THE IMPACT OF NEIGHBOUR PRINCIPLE ON THE DOCTRINE OF PRIVITY OF CONTRACT*

1.1 INTRODUCTION

Though prior to the formulation of the neighbour principle there were (and still are) known areas of overlap between contract and torts that have not led to any threatened or actual exclusion of the application (wholly or partly) of one or the other principles of both laws. Rather, the overlap offer their litigants the opportunity of choosing under which of the laws to institute his case in a court or to make alternative claim in the pleading so that if the facts of the case do not for instance, establish a claim under contract, it may do so in tort. But with the formulation of the neighbour principle under the tort of negligence, a new but life threatening area of inter-course came into existence between them. This area is known as the rights of third parties under an agreement.

Under the doctrine of privity of contract, third parties cannot sue in their own rights to enforce benefits accruing to them under a contract. However, under the neighbour principle, it is possible for third parties to a contract to sue for the enforcement of benefits accruing to them there under provided they can prove that the non-realization of the rights or benefits is as a result of the non-exercise of care on the part of the party sued. The stand of these two important principles of both laws (i.e. contract and tort) has clearly put them in a conflictual situation. And since it is the neighbour principle that allows direct enforcement of third parties rights, it is unarguable that it is the one that would threaten the existence of the doctrine of privity of contract. The nature and extent of the impact however, is what one would like to know. That, therefore, is the major task of this paper. But before discussing that, the paper will first discuss separately and briefly the nature of privity of contract and the neighbour principle.

2.2 THE DOCTRINE OF PRIVITY OF CONTRACT:

By privity of contract, as a general rule, a contract cannot confer rights or imposed obligations arising under it on any person except parties to it. The doctrine became firmly established in the later half of the nineteenth century. Before this period, though there was the rule that one must have done something "of trouble to himself or benefit to the defendant" before he can succeed in his case, the courts continued to be influenced by the view that consideration might be provided by natural love and affection. Thus, in Dutton v. Poole, a father intended to sell wood to raise portions for his younger children. His eldest son dissuaded him from selling by promising to pay £1,000 to each of the younger children. One of the daughters successfully sued the eldest son on the promise made to the father. Scroggs C. J. (as he then was) while delivering judgment said: "there was such an apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children". The underlying consideration here is that if the promise had been made by the father to the younger children it would have been binding because natural affection was then, good consideration. The fact that no promise was made and that the alleged consideration did not move from them were simply ignored.

Natural love and affection as consideration however fell into disused in the nineteenth century and in its place the doctrine of privity of contract as it is today sprang up. The ratio in Dutton V Poole consequently became obsolete. The *locus clasicus* for the present position of the doctrine of privity of contract is the case of Tweddle v Atkinson. In that case, the fathers of a husband and wife in pursuance of an oral contract between them before marriage agreed together in writing to pay the husband, the one £100 adding that the husband should have full power to sue them in court of law for those sums. An action by the husband against the wife's father to enforce this agreement failed on the ground that he was not a party to it. The doctrine was affirmed by the House of the Lords in the case of Dunlop Pneumatic Tyre Co. Ltd. V Selfridge & Co. Ltd. Where Lord Haldane (as he then was) said: "In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *Jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in *personam.*"

Though doubts were later raised as to the propriety for continued existence of the doctrine of privity of contract they appeared to have been laid to rest in the case of Scruttons Ltd v. Midland Silicons Ltd when the House of Lords again reaffirmed the existence of the doctrine by holding that a person could not take the benefit of an exclusion clause contained in a contract to which he was not a party.

After the above case, the continued application of the doctrine was thence assured. Thus, in Beswick v. Beswick, a coal Merchant transferred his business to his nephew who promised him, *inter alia*, the he would, after the uncles death pay an annuity to the uncle's widow. After the uncle's death, the widow became his administratrix. She brought an action to enforce the nephew's promise, suing both in her own right and as the administratrix. In the Court of Appeal it was held, (1) by Lord Denning MR, that the widow could sue in her own right at common law, notwithstanding the doctrine of privity, saying it was "at bottom... only rule of procedure" and could be overcome by simply joining the promisee as a party to the action (2) by Lord Denning MR. And Danckwerts L. J, that the widow could sue in her own right by virtue of section 56(1) of the law of property Act 1925, and (3) by Lord Denning MR, Danckwerts and Salmon L. JJ., that the widow could sue in her capacity as the administratrix of the promise and could in that capacity obtain an order of specific performance against the nephew obliging him to pay the annuity to her for her own personal benefit. The speeches of their Lords however, all assumed the correctness of the accepted view that a contract can only be enforced by the parties to it. Lord Denming's view about the doctrine therefore remains a minority view and the continued application of the doctrine was/is in no way threatened by it.

