CONTRACT AND THIRD PARTIES

by

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GENERAL PRINCIPLE

In general, entrenched principle precludes effective enforcement, by a court, of a contract conferring rights, or imposing obligations, on any person not a party to the contract.[1] The rule that a third party cannot be made liable under the contract is generally regarded as just and sensible. However, the first arm of the rule plainly permits a ready escape from commercial obligations freely assumed. Furthermore, in the absence of any obligation imposed by a trust, the parties may, at their option, vary or rescind the contract without any reference, or even notification, to the beneficiary of the promise. The self evident injustice[2] or, at least, inconvenience to which the first limb of the principle can give rise has ensured that it is riddled with exceptions. The exclusions have sprung up independently of one another, without a coherent pattern and without any common doctrinal basis. They are difficult to identify and difficult to enforce. These factors readily explain the insistent demand for reform which has been echoed by the House of Lords.

The basis of the principle is of more than academic interest. It assumes importance in the framing and interpretation of remedial legislation. Samuels JA explored the question in a paper delivered to the Law Summer School

held at the University of Western Australia.[3] The two candidates he proffered as founding the principle were the doctrine of privity of contract and the rule that consideration must move from the promisee. Unfortunately, even today, it remains a moot point whether the two are distinct. In Coulls v Bagot's Executor and Trustee Co Limited,[4] four out of the five judges of the High Court were prepared to hold that the fact that the plaintiff's husband had provided the consideration was not a necessary bar to the plaintiff's claim. Barwick CJ had no doubts that they were separate and distinct matters. On the other hand, many commentators have assumed the doctrine and the rule to be the same. Pearson saw the question somewhat differently again.[5] He suggested that privity of contract rested on either of two bases. Both mutuality and absence of consideration had their champions in supporting the independent principle of privity of contract. He pointed out that the Privy Council has stated in terms that a statutory provision which permitted consideration to move from someone other than the promisee did not alter "the English conception of a contract as an agreement on which only the parties can sue".[6] In the view of the Queensland Law Reform Commission, although the absence of consideration played a historical role in the development of this branch of the law, the "rule which precluded a stranger to a contract from enforcing it for his benefit now has an independent existence".[7] Even though Roman law did not know the doctrine of consideration, in the main, it did not

permit a third party to claim on or be found liable under a contract. The French Civil Law initially provided for contracts to have effect only as between parties to it, although now recognition of third party rights in contract is normal instead of exceptional.[8] It would seem that prudence dictates that attention be paid to all possibilities which might support the principle when formulating any statutory reform of it.

The harsh impact of the principle may be alleviated in a number of ways. Where the beneficiary of the promise can prevail upon a party to the contract to bring action to enforce the promise, specific performance or injunctive relief may provide sufficient and appropriate remedy.[9] However, the restrictions on the availability of specific performance or injunction may render this remedy insufficient. One of the usual answers to a claim for specific performance, however, will not prevail. Specific performance will not be refused simply on the ground that damages are an adequate remedy. As will be seen, damages will usually only be nominal. Thus, cases of this kind are ideal illustrations of circumstances when damages are inadequate to meet the justice of the case.[10] On the other hand, obviously no specific performance will be ordered, for example, of a promise to render personal services to a third party or where the requirements of mutuality are not satisfied.

Where the party to the contract bringing the proceedings for one reason or another is restricted to an action for damages, generally speaking they will be only nominal[11] because usually the loss flowing from the breach will have been suffered by the beneficiary and not by the party. As Megarry VC put it, the remedy is inadequate because "the only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim".[12] In 1962, Else-Mitchell J of the Supreme Court of New South Wales surveyed the field and pointed out that the decisions on this point are "conflicting and unsatisfactory".[13] The situation has not improved. Even if the damages are not nominal they do not necessarily correspond with the damage suffered by the beneficiary.[14]

In this unsatisfactory situation, Lord Denning, with the concurrence of Orr LJ, in his judgment in Jackson v Horizon Holidays Limited,[15] attempted to effect a reversal of the general rule that a party cannot recover damages on behalf of third parties. The plaintiff sued a travel agency for damages and recovered damages not only for the discomfort and inconvenience he himself suffered in the course of a holiday organised by the defendant but also for that endured by members of his family. Lord Denning thought that the words of Lush LJ in Lloyd's v Harper[16] justified this approach. Lush LJ had said:

> "I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have

> recovered if the contract had been made with B himself."

The House of Lords has since explained, albeit by way of obiter, in Woodar Investment Development Limited v Wimpey Construction UK Limited[17] that the statement by Lush LJ applied, according to some of their Lordships, only where the promisee was an agent for the undisclosed principal, the beneficiary, or, according to some others, where the promisee stood in a fiduciary relationship to the beneficiary. The House appears to have postponed for a further period this avenue of escape from the shackles of the rule, notwithstanding the call for reform by Lord Reid in 1967,[18] repeated with emphasis by Lord Scarman in Woodar. Even if the reasoning of the majority in Jackson could have been sustained, other problems would have surfaced. Thus, were the wife and children of the plaintiff entitled to have the plaintiff hold as trustee such of the damages as were awarded in respect of their discomfort?[19]

Of course, the general principle in question also underlies the decision of the majority in Scruttons Limited v Midland Silicones Limited.[20] As was explained by Lord Morris, there is no difference in principle between denying C the right to enforce the benefit of a promise by A to B to pay money to C, and denying the opportunity to C to set up in defence of a claim made by A the promise A made to B not to make a claim againt C. It has been argued that exemption clauses are outside the scope of the doctrine of

privity.[21] However, the speeches in Midland Silicones and the judgments in the parallel decision in Australia, Wilson v Darling Island Stevedoring and Lighterage Co Limited[22] are based equally on absence of privity. More recent decisions have opened up a new escape route from the difficulties in the operation of exemption clauses thrown up by the principle under discussion.[23]

SOME EXCEPTIONS

Exceptions to the general principle can be found in equity, at common law and in statute.

