

THE HIGH COURT, CONTRACT AND REMEDIES

By

C.A.C. MacDonald*

Introduction

The High Court, in recent years, has indicated that it is no longer constrained by nineteenth century notions of the classical theory of contract.¹ That theory postulates that where a contract is entered into the parties will be bound to perform it strictly in accordance with the agreed terms, that the only persons entitled to enforce the contract are the parties, that until the contract is formed there will be no obligation enforceable at the suit of either party, and that if for any reason the contract is not valid the parties will be free from any liability for non-performance. These statements are obviously generalizations and never at any stage have been completely accurate. However, they reflect a general attitude that a contract creates a discrete legal relationship between the parties, and that there is little room for intervention in that relationship. Recent High Court decisions represent a direct attack on these propositions. These cases are *Trident General Insurance Co. Ltd v. McNiece Bros. Pty Ltd*² *Waltons Stores (Interstate) Ltd v. Maher*,³ and *Pavey & Matthews Pty Ltd v. Paul*⁴

At this stage in the emergence of the Court's "new contractual jurisprudence" it is impossible to identify a single theory to unify these developments although as will be seen there are some common trends. It is clear that the Court is much more influenced by developments in United States law than would have been conceivable even ten years ago. In addition the Court has indicated, particularly in the decisions in *Trident* and *Waltons v. Maher* that it is prepared to reconsider, in what it would consider to be appropriate cases, fundamental legal rules. It is trite and perhaps even unhelpful to say that the Court is attempting to do justice. What is emphasized time and again in the judgments is that the "principled development"⁵ of the law has led the court to its somewhat revolutionary conclusions.

It is not the purpose of this paper to debate the merits of the judgments in terms of whether they reflect desirable developments, nor is it intended to analyze them in terms of the application of the doctrine of precedent. Its purpose is to discuss the principles laid down in the cases, their implications, and their application in the future.

1. *Trident General Insurance Co. Ltd. v McNiece Brothers Pty. Ltd.*

The effects of the decision in *Trident General Insurance Company Limited v. McNiece Brothers Pty. Ltd.* have already been much discussed. While the primary focus of this paper will be on a comparison between the decision and the effect of s. 55 Property Law Act (Queensland), there are other interesting implications of the case which are worth examining. First of all, however, it is necessary to consider the decision itself.

* B.A. LL.B. (Qld), LL.M. (Lond), Solicitor, Principal Lecturer in Law, Queensland University of Technology

1. For a discussion of the classical theory of contract see e.g. P. Atiyah, "The Rise and Fall of Freedom of Contract", (Clarendon Press), Chapter 14.

2. (1988) 62 ALJR 508.

3. (1988) 164 CLR 387.

4. (1987) 162 CLR 221.

5. See e.g. per Mason CJ and Wilson J in *Trident General Insurance Co Ltd v McNiece supra* n.2 at 515.

(a) The Decision

McNiece Brothers Pty Ltd was the principal contractor for construction work being carried out at the limestone crushing plant of Blue Circle Southern Cement Ltd. Blue Circle had entered into a contract of insurance with Trident General Insurance Co. Ltd. "The Assured" was defined as "Blue Circle Southern Cement Ltd., all its subsidiary associated and related companies, all contractors and subcontractors and all suppliers". Inter alia, the policy provided that the insurance indemnified the assured against all sums which the assured should become legally liable to pay in respect of death of or bodily injury to or illness of any person . . .

McNiece Brothers had been held, in other litigation, to be liable for damages for personal injuries suffered by a workman on the construction site. McNiece sought indemnity from Trident for the amount of the judgment awarded to the workman. Trident denied liability.

The trial judge, Yeldham J, held that there was a contract between McNiece and Trident on the basis that McNiece was in contemplation as one of the assured at the time the contract of insurance became effective in respect of the relevant site, that although Blue Circle did not have actual authority to enter into the insurance policy on behalf of McNiece, service of the statement of claim in the present litigation constituted ratification of the policy by McNiece and that McNiece had provided consideration for the promise of indemnity in that Blue Circle had taken into account as between itself and McNiece "in a financial way" that it had contracted with Trident to insure McNiece and that in that sense McNiece had provided consideration for part of the premium paid to the insurer.⁶

An appeal to the Court of Appeal by Trident failed.⁷ The Court of Appeal held that McNiece could not be a party to the contract because, although the contract of insurance contemplated that the assured included any person who might be engaged as a contractor, sub-contractor etc. at any time on the construction site, McNiece was not ascertainable as a principal at the time when the policy was issued. Moreover McNiece had not supplied consideration for the promise of indemnity and the policy had not been effectively ratified because the purported ratification did not take place within a reasonable time as required by the terms of the insurance policy.

The Court then went on to hold that nevertheless McNiece was entitled to enforce the promise of indemnity as a matter of commercial convenience and practice. McHugh J A (who delivered the leading judgment) held that a liability insurance policy, like bankers' letters of commercial credit and undisclosed principals, provides a common law exception to the general rule that only a party to a contract can sue on it.⁸

Pausing there for a moment, it appears that the conceptual basis of this decision is that the third party, McNiece, is to be regarded as being in the same position as the promisee in two respects at least. In the firstplace it seems that the third party is to have the same remedies as the promisee and secondly the insurer, the promisor, is entitled to the same defences as it would have in an action brought by the promisee to enforce the promise.

However in another important respect, the third party beneficiary is in a different position from the promisee in that in the view of McHugh J A, the failure of McNiece to give consideration for the promise of indemnity was not fatal. It was sufficient that Trident received consideration from Blue Circle; and while acknowledging that there was a difference between this case and *Coulls v. Bagot's Executor and Trustee Company Limited*,⁹ McHugh

6. This version of the decision at first instance is taken from the judgment of Mason CJ and Wilson J, *ibid.* at 510.

7. (1987) 8 NSWLR 270.

8. *Ibid.* at 280.

9. (1967) 119 C.L.R. 460

J A noted that in the latter case the High Court thought that the failure of one of two joint promisees to provide consideration could not prevent that party from enforcing the contract. It was sufficient that the other joint promisee had given consideration on behalf of both. Trident received consideration from Blue Circle, the promise of Trident was made for the benefit of all assured.¹⁰

The significance of what was said in the Court of Appeal in rejecting the application of decisions such as *New Zealand Shipping Co. Ltd v. Satterthwaite*¹¹ to *Trident's* case should not be overlooked. It may be that in future the decision of the High Court in *Trident* will be narrowly interpreted as applying only to contracts of insurance. If that is so, the continued application of the common law rules of privity of contract would mean that reasoning of the kind applied in the *New Zealand Shipping* case would remain important in other types of contract where an apparent third party is intended as a beneficiary.

Briefly, the conclusion that was reached in the *New Zealand Shipping* case and subsequent decisions¹² was this:

Where a contract is made between A (the promisor) and B (the promisee) pursuant to which A promises to confer a benefit on a third party C, C is able to enforce the promise directly against A where a contract can be found to have arisen between A and C. Such a contract will arise firstly, if the original contract between A and B makes it clear that C was intended to benefit from the promise, secondly if the original contract makes it clear that A, in addition to contracting on his own behalf is also contracting as agent for C, thirdly that at the time of that original contract B had authority to enter into the contract on behalf of C, (or perhaps later ratification by C would do) and fourthly consideration is supplied by C in return for A's promise.

