Darlington Borough Council v Wiltshire Northern Ltd [1994] ABC.L.R. 06/28

CA on appeal from HHJ Newsy QC. Before Dillon LJ; Steyn LJ; Waits LJ. 28th June 1994.

JUDGMENT : LORD JUSTICE DILLON:

1. This is an appeal by the plaintiff in the action, the Darlington Borough Council ("Darlington") against an Order of the late Judge Newey Q.C. Made on the 13th October 1993. The respondent to the appeal is the first defendant in the action Wiltshier Northern Ltd ("Wiltshier"). By his Order the Judge decided a number of preliminary issues in the action, but only some of the issues which he decided are reopened on this appeal.

2. In 1977 and the years that followed Darlington wanted to create a new recreational centre on land at Darlington which Darlington already owned. The straight forward way of going about that would have been for Darlington to enter into a building contract with a construction company, and to raise the finance to pay for the work by borrowing. However there were then, as since, restrictions on local authority borrowing and it was feared that Ministerial consent for the requisite borrowing would not be forthcoming.

3. Consequently it was decided to approach an institution to see if the finance could be provided by some means other than borrowing.

4. The upshot was that the desired recreational centre, known as the Dolphin Centre, was built, in two Phases, under two building contracts under seal one for each Phase in the JCT Standard Form of building contract for use with quantities, local authorities edition 1963 (July 1977 revisions) dated respectively the 29th October 1979 and the 1st December 1981. Wiltshier entered into each of these building contracts as "the Contractor" under its then name of Leslie and Company Ltd, but "the Employer" under each of the building contracts was not Darlington, but a company called Morgan Grenfell (Local Authorities Services) Ltd of 23 Great Winchester Street, London ("Morgan Grenfell"). The Judge held, on one of the preliminary issues on which his decision is not challenged, that Morgan Grenfell entered into the building contracts with Wiltshier as a principal and not as agent for Darlington. So far as this judgment is concerned, nothing turns on any of the terms of the building contracts.

5. Collaterally to the building contract for Phase 1, Darlington and Morgan Grenfell entered into a Covenant Agreement which is also dated the 29th October 1979. But this Covenant Agreement was replaced by a Covenant Agreement dated 1st August 1980, which relates to both Phases, and it is sufficient to refer to clauses in the 1980 Covenant Agreement.

6. **Clause 2(1)** recorded the intention of the parties that Morgan Grenfell would continue to develop the Site by procuring the erection of the Building thereon i.e. the Dolphin Centre and would pay Wiltshier all sums falling due under the building contracts, and all fees for the professionals etc up to an aggregate not exceeding the Maximum Costs as defined.

7. By **Clause 2(2)** Darlington agreed to pay Morgan Grenfell all amounts expended by Morgan Grenfell under Clause 2(1) and by **Clause 2(3)** Darlington granted Morgan Grenfell all necessary rights and powers to enable it, inter alia, to erect the Building.

8. **Clause 3** sets out the obligations of Morgan Grenfell.

   Under **subclause (1)** it was to pay Wiltshier all moneys due under the building contracts.

   By **subclause (2)** Morgan Grenfell appointed Darlington to be its Agent for all purposes of the building contracts (save the negotiation execution or determination thereof and the liability to pay the Contract sum) to the intent that Darlington by itself or its employees should exercise all the duties and rights (save as aforesaid) under the building contracts.

   Subclause (3) excludes all warranties by Morgan Grenfell as to the design or quality of the Building or its fitness for any purpose or as to the performance by Wiltshier of the building contracts.

   Subclause (4), which is important, provided comprehensively for Morgan Grenfell to assign to Darlington all rights it had against, among others, Wiltshier. It reads as follows: *"At the end of the Construction Period or whenever called upon so to do the Company will at the request and cost of the Council assign to the Council the benefit of any rights against the Contractors (or any of them) the Architect the Consultant Structural Mechanical and Electrical Engineers or any other Consultant to which the Company may then be or become entitled. If any cause of action accrues to the Company against the Contractors or any of them the Architect the Consultant Structural Mechanical and Electrical Engineers or any other Consultant and the Council gives written notice to the Company of its wish to pursue the same the Company shall at the cost of the Council be obliged to assign and the Council shall be obliged to take an assignment of the benefit of such rights or cause of action and any agreement entered into between the Company and a Contractor the Architect the Consultant Structural Mechanical and Electrical Engineers or any other Consultant as the case may be."*