Probably the most promising of these in restricting the destructive effect of the principle was the equitable principle of the trust of a contractual right. If the court can discern an intention by a party to create a trust in favour of the beneficiary of the promise, that party, as trustee, may bring action against the promisor. In the event of refusal by the trustee to bring an action, the beneficiary has a right to enforce the trust by bringing an action against both the parties to the contract.[24] Unfortunately, after a promising start, the courts have turned their face against trusts of this nature. The reported cases where a third party beneficiary attempted to establish a trust are impossible to reconcile and application of the principle cannot be predicted with any certainty (cf the tabulation of inconsistent decisions in Cheshire and Fifoot Law of Contract 4th Aust Ed para 1940).

Generally speaking, currently, judges are directed by authority to view with disfavour claims of the existence of a trust of a promise to benefit another. Fairly typical is the language of du Parcq LJ in Re Schebsman:[25]

> "It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jourdain talked prose, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention. I have little doubt that in the present case both parties (and certainly the debtor) intended to keep alive their common law right to vary consensually the terms of the obligation undertaken by the company, and if circumstances had changed in the debtor's lifetime injustice might have been done by holding that a trust had been created and that those terms were accordingly unalterable."

Perhaps even more emphatic was Romer LJ in saying that "an intention to provide benefits for someone else and to pay for them does not in itself give rise to a trusteeship".[26] Once again, stress was laid on the fact that there was nothing to prevent Mr Russell, at any time, had he chosen to do so, from surrendering the policy, the subject of the claimed trust, and receiving back a proportionate part of the premium he had paid.

It is of interest to note the reasoning of the NSW Court of Appeal in its recent decision in Eslea Holdings Limited v Butts (unreported 20 June 1986). The facts closely replicated the circumstances of Lloyd's v Harper.[27] The defendant established a fully owned subsidiary to enter the

reinsurance market in London. It was recognised by all concerned that, unsupported, the newly fledged subsidiary would be unable to attract business. Accordingly, the defendant provided its guarantee. The guarantees were addressed to brokers operating in the London market because it was not known who might ultimately be the assured and both time and numbers precluded the giving of individual guarantees to each assured. It was held that the brokers held the guarantees on trust for the several assured. Commercial necessity was found sufficient to support the existence of the requisite intention on the part of the promisee brokers to create a trust in favour of the several assured. That the dictates of commercial practice were considered sufficient to overcome the warning of du Parcq LJ may possibly represent a swing in the pendulum of judicial thinking back to an earlier, more relaxed view of equity. After all, as Fullagar J pointed out, "It is difficult to understand the reluctance which courts have sometimes shown to infer a trust in such cases."[28]

Nonetheless, for the time being, the Sixth Report of the English Law Revision Committee in 1937 continues to stand as an accurate statement:[29]

> "We feel that this summary of cases - and many might be added to those we have cited - will at least have made one point clear, and that is that the law on this point is uncertain and confused. For the ordinary lawyer, it is difficult to determine when a contract right 'may be conferred by way of property', in Viscount Haldane's phrase, and when it may not. A promises B to guarantee C against loss: in Lloyd's v Harper this is held to be a trust. A promises B to insure C against loss:

> in Vanderpitte v Preferred Accident Corporation of New York this is held not to be a trust. Undoubtedly these cases can, or, at any rate, must be distinguished, but we find some difficulty in stating the simple grounds on which the distinction can be made. In the circumstances it seems to us that there is a strong argument for attempting to frame a rule which will be more easily understandable."

The escape from the general rule available by this route is studded with uncertainty. Furthermore, the price which must be paid for a finding that a trust had been created is that it forecloses, from the date of contract, any opportunity for the parties to the contract to resile from or vary the trust so created.

Equity brought another significant departure from the general rule. The rule in Tulk v Moxhay,[30] whereby a negative covenant entered into by adjoining landowners may be enforced by subsequent owners of the property in favour of which the covenant was given, was, until statutory reform, the only way that dealing in real estate could effectively function. In this instance, the exception was initially founded on notice. The subsequent evolution of this concept and the impact of the decision of the Privy Council in Lord Strathcona SS Company v Dominion Coal Company,[31] on personal property, have shrouded the doctrinal foundation for this exclusion from the general rule in an impenetrable fog.

Exceptions, recognised by the common law, made in the

interests of commercial convenience and practice, include:

1 The ability of an undisclosed principal to sue in his own name. Attempts to reconcile this rule with the doctrine of privity have not been a success. The presently preferred view is that the right of the principal is simply an exception to the doctrine established in the interests of commercial convenience;[32]

2 A rule that a seller, in whose favour an irrevocable letter of credit has issued, may sue the issuing bank, notwithstanding that such consideration as exists moves from the buyer and that the seller is a stranger to the contract between the bank and the buyer by which the letter of credit is brought into existence;[33]

3 The rule that, where a person with a limited interest in goods insures them to their full value on behalf of others interested in the goods, but unnamed in the policy, the unnamed assureds may also sue on the policy;[34]

4 A covenant for the settlement of property under a marriage settlement can be enforced by persons within the marriage consideration and they are taken to include the issue of the marriage. This is not a bad example of the tortured reasoning required to bring the law to accord with the evident desire and needs of the parties. Lord Cottenham LC described[35] the children of the marriage as quasi-parties to the contract, whatever that term may describe.

Statutory exceptions, taking New South Wales as an

illustration, include the Conveyancing Act 1919, ss 88, 117 and 118, whereby a lease is enforceable by and against purchasers of the reversion. Other statutory exceptions include the provision under the Motor Vehicles (Third Party Insurance) Act 1942 (s 10) whereby a third party insurance policy, to accord with the Act, must insure not only the owner of the relevant motor vehicle but also any other person who at any time drives the vehicle. S 36C of the Conveyancing Act 1919 (NSW) provides that:

> "a person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property although he may not be named as a party to the conveyance or other instrument"

and may bring an action as if he had been named a party. In spite of the width of the language used, in Beswick v Beswick[36] the English equivalent of the section was given a limited operation by the House of Lords. It is of some interest, for the purposes of law reform, to note that, whilst their Lordships accepted the conclusion of Lord Denning and Danckwerts LJ, in the Court of Appeal, that the language employed was sufficiently wide to abrogate the doctrine of privity in the case of contracts in writing affecting property, they presumed that the legislature did not intend such result. It is somewhat ironic that, at the same time as lamenting the inaction of Parliament in the field of law reform in this area, Lord Reid felt it necessary to reject the English provision as offering at least partial relief against injustice occasioned by the operation of the principle.