The conclusion by McHugh J that McNiece gave no consideration for Trident's promise of indemnity was expressed thus:

A person can only give consideration for a promise if what he does or forbears to do is done in reliance on that promise...There is no evidence to suggest that McNiece made or authorised any payment or deduction in reliance on the indemnity given to The Assured. Yeldham J held that the policy was not ratified by McNiece until the present action was commenced in May 1984. If that finding was correct then McNiece did nothing to confirm the policy until five years after its contract with Blue Circle had terminated. That is to say there was no act of McNiece in relation to the policy which was done before 1984. Accordingly nothing which passed between Blue Circle and McNiece could constitute consideration for Trident's promise of indemnity.¹³

Trident appealed to the High Court. Four of the judges, Mason C J, Wilson, Toohey and Gaudron JJ held that the appeal should be dismissed; Brennan and Dawson JJ dissented and Deane J held that leave should be given to allow McNiece to join Blue Circle as a respondent to the proceedings to enable McNiece to allege the existence of a trust.

To what extent do the common law rules of privity of contract survive, if at all, this decision?

In fact only three of the judges formulated their judgments on the basis that the common law rules of privity of contract should be abrogated. And these three judges were careful to limit their conclusions to cases concerning contracts of insurance. For example, Mason

10. *Supra* n.7 at 280.

11. [1975] A.C. 154.

12. E.g. *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Aust) Pty Ltd* (1980) 54 ALJR 552.

13. *Supra* n.7 at 278, 279.

CJ and Wilson J, at the end of a wide ranging consideration of the policy behind the common law rules of privity of contract and the difficulties in applying such rules said:

In the ultimate analysis the limited question we have to decide is whether the old rules apply to a policy of insurance . . .

In the circumstances, notwithstanding the caution with which the court ordinarily will review earlier authorities and the operation of long established principle, we conclude that the principled development of the law requires that it be recognized that McNiece was entitled to succeed in the action.¹⁴

Similarly, Toohey J said:

The proposition which I consider this court should now endorse may be formulated along these lines. When an insurer issues a liability insurance policy, identifying the assured in terms that evidence an intention on the part of both insurer and assured that the policy will indemnify as well those with whom the assured contracts for the purpose of the venture covered by the policy, and it is reasonable to expect that such a contractor may alter its affairs by reference to the existence of the policy, the contractor may sue the insurer on the policy, notwithstanding that consideration may not have moved from the contractor to the insurer and notwithstanding that the contractor is not a party to the contract between the insurer and assured.¹⁵

While these two judgments, if strictly confined, allow abrogation of the privity rules in respect of contracts of insurance only, the tenor of the joint judgment of Mason CJ and Wilson J is clearly one of general dissatisfaction with the common law doctrine of privity of contract. The initial reasons given by their Honours for that dissatisfaction were that the U.K. Law Reform Commission recommended (in 1937) reform of the rules for various cogent reasons and various Australasian jurisdictions including Queensland, have subsequently introduced statutory reforms.¹⁶ More substantively their Honours considered that the following problems were caused by the existing common law rules:

- (a) Can the promisee recover substantial damages for breach by the promisor of his promise to confer a benefit on the third party.¹⁷
- (b) Whether the availability of an action for damages at the suit of the promisee for breach of the promise to benefit the third party is a sufficient sanction to secure performance of the promise.¹⁸
- (c) Whether the action for specific performance is available to enforce the promise for the benefit of the third party.¹⁹
- (d) The impossibility of applying the trust concept to all situations.²⁰

As to the other judgments in the High Court, Brennan J was adamant that the common law rules of privity of contract could not and should not be altered by the court. While recognizing that there are established cases by which application of other legal principles to the contractual relationship of promisor and promisee may solve some of the problems raised by a third party promise, his Honour said that "There is no true exception to the doctrine of privity. If an exception were now introduced and a *jus quaesitum tertii* were recognized in respect of some contracts, the exception would raise at least as many problems as it might solve".²¹

14. *Supra* n.2 at 515.

15. *Ibid.* at 536.

16. *Ibid.* at 512.

17. *Ibid.* at 513.

18. *Ibid.*

19. *Ibid.*

20. *Ibid.* at 514.

21. *Ibid.* at 520.

Similarly, Deane J was not prepared to alter the “fundamental nature and binding character of the common law rule that a third party is neither bound by nor entitled to enforce the terms of the contract between others.” His Honour subsequently said, “If a third party is to be entitled to rights and subject to obligations in relation to a contract to which he is a stranger, those rights and obligations must have some basis, either in statutory provision or in common law principle, beyond the mere contract. They cannot be based merely on the contract since the contract of itself directly operates only between the parties to it.”²² His Honour was of the view that any injustice which may occur, potentially, in relation to a third party can be avoided by development of other legal doctrines, for example the doctrine of estoppel by conduct or in reliance upon principles of unjust enrichment.

Likewise, Dawson J held that the invitation to abandon, at least in the case of contracts of insurance, the rule that only a party to a contract can sue upon it, was not so much an invitation to engage in judicial creativity as to engage in the destruction of accepted principles, which, said his Honour, is a very different thing.²³ Given the matters of policy involved, and the contents of legislation in other jurisdictions where statutory amendments to the third party have been made, his Honour held that the court was not an appropriate forum for the expounding of these matters of policy.²⁴

Gaudron J, in an interesting judgment, agreed generally with the reasons for judgment of Mason C J and Wilson J but differed in two significant respects.

Firstly her Honour held, it is only when the promisor has *accepted* an agreed consideration for a promise to benefit a third party that the promisor comes under an obligation to the third party to fulfil that promise and the third party acquires a right to bring an action to secure the benefit of that promise. Secondly the right of the third party is not a right to sue on the contract; rather it is a right independent of but ordinarily corresponding in content and duration with, the obligation owed under the contract by the promisor to the promisee.²⁵

To consider the second of those propositions first — her Honour pointed out that the “source of the obligation to perform a contractual promise is the contract itself, but there is no reason in logic or in law why the existence of a contract should preclude the existence of another obligation ordinarily corresponding in content and duration with the contractual obligation, but having its source in law rather than in the contract.”²⁶ With respect, it is suggested that this is a more satisfying analysis, in principle, than founding the right of a third party beneficiary in the contract itself. This matter is considered further in the discussion of s.55 Property Law Act, post.

Her Honour then went on to hold that:

. . . it should now be recognized that a promisor who has accepted agreed consideration for a promise to benefit a third party is unjustly enriched at the expense of the third party to the extent that the promise is unfulfilled and the non-fulfilment does not attract proportional legal consequences . . . there is no legal principle to preclude the recognition of an obligation and corresponding right as between promisor and third party separate from the contractual obligation existing between promisor and promisee. Rather the fact that the law, as it is presently understood, permits of the possibility of unjust enrichment provides a compelling reason for the recognition

22. *Ibid.* at 524.

23. *Ibid.* at 531.

24. *Ibid.* at 532.

25. *Ibid.* at 537.

