Lord Scarman, who as a former chairman of the Law Commission usually favoured legislative rather than judicial reform where radical change was involved, reminded the House that it might be necessary to review all the cases which "stand guard over this unjust rule:" Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd. [1980] 1 W.L.R. 277, 300G. See also Lord Keith of Kinkel, at pp. 297H-298A. In 1981 Dillon J. described the rule as "a blot on our law and most unjust:" Forster v. Silvermere Golf and Equestrian Centre (1981) 125 S.J. 397. In 1983 Lord Diplock described the rule as "an anachronistic shortcoming that has for many years been regarded as a reproach to English private law:" Swain v. The Law Society [1983] 1 A.C. 598, 611D.

But as important as judicial condemnations of the privity rule is the fact that distinguished academic lawyers have found no redeeming virtues in it: see, for example, Markesinis (1987) 103 L.Q.R. 354; Reynolds (1989) 105 L.Q.R. 1; Beatson (1992) 44 C.L.P. 1 and Adams and Brownsword (1993) 56 M.L.R. 722. And we do well to remember that the civil law legal systems of other members of the European Union recognise such contracts. That our legal system lacks such flexibility is a disadvantage in the single market. Indeed it is a historical curiosity that the legal system of a mercantile country such as England, which in other areas of the law of contract (such as, for example, the objective theory of the interpretation of contracts) takes great account of the interests of third parties, has not been able to rid itself of this unjust rule deriving from a technical conception of a contract as a purely bilateral vinculum juris.

In 1991 the Law Commission revisited this corner of the law. In cautious language appropriate to a consultation paper the Law Commission has expressed the provisional recommendation that "there should be a (statutory) reform of the law to allow third parties to enforce contractual provisions made in their favour:" Privity of Contract: Conflicts for the Benefit of Third Parties, Consultation Paper No. 121, p. 132. The principal value of the consultation paper lies in its clear analysis of the practical need for the recognition of a contract for the benefit of third parties, and the explanation of the unedifying spectacle of judges trying to invent exceptions to the rule to prevent demonstrable unfairness. No doubt there will be a report by the Law Commission in the not too distant future recommending the abolition of the privity of contract rule by statute. What will then happen in regard to the

proposal for legislation? The answer is really quite simple: probably nothing will happen.

But on this occasion I can understand the inaction of Parliament. ***There is a respectable argument that it is the type of reform which is best achieved by the courts working out sensible solutions on a case by case basis, e.g., in regard to the exact point of time when the third party is vested with enforceable contractual rights: see Consultation Paper, No. 121, para. 5.8. But that requires the door to be opened by the House of Lords reviewing the major cases which are thought to have entrenched the rule of privity of contract. Unfortunately, there will be few opportunities for the House of Lords to do so. After all, by and large, courts of law in our system are the hostages of the arguments deployed by counsel.*** *And Mr. Furst for the council, the third party, made it clear to us that he will not directly challenge the privity rule if this matter should go to the House of Lords. He said that he is content to try to bring his case within exceptions to the privity rule or what Lord Diplock in Swain v. The Law Society [1983] 1 A.C. 598, 611D, described as "juristic subterfuges ... to mitigate the effect of the lacuna resulting from the non-recognition of a jus quaesitum tertio ..."* (my emphasis).

14. I would simply add to this impressive list of critics of the privity doctrine the work of *Palmer, Vernon,* *The Paths to Privity: The History of Third Party Beneficiary Contracts at English Law* 1992 (Austin & Winfield). Professor Palmer traces the history of privity at common law and equity. He has conclusively demonstrated, in my view, that ***Tweddle's*** case did not decide what has been attributed to it.

15. By the end of the twentieth century, we had the somewhat unusual occurrence of academic and judicial opinion on the same side of an issue, namely that something is terribly wrong with the privity of contract rule. Additionally, academic opinion had finally persuaded judges that the commonly held view that the privity rule is founded on ***Tweddle v. Atkinson*** (1861) B. & S. 393 had no historical basis. That view, to put it bluntly, was simply

erroneous. What apparently happened was that subsequent judges conflated two separate rules, the privity rule and consideration rule, and stated them as a single rule.