ROAD TO REFORM

Reform of the doctrine of privity has been proposed in England (English Law Revision Committee Sixth Interim Report 1937[37]), enacted in Western Australia (Property Law Act 1969, ss 11(2) and (3)), Queensland (Property Act 1974, s 55) and, most recently, in New Zealand (Contracts (Privity) Act 1982).

In the United States, common law now recognises a right in a third party beneficiary to enforce a promise in his favour (American Law Institute, Restatement (Second) of Contracts, ss 302-315). It is interesting to note that the breach in the continued existence of the principle was initially achieved by judicial decision in the New York Court of Appeals in Lawrence v Fox.[38] The response of the majority of the Court to the submission based on privity is not at all convincing but nonetheless after an initial stumble the decision survived. There is an interesting examination, in an article "The Property in the Promise; A Study of the Third Party Beneficiary Rule"[39], of the evolution of United States thinking on this topic including the struggle waged by Corbin for the extinction of the principle, finally culminating in the Restatement in 1932. Quite a number of the individual States have passed legislation to repeal the application of the general principle but the diversity in approach makes useful analysis of statutory reform impossible. In 1979, with the advent of the Second Restatement, the United States foundation for allowing

enforcement of contracts by third parties underwent fundamental change. At the heart of the qualification for enforceability lies the need to show an intention to benefit the third party. S 302 of the Restatement provides:

> "(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> > (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> >
> > (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary."

The Restatement addresses what is one of the major difficulties in reconciling competing interests in this area. It allows the parties to discharge or vary the obligation to the beneficiary, unless there is an express term of the contract to the contrary (s 311). If the contract makes no provision one way or the other, the freedom of the parties so to act comes to an end when s 311(3)):

> "the beneficiary, before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it."

Although the "intent to benefit" test has excited both criticism and support,[40] there is no doubt that its application requires a deal of working out. Comment (d) to

s 302, if applied in terms, could occasion difficulties. It states that:

> "if the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary".

There has been considerable disagreement between United States courts as to whether relevance attaches to the intention solely of the promisor, the promisee or both. The difficulty stems from the ambiguity of the language of the Restatement on this point. There is an absence of agreement also on the cognate question. Does the requisite intention have to be found in the express words of the contract or may regard be had to surrounding circumstances? The actual text of the Restatement is silent on this question.

It must be acknowledged that any enthusiasm for reform of the presently prevailing principle is considerably blunted by the difficulties encountered by the first Restatement. It serves no useful purpose to set these out. They do need to be borne in mind in formulating proposals for reform.

In England and Australia, accepting the need for some change to alleviate the impact of the rule, the question for debate has been the nature and extent of the requirement. Is it desirable that there should be change to the immunity from imposition of a duty on a third party? On the face of it, no change is required. There is nothing unjust in a third party enjoying freedom from the enforcement of an obligation

sought to be cast upon it by a contract to which it is not a party. As will be seen, none of the remedial statutory changes have attempted to impose overall burdens on third parties. However, should there be complete immunity from enforcement of a duty against a third party who is also the beneficiary of a promise under the same contract and claims the benefit of it? Should such third party obtain the benefit of the promise without being subjected to an obligation imposed by the same contract? Again, a possible route to follow, in effecting change, is simply to give the promisee the right to recover damages in full, not merely nominal damages. One obvious difficulty in charting a path to reform along that particular route would arise where the promisee came to terms with the other party to the contract. In fact, each of the Law Reform bodies which has examined the question has opted for more detailed change than the last mentioned.

United Kingdom

The English Law Revision Committee, chaired by Lord Wright, in its Sixth Interim Report in 1937 said:[41]

> "The common law of England stands alone among modern systems of law in its rigid adherence to the view that a contract should not confer any rights on a stranger to the contract, even though the sole object may be to benefit him."

The Committee recommended that:

> "Where a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third party in his own name subject to any defences that would have been

> valid between the contracting parties. Unless the contract otherwise provides it may be cancelled by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct."

The phraseology of the recommendation owes a great deal to the difficulties encountered in the United States under the rules laid down by the first Restatement published in 1931. The rule allowed for a class of third parties described as "incidental beneficiaries". The common example given is: A contracting with B to erect an expensive house on B's land would, on performance of the contract, enhance the value of C's land. In such circumstances, C would be merely an incidental beneficiary. The call of the recommendation for express terms purporting to confer a benefit directly would avoid this category of problem. It is suggested that:

> "It would not be possible to infer an intention to benefit the third party from the circumstances surrounding the contract, and so there would be no problem in distinguishing persons whom the contracting parties impliedly intended to benefit from those who did so only incidentally."[42]

Examples of decisions cited by Dawson in his commentary on the New Zealand Act suggest how, without properly drawn boundaries, reform can get out of control.[43] Oddly, although the Second Restatement goes back to 1979 and the New Zealand Committee reported in 1981, it appears to have considered the first Restatement in the Report which it delivered.

It is important to note the qualification which the English

Commission expressed thus:

> "The above recommendation, if adopted, will give the third party a contract right but not a trust right. It does not go far enough, therefore, to cover the situation which arose in Re Engelbach's Estate [1924] 2 Ch 348. In that case a father took out an endowment policy of insurance in his own name which provided that the policy moneys should be payable to his daughter if she survived a certain date, and that if she should not do so the premiums were to be refunded to the father. The policy was not expressed to be for the benefit of the daughter. It was held that the father was not, in these circumstances, a trustee for his daughter and that the policy moneys belonged to his estate and not to the daughter."