9. **Clause 4** contains obligations on the part of Darlington. It is sufficient to set out **Subclause (5):** *"The Council agrees that the Company shall not be liable to the Council for any liability cost claim demand loss damage or expense of any kind or nature caused directly or indirectly by out of or by the use of any part or the whole of any of the Building or the Landscaping or for any incompleteness thereof or any inadequacy thereof for any purpose or any deficiency or defect therein or the use or maintenance thereof or any repairs servicing or adjustments thereto or any delay in providing or failure to provide any such or any interruption or loss of service or use thereof or any loss of business or any damage whatsoever and howsoever caused. The Council agrees to indemnify and hold the Company harmless from and against all and any such liabilities costs claims demands losses damages and expenses."*

10. There follow in **Clause 5** further provisions as to payments by Darlington to Morgan Grenfell which are not material for this judgment.

11. As supplemental to each of the building contracts and of the same date a tripartite Deed was entered into by Morgan Grenfell, Wiltshier and Darlington which gave Darlington direct contractual rights against Wiltshier for any liquidated damages for failure to complete the construction of either Phase on time under the building contracts. In the events which have happened there has been no occasion for Darlington to seek to claim such liquidated damages. But the fact that such provision was made for the liquidated damages in the tripartite Deeds is relied on by counsel for Wiltshier as an indication that Darlington has no right to any other damages as against Wiltshier as no comparable provision was made for other damages. As I see it, that is not a point of great weight. For the liquidated damages to be recoverable, it would be necessary to show that they were a fair pre estimate of loss which would be occasioned by delay in completion of the Dolphin Centre. But the liquidated damages could only be a fair pre estimate of loss occasioned by delay in completion if they were payable to Darlington to compensate Darlington's los. Delay in completion plainly would not cause Morgan Grenfell any loss at all.

12. There were also letters from Wiltshier to Morgan Grenfell dated the 25th October 1979 and 18th November 1981 which were relied on before the Judge as constituting, with the assignment of Morgan Grenfell's rights to Darlington as envisaged in Clause 3(4) some form of novation agreement in Darlington's favour. But the Judge held that those letters amounted to no more than an agreement to agree and had no effect in law; that decision, on the preliminary issues relating to the letters, is not challenged.

13. Morgan Grenfell paid all moneys due to Wiltshier under the building agreements against architect's certificates issued by the Borough Architect as the Architect nominated in the building contracts. The Judge held, on another preliminary issue on which his decision is not challenged, that the Final Certificates of the Architect under each building contract do not afford Wiltshier a defence to Darlington's claims under those contracts.

14. That brings me to matters which are in dispute.

15. Darlington claims that there are serious defects in the Dolphin Centre which are due to bad workmanship, or other breaches of provisions in the building contracts, on the part of Wiltshier. It is said for instance that all the masonry walls of the Centre are defective and dangerous, principally because of defects in the mortar used. It is said also that roofing tiles used in the flat roofs have deteriorated prematurely under the effects of normal weathering and were not of merchantable quality. It is said also that parts of the structural steelwork columns and beams were not provided with adequate fire protection. Darlington claims that it will incur expenses of the order of £2m in carrying out repairs to remedy these defects.

16. Whether the defects exist and are the fault of Wiltshier has, of course, not yet been tried. We are only concerned with preliminary issues and for the purposes of those issues it is to be assumed that there are such defects, and that they are the result of breaches by Wiltshier of its obligations under the building agreement as alleged. It is also, as I see it, to be assumed, in so far as necessary, that the assumed defects will be made good by Darlington, through other contractors, at considerable expense to Darlington.

17. Because of the alleged defects, Darlington obtained from Morgan Grenfell under a Deed of Assignment dated the 22nd August 1991 a comprehensive assignment to Darlington of all rights and causes of action which Morgan Grenfell might then have or might become entitled to against Wiltshier. The Writ in this action was issued thereafter.

18. The preliminary issues which are at the core of this appeal are those designated C(i) and C(ii) (and also numbered (8) and (9) in the Notice of Appeal), viz:

    C(i) Does Darlington as assignee have a valid claim against Wiltshier for damage other than nominal damages for breach of contract?