Nigeria being a common Law country has also adopted the doctrine of privity of contract. Thus, in Chuba Ikpeazu v African Continental Bank Ltd, the appellant was the second defendant in an action before the High Court of Onitsha, instituted by the respondent in which the sum of 28,012:19:10d was claimed "being amount owing by the defendants to the plaintiffs Onitsha branch." The first defendant Emodi Brothers (William Emodi) admitted the claim but the action proceeded against the appellant as the only confessing defendant. Regarding the contention that the appellant was liable because he guaranteed the overdraft to Emodi brothers, counsel for the bank relied on a deed seal (Exhibit D) upon which the trial judge based his decision in favour of the bank that it was primarily a guarantee.

An examination of Exhibit 'D' revealed that it was a document between William Emodi representing Emodi Brothers and the appellant only. The bank was never a party to it. Exhibit 'D' was prepared by the appellant who was solicitor to the bank to whom he gave a copy, but there was no evidence on whether he said anything to the bank, or what the bank understood by the deed. To William Emodi, the appellant lied because a recital in the deed represented the deed as if he had guaranteed him with the bank and got him to hand over his river craft to him to manage as the director.

The supreme court held, allowing the appeal, that the appellant was not liable to the bank for it disagreed with the learned trail judge that exhibit 'D' could be construed as a guaranteed to the Bank by the appellant. Commenting on Exhibit 'D' which was heavily relied on by the lower court, Ademola C.J.N. (as he then was) said:

> What advantages, if any, can the bank gain from the deed, Exhibit 'D'? can the bank sue on it as a guarantee? Not being a party to it we are of the view that the bank cannot acquire any rights under the deed. Generally a contract cannot be enforced by a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue upon it – the position is stronger with regard to contracts under seal; unless a person is named as a party to the deed, he cannot maintain as action upon it...

The above judgment of the Supreme Court has thus clearly shown that the doctrine is in application in Nigeria in the same way as in any other common law country. Infact it has been held in a recent decision of the Court of Appeal that even evidence of financing a contract is not enough to vest someone with the *locus standi* to sue on it.

3.3 THE NEIGHBOUR PRINCIPLE

The question, who is one's neighbour had been put and answered by Lord Atkin in the Land mark case of Donogue v Stevenson where he said:

> Who then in law is my neighbour? The answer seemed to be – person who are so closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omission which are called in question.

The above answer is actually what gave rise to the neighbour principle. It established a general rule for determining when someone is under a duty of care for the purpose of holding him liable in negligence. Before this case there have been previous attempts at formulating a generally accepted rule for determining the existence of a duty of care but without success. For instance, in the case of Heaven v Pender Lord Esher (then Brett M.R) dealing with the issue stated thus:

> The questions which we have to solve in this case are – what is the proper definition of the relation between two persons other than the relation established by contract, or fraud, which impose on the one of them a duty towards the other to observe, with regard to the person or property of such other such ordinary care or skill as may be necessary to prevent injury to his person or property... whenever one person is by circumstance placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that he did not use ordinary care and skill in his own conduct with regard to the person or property of the other, a duty arises to use ordinary case and skill to avoid such danger.

The above proposition is however vague, it is not clear whether the statement is referring to physical proximity only or proximity based on foreseeability of harm or damage (i.e. legal proximity) or both. Hence, in an apparent attempt to clear the air of uncertainty surrounding Lord Esher's proposition, A. L. Smith stated in Le lievre v Gould that:

> That case established that, under a certain circumstance, one man may owe a duty to another even though there is no contract between them. If one man is near to another, a duty lies upon him not to do that which may cause a personal injury, to that other, or may injure his property.

Smith's clarification as stated above resulted however, in the restriction of the existence of duty of care situations of physical proximity only. It is therefore, apparently, in reference to this that Lord Atkin opined that "the question who is my neighbour had received a restricted reply" and then went ahead to answer in the manner earlier stated. Thus, a neighbour (by Lord Atkin's exposition) is not only someone with whom one is in physical proximity but even someone who is thousand of miles away from you but who, all the same you ought to know that your action is likely to cause harm or damage to him unless due care is exercised. A neighbour is therefore determined purely by foreseability of injury.