Notwithstanding repeated calls thereafter for the implementation of the suggested reform, nothing was done in England. In Woodar Investment Development Limited v Wimpey Construction UK Limited,[44] Lord Scarman urged the House of Lords to reconsider the rule without further delay. Although New Zealand and some of the Australian States have passed legislation, most have remained passive.

The English Law Revision Committee recommendation has been said to raise as many problems as it solves. A number of these were discussed by Myers AJ[45] and the commentators on the paper he delivered. The following questions were thrown up:

1 What express provision would be required in the contract sufficient to amount to an intention to directly benefit a third party? In the result, at the other end of the spectrum, each of the Acts passed preserves the opportunity to the contracting parties to confer benefits

on third parties whilst making it clear that it was not intended that the third parties have rights enforceable at law.

2 Should such an expression of intention suffice to entitle the third party:

(a) whether he is aware of the contract or not?

(b) only where he has notice?

(c) only where he has adopted it?

(d) what constitutes adoption?

3 Should the promisee be entitled to raise against the third party any defences available against the promisor?

4 Is it practical or desirable to limit the class of potential third party beneficiaries by restricting or defining the kind of benefits which a third party contract can confer?

Myers AJ concluded that no rights of enforceability, going beyond those permitted by the then existing law, should be conferred on third parties because it was not practicable to separate the cases in which the right was properly to be granted from those in which it was not. As he put it:

> "What distinguishes those in which it is desirable that the right should exist from those in which it is not, is the circumstances of the particular cases and is therefore something incapable of definition or general explanation."

Notwithstanding this somewhat pessimistic view, the questions and difficulties were addressed in the legislation

which has been brought down. The threshold problem remains as to the appropriate reconciliation of two basic aims. On the one hand, it is desired to give the beneficiary a right to bring action to obtain the benefit promised to him under the contract and on the other to preserve to the actual parties to the contract their customary power to vary or revoke it.

Western Australia

Ss 11(2) and (3) of the Property Law Act 1969 implement the recommendations of the English Law Reform Commission. Apparently, there was no further independent investigation by a law reform body in that State before the Act was passed, although Kennedy J refers to the Law Revision Committee in the judgment to be cited. This was the original Australasian legislation in the field.[46] It is also the only one, as far as I know, to have received judicial interpretation. It provides as follows:

> (2) Except in the case of a conveyance or other instrument to which subsection (1) of this section applies, where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to subs (3) of this section, enforceable by that person in his own name but -
>
> (a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract shall be so available;
>
> (b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and
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> (c) such defendant in the action or proceeding

> shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.
>
> (3) Unless the contract referred to in subs (2) of this section otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the person referred to in that subsection has adopted it either expressly or by conduct."

As can be seen, the provision adheres to the English proposal in requiring the contract to confer the benefit expressly in its terms directly on a third party.

Bearing in mind that the West Australian provision finds its lineage directly in the Report of the English Law Revision Commission, it seems to me that a court has to assume that the legislature intended the consequence, adverted to by the English Commission, with respect to the exclusion of trusts, to follow. Yet, as has been seen, the law with respect to trusts is quite uncertain. That uncertainty would therefore continue. In this respect, as will be seen, the later Queensland provision made a considerable advance.

A significant provision is subs 2(a) which, in terms, preserves all defences that would have been available had the beneficiary been named as a party to the contract. There is no doubt what the framers of the provision had in mind. Defences such as illegality, undue influence, fraud or mistake need to be available to the promisor in any action brought by the beneficiary. However, it also

permitted to be raised in a stark form the question whether absence of consideration could be relied upon. As will be seen, this problem also was attempted to be covered expressly by the later Queensland provision, at least in part, separately from the consequences of absence of privity. In the event of legal proceedings, subs 2(b) requires each party to the contract to be made a party to the proceedings. In the light of the decision in Beswick v Beswick[47] this, no doubt, was a wise precaution. It avoids the possibility of action being brought separately by the promisor for the enforcement of the promise. The enactment does not deal directly with the enforcement of duties thrust upon third parties. The only provision in this regard is subs 2(c) which enables the defendant to an action by a beneficiary of a promise to enforce against such plaintiff all obligations imposed on such a plaintiff for the benefit of the defendant. The Act fails to make the provision to be found in the Queensland and New Zealand Acts allowing enforcement by beneficiaries who were non-existent or unascertained at the time the contract was made.

The provision gave rise to the litigation in Westralian Farmers Co-operative Limited v Southern Meat Packers Limited.[48] The Co-operative sold thirty-six head of cattle on behalf of the owners, Mr and Mrs King, to Southern. The contract of sale contained the following clause:

> "To enable the agents to protect themselves as del credere agents in the sale the full purchase price

> shall be payable by the buyer to and be recoverable by the agents alone."

In fact, Southern paid the full price to the Kings direct. The Kings were also credited by the Co-operative with the proceeds of sale less commission. The Co-operative then attempted to recover the full purchase price from Southern directly but, of course, the latter refused to pay. In order to satisfy the requirements of s 11(2)(b), the Kings were joined in the proceedings but, for some reason, which does not appear in the judgments, no claim was made against them. The dispute was ultimately taken to the Full Court. That Court was of the view that, on its true construction, the contract was one for the benefit of a third party. The parties to the contract were held to be the Kings as sellers and Southern as the buyer. The Co-operative was held not to be a party in its own right, but to be a third party beneficiary of the contract between the buyer and the sellers. The "benefit" was that the full purchase price was payable to a non-party, the Co-operative. It was on this basis that the Court dealt with the argument advanced by the Co-operative based on the relevant provisions of the Property Law Act. The Court had no difficulty in concluding that the requirements of s 11 were satisfied in that the contract did, in its terms, confer a benefit directly on the third party beneficiary.

