

EVOLUTION OR REVOLUTION? CONFLICT IN THE HIGH COURT

By

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Recently in *Trident General Insurance Co. Limited v. McNiece Bros. Pty Limited*¹ the High Court was faced with the question whether a third party beneficiary under a policy of insurance was able to sue on the policy. It was argued that the rules that only a party to a contract may sue on it and that consideration must move from the promisee, were so fundamental and so embedded in our law of contract, that they should not be overturned by judicial decision to allow recovery by the named beneficiary on the policy.

The Court was asked to consider a rule of law, *jus quaesitum tertio*, thought to have been firmly entrenched since 1861. Focus was thrown on the question as to how far the High Court could overthrow long established legal principles. With the exception of Gaudron J., differing views were offered by the remaining six Justices as to the role and responsibility of Australia's final appellate court. Some Justices saw the role of the court as limited to the development of the law through the traditional application of established legal principles to new conditions while others favoured arbitrary change where the application of entrenched rules produced unsatisfactory and unjust results.

The facts were these. The appellant, Trident, had entered into a contract of insurance with Blue Circle Southern Cement Ltd in June 1977 agreeing to indemnify the assured "against all sums which the assured shall become legally liable to pay in respect of bodily injury to any person". The "Assured" were defined as "Blue Circle Southern Cement Limited, all its subsidiary, associated and related companies, all contractors and sub-contractors and/or suppliers".

McNiece, the respondent, became a contractor for construction work being carried out at the Blue Circle plant. Although McNiece was not a contractor at the time the policy was issued, there was never any question that McNiece fell within the class of persons expressed to be covered as the "Assured" by the policy. In 1979 a workman, Hammond, was injured at the plant while acting under the direction of McNiece. McNiece became liable to pay damages to Hammond in respect of that injury. McNiece sought to be indemnified by Trident under the policy.

It was decided at first instance² that McNiece was entitled to an indemnity from Trident. Trident appealed to the N.S.W. Court of Appeal. The Court found³ that McNiece was neither a party to the contract of insurance between Blue Circle and Trident nor had it provided consideration to Trident. Nonetheless, judgment was sustained in favour of McNiece on the ground that it could directly sue on the policy; the Court (McHugh J.A. with whom Hope and Priestley J.J.A. agreed), accepting the "far-reaching" submission that a beneficiary could sue on the policy although it was not a party to the contract and had provided no consideration.

McHugh J.A. so decided because he considered that the two common law rules that only

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1. (1988) 62 ALJR 508.

2. Unreported decision of Yeldham J.

3. *Trident General Insurance Co Ltd v. McNiece Bros Pty Ltd* (1987) 8 NSWLR 270.

a party to a contract can sue on it and that consideration must move from the promisee, when applied, worked injustice in many situations and further, that it was commercially necessary to create an exception to the rules to allow a non-party beneficiary to sue on the policy. Moreover, he considered that the common law should develop in a parallel fashion with statutory reforms enabling recovery by non-party beneficiaries.

On appeal to the High Court it was argued by Trident that the two common law rules were fundamental principles of the law of contract and so embedded in our law that they should not be overturned by judicial decision even though their application to non-party beneficiaries' entitlement to recover was unsatisfactory. It was submitted that a trust of a contractual promise was the appropriate mechanism to protect the rights of non-party beneficiaries. (Trident had in the Court of Appeal sought leave to plead the existence of a trust, not raised at first instance, between Blue Circle and McNiece, however leave was refused on evidentiary grounds).

Mason C.J. and Wilson J. in a joint judgment accepted that the settled doctrine was that decided in *Tweddle v. Atkinson*⁵ in 1861, preventing *jus quaesitum tertio*, but that it was the decision of the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co Ltd*⁵ in 1915 that firmly established the two rules, that a third party cannot sue on a contract and that a stranger to consideration cannot maintain an action at law on it, as part of the common law of England. Those rules had hitherto been accepted by the High Court in a number of cases.

Their Honours alluded to judicial criticism and legislative erosion in other jurisdictions of the application of the rules in the field of insurance contracts. Notwithstanding their vintage they strongly favoured a departure from the established rules where injustice flowed as a result of their application. Their Honours stated:

Regardless of the layers of sediment which may have accumulated, we consider that it is the responsibility of this Court to reconsider in appropriate cases common law rules which operate unsatisfactorily and unjustly.⁶

Their Honours were of the opinion that if the old rules were applied in the field of insurance contracts, injustice would result from a failure to give effect to the expressed intentions of the contracting parties when a third party, aware of the existence of the policy, assumed that such an insurance was an effective indemnity in his favour, and on that footing ordered his affairs accordingly by refraining from making his own arrangements on insurance. For this reason a named beneficiary under a policy of insurance should be able to enforce the policy. Their Honours held therefore that McNiece was entitled to the indemnity.

Furthermore, the rights of a third party, it was held, ought not be made to depend on the vagaries and uncertainties of the alternative remedies of trust and estoppel because by ensuring that a third party can enforce an insurance contract the law is merely giving effect to what is the expressed intentions of the contracting parties.

