# CASE NOTE

## PRIVATE INTERESTS IN WORLD HERITAGE PROPERTIES: PEKO-WALLSEND VERSUS THE COMMONWEALTH

The implementation of the World Heritage Convention in Australia has been marked by a series of conflicts. The most publicized have taken place at the governmental level and have involved issues of constitutional law.[1] Recently, however, the issue of the rights of those with private interests in property proposed for World Heritage nomination has become the subject of litigation in the administrative law arena.

This case note consists of an analysis of the decisions in *Peko-Wallsend v The Minister for Arts, Heritage and the Environment*[2] and, an appeal, *The Minister for Arts, Heritage and the Environment v Peko-Wallsend.*[3] Some general conclusions are drawn about the rights of those with private interests in World Heritage properties.

The Peko-Wallsend Case arose when the applicants sought to challenge a Federal cabinet decision to nominate Stage 2 of the Kakadu National Park for World Heritage listing. The nomination was submitted to the World Heritage Committee in accordance with Article 11 of the World Heritage Convention. By this Article States parties undertake to submit suitable properties to the World Heritage Committee for consideration for inclusion on the World Heritage List. The World Heritage List is an inventory of properties forming part of the cultural and natural heritage, as defined in Articles 1 and 2 of the Convention, which the World Heritage Committee considers as having universal value in terms of such criteria as it shall have established.[4]

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[1] See *Commonwealth v Tasmania* (1983) 46 ALR 623 (the *'Tasmanian Dam Case'*) and *Richardson v The Forestry Commission* (1988) 62 ALJR 158 (the *'Tasmanian Forests Case'*). For commentary on these cases see Bates, G M, The Tasmanian Dam Case and Its Significance in Environmental Law, *Environmental and Planning Law Journal,* vol 1, Dec 1984, No 4 at p 325 and Tsamenyi, B M and Bedding, J M, 'The World Heritage Convention in the High Court: A Commentary on the Tasmanian Forests Case', *Environmental and Planning Law Journal*, vol 5, Sept 1988, No 2 at p 127.

[2] (1986) 70 ALR 523.

[3] (1987) 75 ALR 218.

[4] Article 11.2. These criteria are set out in the 'Operational Guidelines for the Implementation of the World Heritage Convention', UNESCO document WHC/2, revised

Stage 1 of the Park had been inscribed on the List in 1981. The nomination of Stage 2 for inclusion on the List was to have been considered by the World Heritage Committee at its annual session to be held in the week commencing 24th November 1986.

The applicants had been accumulating mining interests in some 30 small areas of Kakadu Stage 2, making up about one percent of the total area of that Stage, since the early 1970s. They feared that a consequence of the listing of the property would be to make those interests liable to be extinguished under the *World Heritage Properties Conservation Act* 1983.

The World Heritage Properties Conservation Act enables the Commonwealth to fulfil its obligations under Article 4 of the World Heritage Convention to ensure 'the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage' to the utmost of its resources. The Act provides that the Governor-General may declare any 'identified property' that is in danger of being damaged or destroyed to be property to which one of the protective provisions of the Act applies.[5] An 'identified property' is property which falls into one of the following categories: property that is subject to any inquiry established by the Commonwealth to consider whether it forms part of the cultural or natural heritage; property that is subject to World Heritage nomination; property included on the World Heritage List; or property which forms part of the cultural or natural heritage and is declared by regulations to do so.[6]

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1987. Cultural properties must also satisfy a test of authenticity while natural properties must comply with a test of integrity.

[5] By sections 6, 7 and 8.

[6] This definition was inserted in March 1988 by the *Conservation Legislation Amendment Act*. Previously the *Heritage Act* had defined 'identified property' in the following way:

> (a) property forming part of the cultural or natural heritage, being property that -
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> (i) the Commonwealth has, under Article 11 of the Convention, submitted to the World Heritage Committee, whether before or after the commencement of this Act, as suitable for inclusion in the World Heritage List provide for in paragraph 2 of that Article; or
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> (ii) has been declared by regulations to form part of the cultural or natural heritage; or
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> (b) any part of property referred to in paragraph (a).