The principal defence mounted by the buyer went right to the heart of one of the major problems in this area. Southern submitted that s 11(2) of the Act, while resolving the

problem of absence of privity, did not deal with the fact that there was no consideration passing from the Co-operative and, accordingly, the obligation was unenforceable. Both the judgments delivered, Wallace J agreed with the Chief Justice, rejected this submission. Burt CJ said:[49]

> "The submission in substance is that s 11(2) of the Act makes good lack of privity but leaves untouched the doctrine of, and the necessity for, consideration, so that in an action brought pursuant to it it is an available defence to plead that the plaintiff is a stranger to the consideration.
>
> To accept that submission would, I think, be to deny the capacity of a beneficiary under a contract, he being a person who is not named in the contract, to enforce that contract in all cases. In a contract between A and B which confers a benefit directly on C, C will necessarily be a stranger to the consideration. Hence, if the submission is accepted, para (a) would not be a qualification upon the right to enforce a contract created by the positive enactment to be found in the words of the subsection preceding the word 'but'. The 'but' would deny the right which the section creates. For this reason lack of consideration is not, in my opinion, a 'defence' made available by that paragraph."

Kennedy J addressed the submission along more general lines:[50]

> "It would, I think, however, be a startling result if the recommendation of the Law Revision Committee was not directed to both problems. One of its terms of reference was to consider the rule that consideration must move from the promisee, including the attitude of the common law towards jus quaesitum tertio, although it is observed that in para 39 of the Report it was noted that the consideration rule was not the same as that which had caused difficulty of the kind discussed in connection with jus quaesitum tertio. If the doctrine of privity is distinct from the rule as to consideration, it appears to me that s 11(2) should be interpreted to cover both, and the fact that no

> consideration moved from the third party should not be an available defence under s 11(2)(a). If this were not so, the instances in which the contract would be 'enforceable' by the third party would be rare. I do not think that Parliament intended a beneficiary to escape the Scylla of the doctrine of privity only to encounter the Charybdis of consideration. Be this as it may, in my opinion, in the present case, the appellant did provide consideration. It undertook positive obligations in relation to the contract, which was entered into through its instrumentality."

If his Honour was correct in thinking that consideration did pass from the Co-operative in execution of its duties as a selling agent, then the absolute statement by the Chief Justice that "C will necessarily be a stranger to the consideration" can not be sustained. However, I suggest that, whether or not Kennedy J be correct in the concluding words of his judgment, purposive interpretation of the provision mandates the conclusion to which the Court came. No other decision can be imagined.

Burt CJ identified the "adoption" of the contract by the beneficiary (see subs 3) in the act of the Co-operative in crediting the account of the Kings with the sale price less commission. The facts do not make it clear whether any notification of the act was given to the Kings. In any event, the question of the adoption of the contract was not a matter for debate because there was no suggestion that the subsection had any application to the facts.

On the other hand, there is a feature of the proceedings which remains a puzzle. In the result the buyer was

required to pay twice for the cattle. Why this result was not avoided, the sellers being a party to the action pursuant to s 11(2)(b), is not clear to me. That such a result is avoidable was pointed out by Corbin on Contract where the author says:[51]

> "The remedy for the prevention of injustice to the promisor is not to deny a remedy to the third party. It is to make use of the modern code procedure following equity: a promisor can cause the joinder in one action of all the parties concerned; in that action an unjust double recovery can be avoided, at the same time giving to each claimant his just due."

Notwithstanding that no claim was made against the Kings in the proceedings before the Court, and therefore double payment to them permitted to stand, I suggest that the facts illustrate a deficiency in the Queensland legislation which, as will be seen, does not in terms require all parties to the contract to be made parties to an action by the beneficiary.

Unfortunately, the circumstances did not call for any in depth elucidation of the meaning of some of the terms used in the section. In this context, interesting questions are raised in a helpful discussion of the decision:[52]

> "Does a person have to be referred to by name in order to qualify for inclusion within the terms of s 11(2)? Or, is it sufficient for that person to be a member of an identifiable class of persons? The section itself refers to persons who are 'not named as a party to the contract' (emphasis added). In the Wesfarmers Case, Wesfarmers was named as the person upon whom the benefit had been conferred. But would these provisions be satisfied when dealing with the so-called 'Himalaya' clause the subject of such cases as New Zealand Shipping Co

> Limited v A M Satterthwaite & Co Limited (the 'Eurymedon') [1975] AC 154 and, more recently, Port Jackson Stevedoring Pty Limited v Salmond and Spraggon (Australia) Pty Limited (the 'New York Star')(1980) 54 ALJR 552? The question in those cases was whether stevedores could rely on exemption clauses in a bill of lading, to which they were not a party, which purported to exempt the carrier's servants, agents and independent contractors (which the stevedors claimed they were) from loss or damage of whatsoever kind arising directly or indirectly from any act, neglect or default whilst acting in the employment of the carrier.
>
> Would s 11(2) of the Act apply to the facts of the New York Star should they arise for decision in Western Australia? Would the stevedores have to be referred to by the name of their employment to come within the terms of that subsection, or would it be sufficient that they fall within a general class of independent contractors? Further, is exemption from a liability, otherwise operative, a 'benefit' within the meaning of s 11(2)? Many questions relating to the scope of this subsection still remain after the Wesfarmers decision. Answers will have to await further consideration of this section of the statute."

Whilst I agree that the questions are legitimately the subject of comment, consistently with the approach of Kennedy J, I would have little doubt that they would be answered favourably to the application of the provision.[53] If ever a remedial statute deserved beneficial construction, this is such a case.

Queensland

The major operative provisions bearing on the topic are ss 55(1), (2) and (3) of the Property Law Act 1974. They provide as follows:

> "(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 a 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 thereform.

(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."