    C(ii) If so, upon what principles are such damages to be assessed?

    The Judge answered C(i) "No" and C(ii) "Not applicable".

19. In the Notice of Appeal Darlington also challenges the Judge's answers to preliminary issues D(i), D(ii) and D(iii).

20. These raise an alternative claim that moneys can be recovered from Wiltshier as moneys paid under a mistake of fact viz the mistaken belief of the Architect that the works under the building contracts had been properly carried out. We did not find it necessary to call on counsel for Wiltshier on these issues and I do not propose to say anything about them in this judgment.

21. It is fundamental to an appreciation of the appeal on issues C(i) and C(ii) and is common ground between the parties that Darlington as assignees of Morgan Grenfell cannot recover any damages from Wiltshier beyond those which Morgan Grenfell could have recovered from Wiltshier if there had been no assignment. See ***Dawson v Great Northern and City Railway Company*** [1905] 1 KB 260 at 272 3 where Stirling L.J. Said:

    "We think, therefore, that so far as this item is concerned the defendants have not had any greater burden imposed on them than they would have had to bear if the proceedings had actually been taken in Blake's name."

    and a little later:

    "In our opinion, the plaintiff cannot ..... recover a greater amount of compensation than Blake could have got."

22. We start therefore with certain elementary propositions in the law as to damages for breach of contract which are binding on this Court.

23. Thus in the first place the general principle for the assessment of damages for breach of contract is compensatory to compensate the plaintiff for the damage loss or injury he has suffered through the breach. See Lord Wilberforce in ***Johnson v Agnew*** [1980] A.C. 367 at page 400 and Viscount Haldane L.C. In ***British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*** [1912] A.C. 673 at page 689.

24. In the second place, though the doctrine has been much criticised, it remains the law binding on this Court that a third party cannot sue for damages on a contract to which he was not a party. See the decisions of the House of Lords in ***Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*** [1915] A.C. 847, ***Midland Silicones Ltd v Scruttons Ltd*** [1962] A.C.446 and ***Beswick v Beswick*** [1968] A.C. 58.

25. In the third place, the general position is that if a plaintiff contracts with a defendant for the defendant to make a payment or confer some other benefit on a third party who was not a party to the contract, the plaintiff cannot recover substantial damages from the defendant for breach of that obligation on the part of the defendant. See ***Woodar Investment Development Ltd v Wimpey Construction U.K. Ltd*** [1980] 1 WLR 277. The plaintiff can, prima facie, only recover for his own loss.

26. Thus the case of Wiltshier, which the Judge accepted on issues C(i) and C(ii), is simply that Morgan Grenfell, the Employer under the building contracts, having no proprietary interest in the Dolphin Centre and no obligation to Darlington for the quality of Wiltshier's workmanship or for Wiltshier's due performance of the building contracts, has suffered no damage or loss at all from whatever defects there may have been in the construction of the Dolphin Centre, and cannot recover by way of damages from Wiltshier whatever loss Darlington may have suffered from the defects.

27. It has been recognised in the House of Lords, however, that there are certain exceptions to the general principles I have mentioned.

28. One exception, recognised in ***Woodar v Wimpey***, is where the plaintiff made the contract as agent or trustee for the third party, and was enforcing the rights of a beneficiary, there being a fiduciary relationship. See per Lord Wilberforce at 284A B and per Lord Russell of Killowen at 293H. This is recognised in the decision of this Court in ***Lloyd's v Harper*** 16 Ch D 290 where it was held that the corporation of Lloyd's as successors to the committee of Lloyd's were entitled to enforce a guarantee of the liabilities of an underwriting member which had been given to the committee, (which had itself suffered no loss) for the benefit of all persons, whether members or not, with whom the member had contracted engagements as underwriting member.

29. A further exception is to be found, in the law as to the carriage of goods by sea, in the recognition by the House of Lords in ***The Albazero*** [1977] A.C. 774 of the continuing validity, in such a context, of the earlier decision of the House in ***Dunlop v Lambert*** [1839] 6 Cl & F 600.

30. It is unnecessary to go into details of the circumstances in ***The Albazero*** and ***Dunlop v Lambert***, since what Lord Diplock referred to in ***The Albazero*** as the rule laid down by the House in ***Dunlop v Lambert*** was applied by the House in a building contract context in ***St. Martin's Property Corporation Ltd v Sir Robert McAlpine Ltd***, reported with ***Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*** at [1994] A.C. 85.