Lord Atkin's neighbour principle, though not the rario decidendi of the Donogue v Stevenson's case is yet very significant in two respects. Firstly, it has firmly established a new category of duties, namely, that of manufacturers of goods to eventual users. Thus, where someone manufacture some goods and they reached the final consumer in a condition devoid of the possibility of their being tampered with (such as repackaging it) by an intermediary (e.g. retailer) and caused harm to the consumer, he (consumer) has a valid cause of action against the manufacturer). This was what actually took place in the case of Donogue v Stevenson the locus classicus of this principle. In that case, the plaintiff drank a bottle of ginger beer, manufactured by the defendant which a friend bought from a retailer and gave her. The bottle contained the decomposed remains of a snail which were not, and could not be detected (as bottle was opaque) until the greater part of the content of the bottle was consumed. She fell sick as a result, and sued the defendant. The House of Lords had to decide whether the plaintiff's averments disclosed a cause of action, and they found for the plaintiff by a majority of 3 to 2. A similar decision is found in the Nigerian case of Osemobor v Niger Biscuit Co, the plaintiff purchased at a supermarket a packet of biscuits manufactured and packed by the defendants. In the course of chewing a biscuit she felt something hard in her mouth, which turned out to be a decayed tooth. As a result she became ill and received medical attention. In holding the defendants liable in negligence, the learned judge said:

> I am satisfied that there was no probability of an intermediate examination of the biscuits before they reached the plaintiff, and I find myself unable to uphold the submission of the learned counsel for the defendants that she was bound to look at the biscuits before she put them in her mouth... A person who manufacture goods, which he intends to be used or consumed by others, is under a duty to take care in their manufacture, so that they can be used or consumed in the manner intended, without causing physical damaged to person or property.

The second significance of the neighbour principle is that it laid to rest any possible doubts as to whether the torts of negligence is capable of further expansion or not. Consequently apart from the extension of duty of care to manufacture of goods and their end users, it has since been further extended to cover cases of pure economic or financial loss (as oppose to physical injury only as was the initial position of the law) and nervous shock. With regard to pure financial or economic loss for instance, it has been held that where "B" employed "A" (a firm of solicitors) to draw up a will under which C was to be a beneficiary, "A" is liable in negligence to "C" for allowing the will to be witnessed by "C's" spouse thereby invalidating the gift in "C"s favour. In the Nigerian case of Abusomwan V Mercantile Bank of Nigeria, the plaintiff/appellant is a businessman who deals in the importation of cement. In the ordinary course of his business he entered into an arrangement for the importation of cement from Lime International, New York through one Mr. Bassey and Mr. E. R. Tucker. The arrangement was that cement was to be imported on a regular basis on the terms and conditions specified in the agreement dated 22nd December, 1977. As part of the agreement, the cement was to be shipped to the plaintiff by Lime International Corporation of New York. It was also a term of the agreement that the plaintiff/appellant was to obtain a guarantee from his bankers for the payment referred to in the memorandum. The plaintiff/appellant duly obtained the required guarantee from his bankers, the New Nigerian Bank Ltd, Mission Road, Benin City in favour of Mr. Bassey and the defendants/respondents opened a letter of credit in favour of Lime International Corporation New York. It was clearly stated in the bank guarantee that all documents, drafts, bills of lading and invoices consequent upon the letter of credit shall be drawn in favour of P. A. Abusomwan, that is, plaintiff/appellant, and shall be endorsed to New Nigeria Bank Ltd, Head Office Mission Road, Benin City. However, in opening the letter of credit, the defendant bank directed that the documents be drawn in favour of Heilit (Nigeria) Ltd and endorsed to itself. This disregard of the instruction in the banker's guarantee resulted in the defendants/respondents notifying the arrival of the consignment to Heilit (Nigeria) Ltd and the endorsement to itself. As a consequence, neither the plaintiff/appellant nor his bankers were informed of the arrival of the cement. Before the plaintiff/appellant became aware of the arrival of the cement which as endorsed in the proforma invoice have bear shipped to him, Mr. E. R. Tucker, Managing Director of Heilit (Nig.) Ltd. had taken delivery. Before plaintiff/appellant could do anything, Mr. Tucker had sold 45,200 bags out of the 84,000 bags. His intervention therefore, only resulted in 35,500 bags not being sold by Mr. Tucker.