"Promise" is defined in subs 6(c). The definition calls for a promise "which is or <u>appears to be</u> intended to be legally binding" (emphasis added). The reason given for this somewhat unusual definition is to prevent a promise not intended to have legal effect from being enforced. Whilst I understand the sentiment, is the second limb appropriate to carry it out? Does it not serve merely to confuse? Is there to be both a subjective and objective evaluation of the intention of the contracting parties? The Queensland

Law Reform Commission considered[54] that the approach of the English Law Revision Committee[55] that enforceability be restricted to a contract which "by its express terms" purports to confer a benefit was too narrow because it would exclude a promise which, by necessary implication, intended the benefit to be conferred. I suggest that there is considerable force in this criticism. To require "express terms" would probably mean that documents drawn by laymen, more often than not, would fail to qualify. However, the Report does not show any awareness of the reason why the recommendation in England took the form it did, or of the difficulties of the notion of the "incidental beneficiary" Notwithstanding the apparent neglect to advert to this problem, I suggest that a Queensland court would not construe the provision beyond encompassing persons who clearly were intended to be beneficiaries in the light of all the surrounding circumstances.

Significantly, subs (1) expressly calls for valuable consideration to move from the promisee. The Commission apparently accepted as the received view that privity of contract and consideration were separate concepts and was concerned to remove the barrier against enforceability in respect of the first rule completely but only to a qualified extent, so far as the doctrine of consideration was concerned. This approach is reinforced by subs (3) which specifically contemplates the grant of equitable relief, notwithstanding that the beneficiary was a volunteer. At

any rate, the provisions remove any prop there might otherwise have been for the argument which occupied the Full Court in Western Australia in Westralian Co-operative.

The Queensland statute is again significant in that the parties are no longer permitted to vary or discharge "the terms of the promise and any duty arising therefrom" after "acceptance" by the promisee (s 55(2)). In this statute, "acceptance" is defined (s 55(6)(a)) as assent by words or by conduct communicated by or on behalf of the beneficiary to the promisor at least within a reasonable time of the promise coming to the notice of the beneficiary. In the result, then, the act of adoption relied upon by Burt CJ in Westralian Co-operative, which presumably was not communicated to anyone, would have been insufficient under the Queensland Act. The requirement, although no doubt fair and sensible on the face of it, may well bring about the failure of some otherwise meritorious beneficiaries. In the result, the New Zealand solution (infra) has a great deal to recommend it.

The definition of "beneficiary" in subs 6(b), which includes a person not in existence at the time when the promise was made, may have effected another significant change in the law. It has been held in New Zealand that the practical difficulty which obtains in the case of the not yet incorporated company, on whose behalf an agent purports to enter into a contract, will be avoided by simple conduct

within a reasonable period after incorporation. In other words, no formality is necessary. The advantage of such a provision is illustrated by the facts in Palmer v Bellaney and ors.[56] In that case, various agreements were entered into by persons described as agents for a company to be formed. Eventually, the company was formed. There was no evidence that after incorporation the company adopted the agreements. Reliance was therefore placed on the New Zealand statute, the Contracts (Privity) Act 1982 which, for relevant purposes, is the same as the Queensland provision. The decision of Hardie Boys J was given on an interlocutory basis. Without assigning reasons, His Honour stated that "it is quite clear that [the Act's] effect is to confer on the company the right to enforce [the] contract". The judgment contains no reasoning to back up this assertion. On the final hearing, Savage J was similarly brief when he said:

> "[Counsel for the first and third defendants] first submitted that, although the moss contract was a pre-incorporation contract ... Sphagnum Products (NZ) Limited is entitled to the benefit of it and to enforce it by virtue of s 4 of the Contracts (Privity) Act 1982. I think that is clearly correct."

A learned writer has suggested[57] that the comments of their Honours go too far:

> "Where a pre-incorporation contract is a complete nullity, the valid contract required by s 4 is absent and the Contracts (Privity) Act will not be applicable."

Support for this proposition is found in the Report on which the New Zealand Act is founded.

New Zealand

problem has most recently and, if I may say so, very elaborately and thoroughly, been considered, in the context of law reform, by the New Zealand Contracts and Commercial Law Reform Committee. Its Report of 29 May 1981 resulted in the enactment of the Contracts (Privity) Act 1982. The Committee did, in terms, address the problem posed by the absence of consideration. It, of course, did not recommend the abolition of the requirement for consideration but suggested that:

> "It should be established that where consideration is provided by a party to the contract, that should be sufficient to constitute lawful rights in a third person as contemplated by, and in accordance with the terms of, the contract." (para 1.4)

In the result, s 8, as well as giving the beneficiary the right of action in his own name, makes clear that relief "shall not be refused on the ground that the beneficiary is not a party to the deed or contract in which the promise is contained or that, as against the promisor, the beneficiary is a volunteer". If I may say so, the draftsman dealt with the problems of privity and consideration with clarity, obviating the difficulties which the West Australian and Queensland Acts may have passed over.

The purpose of the New Zealand legislation is set out in para 8.1 of the Report. It was proposed to:

> "enable a third party to enforce a term of a contract intended by the contracting parties to benefit him, or to give to him the benefit of any immunity or limitation of liability which the

> contracting parties intended to apply to him, in cases where it appears, as a matter of construction of the contract, that the contracting party has also intended that the beneficiary would have rights of enforcement of that term. We propose to leave unchanged the principle that no burden can be cast upon a third party by a contract in which he is not joined, but it will be necessary to ensure that where the benefit, immunity or limitation is conditional, the third party should not be entitled to enforce it unless the conditions have been satisfied."

The Act implemented these proposals. S 4 is worded somewhat more happily than the Queensland provision. It provides:

> "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 (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise: Provided that this section shall not apply to a promise which, in the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person."

The section lends definition to the question of what is required by way of identifying the beneficiary. The reference to a "class" avoids the problem referred to by the author of the note on Westralian Co-operative I have earlier quoted. Furthermore, the definition of "benefit" in s 2, as including any immunity, seeks to cover the point that exemptions are not promises. The impact of the definition is rather blunted by the fact that "beneficiary" is defined in narrower terms by reference to a promise. If the Act operates as it was obviously intended to, then the elaborate

analysis of documents and relationships which, even after the decisions in New Zealand Shipping Co Limited v Satterthwaite[58] and Port Jackson Stevedoring Pty Limited v Salmond & Spraggon (Aust) Pty Limited,[59] continues to plague us in relation to exemption clauses will be consigned to the dustbin of history. A further indication of the desired width of coverage may be seen in the definition of "contract" which expressly includes oral contracts.