26. *Ibid.*

of such an obligation of the same nature of [sic] the obligation imposed by law to compensate for a benefit received under an unenforceable contract.²⁷

Her Honour did not see this cause of action as abrogating the doctrine of privity of contract. Its effect is merely to confine that doctrine to the only area to which it can properly operate, said her Honour, viz the area of rights and obligations having their source in contract.²⁸

In the final result, McNiece was to be indemnified by Trident. On a strict analysis three of the judges, Mason C.J. Wilson & Toohey JJ restricted their decision to contracts of insurance. Of those judges, it is suggested that it is not unrealistic to anticipate that Mason C.J. and Wilson J. would extend their conclusions more generally. Gaudron J did not expressly confine her remarks to insurance contracts, but she would allow a third party a right of action, not to enforce the contract but in restitution provided the promisor has accepted the consideration for the promise.

(b) The Decision in Trident and Section 55 of the Property Law Act Queensland

The decision in *Trident v. McNiece*, even on the widest reading, is probably of less significance in Queensland than in a number of other jurisdictions. This is because since 1975, Queensland has had as part of its legislation s.55 Property Law Act. Surprisingly, that section has been considered in comparatively few cases and so there is little authoritative case law on the section.²⁹

The section is headed "Contracts for the Benefit of Third Parties" and provides:

- (1) A promisor who, for a valuable consideration moving from the promisee, promises to do or to refrain from doing an act or acts for the benefit of the beneficiary shall, upon acceptance by the beneficiary, be subject to a duty enforceable by the beneficiary to perform that promise.
- (2) Prior to acceptance the promisor and promisee may without the consent of the beneficiary vary or discharge the terms of the promise and any duty arising therefrom.
- (3) Upon acceptance —
 - (a) The beneficiary shall be entitled in his own name to such remedies and relief as may be just and convenient for the enforcement of the duty of the promisor; and relief by way of specific performance, injunction or otherwise shall not be refused solely on the ground that, as against the promisor, the beneficiary may be a volunteer;
 - (b) The beneficiary shall be bound by the promise and subject to a duty enforceable against him in his own name to do or refrain from doing such act or acts (if any) as may by the terms of the promise be required of him;
 - (c) The promisor shall be entitled to such remedies and relief as may be just and convenient for the enforcement of the duty of the beneficiary;
 - (d) The terms of the promise and the duty of the promisor or the beneficiary may be varied or discharged with the consent of the promisor and the beneficiary.
- (4) Subject to sub-section (1), any matter which would in proceedings not brought in reliance on this section render a promise void, voidable or unenforceable, whether wholly or in part, or which in proceedings (not brought in reliance on this section) to enforce the promissory duty arising from a promise is available by way of defence shall, in like manner and to the like extent, render void, voidable or unenforceable or be available by way of defence in proceedings for the enforcement of a duty to which this section gives effect.

27. *Ibid.* at 538.

28. *Ibid.*

29. See e.g. *Re Davies* [1989] QdR 48; *S.G. Mackie v Dalziell* (Full Court, 8 December 1988, Unreported).

- (5) In so far as a duty to which this section gives effect may be capable of creating and creates an interest in land, such interest shall, subject to section 12, be capable of being created and of subsisting in land under the provisions of any Act but subject to the provisions of that Act.
- (6) In this section —
- (a) “acceptance” means an assent by words or conduct communicated by or on behalf of the beneficiary to the promisor, or to some person authorised on his behalf, in the manner (if any), and within the time, specified in the promise or, if no time is specified, within a reasonable time of the promise coming to the notice of the beneficiary;
 - (b) “beneficiary” means a person other than the promisor or promisee and includes a person who, at the time of acceptance is identified and in existence, although that person may not have been identified or in existence at the time when the promise was given;
 - (c) “promise” means a promise —
 - (i) Which is or appears to be intended to be legally binding; and
 - (ii) Which creates or appears to be intended to create a duty enforceable by a beneficiary, and includes a promise whether made by deed, or in writing, or, subject to this Act, orally, or partly in writing and partly orally;
 - (d) “Promisee” means a person to whom a promise is made or given;
 - (e) “Promisor” means a person by whom a promise is made or given.
- (7) Nothing in this section affects any right or remedy which exists or is available apart from this section.
- (8) This section applies only to promises made after the commencement of this Act.

An obvious issue that arises, as a result of the decision in *Trident*, is the extent to which that decision will apply in Queensland given the existence of s.55. The answer to that question depends on the following factors:

1. Whether *Trident* is extended to apply to contracts other than insurance contracts.
2. The interpretation which will be given to s.55 — and as will be discussed below, it is suggested that the section differs in significant respects from the decision in *Trident*; and
3. In so far as there are differences between the decision in *Trident* and s.55, whether the differences are such as to increase or decrease the ability of a third party to obtain a remedy.

(1) is discussed above. As to (2), a somewhat detailed discussion of s.55 follows.

The first important point to note is that the section does not endeavour to give the third party, (who is described as the beneficiary throughout the section, and that terminology will hence forward be adopted in discussion of the section) a right to enforce the contract itself. Rather the promisor becomes subject to a duty enforceable by the beneficiary to perform that promise.³⁰

30. In its report recommending the introduction of s.55 the Queensland Law Reform Commission said, “It is, we think, more precise, and more consistent with legal theory, to speak of a promise for the benefit of a third party (or “beneficiary”) rather than a contract for such benefit, since a benefit may be promised by one or even by each of the original parties. In this respect the language of sub.cl. (1) is consistent with that of the *Restatement*: cf. art 133. Section 55 may be contrasted in this respect, with similar legislation in Western Australia (s.11(2) of the Property Law Act 1969-1979) and the recommendations of the U.K. Law Revision (1937 — 6th Interim Report), both of which speak of enforcement of the contract. The New Zealand legislation, on the other hand (s.4 Contracts (Privity) Act 1982) says “Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract, the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise”.

The major significance of the expression of the rights of the beneficiary in that form, rather than as a right to enforce the contract, concerns, it is thought, the remedies available to the beneficiary. Specifically, it is suggested that the normal remedies for breach of contract are not necessarily available in relation to breach of this duty and an action by the beneficiary to enforce it. This is confirmed by reference to s.55 (3) which expressly provides that the beneficiary is entitled to *such remedies and relief as may be just and convenient* for the enforcement of the duty of the promisor. In many cases it may well be that the remedies available will be the same as those which would be available for breach of contract, but there is clearly a discretion as to what remedies are to be granted. In particular, it is possible that the appropriate measure of damages may not necessarily include an element to compensate the beneficiary for loss of expectation interest or loss of bargain. It is clearly contemplated by the section however that remedies such as specific performance should be available in an appropriate case (s.55 (3)(a)) and since the whole context of the section is related to the enforcement of a promise it is likely it is suggested, that a court may well frame its remedies in accordance with those available for breach of contract although it will not necessarily be bound to do so.

There is little discussion of remedies in *Trident v. McNiece*. In the end, the third party, McNiece, was able to enforce the promise of indemnity insurance as against Trident. In effect McNiece was given damages assessed in accordance with contractual principles. Other alternatives may be, under s.55, to compensate in accordance with the tortious measure of damages or in restitution, as argued by Gaudron J in *Trident*. This with respect is one of the difficulties with Gaudron J's judgment. If the basis of the legal obligation owed by the promisor to the third party is unjust enrichment then the appropriate measure of recovery (accepting that the third party, rather than the promisee is the appropriate person to recover as argued by Gaudron J) should, it is suggested, be the amount by which the promisor has benefited (presumably the value of the premiums) rather than the amount which the third party has lost.

