RECENT CASES

BLACK v. SMALLWOOD

The liability of agents whose principals are non-existent.

In *Black v. Smallwood*[1] the High Court upheld the decision of the Full Court of New South Wales,[2] which had reversed the decision of Jacobs J.[3] The High Court (Barwick C.J., Kitto, Taylor, Windeyer and Owen JJ.), following the decision of the Court of Appeal in *Newborne v. Sensolid (Great Britain) Ltd.*,[4] held that the defendants had contracted not as agents but as directors, and that therefore they were not personally liable. However, all members of the High Court expressed the view that when a man purports to contract as agent for a non-existent principal the question as to whether or not he is personally liable on the contract depends on the presumed intention of the parties in each case, and denied that *Kelner v. Baxter*[5] is authority for the proposition that there is a rule of law that when a man purports to contract as agent for a non-existent principal he is personally liable on the contract. With respect to the High Court it is submitted that it is precisely this proposition which was laid down by the Court of Common Pleas in *Kelner v. Baxter*. In that case Erle C.J. said:

> The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to sign "as agent", but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby.[6]

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1 39 A.L.J.R. 405 (1965-66).

2 Smallwood v. Black, [1964-5] N.S.W.R. 1973. For a summary of the facts and judgments see 7 U. WEST AUST. L. REV. 230 (1965).

3 Black v. Smallwood and Cooper, [1964] N.S.W.R. 1121. For a criticism of this decision see *Personal Liability of "Directors" of Non-Existent Companies*, 6 U. WEST AUST. L. REV. 400 (1964).

4 [1954] 1 Q.B. 45.

5 (1866) L.R. 2 C.P. 174.

6 Id. at 183.

Willes J. said:

> . . . construing this document *ut res magis valeat quam pereat,* we must assume that the parties contemplated that the persons signing it would be personally liable. Putting in the words "on behalf of the Gravesend Royal Alexandra Hotel Company" would operate no more than if a person should contract for a quantity of corn "on behalf of my horses".[7]

Byles J. said:

> . . . persons who contract as agents are generally personally responsible where there is no other person who is responsible as principal.[8]

Keating J. said:

> . . . the defendants must, in order to give the contract any operation at all, be personally responsible.[9]

Despite the reference by Willes J. to the assumed contemplation of the parties, it is submitted that it is clear from the judgments that *Kelner v. Baxter* lays down that there is a rule of law that when a person purports to contract as agent on behalf of a non-existent principal he is personally liable, and that this rule is based not on the presumed intention of the parties but on the maxim *ut res magis valeat quam pereat.* This contention can be supported by a passage from the judgment of Parker J. in *Newborne v. Sensolid* where he said:

> The principle laid down in *Kelner v. Baxter* is that if a person contracts ostensibly as agent for a non-existent principal . . . he can be held to be himself personally liable. . . . It is plain that this principle, that the agent is personally liable, . . . is based on this principle, that it is only by holding him personally liable that any effect can be given to the contract.[10]

As the decision of the High Court in *Black v. Smallwood* was based on the fact that the defendants contracted not as agents but as directors, the observations of the Court on the effect of *Kelner v. Baxter* are, strictly speaking, obiter dicta: however, they represent the considered opinions of all the members of the High Court and will undoubtedly be followed. It would appear, therefore, that on this matter the law in Australia differs from the law in England.

W. E. D. DAVIE

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7 Id. at 185.
8 Ibid.
9 Id. at 186.
10 [1954] 1 Q.B. 45, 47.