31. The key passage giving the ratio in the ***McAlpine*** case is in the speech of Lord Browne Wilkinson, with which all other members of the House agreed, at 114G 115B as follows:

> *"In my judgment the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which, to the knowledge of both Corporation and McAlpine, was going to be occupied, and possibly purchased, by third parties and not by Corporation itself. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party, Corporation. As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the loss of any right of suit against McAlpine. On the contrary, McAlpine had specifically contracted that the rights of action under the building contract could not without McAlpine's consent be transferred to third parties who became owners or occupiers and might suffer loss. In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach. It is truly a case in which the rule provides`a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who caused it.'"*

32. The present case is, in my judgment, a fortiori since so far from there being a prohibition on the assignment of Morgan Grenfell's rights against Wiltshier under the building contracts, the Covenant Agreement, of which Wiltshier was aware, gave Darlington the right to call for an assignment of such rights. The argument to the contrary, that Lord Browne Wilkinson's decision depended on the prohibition on assignments in the building contract in the ***McAlpine case*** seems to me to lead to absurdity viz:

    (i) because there was a prohibition on assignments in the ***McAlpine case*** it was right to allow Corporation, the original contracting party, to enforce its rights for the benefit of those successors in title who suffered from defective performance.

(ii) In the present case there is no justification for allowing Morgan Grenfell, the original contracting party, to enforce its rights for the benefit of Darlington which will obviously suffer from defective performance, because assignment is permitted

(iii) Therefore Morgan Grenfell had no right before the assignment to recover substantial damages for the benefit of Darlington and the permitted assignment therefore fails of its purpose and Darlington cannot get the damages.

33. One would thus be back at the starting point that, in Lord Browne Wilkinson's words repeating those of Lord Diplock in ***The Albazero*** "It is truly a case in which the rule provides`a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it'".

34. Counsel for Wiltshier also sought to distinguish the decision in the ***McAlpine case*** on the ground that in the present case Morgan Grenfell never acquired or transmitted to Darlington any proprietary interest in the Dolphin Centre. I do not see that that matters as Darlington had the ownership of the site of the Dolphin Centre all along. It was plainly obvious to Wiltshier throughout that the Dolphin Centre was being constructed for the benefit of Darlington on Darlington's land.

35. Accordingly I would allow this appeal by direct application of the rule in ***Dunlop v Lambert*** as recognised in a building contract context in Lord Browne Wilkinson's speech in ***McAlpine's case***.

36. I reach the same result, however, by a slightly different route which was put forward by an amendment to Darlington's Notice of Appeal which we allowed in the course of the appeal. The amendment added an additional ground (e) as follows:

"(e) That Morgan Grenfell were constructive trustees for Darlington of the benefit of any rights under or for breach of the building contracts against Wiltshier and as such would have been entitled, but for the assignment, to recover substantial damages for and on behalf of Darlington. Accordingly, by the assignment, Darlington is seeking to recover a head of loss which would have been available to Morgan Grenfell and the burden on Wiltshier is not thereby increased because Morgan Grenfell would have been entitled, but for the assignment, to substantial damages as constructive trustees."

37. In the light of Clause 3 (4) of the Covenant Agreement, if Morgan Grenfell had, before any assignment, sued in its own name for damages for the alleged breaches of the building contracts, it would have held any damages recovered as a constructive trustee for Darlington and would have been accountable accordingly in equity. ***Lloyds v. Harper*** is thus analogous, and Morgan Grenfell could have recovered from Wiltshier the losses of Darlington to whom it stood, in that respect, in a fiduciary relationship.