If there is a difference between the remedies available by application of the principles in *Trident*, and those under s.55, then s.55 (7) would appear to supply a solution. Subs. (7) provides that nothing in the section affects any right or remedy which exists or is available apart from the section. To the extent then that either proceeding may give rise to a greater remedy it is suggested that a plaintiff would have an election as to which course to pursue.

(c) The Problem of Double Liability.

In the United States particularly, concern has been expressed that to allow a third party to enforce a promise would be to impose potential double liability on the promisor in that the promisor may become liable to both the promisee and the third party. The solution generally suggested³¹ is that the promisor should ensure that all interested persons are joined in the suit. The problem is addressed in the Restatement of the law of Contract (2nd) s. 305 which says that there is a duty owed both to the promisee and to the intended beneficiary but goes on to provide in clause 2 that whole or partial satisfaction of the promisor's duty to the beneficiary satisfies to that extent the promisor's duty to the promisee.

This matter was considered by various members of the Court in *Trident*. Mason CJ and Wilson J dismissed it shortly. "The risk is insignificant, joinder of all parties in the first action will make the resulting decision binding on all."³² Brennan J on the other hand said

31. Corbin on Contracts, para 810 at 235.

2 Williston on Contracts para 400 at 1081.

32. *Supra* n. 2. at 514.

that joinder of the promisee-party would not discharge any cause of action vested in him, and further, he asked, if there is but one cause of action which either might enforce on what principles would a contest between them be resolved?³³

This matter is not directly addressed in s.55. In so far as s.55 (1) provides that the promisor shall be subject to a duty enforceable by the beneficiary to perform the promise, it may be arguable on first sight that the beneficiary is the *only* person entitled to enforce the promise. However it appears that that is not the correct interpretation of the sub-section. Two reasons may be given. Firstly subs. (1) clearly requires that the promise be supported by valuable consideration moving from the promisee — it thus contemplates that there be a contract between the promisor and the promisee.

That being so, it would require very clear words to take away the promisee's rights to enforce that contract, and it is suggested the words used in subs.(1) are not sufficiently clear to achieve that end. In addition reference again can be made to subs.(7) which as indicated above provides that nothing in the section is to affect any right or remedy which exists or is available apart from the section. There is no express limitation on the application of that section and therefore it is argued it would allow the continuance of the promisee's rights to enforce the contract.

In so far then as there is a possibility of double liability and double litigation to enforce a promisor's duty, the suggestion that all relevant persons be parties to the litigation would appear to be a wise one, whether the action is pursued under *Trident* or s.55.

(d) Ability to Vary or Discharge the Promise.

Once it is recognized that a third party may have a right to enforce a promise, the question arises as to whether the terms of that promise may subsequently be varied or discharged and if so on what basis.

It would appear that there are three possible analyses:

1. That the promisor and promisee retain the normal rights of contracting parties — that is that they may agree to vary or discharge the terms of the contract. This approach means that the third party may well lose any rights which he originally attained, without his consent. This would appear to be the approach favoured by Mason C J and Wilson J in *Trident*.³⁴
2. The contract may be varied or discharged only with the consent of the promisor and beneficiary. This is the approach adopted by s.55 (3) (d) although it should be noted that such a consequence follows only after the beneficiary has accepted the promise within the meaning of subs.(6).
3. Variation or discharge may only take place (after acceptance or reliance by the third party), with the consent of all relevant persons — the promisor, promisee and the third party.

There are arguments in favour of each. One difficulty with s.55 is that while the promisee is apparently intended to retain his traditional rights in contract (see discussion above), he has no influence on any subsequent move to alter the terms of that contract at least in so far as those terms relate to the promise in favour of the beneficiary. Since the terms of the promise can be varied or discharged without the consent of the promisee (who is the person who has supplied the consideration which supported the promise initially), the promise is no longer effectively enforceable at the suit of the promisee. This appears to create some difficulties with traditional notions of enforcement of contractual obligations. To give but one example — if the promise is the only term of the contract between the promisor and

33. *Ibid.* at 521.

34. *Ibid.* at 514.

the promisee, and that promise is discharged, after acceptance, by agreement between the promisor and the beneficiary, there is nothing the promisee can do. Is the promisee obliged to fulfil his promise to supply consideration assuming that he has not done so to date?

There was, surprisingly, no discussion of this aspect of the matter by the Law Reform Commission in its Report recommending the introduction of s.55. While it is understandable that the Commission may have thought it desirable that the beneficiary, after acceptance, be protected in some way from losing the benefit of the promise, particularly if the promise has imposed a corresponding duty to be performed by the beneficiary, the solution adopted would not appear to be ideal. Again one wonders whether the correct interpretation of subs. (1) is that referred to above namely that it is only the beneficiary who is entitled to enforce the promise once it has been accepted. Again for the reasons outlined above it is thought that this was not the intention of the legislature.

In this respect at least, there is clear conflict between the provisions of s.55 and the proposal of Mason CJ and Wilson J in *Trident*. It is suggested therefore that a Queensland Court in determining a problem of this nature would be obliged to give effect to s.55 (3) (d).

(e) Intent to Benefit.

Most of the litigation in the United States concerning enforcement of third party beneficiary contracts has concerned the question of whether or not there has been sufficient intent evident to warrant recognition of a cause of action in a third party. The Restatement (2nd) s.302 effectively requires that both the promisor and the promisee must intend the beneficiary to have a right to performance if the beneficiary is to have a cause of action. Paragraph (d) of the commentary provides that if it would be reasonable for the beneficiary to rely on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary. The commentary goes on, "Where there is doubt whether such reliance would be reasonable, considerations of procedural convenience and other factors not strictly dependent on the manifested intention of the parties may affect the question whether under subs. (1) recognition of a right in the beneficiary is appropriate."

Section 55(1) simply speaks of a promise to do or refrain from doing an act or acts for the benefit of a beneficiary. However s.55 (6)(c) defines promise to mean a promise —

- (i) which is or appears to be intended to be legally binding;
- (ii) which creates or appears to be intended to create a duty enforceable by a beneficiary.

It would appear then that a beneficiary pursuing a claim pursuant to s.55, must first establish that the promise is intended to be legally binding. Given that the promise forms the basis of a contract between the promisor and the promisee this is not surprising. The beneficiary must also show that it is the *promisor's* intention that the promise create a duty enforceable by the beneficiary. The sufficiency of the requisite intention to found a cause of action was considered by Mason CJ and Wilson J in *Trident*, who framed the question thus, "Should it be a sufficient foundation for the existence of a third party entitlement to sue on the contract that there is a contractual intention to benefit a third party? or, should an intention that the third party should be able to sue on the contract be required?"³⁵ The Judges express a preference for the former view namely that there be a contractual intention to benefit the third party, on the basis that as the contracting parties are unlikely to turn their attention to the enforcement by the third party, the ascertainment of such an intention may well be fraught with similar problems to those that have surrounded the trust concept.