16. The passage from Lord Justice Steyn demonstrates what while the condemnation of the doctrine was virtually universal in England the issue was not whether the rule should be reformed but the means by which it would be reformed and the extent of the modification. Some favoured legislation while others favoured judicial intervention. One gets the impression that but for counsel's disinclination to challenge the rule Steyn LJ was prepared to begin judicial reform of the rule itself rather than trying to look for dubious "exceptions" to the rule. The disappointment of the Lord Justice is palpable. In Australia, the High Court suffered no such disappointment. Counsel on behalf of the respondent ***Trident General Insurance Company Limited v McNiece Bros Proprietary Limited*** (1988) 165 C.L.R. 107 boldly argued that there should be an exception to the privity rule in the case of public risk policies where the parties to the contract intend to confer a benefit on an identified third party. Led by Chief Justice Mason the High Court of Australia, by a majority of 5:2, on varying grounds, upheld the decision of the Court of Appeal of New South Wales, which decided that McNiece Bros. could recover under an insurance policy to which they were not parties and did not contribute any of the premiums because in the opinion of the court, the contract was clearly made for the benefit of McNiece. The insurance company resisted the claim by raising squarely the issue of privity of contract. The submission was that McNiece was not a party to the contract and therefore

its claim was not sustainable in law. The trial judge resorted to an elaborate argument based upon ratification of the acts of the agent by the principal in order to circumvent the privity doctrine – further testimony to the desperate measures some judges may employ to avoid the rule. He said that the proposer of the insurance was acting as agent of McNiece who subsequently ratified the act of the proposer. Evidentially, this ratification rationale was not sustainable. In the Court of Appeal of New South Wales McHugh J.A. recognised this. It appeared that the other judicial devices commonly deployed to skirt the rule would not be of much assistance. McHugh J.A. therefore had no choice, if he was going to uphold the decision, but to confront the privity issue head on. This he did by declaring that "*the injustice of the rule in some situations is so obvious that it has been subject to prolonged and intensive criticism. Few could be found today who would agree ... that no change should be made to rule*" (cited by Brennan J (dissenting at page 127).

17. McHugh J.A. and the High Court were prepared to make the necessary judicial adjustment to the doctrine to achieve a just, fair and logical result consistent with the will theory of contract law. The High Court did not embark on a root and branch excision of the principle. The dissenting judges (Brennan and Dawson JJ) raised important considerations but these were adequately met by the joint judgment of Mason CJ and Wilson J and to a lesser extent by Gaudron J. As Gaudron J explained at pages 176 – 177:

> *To recognise an obligation on the part of a promisor who has accepted agreed consideration for a promise to benefit a third party, is not to abrogate the doctrine of privity of contract. It*

is merely to confine it to the only area in which it can properly operate, viz the area of rights and obligations having their source in contract.

18. In the case before me, Miss Thompson was the intended beneficiary of the contract. That is indisputable. The clear intention of the parties was to confer a benefit on Miss Thompson or a beneficiary identified by her. In other words, Miss Thompson was given the option of disposing of her benefit to whomever she pleased. She chose Miss Edwards. But for the alleged change of beneficiary, Miss Edwards would have stepped into the shoes of Miss Thompson once she (Thompson) died. The injustice of saying Miss Edwards in the event of Miss Thompson's death cannot bring an action is patent. Following on from the logic of Gaudron J, why should the initially named beneficiary be prevented from attempting to establish that the second named beneficiary secured the benefit by inequitable conduct, which if established can have the effect of setting aside the purported change of beneficiary? The case also raises the issue of whether a person can be unjustly enriched and left to retain their ill-gotten gain. To permit Miss Edwards to maintain this claim does not require wholesale destruction of the privity rule. It would simply be a demonstration of what the common law has always done – updating the law to do justice while maintaining the stability of the law. The difference between ***Trident*** and the instant case is that here the initially identified beneficiary is complaining that she has been ousted by the unlawful and inequitable conduct of the now named beneficiary. If this is so, what doctrinal, logical or policy reason can there be to deny Miss Edwards the right to

bring this claim? If the danger against which doctrinal and logical purity are guarding can be adequately addressed by adjustments in the law while providing a just result then the court should hesitate to bar a litigant merely because it wants to maintain doctrinal and logical wholesomeness.

19. There is no indication that the Jamaican legislature is considering circumstances as are before me to say nothing of enacting legislation to correct this unjust doctrine in the manner sought by the claimant any time soon.