The new definition was designed to be more in line with the format of the Convention itself. As Mr Punch pointed out in the second reading speech, 'the Act would follow the three stages of the World Heritage Convention; identification of property, nomination and listing. Interim protection would be afforded at each stage' - House of Representatives Hansard, 5th May 1983 at p 311. The amendment, by including properties subject to an inquiry into their World Heritage values, took account of the High Court finding in the *Tasmanian Forests Case* that the Commonwealth could legally provide interim protection for properties pending their identification as part of the heritage of the world, where there was a reasonable judgment made that obligations could arise under the Convention in relation to these areas - see Tsamenyi and Bedding, *op cit* n 1 at p 237.

The protective provisions of the Act are sections 9, 10 and 11. Section 9 provides that: where an act is prescribed for the purposes of this subsection in relation to a particular property to which this section applies, it is unlawful, except with the consent in writing of the Minister, for a person to do that act, or to do that act by a servant or agent, in relation to that property.[7] Section 10 makes unlawful a series of listed activities or any other activities declared to be unlawful under the section, when they are carried out without the consent of the Minister by trading or financial corporations on property to which the section applies.[8] Section 11 prohibits listed activities, or any additional activities declared to be unlawful, from being carried out without the consent of the Minister on Aboriginal sites which are sites to which the section applies.[9]

The applicants in the Peko-Wallsend case claimed that, in view of the potential effect of nomination (which would make the property an identified property under the *Heritage Act*) on their private interests in Kakadu Stage 2, the rules of natural justice or procedural fairness required that they be given an adequate opportunity to be heard before a decision to nominate was made, yet they were afforded no such opportunity.

An interlocutory mandatory injunction was granted to the applicants on 24th November 1986. Beaumont J ordered that the respondents should inform the World Heritage Committee that the Federal Court had directed them to inform the Committee of the following:

> (a) that the applicants claim to be entitled to certain mining rights over an area of approximately 65 square kilometres situated within the boundaries of the Stage 2 extension which area is described in the schedule hereto;
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> (b) that the applicants have recently commenced proceedings in the Federal Court of Australia seeking to restrain the consent of the Commonwealth of Australia to the listing and to require that consent be withdrawn;
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> (c) that the proceedings have been fixed for the final hearing to commence on 8th December 1986;

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[7] This section was also amended by the *Conservation Legislation Amendment Act* of 1988. The general provision replaced the previous section 9, which had been the subject of litigation in the *Tasmanian Dam Case*, and had been partly invalidated in that case because it was not sufficiently appropriate and adapted to achieving the aims of the convention.

[8] Section 10 relies on the Commonwealth's power in paragraph 51(xx) of the Constitution over trading and financial corporations.

[9] Section 11 relies on the Commonwealth's power in paragraph 51 (xxvi) to make laws with respect to the people of a particular race.

(d) that it is anticipated that the proceedings will conclude on 12th December 1986 and that the judgment of the Court will be given shortly thereafter;

(e) that with a view to preserving the *status quo* until judgment in the proceedings in respect only of the area described in the schedule (and not otherwise), the Federal Court of Australia has directed the respondents to request the World Heritage Committee to defer until further notice its consideration of so much of the application for listing as includes the area described in the schedule.[10]

An appeal to the full court against these orders failed and special leave to appeal was refused by the High Court of Australia.[11] The Australian Government thus asked the World Heritage Committee to defer until its 1987 meeting the application in respect of Stage 2, a request which was acceded to.[12]