There will obviously be further developments in the application of *Trident* and s.55 — both are fruitful sources of litigation.

35. *Ibid.*

2. *Waltons Stores (Interstate) Ltd v. Maher*

The facts in *Waltons v. Maher* are straightforward. Waltons carried on a retailing business in Nowra in New South Wales. Maher was the owner of land in that town on which was a substantial building.

In the latter part of 1983 the parties were negotiating concerning the property. The essence of the arrangement was that Maher was to demolish the existing building on the land and to construct a new building, to the specifications of Waltons, to be leased by Waltons. A great deal of urgency surrounded the negotiations as Waltons was obliged to give up possession of its existing premises in January, 1984. As a result of various letters and discussions the negotiations between the parties solicitors finally reached the point where on 7 November 1983 Maher's solicitor said that unless agreement was reached within a couple of days, his client would be unable to complete construction of the new building by the date specified. On that day, Waltons' solicitors sent fresh documents (i.e. a lease) incorporating various discussed amendments with a covering letter indicating that they were awaiting their clients final instructions and approval of the various amendments. The letter also stated that such approval was expected and that Mahers solicitors would be advised on the next day if any amendments were not agreed to.

Maher executed the documents and these were forwarded to Waltons solicitors "by way of exchange" on 11 November. Those documents were retained by Waltons solicitors until 19 January, when they were returned to Mahers solicitor, unexecuted, with the advice that Waltons were no longer proceeding with the transaction.

In the meantime, Maher had proceeded with the demolition and construction of the new building. It turned out that Waltons had been re-assessing their retailing strategy, had checked with their solicitors and been advised they were not contractually bound, had instructed their solicitors to keep the matter "on hold" and ultimately had decided not to go ahead with the transaction. It was found that as from 10 December Waltons knew that Maher was proceeding with the demolition.

Maher then commenced proceedings in the Supreme Court of New South Wales seeking declarations that a valid and enforceable agreement for a lease had been made and for specific performance thereof. Both the Supreme Court and the Court of Appeal held, for somewhat varying reasons, that the appellant was estopped, at common law, from denying the existence of a contract for a lease. The trial judge, Kearney J. made a declaration that a valid and enforceable agreement for a lease had been made and that the appellant was bound to perform the agreement and ordered that in lieu of specific performance the appellant pay to the respondents damages sustained by the appellants breach of the agreement.

The High Court unanimously dismissed an appeal from the judgment of the Court of Appeal. However, the reasons and conclusions reached by the learned judges varied somewhat and it is proposed to spend some time analysing those judgments.

Mason C.J. and Wilson J. (who delivered a joint judgment) and Brennan J. held that the evidence did not support the finding of the lower courts that Maher had assumed that contracts had been exchanged.³⁶ However these judges held that Maher assumed that exchange would take place,³⁷ and that in the circumstances Waltons failure to warn Maher of their change of plans raised an estoppel, in equity, against Waltons.³⁸ Deane and Gaudron JJ. were not prepared to differ from the lower courts' conclusion that Maher assumed that exchange had occurred.³⁹ They held that in the circumstances Waltons were estopped from denying the existence of a binding contract.⁴⁰

36. *Supra* n.3 at 395 (per Mason C.J. and Wilson J.) and at 430 (per Brennan J.)

37. *Ibid.* at 397 (per Mason C.J. and Wilson J.) and at 430 (per Brennan J.)

38. *Ibid.* at 408 (per Mason C.J. and Wilson J.) and at 429 (per Brennan J.)

39. *Ibid.* at 443 (per Deane J.) and at 464 (per Gaudron J.)

40. *Ibid.*

The significance of the different formulations as to the assumptions made by Maher lies of course in defining the type of estoppel which was raised against Waltons. In short, the "traditional" classification of estoppel by representation into common law and equitable estoppel is made on the basis that to found a common law estoppel there must be a representation of existing fact, whereas a representation of future intention, a promise, can only give rise to an estoppel in equity.

The validity of this categorisation was the subject of some considerable discussion in the judgments in *Waltons v. Maher*. As was recognised by a number of the judges, the reason that a representation as to future conduct was not thought to be capable of giving rise to an estoppel at common law was because ". . . the doctrine of consideration was thought to be a significant obstacle to the acceptance of an assumption founded upon a representation (or promise) as to future conduct . . ." ⁴¹

Mason C.J. and Wilson J. (having rejected the proposition that a valid distinction can be drawn between representations as to future conduct and mistaken assumptions as to future conduct in terms of the applicability of common law estoppel) were not prepared to reconsider the "traditional" classification — although they did not rule out that possibility in a future case:

If there is any basis at all for holding that common law estoppel arises where there is a mistaken assumption as to future events, that basis must lie in reassessing *Jorden v. Money* and in accepting the powerful dissent of Lord St Leonards in that case. The repeated acceptance of *Jorden v. Money* over the years by courts of the highest authority makes this a formidable exercise. We put it to one side as the respondents did not present any argument to us along these lines. ⁴²

Brennan J. did not advert to this possibility, but Deane J. referred to *Legione v. Hateley* ⁴³ saying "The doctrine of estoppel by conduct must now be accepted as applying to preclude departure from a represented or assumed future state of affairs in at least some categories of case." ⁴⁴

While indicting a preference for the view that the doctrine of estoppel by conduct should be generally extended to include an assumption of fact or law, present or future, his Honour was content to proceed more cautiously. ⁴⁵ On consideration of this case, his Honour held that it was one to which the doctrine of estoppel by conduct should be applied notwithstanding that the assumption related to future conduct.

Mason C.J. Wilson and Brennan JJ., having affirmed the traditional dichotomy of estoppel into common law and equitable estoppel then went on to note that previous decisions had established that promissory estoppel and proprietary estoppel are but aspects of the same doctrine. ⁴⁶ Of course given Deane J's views as to the unified nature of estoppel it was not necessary for him to address that aspect of the matter; Gaudron J. seemed content to continue to view equitable estoppel as continuing to have two branches — proprietary and promissory. ⁴⁷

41. Per Mason C.J. and Wilson J., *ibid.* at 398, referring to *Legione v Hateley* (1983) 152 C.L.R. 406 and 432. See also the judgment of Deane J. in *Waltons* at 449.

42. *Ibid.* at 399.

43. *Supra* n. 42.

44. *Waltons v Maher supra* n. 3 at 452.

45. *Ibid.*

46. *Waltons v Maher supra* n. 1 at 403, per Mason C.J. and Wilson J. citing *Crabb v Arun District Council* [1976] Ch. 179, Lord Denning in *Amalgamated Property Co. v Texan Bank* [1982] Q.B. 84 at 122, and *Attorney-General of Hong Kong v Humphreys Estate Ltd* [1987] A.C. 114 at 123-124; and at 420, per Brennan J., referring to the judgment of Scarman L.J. in *Crabb v Arun District Council* at 193.

47. *Ibid.* at 458, 459.