It has been suggested[60] that s 4 confers a prima facie entitlement on the third party and that the onus lies on whoever wishes to assert that an enforceable right was not intended to be conferred. It will be interesting to see if the test of intention is held to be objective or subjective.[61]

The New Zealand Committee recommended a different course to be followed from that adopted by the Australian legislation in relation to the ability of the parties to the contract to vary or discharge it. The New Zealand Committee deliberately did not travel the route accepted by the Queensland and West Australian legislation of terminating the opportunity to vary or revoke the contract at the point of acceptance or adoption by the beneficiary. The view was taken that such a requirement would be indistinguishable from a trust and that, if the parties had wished to create a trust, they would have done so. With all respect, this reasoning lacks conviction. It assumes that the parties had reasonably

sophisticated legal advice as well as a clear formulation of their needs and wishes. The same assumption underlies the proposition advanced that "to take away the parties' normal right to vary or revoke could be to guarantee to the beneficiary contractual rights which the parties no longer intended he should have".[62]

The cut off point suggested, in the absence of some express provision to the contrary, was any time before the beneficiary, having knowledge of the existence of the promise, by act or omission, materially altered his position in reliance upon the promise or has recovered judgment against the promisor, whichever occurred first. This proposal emerged as s 5 of the Act. So far, to all intents and purposes, the provision sounds in the same terms as the Second Restatement. However, the recommendation then continues. Most interestingly, jurisdiction was proposed to be conferred on a court to authorise the contracting parties to vary or discharge a contract without the beneficiary's consent even after material alterations of position had taken place. In such an event, the court was to have jurisdiction to award compensation where the beneficiary suffered damage as a result of his reliance upon the promise. S 7 of the Act gave effect to this recommendation. Compensation shall be such sum "as the Court thinks just". It is illuminating in this context to read what Professor Coote, a member of the Committee, had to say:[63]

> "The next question, then, is upon what basis should that compensation be assessed? Clearly, if compensation under s 7 were always to cover the full expectation loss of the beneficiary, that is, the full value of the promise, there would be little point in having the section at all. The intention of the Contracts and Commercial Law Reform Committee was that, in general, compensation under s 7 would be confined to the reliance loss of the beneficiary, since, ex hypothesi, the rights of the beneficiary would no longer stem from the contractual will of the parties. Accordingly he or she should, prima facie, be entitled only to be returned to the position he or she would have been in had the reliance not occurred. It is for that reason that s 7(2)(b) is expressed as it is. The beneficiary must have been injuriously affected by the reliance and it is for the injurious reliance the court is to award compensation. But the Committee also intended that, if it were no longer possible for the beneficiary to be returned to his or her previous position, he or she might recover the full expectation loss. That is why the court is to award such sum as it thinks just. Returning to the example of the employer and the employee who wanted to cancel the widow's benefit, you will remember that the wife, in reliance, had not taken out life endowment insurance or medical insurance. Suppose she is now thirty years of age and in good health. She can still take out life and medical insurance and her only reliance loss is that she has now to pay higher premiums. That difference might form an appropriate basis for her compensation. On the other hand, suppose the wife is now aged sixty-one years, is in poor health and finds she cannot now get either endowment or medical insurance. In such a case, there might be some argument for giving her something closer to the present value of the promised pension."

The New Zealand approach to the problem of variation or discharge of the contract appears to have some advantage over the Australian legislation. For example, in the case of a benefit conferred gratuitously on a third party, it may be fair to allow a mutual recission between the parties to the contract due to some change in circumstances arising after the assent or adoption by the third party. The

Australian legislation does not contemplate such an event occurring.

A somewhat unfortunate feature of the New Zealand legislation has been said to be the furtherance of the tendency to give courts the power to interfere with the contractual arrangements of parties. This, it is said, is particularly unfortunate where the only guidance given to the court is that the order be "just and practicable" (s 7). Whilst I understand the reasoning which prompts the criticism, the fact is that legislation of this kind is now so commonplace that it is too late to attempt to turn back the tide.

There is no explanation as to why no clear cut provision, as recommended in the Report, is made in the Act requiring the beneficiary to carry out any duty or obligation cast upon him by the contract as a condition for obtaining the benefit. It may be that the draftsman considered that the work was done by s 9(2). That provides:

> "Subject to subsections (3) and (4) of this section, the promisor shall have available to him, by way of defence, counterclaim, set-off, or otherwise, any matter which would have been available to him -
>
> (a) If the beneficiary had been a party to the deed or contract in which the promise is contained; or
>
> (b) If -
> (i) the beneficiary were the promisee; and
> (ii) the promise to which the proceedings relate had been made for the benefit of the promisee; and
> (iii) the proceedings had been brought by the promisee."

The qualification in subs 4 is of interest. That provides:

> "Notwithstanding subsections (2) and (3) of this section, in the case of a counterclaim brought under either of those subsections against a beneficiary, -
>
> (a) The beneficiary shall not be liable on the counterclaim, unless the beneficiary elects, with full knowledge of the counterclaim, to proceed with his claim against the promisor; and
>
> (b) If the beneficiary so elects to proceed, his liability on the counterclaim shall not in any event exceed the value of the benefit conferred on him by the promise.

It may be exhibiting overmuch tenderness for the beneficiary to have such a provision, particularly subs 4(b). This was not a provision in the draft Bill annexed to the Report. The provision of the West Australian Act requiring all parties to the contact to be before the court is also absent from the New Zealand Act. However, this is of little moment in view of the procedures available for joinder of parties. The Westralian Case clearly indicated the need for all parties to be before the court.

Commonwealth

Although restricted to the field of insurance, the entry of the Commonwealth in this field of reform is full of interest. S 48 of the Insurance Contracts Act 1984 provides:

> "(1) Where a person who is not a party to a contract of general insurance is specified or referred to in the contract, whether by name or otherwise, as a person to whom the insurance cover provided by the contract extends, that person has a right to recover the amount of his loss from the insurer in accordance with the contract

notwithstanding that he is not a party to the contract.

