



The Transplantation and Legal Implications of Bolton into Scots Law

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Introduction

In *Gray v Baird Logistics* the judges were forced to consider points of agency law in a company law context.¹ Since a company is an artificial legal entity, *i.e.*, it exists in the legal sphere, the rules of agency must be transferred from the shareholders to the members, who are tasked with ensuring its success. Particular difficulties arise regarding the doctrine of ratification. Lord Macnaghten's interpretation of the doctrine as a 'convenient fiction', creates the impression that this area of law is underdeveloped.² For this reason, the court in *Gray* decided to consider an English Court of Appeal case, which hitherto had limited judicial consideration and was thus not binding in Scots law.³ The case concerned a decision to dismiss the pursuer, Gray, taken on behalf of the defender's company. Since the agent who informed Gray of this outcome did not possess the express authority to dismiss him, the question arose as to precisely when a retrospective endowment of authority would be effective. The Outer House of the Court of Session eventually confirmed that the rule outlined in *Bolton v Lambert Partners*,⁴ that retrospective ratification goes back to the date when the purported decision was made, should be transplanted into Scots law.⁵ The pursuer in *Gray* was protected from the *Bolton* rule as there had been an

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¹ [2017] CSOH 44; henceforth 'Gray'.

² *Keighley, Maxsted & Co v Durant* [1901] AC 240 at paragraph [247].

³ Robin M White, Ian D Willock and Hector L MacQueen, *The Scottish Legal System*, (5th edn, Bloomsbury, 2013), page 312.

⁴ (1889) LR 41 Ch D 295; henceforth 'Bolton'.

⁵ *Ibid* 306.

invalidity in the dispute resolution process, which was proscribed by the company's articles of association, and thus his dismissal was contrary to the provisions laid down therein.⁶ Accordingly, Gray was protected from the strict application of the rule and was eventually successful. However, this article will show that the potentially fertile doctrine could be prejudicial to third parties in future litigation; especially when there are no procedural safeguards, as there were in *Gray*. Instead of transferring the rule from England and, admittedly, properly constraining the more restrictive effects, it is strange that no reference was made to the more protective approaches exhorted by the Scottish institutional writers. This essay will argue that this alternative approach could help alleviate some of the detrimental effects to third parties.

Limitations on the Bolton Doctrine Outlined in Gray

The court in *Gray* adopted the *Bolton* rule but also imported two limitations to its strict application. Counsel for the pursuer in *Gray* relied upon the doctrine outlined in *Bird*,⁷ which was confirmed in *Bolton*,⁸ which states that 'an estate once vested cannot be divested... by the application of... ratification'. The judge accepted this caveat, and agreed that the word 'estate' should be limited to only real rights and thus adopted the approach taken by Clarke LJ in the '*Borvigilant*'.⁹ The second caveat implied that in the situation of any other right accrued by a third party, ratification would have to be done within a reasonable timescale in order to deprive them of that right. Counsel for the pursuer in *Gray* argued that if the ratification was to have strict retrospective effect, then it would deprive his client of a resignation benefit. As this was not a real right in estate, he submitted that the ratification had to be approved within a reasonable timescale, which it had not and thus the defenders' argument ought to fall.

While the court accepted the pursuer's argument, it is peculiar that the court did not consider the perspectives of Erskine and Bell. No mention was made in the case report of either *Bell's commentaries* or *Erskine's institutions*. While Bell argued that a protective rule for proprietary rights once vested ought to exist;¹⁰ similar to the *Bird* restriction which was

⁶ This protection is afforded irrespective of whether the ratification is 'ordinary' or 'special'.

⁷ 154 ER 1433; henceforth '*Bird*'.

⁸ *Bolton* (n 4) 307.

⁹ [2004] 1 C.L.C.41.

¹⁰ Bell, Comm, II, 141.

considered in the case report; it is arguable that a broader limitation on the retrospective doctrine can be found in Scots Law. Erskine professed a protective right which was broader than the proprietary one posited by Bell, in which third parties' personal and real rights ought to be protected.¹¹ Under Erskine's view, the pursuer in *Gray* would have been able to keep his resignation benefit even if the ratification was done in a reasonable time, as personal rights were also included under his rule. There is no reason why the court did not expressly consider Erskine's view, and thus by adopting the narrower constriction to the *Bolton* rule provided by *Bird*, it is asserted that this interpretation has the potential to prejudice third parties in future cases.

Protection of Third Parties

Despite the case falling on different grounds, the outer house decision has been subject to criticism, particularly in relation to the defenders' argument that an express ratification had occurred. The court considered and assessed the retrospective ratification doctrine outlined in *Bolton*. Among others,¹² Laura MacGregor has been the lead critic in Scotland, and has argued that the judicial consideration of the rule could be detrimental to third parties.¹³ It has been consistently argued that the *Bolton* rule impedes the contractual doctrine of equality of arms. By not endowing a third party with the ability to withdraw an offer, MacGregor argues that this places the principal in a 'super position' in which they may 'play the market' by deciding whether or not to ratify.¹⁴ The third party is left in an awkward position where they cannot validly withdraw their offer nor have the protection of a legally enforceable obligation.¹⁵ The upshot of this arguably impedes the contractual analysis of offer and acceptance by allowing a principal to either avoid liability for the agent's unauthorised decision, or ratifying and reaping the rewards of a good bargain.¹⁶ At first glance, Macgregor's argument is credible: by accepting the rule in *Gray*, principals may retrospectively ratify unauthorised decisions for tactical reasons. However, it must be conceded that the court in *Gray* was right to limit the *Bolton* rule by adopting the second

¹¹ Erskine, Inst, III, 3, 49.