It seems then that the High Court has moved towards the adoption of a unified theory of equitable estoppel, one in which proprietary and promissory estoppel will be seen as “mere facets of the same general principle”.⁴⁸

Apart from the obvious advantages that unity brings — more coherent and simple analysis, for example, the significance of this decision lies in the fact that the previously widely accepted view that promissory estoppel only arises in relation to a promise to modify or not to enforce an existing contractual or legal right is no longer valid. From that conclusion it follows that liability can arise, in respect of a promise or statement of future intention, unsupported by consideration, where there is no existing contract, and indeed where no contract is ever entered into.

(a) The Enforcement of A Voluntary Promise

Admittedly, it can be argued that Waltons made no promise, either voluntary or supported by consideration — that there was no promise to enter into a binding contract but merely a mistaken assumption by Maher to that effect, which assumption was induced by Walton’s conduct and which mistake Waltons failed to correct on learning that Maher had relied on the assumption to its detriment. But three of the judges (Mason C.J., Wilson, and Brennan J.J.) considered the issues on the basis that there had been such a promise. Mason C.J. and Wilson J. expressly state their conclusion, alternately, in the language of promissory estoppel: “. . . the appellant is estopped in all the circumstances from retreating from its implied promise to complete the contract.”⁴⁹

In looking at the impact of the case on contract law then, the critical issue is to define if and in what circumstances a non-contractual promise, that is, one given without consideration will be “enforced”.

The reason the doctrine of equitable estoppel extends to the enforcement of voluntary promises held Mason C.J. and Wilson J. is that to allow departure from the basic assumptions underlying the transaction would be unconscionable. It is not a failure to fulfil a promise, even one on which the other has relied to his detriment, which is unconscionable. Something extra is needed. The extra factors in this case were the urgency surrounding the transaction and the fact that the respondents had executed the deed and thereafter assumed that completion was a mere formality. The appellant’s inaction constituted clear encouragement to the respondents to act to their detriment on the basis of their false assumption and amounted to unconscionable conduct.⁵⁰

The unconscionable conduct which it is the object of equity to prevent is the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation or otherwise to avoid the detriment which that failure would occasion . . .

A non-contractual promise can give rise to an equitable estoppel only when the promisor induces the promisee to assume or expect that the promise is intended to affect their legal relations and he knows or intends that the promisee will act or abstain from acting in reliance on the promise, and when the promisee does so act or abstain from acting and the promisee would suffer detriment by his action or inaction if the promisor were not to fulfil the promise. When these elements are present, equitable estoppel almost wears the appearance of contract, for the action or inaction of the promisee looks like consideration for the promise on which, as the promisor knew or intended, the promisee would act or abstain from acting.⁵¹

48. Per Oliver J. in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co. Ltd* [1982] Q.B. 133 at 153.

49. *Waltons v Maher supra* n. 3 at 408.

50. *Ibid.* at 407, 408.

51. *Ibid.* at 423, 424.

Deane J held that the doctrine of estoppel by conduct applied in this case. Such an estoppel is determined by notions of good conscience and fair dealing, enforced by the rationale of legal doctrines precluding unjust enrichment, and on the basis of analogy and mutuality. His Honour took the view that the extension of the doctrine of estoppel by conduct to that category of case would not undermine the general position of the doctrine of consideration in the fields in which it presently holds prima facie sway. Rather that doctrine would be strengthened by its unjust operation being overcome in special circumstances.⁵²

The final impact of these analyses is impossible to predict. Certain it is that in some cases a person who has relied on a voluntary promise to his detriment will be granted a remedy. The choice of remedy will be examined later. But first it will be useful to consider the choices open to the High Court.

(b) The Choices

The High Court in this case founded the availability of relief firmly in notions of equity. Maher was to succeed because it would be unconscionable to allow otherwise. In following this path, the court has committed itself to a direction flagged by its earlier decision in *Legione v. Hately*⁵³ It is submitted that, faced with facts such as those in *Waltons v. Maher* the court had open to it two choices in approach. One was to do what it did, namely to develop and expand the doctrine of estoppel; the other could have been to take the first step in a much more radical direction by commencing an open reappraisal of the principles of contract law.

Given that the decision in the case will be seen by many as an unnecessary, not to say unfortunate development, in that it has at the very least opened up the debate as to whether and in what circumstances a gratuitous promise should be enforced, it is perhaps hardly surprising that the court adopted the approach it did. Even within the context of estoppel the case marks an important milestone, the significant developments being that the court recognized that promissory and proprietary estoppel are but two aspects of one general principle of equitable estoppel, and that equitable estoppel is capable of founding a cause of action. While these are both substantial developments, particularly the latter, they were not it is suggested, entirely unexpected. For there certainly was English authority, referred to by the High Court to the effect that the doctrines of promissory and proprietary estoppel should be assimilated, or more properly seen as having a common source in equity. In particular, Oliver J. in *Taylor's Fashions Ltd v. Liverpool Trustees Co. Ltd*,⁵⁴ Robert Goff J. and the Court of Appeal in *Amalgamated Investment and Property Co. Ltd v. Texas Commerce International Bank Ltd*,⁵⁵ and Lord Denning M.R. in *Moorgate Mercantile Co. Ltd v. Twitchings*⁵⁶ and *Crabb v. Arun District Council*⁵⁷ had argued persuasively in favour of such a development.

As to the use of estoppel as a sword rather than a shield, there was less authority, particularly if the promissory estoppel cases are considered. Deane J. (with whom Blackburn J. agreed) in *Reed v. Sheehan*⁵⁸ had adverted to the question, but the matter had been left open by Mason and Deane JJ. in their joint judgment in *Legione v. Hately*.⁵⁹ Cases such as these need to be contrasted with the views of Denning J. in *Central London Property*

52. *Ibid.* at 453.

53. *Supra* n.42.

54. [1982] 1 Q.B. 133 n. at 153-154.

55. [1982] 1 Q.B. 84 at 122.

56. [1976] Ch. 179.

58. [1982] 56 F.L.R. 206 at 320.

59. *Supra* n.42.

60. [1947] K.B. 130.

*Trust Ltd v. High Trees House Ltd*⁶⁰ that “The Courts have not gone so far as to give a cause of action in damages for breach of such a promise, but they have refused to allow the party making it to act inconsistently with it”,⁶¹ which have been cited with approval in numerous cases since then.

In choosing this approach, the court has ignored the plea of P.D. Finn that . . . the law of estoppel is too crude, too unsubtle an instrument to solve the problems which will necessarily arise if the courts are to commit themselves to a jurisdiction which enforces and relieves against gratuitous promises.⁶²

In effect, Professor Finn argues that the province of estoppel is to prevent an unconscionable insistence on rights. It is not its function to compel the making good of representations and expectations generally.⁶³

However the major advantage of adopting estoppel as the basis for relief, it is submitted, is that the court has endeavoured to preserve, so far as is possible, the framework of contract law particularly as it has developed in the last hundred years or so. Thus, inherent in the judgments is clearly an acknowledgment of the force of precedent, and probably also acknowledgment that the rules of contract, on the whole, work tolerably well. The decision therefore can at most be seen as a gloss on the law of contract — not a fundamental attack.

(c) Some Implications for Contract

That the decision is not a fundamental attack on contract, is manifested in a number of ways. One is that relief is only to be given where it would be “unconscionable” not to do so. There will, it is suggested, be far fewer cases where a defendant would be found to be liable on this basis, than those where contractual liability arises.