(2) Subject to the contract, a person who has such a right -
(a) has, in relation to his claim, the same obligations to the insurer as he would have if he were the insured; and
(b) may discharge the insured's obligations in relation to the loss.

(3) The insurer has the same defences to an action under this section as he would have in an action by the insured.

(4) Where a contract of life insurance effected by a person upon his own life is expressed to be for the benefit of a person specified or referred to in the contract, whether by name or otherwise, that second-mentioned person has a right to recover the moneys payable under the contract from the insurer in accordance with the contract notwithstanding that the second-mentioned person is not a party to the contract, and the moneys payable under the contract do not form part of the estate of the person whose life is insured and are not subject to his debts.

(5) Section 94 of the Life Insurance Act 1945 does not apply in relation to a policy within the meaning of that Act that is entered into after the commencement of this Act."

A commentator has suggested that in practice the section will not have great import because insurers have generally ignored the privity rule and have honoured their promises to third party beneficiaries.[64] This would be news to the parties in Vandepitte v Preferred Accident Insurance Corporation of New York.[65] The Australian Law Reform Commission in its Report on Insurance Contracts[66] gives an interesting example of circumstances where fairness demanded a provision of the kind eventually enacted.[67]

It is a matter for suprise that the legislation I have

considered, in a field bristling with difficulties, has not thrown up any problems for argument in the courts. It demonstrates that, at the very least, reform is on the right path. With the advantage of a number of Law Reform Commission reports, and the experience gained from the operation of legislation for a number of years, there is no proper reason for the other Australian States to refrain from correcting what I suggest is an undoubted blot on the law. If the legislatures continue to practise abstinence it may be necessary for the High Court to take up the cudgels and alter the law so as to allow a promisee to recover from the promisor the damages suffered by the beneficiary and account to the latter for moneys received on that account.

* * *

1 Tweeddle v Atkinson (1861) 1 B&S 393; Dunlop Pneumatic Tyre Company Limited v Selfridge & Company Limited 1915 AC 847; Coulls v Bagot's Executor & Trustee Co Limited (1967) 119 CLR 460

2 eg Crow v Rogers (1724) 1 Str 592 (93 ER 719); Forster v Silvermere Golf & Equestrian Centre (1981) 125 SJ 397

3 (1968) 8 West Aust L Rev 378

4 (supra) Barwick CJ at 478, Taylor and Owen JJ at 486, Windeyer J at 492

5 (1983) 5 Otago L Rev 316

6 Kepong Prospecting Limited v Schmidt 1968 AC 810, 826

7 QLRC 16 p 37

8 Cheshire & Fifoot Law of Contract (10th ed) p 407; Ryan An Introduction to the Civil Law pp 67-69

9 Beswick v Beswick 1968 AC 58

10 Treitel "Specific Performance and Third Parties" 30 MLR 687

11 Beswick (supra) 73, 81, 83, 102

12 Ross v Caunters 1980 Ch 297

13 Cathels v Commissioner of Stamp Duties 62 SR(NSW) 455 at 472: cf 21 ALJ 422; the speeches in Woodar Investment Development Limited v Wimpey Construction UK Limited 1980 1 AER 571 have done little to clarify this question

14 Coulls (supra) Windeyer J at 501; Beswick (supra) Lord Pearce at 88

15 1975 3 AER 92

16 (1880) 16 ChD 290, 321

17 1980 1 AER 571

18 Supra #9

19 Yates (1976) 39 MLR 202

20 1962 AC 446

21 Carver's Carriage by Sea (12th ed) Vol 2, 1241; Coote Exception Clauses

22 (1956) 95 CLR 43

23 Infra #58, #59

24 Harmer v Armstrong 1934 Ch 64

25 1944 Ch 83 at 104

26 Green v Russell 1959 2 QB 226

27 Supra #16

28 Wilson v Darling Island Stevedoring & Lighterage Co Limited (1956) 95 CLR 43, 67

29 Command 5449 p 28

30 (1848) 2 Ph 774

31 1926 AC 108

32 Treitel The Law of Contract (6th ed) p 544

33 cf Westpac Banking Corporation v Commonwealth Steel Co Limited (1983) 1 NSWLR 735 at 740

34 cf 60 ALJ 623

35 Hill v Gomme (1839) 5 My&Cr 250, 254

36 Supra #9

37 Command 5449 p 25 et seq

38 (1859) 20 NY 268

39 (1985) 98 Harv LR 1109

40 cf (1957) 57 Colum L Rev 406; (1975) 88 Harv L Rev 646; (1982) 67 Cornell L Rev 880

41 Supra #37

42 Anson's Law of Contract (25th ed) p 438

43 (1982) 2 Oxford Jnl of Legal Studies 448

44 Supra #17

45 (1954) 27 ALJ 175

46 There is a useful comparison of the presently existing Australian legislation in a note in (1984) 58 ALJ 5

47 Supra #9

48 1981 WAR 241

49 ibid at 245

50 ibid at 251

51 (1951) Vol 4 pp 288, 289

52 15 West Aust L Rev 411 at 416

53 But see #21

54 QLRC 16

55 Supra #37 at 30

56 Hardie Boys J, High Court of New Zealand, unreported, 1 November 1983 and Savage J on 20 November 1984

57 (1986) 12 NZ Univ LR at 45 et seq

58 1975 AC 154

59 (1980) 144 CLR 300

60 (1983) 4 Auckland Univ LR 329 at 344

61 cf Air Great Lakes Pty Limited v K S Easter (Holding) Ltd (1985) 2 NSWLR 309; Mulroney v Laurence (unreported, New South Wales Court of Appeal, 28 February 1986)

62 Professor Coote, April 1984 Recent Law 107

63 ibid at 114

64 Callaghan "The New Insurance Legislation", seminar paper to the Law Society of South Australia Inc, Adelaide, 17 April 1985

65 1933 AC 70

66 ALRC 20

67 ibid para 122 et seq