¹² Kerr, *The Law of Agency* (3rd edn, Butterworths 1991), pages 105-108.

¹³ Laura Macgregor, 'Agency Law in the Scottish Courts: Time for a Broader Approach?' (2019) 23 *Edinburgh Law Review*, page 94.

¹⁴ *Ibid.*

¹⁵ Stoljar, *The law of agency: its history and present principles*, (1st edn, Sweet & Maxwell 1961),190.

¹⁶ Laura Macgregor, *The Law of Agency in Scotland* (1st edn, W Green 2013).

caveat outlined above, as the effect would have been prejudicial to *Gray* by depriving him of his resignation benefit after a reasonable timescale had elapsed. This is the position adopted by Fridman who argues that the Bolton rule is perhaps not as detrimental as some may think, as procedural exceptions are present.¹⁷

That said, however, by planting a rule in Scots law that previously had no substantial judicial consideration, MacGregor is right to be cautious. The case in *Gray* was decided correctly by not allowing the defenders' the luxury of retrospective ratification, but in that particular circumstance, the purported ratification had been subject to a common law caveat. Moreover, the pursuer in *Gray* was an insider who was protected by Article 20 of the company's articles of association which provided that he had the right to vote in matters which directly concerned him. By improperly excluding him from voting, the court inferred that this was a breach of the articles and thus the resolution was void. Hence, it could be claimed that the pursuer in *Gray* was protected. But what if the third party is an outsider with little knowledge of the agent's actual authority? No equivalent protection is provided if the security is not clearly expressed in the contract. In addition, while *Bolton* may be justified on the basis that the third party should have assumed that the agent had the potential to seek ratification due to the nature of his job title, how are third parties in other contexts meant to infer an agent's true level of authority, particularly when the agent is low down in the company hierarchy? From this, it can be shown that a third party may assume that the agent either (a) has the authority to create an enforceable obligation on behalf of his principal or, (b) is dealing with someone who is not authorised but will seek ratification on behalf of the principal. Either way, the principal is in a more beneficial position as he has the discretion to exercise whether or not he is to be legally bound.

Events After 'Withdrawal'

The Bolton rule poses difficult questions for Scottish courts in the future; particularly, what occurs after an unenforceable obligation becomes enforceable. In essence, the *Bolton* doctrine ignores events which have occurred following ratification.¹⁸ In response, Fridman asserts that a third party may not be liable for breach of contract if the Bolton rule is

¹⁷ GHJL Fridman, *Law of Agency* (7th edn, Butterworths 1996),103.

¹⁸ Schultz, 'Principles without Principals? Reconsidering unauthorised agency on the boundary of contract: implied warranty of authority and ratification', *Auckland University law review*, 2014, pages 23-6.

applied.¹⁹ Tan Cheng-Han explains that if a third party is prevented from withdrawing an offer, then why should they expect no liability for a breach of contract as a result of the retrospective effect of the ratification.²⁰ This argument presents a more nuanced issue, which can be applied to *Gray*: how much liability can a third party expect when they have legally withdrawn their offer? By accepting the *Bolton* rule, there is no reason why a third party should be excluded from such rigorous application. Furthermore, it is argued that the case of *Kidderminster Corporation v. Hardwick* is further authority for restricting a third party from their lawful right to withdraw.²¹ This is done by obligation accumulation; Cotton LJ arguably confirmed in *Bolton* that an obligation made by a third party to a party outwith the purported agency relationship will not be struck down if the principal subsequently ratified the first obligation. Therefore, the third party will be bound by two obligations instead of one.

Conclusion

In sum, while it must be conceded that the court in *Gray* did appropriately apply the *Bolton* rule by also importing common law limitations, it is submitted that there was no need for the doctrine to be imported in the first place as Erskine had professed a broad protective rule for third parties. MacGregor is right to be cautious about the narrow exceptions to the *Bolton* rule as future courts may apply *Gray* to the detriment of third parties and thus create a knock-on effect. Furthermore, as explained above, there could be further legal implications such as damages for breach of contract. Such consequences come to the fore where there are uncertainties regarding the agent's level of authority, and thus it is asserted that 'outsider' third parties are in a more vulnerable position as they do not have the luxury of protective safeguards, like the pursuer in *Gray* did. That said, perhaps the impact is over-stated and the courts in future litigation may decide to further limit the scope of the *Bolton* rule. However, at present the concerns of the doctrine must continue to be exhorted by those in academia.

¹⁹ Fridman (n 17).

²⁰ Tan Cheng-Han, 'The principle in *Bird v. Brown* revisited', (2001) 117 LQR 626.

²¹ *Ibid.*