20. Mr. Dabdoub's suggestion that the estate could bring an action seems a doubtful proposition since the estate was never named as a beneficiary. It is not clear on what basis the estate could maintain a claim unless the argument is that Miss Edwards was not a beneficiary at any time. However, no one is making that argument. Miss Edwards, prior to the alleged change of beneficiary, was the person entitled, under the contract, to collect the proceeds of the policy once the triggering event occurred. The triggering event has occurred.

21. Mr. Dabdoub next submitted, based upon the authorities of ***National Commercial Bank (Jamaica) Ltd. v Raymond Hew and Clifton Hew*** (2003) 63 W.I.R. 183 and ***Royal Bank of Scotland v Etridge (No. 2)*** [2001] 3 W.L.R. 1021, that the facts alleged by Miss Edwards cannot lead to a successful case of undue influence. At this stage of the matter, the question is not whether Miss Edwards will ultimately succeed but whether the plea of undue influence has been set out sufficiently in the statement of case. Admittedly, the claimant's case is not a model draft but in my view, it sets out with enough particularity what is being alleged. The claimant has identified the antecedent relationship that is capable

of giving rise to the necessary influence and she has set out circumstances that are capable of demonstrating an abuse of the relationship.

22. The claimant has alleged that Miss Thompson was in a subservient relationship (she was an office helper) with Quest. She reposed confidence in her employers. This is the antecedent relationship. It is common ground that Miss Thompson had leukemia. Her health deteriorated in February 2005. She was admitted to hospital on February 5, 2005. On February 5, 2005, she executed the change of beneficiary form at the home of Mr. and Mrs. Rachel Dibbs, directors of Quest. On the face of it, there is no reason why Miss Thompson would make such a change. These allegations point to the possibility of the abuse of the confidence. Without a full examination of the circumstances, it is impossible to say that the claimant must fail or has no real prospect of success.

23. I therefore conclude that in light of the allegation in this case and the developments in the law relating to doctrine of privity of contract Miss Edwards does have reasonable grounds for bringing the claim.

IS THIS CLAIM FRIVOLOUS, VEXATIOUS AND AN ABUSE OF PROCESS?

24. Mr. Dabdoub submitted that should he fail on the first ground, the claim should be struck out on the basis that the claim is frivolous, vexatious and an abuse of process. He relied on his privity submissions and said that if he is correct then it necessarily follows that claimant's case is the legal equivalent of the Titanic – doomed to failure from the out set and to launch a claim that is going to founder, without more, is an abuse of

process. From what I have said already, I do not accept this submission.

25. Mr. Dabdoub then traced the history of the proceedings to demonstrate that the claimant's behaviour is vexatious. According to Mr. Dabdoub, she prevaricated in stating what was her true claim; she launched the action by inappropriate procedure (i.e. using a fixed date claim form and not a claim form); there was a lack of clarity between April 21, 2005, when the claim was filed and July 22, 2005, when the amended claim was filed; this confused course of conduct imposed unnecessary costs on his client who was dragged into court and was engaged in "shadow boxing" until July 22, 2005, and finally, he said, the claimant did not file the claim in good faith.

26. It is true that the claimant did not seem to be clear on which route to take to her legal objective but this uncertainty was not the product of male fides but more consistent with formulating a claim that would circumvent the doctrine of privity or at least not make it an issue. This may explain why the claimant is asking for declarations. Further, Miss Thompson died on April 9, 2005. The claim was filed on April 21, 2005 – twelve days later. At the time of Miss Thompson's death, Quest on the face of it was the named beneficiary. Speed was of the essence and while not condoning loose pleadings but an attorney in these circumstances would have needed to do some research to see how best to formulate the claim taking full account of the doctrine of privity. I conclude that the proceeding is certainly not an abuse of process and neither is it vexatious and frivolous. The claim has raised

important points of law, procedural and substantive and these issues ought to be fully ventilated.

CONCLUSION

27. The claimant has reasonable grounds to bring the claim because the developments in the law of contract, particularly in the area of insurance, which is the subject of the claim, suggest that a person who is not a party to the contract may bring an action. To what extent this view will be accepted remains to be seen. It would be wrong to ignore the high authority that has condemned the privity rule in its current form and inexcusable to ignore a decision from a well respected final appellate court that has opened the door to judicial re-examination of the doctrine of privity. In these circumstances, it would be a severe misuse of language to describe this claim as lacking in merit or as frivolous, vexatious and an abuse of process. The application is therefore dismissed with costs to the claimant to be agreed or taxed. Leave to appeal granted.