38. In the ***McAlpine case*** Lord Griffiths suggested a wider principle which received a measure of support, obiter, from Lord Keith and Lord Bridge. Mr. Furst urged us to decide this case on Lord Griffiths' wider principle. But I do not find it necessary to consider Lord Griffiths' principle, and I prefer not to, since it has been suggested that Lord Griffiths' formulation is, at least in one respect, still too narrow. It seems that Lord Griffiths' formulation was not the subject of argument during the hearing of the McAlpine appeal. It includes the statement at 97G H that *"who actually pays for the repairs is no concern of the defendant who broke the contract. The court will of course wish to be satisfied that the repairs have been or are likely to be carried out, but if they are carried out the cost of doing them must fall upon the defendant who broke his contract"*. This wording seems to be founded on the judgment of Neill L.J. In ***Jones v Stroud District Council*** [1986] 1 WLR 1141 at 1150H. But in ***Dean v Ainley*** [1987] 1 WLR 1729 at 1737 8 Kerr L.J. Thought it unnecessary for a plaintiff claiming the cost of making good as damages for defective work to show that he intended to make good the defects, and in ***Ruxley Electronics Ltd v Forsyth*** [1994] 1 WLR 650 at 657F Staughton L.J. Agreed with Kerr L.J.

39. For the reasons given I would allow this appeal. I would answer issue C(i) "Yes" and in answer to issue C(ii) I would declare that the damages should be assessed on the normal basis as if Darlington had been the Employer under the building contracts.

LORD JUSTICE STEYN:

40. I would also allow the appeal. I differ from His Honour Judge Newey, Q.C., who died recently, with great diffidence. He was an outstanding judge and did more than any other judge to build up a modern Construction Court in the Queens Bench Division. His experience was that some users found the name Official Referees quaint and others found it confusing. He preferred the name Construction Court. So does almost everybody.

A contract for the benefit of a third party

41. In order lawfully to avoid the financial constraints of the Local Government Act 1972 Morgan Grenfell (Local Authority Services) Ltd acted as financier to Darlington Borough Council in connection with the construction of the Dolphin Centre in Darlington. Morgan Grenfell entered into a building contract with Wiltshier Northern Limited for the benefit of Darlington. That is how the transaction was structured and that is how all three parties saw it. And it is, of course, manifest that Darlington, as the third party, accepted the benefit of the building contract. But for the rule of privity of contract Darlington could simply have sued on the contract made for its benefit.

42. The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third

party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract. I will not struggle further with the point since nobody seriously asserts the contrary. But see a seminal article by Jack Beatson, a Law Commissioner, now Rouseball Professor of English Law at Cambridge, Reforming the Law of Contracts for the Benefit of Third Parties: a Second Bite at the Cherry, 1992, C.L.P. 1.

43. The genesis of the privity rule is suspect. It is attributed to ***Tweddle v. Atkinson*** (1961) B.& S. 393. It is more realistic to say that the rule originated in the misunder standing of ***Tweddle v. Atkinson.*** See Atiyah, The Rise and Fall of Freedom of Contract, 1979, 414; Simpson, A History of the Law of Contract: the Rise of the Action of Assumpsit, 1975, *475*. While the privity rule was barely tolerable in Victorian England, it has been recognized for half a century that it has no place in our more complex commercial world. Indeed as early as 1915 in ***Dunlop v. Selfridge*** 1915 A.C. 847, at 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."*

44. Among the majority Viscount Haldane, the Lord Chancellor asserted as a self evident truth that *"only a person who is a party to a contract can sue on it"*: at 853. 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.

45. In 1937 the Law Revision Committee in its Sixth Report 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: Cmd. 5449, para 41 8. 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 the unjust rule*": ***Woodar Investment Development Ltd v. Wimpey Construction U.K. Ltd.*** [1980] 1 W.L.R. 277, at 300G; see also Lord Keith, at 297H 298A. In 1981 Dillon J (now Lord Justice Dillon) described the rule as *"a blot on our law and most unjust"*: ***Forster v. Silvermore Golf & Equestrian Centre*** 125 SJ 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, at 611D.

46. 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 recognize 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.***

47. 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 Paries, Consultation Paper No. 121, at 131. 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 to 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.

48. 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, at par. 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 counsel for Darlington, 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,*** supra, at 611D, described as *"judicial subterfuges.....to mitigate the effect of the* ***lacuna*** *resulting from the non recognition of a* ***jus quaesitum tertio*** *"*.

The issues

49. Darlington, as the assignees of Morgan Grenfell, are seeking to recover substantial damages for breach of the building contract against Wiltshier, namely the cost of the remedial works to the Darlington Centre. Darlington accepts that, as assignees, they can recover no more in damages than Morgan Grenfell could have recovered. In

other words, the question is what the assignor (Morgan Grenfell) could have recovered against the builder (Wiltshier) had the assignment not taken place: ***Dawson v. Great Northern & GM Railway Co.*** [1905] 1 K.B. 260.