Toohy J. also was of the opinion that the law be changed to allow recovery by McNiece. His Honour cited with approval the remarks made by Lord Reid in *Myers v. Director of Public Prosecutions*⁷ in 1965 where His Lordship stated that if the Court were to extend the law it must do so by the development and application of fundamental principles and not introduce arbitrary change so as to encroach on what is the proper field of the legislature.⁸

4. (1861) 1 B & S 393; 121 ER 762.

5. [1915] AC 847.

6. *Supra* n.1 at 515

7. [1965] AC 1001.

8. *Ibid.* at 1021 1022.

His Honour posed the question whether in this case to uphold the decision of the Court of Appeal would be to intrude on that field. His concern was whether the law was so well entrenched that nothing short of legislative interference could fairly budge it. His Honour concluded that the *jus queasitum tertio* rule was based on "shaky foundations" and was therefore capable of judicial alteration.

Gaudron J., the final member of the majority, found the solution in the doctrine of unjust enrichment,⁹ which was not argued before the court.

On the other hand, Dawson J., in allowing the appeal, considered that the role of the court must be limited, favouring considered development of the law to the alternative of sheer abrogation. His Honour cited with approval¹⁰ the remarks made by Sir Owen Dixon in "*Concerning Judicial Method*" in *Jesting Pilate*,¹¹ where his Honour stated:

It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience.¹²

His Honour was of the opinion that in the case before him the argument put forward by McNiece that the Court ought to abandon, at least in the case of insurance contracts, the doctrine of privity of contract, was an invitation "not so much to engage in judicial creativity [but] to engage in the destruction of accepted principle which is a very different thing".¹³

Dawson J. remarked that the Court "...is neither a legislative nor law reform agency. It would do more harm than good to attempt to reach a right result by wrong means".¹⁴ The respondent's remedy, he remarked, lay elsewhere:

Equity,... provide[s] a means of averting the hardship which might otherwise arise from the application of the common law doctrine whilst at the same time preserving the conceptual basis of the law of contract¹⁵ and particularly in the case of an insurance policy for the benefit of third persons equitable principle may, without undue complication be employed to temper any harshness arising from the common law.¹⁶

His Honour said that there was every reason in this case why the rules of equity should be given a generous application. A trust of a contractual promise would have been the proper remedy for the respondent. However, his Honour said that future development of this approach would have to await other cases as in this case no trust was pleaded.

Dawson J. also addressed the point made by McHugh J.A. in the Court of Appeal, that the common law should develop in a parallel fashion with statutory reform. He was of the opinion that before the common law develops in a like manner with legislation there must be some "conceptual foundation" for changing the law. The court should not arbitrarily abandon established doctrine in emulation of statutory reform.

9. *Supra* n.1 at 538.

10. *Ibid.* at 532

11. Sir Owen Dixon, *Jesting Pilate*, The Law Book Co., Australia 1965 at 152.

12. *Ibid.* at 158.

13. *Supra* n.1 at 531.

14. *Ibid.* at 532.

15. *Ibid.* at 529.

16. *Ibid.*

Brennan J., in upholding the appeal, agreed with the views expressed by Dawson J. as to the use to which statutory comparisons could be put in developing the common law. His Honour also endorsed¹⁷ the remarks made by Sir Owen Dixon cited in Dawson J.'s judgment. Consequently, he rejected the notion of McHugh J. A.'s that commercial necessity and practice evoked the creation of a new principle of common law. The rights of the third party were to be accounted for by the operation of the law of agency, trust and estoppel and not in the admission of a third party's right to sue. However, his Honour remarked that the proposition that an exception to the doctrine of privity ought be made would be more supportable if it were found that these principles left the law powerless to prevent or remedy injustice. His Honour said it was not necessary for him to elaborate on those remedies in this case.

Deane J., in allowing the appeal, was of the opinion that the Court may be compelled to depart from established principle, but like Dawson J., was of the opinion that a departure could only be justified by "precisely defined and compelling reasons advanced as part of a plainly identified process of legal reasoning".¹⁸

In this case "no such reasons [were] available to justify a wholesale abrogation of the general common law rule of privity of contract".¹⁹

His Honour considered that other principles of law operated to avoid injustice and give effect to the expressed intentions of the parties. The remedies of estoppel and unjust enrichment were available to a third party but the appropriate mechanism for giving effect to the intentions of the contracting parties lay in the law of trusts.

Although leave had been refused by the Court of Appeal to plead the existence of a trust, his Honour took the unique step of allowing McNiece to join Blue Circle as respondent and to file a notice of contention alleging the existence of a trust before the High Court.

What is clear from the case is the uncertain direction of the High Court. Is the duty of the Court to administer justice according to law or is it to change the law to meet the justice of the case? Should a case be decided by reference to the law as it is or by reference to the law as it ought to be? Should the court develop the law or make it? Quo Vadis?

17. *Ibid.* at 522.

18. *Ibid.* at 524.

19. *Ibid.*