The plaintiff/appellant then instituted an action at the Benin City High Court, claiming from the defendants/respondents the loss suffered as a result of their negligence in failing to adhere to the instruction in the banker's guarantee. The defendants/respondents denied liability and contended that although they opened letter of credit on the authority of a banker's guarantee provided by the plaintiff/appellant's Bank, it (letter of credit) was drawn in favour of Heilit (Nig.) Ltd who was it's customers, that there was no relationship of banker and customer between the plaintiff/appellant and itself because neither him nor Bassey E. Ekpo Bassey was it's customer. Secondly, that since the proforma invoice indicated Heilit (Nig.) Ltd as the person to whom the cement was to be sold and there was no mention of the name of the plaintiff, they (defendants/respondents) did not owe him any duty of care with respect to the consignment, and were within their legal rights to deal with Mr. Tucker who at all material time was the managing director of Heilit (Nig.) Ltd. The plaintiff was according to them therefore, a total stranger to the transaction.

The learned trial judge held the defendants liable and accordingly entered judgment in favour of the plaintiffs based on the claims before him. The defendants/respondents appealed to the Court of Appeal, Benin where the judgment was set aside on the ground that the defendants/respondents owed no duty of care to the appellant and had thus not acted negligently towards him. The plaintiff/appellant then appealed to the Supreme Court where it was held, affirming the decision of the trial High Court that:

a. The 19th century view that a tort cannot arise from a breach of contract has now been discarded and the law is that an action in tort for negligence can arise from breach of a contract.

b. The duty imposed here is not because there was a contract but because the defendant had impliedly undertaken not to injure the plaintiff, the obligation towards the contracting party extended to all such persons who are likely to be injured by the acts or omission of the defendants, they are the neighbours who ought to be in the contemplation of the defendant.

c. Duty arising from proximity in law or fact, and not contract is a condition precedent for liability in negligence. The appellant is such a person whose relationship with the bankers' guarantee is so proximate that there is a duty to ensure that he was not ignored by any acts of mis-performance or non-performance. Since the defendants/respondents issued the instructions in the bankers' guarantee and this resulted in the loss claimed by the plaintiff/appellant, it was breach of the duty of care owed to him and which is an actionable wrong.

There are other cases of pure economic or pecuniary loss but I have picked only these two because they deal with the involvement of third parties interests, (my concern in this paper). Concerning nervous shock, the case of Chadwick v British transport commission, will serve as a good example of it's application. There, a grievous train accident was caused by "B" negligence and the plaintiff, "C" ran immediately to the scene of the accident to help. He spent many hours in the rescue operation as a result of which he became psycho-neurotic due to the horror of the whole exercise. "C" claimed damages for nervous chock from "B". It was held that "C" must succeed because (a) it was foreseeable that somebody would suffer nervous shock as a result of B's negligence (b) a duty is awed to rescuers and (c) liability for nervous shock is extensible to shock caused by fear for the safety of others. The case of Hambrook v Stoke Borthers is also very illustrative in this regard. There, the plaintiff's pregnant wife had watched her children climb a steep street and then pass out of her sight around a bend. Shortly afterwards she saw a lorry (with no driver in it) coming rapidly round the bend in her direction. She herself was not in danger: the lorry stopped before reaching her. She suffered nervous shock from which she died as a result of her child being knocked down by the lorry. The trial judge directed the jury that no action lay unless she feared for her safety, as distinct from that of her children. On appeal however, the judgment of the trial judge was over-turned and an order for retrial was made by the Court of Appeal (English) which held the view that if the shock resulted from her fear of immediate personal injury to herself or her children derived from what she saw or realized by her unaided senses and not from what others subsequently told her she could recover.

4.4 THE IMPACT OF THE NEIGHBOUR PRINCIPLE ON THE DOCTRINE OF PRIVITY OF CONTRACT

As stated at the introductory part of this paper and further illustrated in subsequent discussions under sub-titles 2 and 3 above, in the law of contract, 3rd parties have no rights of action on an agreement even if it has been clearly stated to be for their benefits. But under the neighbour principle in the law of torts of negligence, it has been shown that a person who is not a party to an agreement (i.e. third party) can successfully sue on it provided that he can prove lack of exercise of requisite care on the part of the party who refused, neglected or improperly performed his own part of the agreement thereby causing him (the 3rd party) loss or damage. This is so because, in the discharge of the contractual obligations of the party to the contract, where there is probability of causing damage or injury to the interest of the third party unless the terms of the contract are duly and properly carried out, that third party becomes a neighbour to the contracting party so that he (contracting party) will be held liable to the third party in negligence where he failed to duly and properly execute his own terms of the contract.