Another concerns the remedies available to the promisee/representee. Surprisingly, there is virtually no discussion of this issue in the judgment of Mason C.J. and Wilson J. in *Waltons v. Maher*. Their Honours were content to affirm the order of the trial judge and the Court of Appeal that Waltons pay Maher damages in lieu of specific performance of an agreement for a lease. While it is not suggested that this was necessarily the wrong remedy in the circumstances, there is some difficulty in accepting that it is necessarily correct, given that the members of the Court of Appeal and the trial judge had all concluded that the estoppel raised was based on the assumption by Maher that a contract had been concluded.

Brennan J’s analysis, is, it is suggested with respect much more satisfactory. His Honour said: “The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon.”⁶⁴ On that basis his Honour held that the decree should be made in the form in which Kearney J. made it.

In “contractual” terms, then, it can be said that Brennan J. sees the purpose of the remedy to be the compensation of the reliance interest, rather than the expectation interest.⁶⁵ Full contractual remedies are not available because there is no contractual obligation.

Brennan J. in fact states most cogently the distinctions between contractual liability and that founded in estoppel.

But there are differences between a contract and an equity created by estoppel. A contractual obligation is created by the agreement of the parties, an equity created

61. *Ibid.* at 134.

62. P.D. Finn, *Equitable Estoppel* in “Essays in Equity” ed P.D. Finn (1985, Law Book Co Ltd) at 77.

63. *Ibid.* at 71-78.

64. *Supra* n.3 at 423.

65. As defined by L.L. Fuller and W.F. Perdue in “The Reliance Interest in Contract Damages”, (1936) 46 *Yale L.J.* 52 and 373.

by estoppel may be imposed irrespective of any agreement by the party bound. A contractual obligation must be supported by consideration; an equity created by estoppel need not be supported by what is, strictly speaking, consideration. The measure of a contractual obligation depends on the terms of the contract and the circumstances to which it applies; the measure of an equity created by estoppel varies according to what is necessary to prevent detriment resulting from unconscionable conduct.⁶⁶

A further problem is raised by the decision for those engaged in pre-contractual negotiations. *Waltons v. Maher* is a case where liability arose in respect of a promise, representation, or mistaken assumption of fact, although the parties did not enter into a contract. The decision is even more significant when it is remembered, as was noted by a number of the judges,⁶⁷ that the parties were intending to enter into a formal contract, and therefore intended, it is fair to say, not to be bound until that formal contract was executed.

Traditionally, parties engaged in pre-contractual negotiations have been free to withdraw at any time before a binding contract is made. That freedom it is suggested can no longer be taken for granted.

The Privy Council was faced with a similar problem in *Attorney-General of Hong Kong v. Humphrey's Estate (Queen's Gardens) Ltd*⁶⁸ in that the appellant argued that the respondents were estopped from withdrawing from an agreement in principle because the appellant had acted to its detriment with the respondents knowledge, by carrying out its side of the transaction. The Privy Council rejected the appellants argument, the judgment finishing with remarks not encouraging to future litigants:

In the present case the government acted in the hope that a voluntary agreement in principle expressly made "subject to contract" and therefore not binding would eventually be followed by the achievement of legal relationships in the form of grants and transfers of property. It is possible but unlikely that in circumstances at present unforeseeable a party to negotiations set out in a document expressed to be "subject to contract" would be able to satisfy the court that the parties had subsequently agreed to convert the document into a contract or that some form of estoppel had arisen to prevent both parties from refusing to proceed with the transactions envisaged by the document. But in the present case the government chose to begin and elected to continue on terms that either party might suffer a change of mind and withdraw.⁶⁹

The distinguishing feature between *Waltons* and *Humphrey* would appear to be that in *Humphrey* the government knew at all times, that there was no binding contract. It hoped that such a contract would be concluded, and were prepared to act on the basis of that expectation; that expectation was no doubt enhanced by the fact that the other party had also partially carried out its "obligations" under the proposed contract.

Such an expectation is not however sufficient to raise an estoppel in the face of the clear knowledge that there was no binding contract. In *Waltons v. Maher*, on the other hand, the court found that Maher thought that a contract would be concluded — an assumption encouraged by *Waltons'* failure to advise him otherwise. So stated the outcome of both cases is not surprising. It is surprising, however, that the High Court apparently did not expect Maher's solicitors to follow up the execution of the documents. Various explanations were advanced as to the reason for this,⁷⁰ none of them, it is suggested, entirely satisfactory;

66. *Supra* n.3 at 425.

67. See the judgments of Mason C.J. and Wilson J., *supra* n.3 at 406 and of Brennan J. at 423.

68. [1987] 1 A.C. 114.

69. *Ibid.* at 128.

70. *Supra* n.3 per Brennan J. at 409, and Deane J. at 436.

in the absence of express confirmation that the agreement had been executed, it would be very easy to say that in fact Maher was in the same position as the government in *Humphrey* — namely he knew there was to be no binding obligation until that contract was concluded.

There are obviously very easy procedural measures which lawyers and their clients can take to avoid liability of the sort suffered by Waltons. The traditional method has been to make it clear that all negotiations are “subject to contract.” *Humphreys* case can be seen as a validation of that approach. The effect of *Waltons v. Maher* is that that phrase (or similar) will no longer provide an automatic barrier to liability. It must be expected that in future a court will be concerned to determine whether contractual *or any other liability* attaches, and in the course of that exercise to consider all the surrounding circumstances. Therefore there will be a positive duty imposed on parties negotiating a contract to consider the effect of their conduct on the other party. Deane J. suggested that this duty might be tortious, saying that, “. . . there is much to be said for the view that the Mahers had a good cause of action in negligence against Waltons for the damage which they sustained by reason of the failure on the part of Waltons to speak in circumstances where it owed a relevant duty of care to them.”⁷¹ Whether this may be the way in which such a case would be pleaded in the future remains to be seen. What is clear at the present is, that, as was stated earlier, the existence or non-existence of a contract will no longer be solely determinative of liability. The judges will look to other bases of liability — whether they be founded in tort, estoppel, or anything else.

3. The Law of Restitution in Australia

Though much less far reaching in its implications than the decisions in *Trident v. McNiece* and *Waltons v. Maher, Pavey & Matthews Pty Ltd v. Paul* indicates yet again that the High Court will not allow a person to insist on their apparent legal rights or defences to the detriment of the other party to the transaction.

The method adopted by the court to attain this result in *Pavey & Matthews* was by application of the principles of restitution to avoid the consequences of a defence based on the Statute of Frauds. The claim was for payment for building work carried out pursuant to an oral contract.

Pavey & Matthews Pty Ltd sued Mrs Paul for \$26,945.50 as due and payable on a quantum meruit. This amount was claimed to be the balance of a total amount of \$62,945.50 due being “a reasonable sum for the work done and materials provided” after giving credit for \$36,000.00 received. The work done and materials supplied by the appellant related to the renovation of a cottage for Mrs Paul, and was carried out pursuant to an oral contract between the parties.

