

# Court of King's Bench of Alberta

**Citation: Mark T Johnson Professional Corporation v Vanshaw Enterprises Ltd, 2023  
ABKB 534**

**Date: 20230921  
Docket: 1803 11801  
Registry: Edmonton**

Between:

**Mark T. Johnson Professional Corporation**

Plaintiff

- and -

**Vanshaw Enterprises Ltd, Albert Stark, and Cameron Christianson**

Defendants

---

**Reasons for Decision  
of  
Applications Judge W.S. Schlosser**

---

[1] This is a summary judgment application.

[2] Kevin Van Der Kooy sold his interest in a casino to the defendants. The Agreement provided:

The Purchase Price for the Shares shall be the obligation of the Purchaser to ensure that the Corporate Licenceholder satisfies (“Satisfaction”) the obligations and indebtedness (collectively, the “Indebtedness”) of the Corporate Licenceholder as set out on Schedule “A” to this Agreement. The approximate amount of the Indebtedness as of the Closing Date is set out on Schedule “A” to this Agreement. Satisfaction means that the Purchaser shall ensure that a full release of such Indebtedness is obtained from the creditors (“Creditors”) who hold the Indebtedness. In addition, Satisfaction shall mean the de-registration of any

security held by the Creditors in regard to the indebtedness. The manner in which the Satisfaction is managed shall be in the sole discretion of the Purchaser on behalf of the Corporate Licenceholder.

[3] Schedule A provided in part:

...

2. Mark Johnson: legal counsel to the Vendor and the Shareholder: \$300,000.00 plus G.S.T. (to be paid within thirty (30) days of the Closing Date)

...

[4] The sale required the approval of the Alberta Gaming and Liquor Commission (AGLC). The closing date was defined to mean 48 hours after approval by AGLC. The Agreement was made effective July 5, 2017. AGLC approval was given July 18, 2017.

[5] The defendants did not pay Mr. Johnson so he sued in his own name. The defendants argue that the Agreement was ambiguous and that as an outsider to the contract, Mr. Johnson cannot sue to enforce it.

## Cases Cited

### By the Parties

*Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49; *Lafferty v Co-operators General Insurance Co*, 2021 ABCA 359; *Saito v Lester Estate*, 2021 ABCA 179; *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108; *Coast-to-Coast Industrial Development Co v 1657483 Ontario Inc*, 2010 ONSC 2011; *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53.

### By the Court

*Beswick v Beswick* [1966] 3 All ER 1, [1967] 2 All ER 1197 (HL); SM Waddams, *The Law of Contracts*, 8th ed (Toronto: Thomson Reuters, 2022), chapter 9, especially pages 185, 190 and 193-4; *Tweddle v Atkinson* [1861–73] All ER Rep 369 (Eng. QB); *London Drugs Ltd v Kuehne & Nagel International Ltd*, (1992) 97 DLR (4th) 261.

## Ambiguity

[6] I do not find the Agreement to be ambiguous. The purchasers were to pay Mr. Johnson \$300,000.00 plus GST within 30 days of the closing date, which, as noted, was 30 days after July 20, 2017. It was open to the defendants to negotiate a lower price with Mr. Johnson in exchange for a release. But the whole idea was that the purchasers were to satisfy the vendor's lawyer's bill for legal services as part of the purchase price.

## The Third-Party Beneficiary Exception: *Jus Quaesitum Tertio*

[7] The respondents' remaining objection is that the plaintiff/applicant is not a party to the contract and cannot sue on it. The root of this objection is based on some very old (pre-*Judicature Act*) law: *Dutton v Poole* (1678), T Raym 302, and *Tweddle v Atkinson*, (1861-

73) All ER Rep 369. This is known as the doctrine of privity of contract. It is based on the idea that if you have not given consideration for the bargain, you cannot sue to enforce it.

[8] The impediment is essentially procedural rather than substantive. Lord Denning M.R. says in *Beswick v Beswick* (at page 7):

Those two cases [*Dutton* and *Tweddle*] give the key at common law to the whole problem of contracts for the benefit of a third person. Although the third person cannot as a rule sue alone in his own name, nevertheless there is no difficulty whatever in the one contracting party suing the other party for breach of the promise. The third person should, therefore, bring the action in the name of the contracting party, just as an assignee used to do. Face to face with the contracting party, the defaulter has no defence. He is sued by one who has provided consideration and to whom he has given his promise to pay the third person. He has broken his promise and must pay damages. The defaulter sometimes seeks to say that the contracting party can only recover nominal damages: because it is not he, but the third person who has suffered the damage. The common law has never allowed the defaulter to escape by such a shifty means. It holds that the contracting party can recover the money which should have been paid to the third person. He can get judgment for the sum and issue a writ of [*fieri facias*] or other machinery to enforce payment: but when he recovers it, he holds the proceeds for the benefit of the third person. He cannot retain the money himself, because it belongs to the third person and not to him,

The decision was affirmed by the House of Lords ([1967] 2 All ER 1197) though on other grounds.

[9] The rule of privity of contract may promote certainty but not justice. Many fictions and techniques have been employed to circumvent it; such as assignment, joinder, trust, or agency (see Waddams, chapter 9, generally). In *Tweddle*, the memorandum of agreement expressly permitted the plaintiff to sue but the Court refused to recognize the consideration.

[10] A significant erosion of the rule came in the *London Drugs* case, to make contract law conform to ‘commercial reality and justice’. Now we have *Fraser River*. Iacobucci J, writing for the Court held:

32 In terms of extending the principled approach to establishing a new exception to the doctrine of privity of contract relevant to the circumstances of the appeal, [the benefit of a waiver of subrogation] regard must be had to the emphasis in *London Drugs* that a new exception first and foremost must be dependent upon the intention of the contracting parties. Accordingly, extrapolating from the specific requirements as set out in *London Drugs*, the determination in general terms is made on the basis of two critical and cumulative factors: (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

[11] As noted in *Coast-to-Coast Industrial Development Co*, at paras 43 and 44:

While the principled exception to privity of contract is not restricted to defensive provisions, it seems to me that it would take very clear language to find that a contracting party has assumed a liability to a third party, particularly where that liability is potentially unlimited.

[12] The language in this contract is very clear. Liability is not unlimited, potentially or otherwise.

[13] The intention of the parties was that Mr. Johnson would be paid. The purchasers agreed to pay him. It may have been open to the purchaser to negotiate a lower price, but the point of the exercise was to retire the vendor's debt to his lawyer.

[14] The contract was unequivocal that this benefit be extended to the plaintiff. The 'activities' are specifically described by the provision itself. The *Fraser River* exception applies. Any other approach would lead to a multiplicity of proceedings and likely cloud the issues, but with the same result.

### **Disposition**

[15] The plaintiff is the awarded judgment for \$300,000.00 plus GST together with interest under the *Judgment Interest Act*, running from August 21, 2017.

[16] Costs may be spoken to if they are not agreed.

Heard on the 15<sup>th</sup> day of June, 2023 and the 29<sup>th</sup> day of August, 2023.

**Dated** at the City of Edmonton, Alberta this 21<sup>st</sup> day of September, 2023.

---

**W.S. Schlosser**  
**A.J.C.K.B.A.**

### **Appearances:**

Patrick Hart  
Hart & Company  
for the Plaintiff

Daniel Hagg, K.C.  
Daniel W. Hagg Professional Corporation  
for the Defendants