The implication of this to the doctrine of privity of contract is that its relevance today is seriously being put to question. Third parties can now conveniently avoid it by instituting their actions under negligence. There is no gain saying that this is possible because the cases of Ross v Caunters and Abusomwan v Mercantile Bank (Nig.) Ltd already discussed have made that possibility abundantly clear.

5.5 CONCLUSION

It is now clear that with time and increase awareness by lawyers, the doctrine of privity of contract will only remain as a piece of redundant or obsolete principle with significance only in antiquity, thanks to the extension of duty of care via Lord Atkin's neighbour principle. The principle has succeeded in offering solutions to problems encountered by third parties to a contract but who have sufficient interest to protect there under. For instance, where one of the contracting parties through whom the third party's interest is to be realized in the contract dies, under the old arrangement it seems that is the end of the matter for such a third party unless he later stand as the administrator of the estate of the deceased which status will enable him to bring an action on behalf of the deceased estate and hence indirectly his own interest. Since evidence of simply financing a contract is not enough for a third party to sue in his own right for the enforcement of a contract under the privity of contract regime, it is possible for the contracting parties to connive in not executing the contract and hence, cause serious financial loss to the contract financier. Under the neighbour principle, it now seems possible for the financier to sue both parties for neglecting to discharge their obligations under the contract or any of them that he considers as constituting the bottle neck. All he is required to do in order to succeed is to provide concrete evidence of neglect or carelessness on both sides or on the part of any one of the contracting parties. Before, under the privity of contract regime, he can at best only sue the party that he financed the performance of his own contract and that may not be effective since realization of his interest will be dependent upon the successful execution of the contract as whole.

END NOTES AND REFERENCES

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For instance, a victim of fraudulent misrepresentation in contract may sue for the tort of deceit and a victim of negligent mispresentation in contract may sue for the tort of negligence etc.
By Lord Atkin, in the case of Donogue v Stevenson (1932) A.C. 562.
See Chitty on contracts vol. 1, sweat and Maxwell, London 25th edition, 1983 at p. 662 Para 1221. For the application of the doctrine the cases of Tweddle v Atkinson (1861) I B & S 393, Dunlop Pneumatic Tyre Co. Ltd V Selfridge & Co. Ltd (1915) A.C 847, Beswick V Beswick (1968) A.C 58 among others. And for it's application in Nigeria see recently decided case such as IBWA Ltd v Unakalanba (1998) 9 N.W.L.R (pt. 565) at p.245, C.C. B Ltd v Nwokocha (1996) 4 N.W.L.R (pt. 423) at p.223 and Ilesa L.P.A v Olayide (1994) 5 NWLR (pt 342 at p.91 e.t.c for the exceptions, see generally Chitty on contract, supra and other standard works in the area.
See Chitty, op.cit at P.668
See the case of Bourne v Mason (1668) 1 Ventris at p.6
(1677) 2 Lev. 210
Ibid
Supra
(1915) AC 847, 853.
This doubt was voiced by Lord Denming in the case of Smith and Smith Hall Farm Ltd v. River Doughlas Catchment Board (1949) K. B. 500 at 514-516 and in Drive yourself Hire Co. (London) Ltd v. Strutt (1954) 1 Q.B 250 at 272 – 283.
(1962) A. C. 446
Supra
See Chitty op.cit at p. 670 para 1232
(1965) N.M.L.R. 374
Ibid at p. 379 and See Ilesa L.P.A. v Olayide Supra
Supra
Ibid
(1883) 11 QBD 503
Ibid at 509
(1893) Q.B. 491
Ibid
See Donogue v Stevenson op cit
Ibid

24. Ibid
25. (1973) 7 C. C. H. C. J 71
26. Ibid at p. 72
27. See Street on Torts, Butterworths, London, 7th edition, 1983 at p. 95
28. See the case of Ross v Caunters (1980 Ch. At p.297
29. (1987) 2 N.S.C.C. 878
30. Ibid at p. 879
31. (1967) 2 All E. R. 945
32. (1952) IK.B 141
33. See Abusomwam v Mercantile Bank supra
34. Supra
35. Op.cit
36. Ibid
37. See the case of Ross V Caunters (1980 Ch. At p. 297