Transferred Loss & Contractual Damages after

Forthwell Ltd v Pontegadea UK Ltd [2026] UKSC 33

Introduction

In *Forthwell Ltd v Pontegadea UK Ltd* [2026] UKSC 33, the Supreme Court recently determined whether a contracting party suing for breach, could include in its claim, damages for financial losses suffered by a third party. The *Forthwel*l decision reiterates the fundamental dogma that contractual privity usually excludes the third party's losses and clarifies the limits of the 'transferred loss' doctrine under Scots law. While promoting legal certainty, the judgment raises concerns about the adequacy of remedies where contractual arrangements separate the party holding contractual rights from the business suffering the actual loss.

Facts & Decision

Forthwell was the tenant of commercial premises in Glasgow, leased from Pontegadea., the Land"9td.

Forthwell granted its wholly owned subsidiary, Lynnet Leisure (Rogano) Ltd, a licence to occupy the premises and operate the historic Rogano restaurant. Following flooding and associated damage in 2020 and 2021, the premises became unsuitable for trading.

Forthwell alleged that Pontegadea had failed to fulfil its repair obligations and sought remedies, including damages reflecting Lynnet's lost trading profits.

The difficulty was that Forthwell was party to the lease, whereas Lynnet was not. The latter sustained the consequential business losses, whereas the former did not. The Supreme Court dismissed Forthwell's appeal, holding that the proposed exception allowing recovery for a third party's loss did not form part of Scots law. Lord Doherty delivered the unanimous judgment. If *Swynson v Rembrandt* inserted 'the nail into the coffin' fpr Lord Clyde's suggested approach in *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518, then Lord Doherty's judgment hammered that nail home in relation tp Scot's law. Lord Clyde's approach was rejected because its was too wide and indefinite an exception to the general rule.. Nevertheless, Lord Doherty confirmed that the well established *Albazero* exception, squarely based as a loss being suffered by a third party within the contemplation of the parties', applies in Scotland, England & Wales..

Legal Reasoning

Ordinarily, contractual damages compensate the claimant for its own loss. Allowing recovery for another entity's losses risks departing from this compensatory principle and creating uncertainty about who may claim and under what circumstances.

The Court considered that existing mechanisms, including statutory third-party contractual rights under the Contracts (Third Party Rights) (Scotland) Act 2017, could address some situations. It also observed that the exceptional cases in which neither contracting party nor third party can obtain an effective remedy did not justify creating a broader judicial exception. Furthermore, Forthwell and Lynnet had chosen to structure their affairs through separate corporate entities, while the lease restricted subletting and sharing possession. The Court therefore dismissed the appeal, refusing to recognise the proposed exception as inadequately cogent robust or workable.

Critical Analysis

The judgment's strength is its adherence to the classic understanding of the effect of privity and the maintenance of the rubrics of legal certainty. Recognising a broad exception based on a claimant's "material interest" in another company's losses could create uncertainty about the limits of liability and potentially encourage speculative claims. Separate corporate personality within contractual chains, must entail practical consequences, particularly where sophisticated commercial parties negotiate their respective contractual rights.

Nevertheless, the Court's approach is open to modest criticism because of the emphasis it places on defined corporate structure and contractual duties. Arguably this prioritises formal legal arrangements over addressing a problems arisimg in commercial reality. . Where a landlord knows that premises are intended for restaurant trading, it seems artificial to deny recovery of foreseeable trading losses, merely because the tenant and lessee are separate legal entities and the documentation didn't expressly create a downstream remedy. The restriction against subletting was conditioned by requiring the Landlord's consent which itself was not to be unreasonably withheld. Accordingly, perhaps that specific feature of the case, might not warrant quite the significance the Court attributed to it. However, its telling that the Court did not consider the loss falling upon the third party as being unfair or an injustice meriting judicial remedy.

Furthermore, the Court's apparent reliance on existing statutory remedies, is not entirely satisfactory where the contract breaker inflicts loss on the third party. Third-party rights legislation requires appropriate contractual activation; it cannot retrospectively supply protections omitted from an existing agreement. Consequently, losses may remain uncompensated despite an established breach and foreseeable economic harm. The Court's classic rehearsal of the Cardozo J's concern about uncertain classes and indeterminate liabilities is an important and valid policy concern, but ought to be weighed against injustice to the ultimate victim. Its submitted that this policy objection can be attenuated by narrowly extending/ developing the contours of the *Albazero* exception —such as requiring demonstrable commercial connection, causation, foreseeability of loss, and a duty on the recovering party, to account to the third party.

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However, admittedly, the case facts weakened Forthwell's ability to so argue. Lord Doherty placed weight on the prohibition in the Lease against Forthwell subletting or sharing possession of the premises The licence appeared to violate that restriction. Further, the licence expressly restricted Lynnet's ability to claim against Forthwell for deficiencies in the premises,These structural arrangements support the Court's refusal to extend liability for third party losses beyond the limits of existing legal principles.

Conclusion

Forthwell provides authoritative clarification that Lord Clyde's orbiter *dictum* in *Panatown* does not form part of Scots law. (Inferentially, it will not apply in England & Wales either, but the Court declined to decide that latter point.) *Forthwell* protects doctrinal coherence whilst failing to fashion an effective remedy, in respect of foreseeable commercial losses sustained by an innocent third party business.

The judgment's practical lesson is crystal clear: businesses operating through separate corporate entities and discrete contractual links, should secure express third-party contractual rights and carefully allocate responsibility for losses such as those suffered by Lynnet. Ultimately, the decision preferred contractual certainty over the imposition of a wider flexible remedy. This leaves Parliament or possibly a future case, to address whether a carefully confined broader exception is justified.

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