50. Darlington invoke in the first place the narrower principle relied on by Lord Browne Wilkinson in the case reported under the name ***Linden Gardens Trust Limited v. Lenesta Sludge Disposals Ltd*** [1994] A.C. 85 and in particular that part of his speech which dealt with the St Martin's appeal at 112E 115G. In the alternative Darlington invoke the wider principle enunciated by Lord Griffiths in his speech which deals mainly with the St Martins appeal: at 96D 98F.

51. Wiltshier submit that neither of the principles to be extracted from Linden Gardens apply in the present case.

Morgan Grenfell's lack of a proprietary interest

52. It seems to me helpful to start by considering the problem from the point of view of legal principle. The Judge appeared to say that because Morgan Grenfell had neither a freehold nor a leasehold in the site, but only a licence for the period that it took to complete the works, that by itself is fatal to the contention that Morgan Grenfell had a claim for substantial damages. Given that a proprietary interest at the time of breach may conceivably be relevant to the appropriate measure of damages for defective work, it is difficult to see why its absence should by itself be a bar to recovery of damages in contract. And Mr Blackburn Q.C., for Wiltshier, does not go as far as the Judge did: He does not submit that a proprietary interest is an indispensable requirement for a claim for damages for defective work under a building contract. Rhetorically, one is entitled to ask: Why as a matter of legal principle should it make a material difference if Morgan Grenfell had been granted a lease for the period of the completion of the works? After all, as Mr Furst Q.C., for Darlington, pointed out developers are quite frequently mere licensees of a site, e.g. in joint ventures for the development of car parks. Why should they not be entitled under building contracts to claim substantial damages for defective building work? There seems no logical or policy reason why recovery of substantial damages for such a breach of contract should be denied. As a matter of precedent, it is significant that in the Court of Appeal judgments in the Linden Gardens case, so far as they are unaffected by the decision in the House of Lords, there is no hint of such an artificial bar to recovery of damages for breach of contract: 57 B.L.R. 58. Moreover, the measure of damages causes no complication in such cases. After all, in the case of a building contract, the ***prima facie*** rule is cost of cure, i.e. the cost of remedying the defect: ***East Ham Corporation v. Bernard Sunley & Sons Ltd [***1966] 1 A.C. 406. But, where the cost of remedying the defects involve expense out of all proportion to the benefit which could accrue from it, the court is entitled to adopt the alternative measure of difference of the value of the works. See Hudson, Building and Engineering Contracts, 10th edn., 587; Keating on Building Contracts, 5th edn., 202; McGregor on Damages, 15th edn., par. 1091.

The "no loss" point:

53. I turn to the more substantial point. The judge regarded it as fatal to the claim that Morgan Grenfell had not paid for the cost of remedying the defects and had no intention of doing so. Mr Blackburn supports the judge's reasoning. He says that a ***prima facie*** meritorious claim has indeed disappeared down a ***legal blackhole***. He says that if Morgan Grenfell had done the repairs or had undertaken to do so or if there was evidence that they intended to do so, Morgan Grenfell would have been able effectively to assign a claim for substantial damages to Darlington. As a mere financier of the transaction Morgan Grenfell, of course, had no interest in taking such action. Accordingly, Mr Blackburn submits that Morgan Grenfell, the party in contractual relationship with Wiltshier, suffered no loss and could transfer no claim for substantial damages. And Darlington, who suffered the loss, is precluded by the privity rule from claiming the damages which it suffered. He submits that established doctrine deprives Darlington of a remedy and allows the contract breaker to go scot free. Recognizing that this is hardly an attractive result, he reminds us of our duty to apply the law as it stands.

54. That brings me to the speech of Lord Browne Wilkinson in the ***Linden Gardens*** case. In his speech Lord Browne Wilkinson rested his decision on the exception to the rule that a plaintiff can only recover damages for his own loss, which was enunciated in ***The Albazero*** 1977 A.C. 774 in the context of carriage of goods by sea, bills of lading and bailment. The relevant passage from Lord Diplock's speech in ***The Albazero*** reads as follows (at 847):

*"The only way in which I find it possible to rationalise the rule in **Dunlop v. Lambert** so that it may fit into the pattern of the English law is to treat it as an application of the principle, accepted also in relation to policies of insurance upon goods, that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into."*

55. Clearly, this passage did not exactly fit the material facts in ***Linden Gardens.*** But Lord Browne Wilkinson extracted the rationale of the decision and, by analogy, applied it to the purely contractual situation in ***Linden Gardens.*** He particularly justified this extension of the exception in ***The Albazero*** by invoking Lord Diplock's words in ***The Albazero*** that (at 848)

".....there may still be occasional cases in which the rule would provide a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it."