Section 45 of the Builders Licensing Act 1971 (NSW) provides that a contract under which a licensed builder “undertakes to carry out . . . any building work . . . is not enforceable against the other party to the contract unless the contract is in writing signed by each of the parties or his agent in that behalf and sufficiently describes the building work the subject of the contract”. Mrs Paul pleaded that the contract was unenforceable for lack of writing. The issue was whether, despite the unenforceable contract, the appellants could recover the amount claimed. It was held (by Mason, Wilson, Deane and Dawson JJ, Brennan J dissenting) that the appellants were entitled to succeed.

As has been noted elsewhere, a great deal of historical learning was displayed by the members of the court.⁷² The result was that the majority held that to allow the quantum

71. *Ibid.* at 454.

72. See G. Jones, “Restitution: Unjust Enrichment as a Unifying Concept in Australia?” (1988) 1 *J.C.L.* 8 at 8.

meruit claim would not directly or indirectly, enforce the contract. The reasons of their Honours varied somewhat, but from the point of view of the development of Australian law, the judgment of Deane J is, I would suggest, most significant.

His Honour held that the basis of the obligation to make payment for an executed consideration given and received under an unenforceable contract should now be accepted as lying in restitution or unjust enrichment. In such a case the underlying obligation or debt for the work done, goods supplied or services rendered does not arise from a genuine agreement. It is an obligation or debt imposed by operation of law which arises from the defendant having taken the benefit of the work done, goods supplied or services rendered.

His Honour went on to say that:

The quasi-contractual obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable. In such a case it is the very fact that there is no genuine agreement or that the genuine agreement is frustrated, avoided or unenforceable that provides the occasion for (and part of the circumstances giving rise to) the imposition by the law of the obligation to make restitution.⁷³

The notion that the basis of the obligation to pay money in circumstances such as this lies in implied contract was dismissed by Deane J. thus rejecting the opinion of the majority in an earlier High Court decision *Turner v. Bladin*.⁷⁴ Mason & Wilson JJ recognised the virtues of an approach based on restitution and unjust enrichment and also rejected the implied contract approach holding that the true basis of the action on a quantum meruit is the execution of the work for which the unenforceable contract provided, and its acceptance by the defendant without paying the agreed remuneration.⁷⁵ Dawson J held that a promise to pay could in this case, be implied in fact and therefore it was unnecessary to examine the scope of unjust enrichment as a cause of action.⁷⁶

As Deane J said in *Pavey & Matthews Pty Ltd v. Paul*, recognition that the basis of a quantum meruit action of the type which succeeded in that case lies in restitution will not, probably, affect the outcome of such cases. However the importance of the concept of unjust enrichment is that it constitutes a unifying legal concept which explains why the law recognises in a variety of distinct categories of case, an obligation on the part of the defendant to make just restitution for a benefit denied at the expense of the plaintiff.⁷⁷

The High Court has subsequently unanimously accepted, in *ANZ Banking Group Ltd v. Westpac Banking Corporation*⁷⁸ at least in the case of an action for money had and received for recovery of an amount paid under fundamental mistake of fact, that the basis of the action should now be recognised as lying not in implied contract but in restitution or unjust enrichment.

From the point of view of a discussion of the general theme, "the scope for intervention in commercial dealings", the issues raised by the decision in *Pavey & Matthews* concern the relationship between the unenforceable contract and the restitutionary obligation.

73. *Supra* n.4 at 255.

74. (1951) 82 CLR 463.

75. *Supra* n.4 at 227.

76. *Ibid.* at 267.

77. *Ibid.* at 257.

78. (1988) 164 CLR 662 at 673. Already there are indications that restitution will play an increasingly important role in the Courts judgments. For example, see the judgment of Gaudron J. in *Trident General Insurance Co. Ltd v McNiece supra* n.2 (discussed previously); and that of Toohey J. in *Baumgartner v. Baumgartner* (1987) 164 CLR 137 at 152 who questioned whether the imposition of a constructive trust as a remedy for unconscionable conduct is any more principled than the imposition of such a trust in order to prevent unjust enrichment.

According to Mason, Wilson and Deane JJ, the contract though unenforceable, is not completely irrelevant in determining the parties' rights. There were five uses identified by the judges to which the contract might be put:

- (a) Mason & Wilson JJ said that proof of the oral contract may be an indispensable element in the plaintiffs case to show that the benefits were not intended as a gift;⁷⁹ Deane J on the other hand said that the plaintiff may refer to the unenforceable contract as evidence only on the question whether what was done was done gratuitously.⁸⁰ While these different formulations may produce different outcomes, it would, it seems, be a rare occasion when this would become significant.
- (b) Mason & Wilson JJ also said that the contract may be referred to to show that the defendant has not rendered the promised exchange value.⁸¹
- (c) Perhaps more importantly, Deane J said that the unenforceable contract may be referred to as evidence on the question of the appropriate amount of consideration where a quantum meruit claim is involved.⁸² But by way of contrast,
- (d) his Honour was of the view that the defendant is entitled to rely on the unenforceable contract if it has been executed but not rescinded to limit the amount recoverable by the plaintiff to the contractual amount in a case where that amount is less than what would constitute fair and reasonable remuneration.⁸³
- (e) Finally, his Honour also said that if the unenforceable contract has not been rescinded by the plaintiff or otherwise terminated, the defendant will be free to rely on it as a defence to the claim for compensation in a case where he is ready and willing to perform his obligations under it.⁸⁴

Obviously then the separation between the quantum meruit action and the unenforceable contract is not entire. Reference to the unenforceable contract for the purposes set out above, particularly as evidence of the appropriate quantum in a quantum meruit claim is not unjustifiable, in that the agreement does evidence the basis on which the work was performed.⁸⁵ Nevertheless, it is arguable that reference to the contract, even if only as evidence, comes very close to enforcement, indirectly, of an unenforceable contract.

4. Conclusion

As indicated earlier, it is difficult to find a common theme underlying three such disparate cases. Viewed together, one's immediate reaction is that the traditional rules of contract are, if not dead, at least severely wounded. From the cases it is clear that the court is now prepared to consider the conduct of the parties as a significant factor in determining their obligations. In particular, if one party has relied on the other party's promise, representation, conduct to the point where the former suffers a detriment or the latter an advantage these cases would indicate that a remedy will be given — whether or not there is a valid contract in force between them. The court is not at this time at least, moving in the direction of a civil action based primarily on detrimental reliance. It is instead reconsidering on a case by case basis particular aspects of traditional contractual rules. It remains to be seen whether a coherent set of principles will be developed as an underlying basis for these developments.

79. *Supra* n.4 at 227.

80. *Ibid.* at 257.

81. *Ibid.* at 228.

82. *Ibid.* at 257.

83. *Ibid.*

84. *Ibid.* His Honour referred to *Thomas v Brown* [1876] Q.B.D. 714 as authority for that proposition. The action in *Thomas v Brown* was for the return of the deposit, rather than for compensation. The court did not decide whether the contract (for the sale of land) was unenforceable for lack of sufficient writing.

85. Similarly, reference was made to the 'agreement' in a case where the contract was void for uncertainty (*Way v Latilla* [1937] 3 All E.R. 759); and it is thought that this is the basis on which quantum meruit claims should be determined where the claim is for work done pursuant to a valid contract which is subsequently terminated for breach. (See the discussion in Goff & Jones, *The Law of Restitution* (3rd edn.) at 465-468).