56. Lord Browne Wilkinson's conclusion was supported by all members of the House of Lords although, it is right to say, Lord Griffiths wished to go further. Relying on the exception recognized in ***Linden Gardens***, as well as on the need to avoid a demonstrable unfairness which no rational legal system should tolerate, I would rule that the present case is within the rationale of Lord Browne Wilkinson's speech. I do not say that the relevant passages in his speech precisely fit the material facts of the present case. But it involves only a very conservative and limited extension to apply it by analogy to the present case. For these reasons I would hold that the present case is covered by an exception to the general rule that a plaintiff can only recover damages for his own loss.

The exception contained in Lord Griffith's speech.

57. The rationale of Lord Griffiths wider principle is essentially that if a party engages a builder to perform specified work, and the builder fails to render the contractual service the employer suffers a loss. He suffers a loss of bargain or of expectation interest. And that loss can be recovered on the basis of what it would cost to put right the defects. While other members of the House of Lords expressed sympathy with this view, they did not decide the point. The point has now been argued in some depth before us. We have also had the benefit of some academic comment on the point: John Cartwright, Remedies in Respect of Defective Buildings after Linden Gardens, (1993) 9, Construction Law Journal 281; I.N. Duncan Wallace, Assignment of Rights to Sue: Half a Loaf, (1994) 110 L.Q.R. 42. Subject to one qualification, it will be clear from what I said earlier that I am in respectful agreement with the wider principle. It seems to me that Lord Griffiths has based his principle on classic contractual theory. The qualification is, however, important. Lord Griffiths observed (at 414 G):

"The court will of course wish to be satisfied that the repairs have been or are likely to be carried out but if they are carried out the cost of doing them must fall upon the defendant who broke his contract."

58. There was apparently no argument on this point in the House of Lords. For my part I would hold that in the field of building contracts, like sale of goods, it is no concern of the law what the plaintiff proposes to do with his damages. It is also no pre condition to the recovery of substantial damages that the plaintiff does propose to undertake the necessary repairs. In this field English law adopts an objective approach to the ascertainment of damages for breach of contract. On this point I am in agreement with the observations of Kerr L.J. In ***Dean v. Ainley*** [1987] 1 W.L.R 1729, at 1737H 1738A and Staughton L.J. In ***Ruxley Electronics Ltd v. Forsyth*** [1994] 1 W.L.R. 650, at 656A 657D. Subject to this qualification, I am in respectful agreement with Lord Griffith's wider principle. And I gratefully adopt it as part of my reasoning.

Conclusion

59. As I have already said I would also allow this appeal. I find it unnecessary to consider the question of constructive trust. But I cannot leave this case without expressing my gratitude to counsel on both sides for the excellence of their arguments.

LORD JUSTICE WAITE:

60. I agree with both my lords that this appeal should be allowed by direct application of the rule in ***Dunlop v Lambert*** as recognised in a building contract context in the speech of Lord Browne Wilkinson in **McAlpine's** case. I also would reach the same result by the different route of a constructive trust on the grounds mentioned by Lord Justice Dillon.

LORD JUSTICE DILLON:

61. The judgment in this case has been handed down. The appeal is allowed. The judge's order is set aside. Issue C1 is answered "yes" and in our answer to issue C2 the court declare that the damages should be assessed on the normal basis as if Darlington had been an employer under the building contracts.

ORDER: The two orders of 13th October and 3rd December set aside. Appellants to have costs of the appeal, the costs of the earlier preliminary issues below to be costs in the cause. Leave to appeal refused.

MR S FURST QC and MR A NISSEN (instructed by Pannone & Partners, London) appeared on behalf of the Appellant.
MR J BLACKBURN QC (instructed by Druces & Attlee, London) appeared on behalf of the Respondent.