Judgment in the case was handed down on 22nd December 1986 when Beaumont J made a final declaration that the decision of the Executive to nominate Stage 2 of the Kakadu National Park for inclusion on the World Heritage List was void. The issues in the case related to the nature of the decision made by the Cabinet, the effect of that decision on the applicants and to whether such a decision was judicially reviewable generally, and subject to accordance of natural justice in particular. Amongst the specific issues raised by the case were two important questions which have not, apparently, been previously litigated: whether a decision of a Westminster-style Cabinet may be the subject of judicial review and whether there exists any obligation to afford natural justice to persons whose interests are likely to be affected adversely by a proposed Cabinet decision.[13]

In refuting the applicants' claim that the decision to nominate was judicially reviewable, the respondents had argued that the decision in question involved the royal prerogative to make and implement treaties and therefore was not susceptible to any kind of judicial review. Beaumont J rejected this suggestion, finding that the source of the power to nominate was multiple: first, the common law prerogative; second, the executive powers conferred by section 61 of the Constitution; third, the provisions of the *World Heritage Properties Conservation Act* so far as they pick up the process of submission under Article 11 of the Convention.[14]

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[10] See (1986) 68 *ALR* 394.

[11] *Ibid.*

[12] See UNESCO Document CC 86/Conf 003/Col 3.

[13] See Wilson J in *Minister for Arts, Heritage and the Environment v Peko-Wallsend* at p 229.

[14] See *Peko-Wallsend v Minister for Arts, Heritage and Environment* at p 548. The *Heritage Act* in fact makes no mention of any Cabinet power to nominate a property for listing in accordance with Article 11.

He found that even if the decision to nominate had its sole source in the prerogative, it would not follow that the decision would thereby be immune from judicial review.[15] Citing authority in support of the view that the exercise of statutory and even executive power by representatives of the Crown was judicially reviewable, Beaumont J concluded that:

> Assuming for the purposes of the argument that the decision to nominate Kakadu Stage 2 for listing was derived solely from the prerogative, it would not follow that such an exercise of executive power could not be subject of judicial review on the grounds of procedural impropriety, at least where private property rights or privileges of the kind held by the applicants are involved.[16]

Clearly, however, the decision to nominate, as well as not involving a statutory power, did not involve the Executive through the Governor-General in Council. The decision was made by the cabinet, exercising the prerogative to enter into, and take action under, international agreement.

Beaumont J then considered the question of whether it could be said that the applicants would be prejudiced in relation to their property or privileges by reason of the decision to submit Kakadu Stage 2 for inclusion of the World Heritage List and to whether they were thus entitled to natural justice in the making of the decision. Looking at the nomination in the context of the *World Heritage Properties Conservation Act*, Beaumont J found that the nomination of a site has a dual aspect: an international aspect in terms of the provisions of the Convention, and a municipal aspect as a condition precedent to the availability to the government of the provisions of the *Heritage Act*.[17] His Honour concluded that it is only reasonable to suppose that the Government will seek to invoke any power conferred upon it under the municipal law with a view to eliminating, so far as possible, any mining activity in Stage 2.[18] Indeed, the judge stated the Government is obligated under the Convention to take all appropriate steps to procure the listing of the site and thereafter to take appropriate steps to secure its protection while there is no obligation on the Commonwealth enforceable under domestic law to provide protection for property rights.[19] Referring to the fact that property rights and privileges have traditionally been regarded as a class of case which attracts the rules of natural justice, Beaumont J concluded that the probability that the applicants' interests would be affected in this way meant that they could challenge the decision to nominate and they were entitled to be accorded natural justice.

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15 *Ibid* at p 549.
16 At pp 550-551.
17 *Ibid*.
18 *Ibid*.
19 *Ibid*.

Moving to consider the question of what fairness required in all the circumstances of the case, the judge rejected the argument of the respondents that the applicants had in fact been given adequate opportunities to be heard and had availed themselves of these opportunities. The respondents pointed to the fact that the applicants had known for years of the proposal to nominate the area and had been making submissions to the Government on the issue over a considerable period.[20] Beaumont J was of the view that fairness required that the applicants be given reasonable notice of the proposal that on 15th or 16th September, the Cabinet nominate Kakadu Stage 2 and be given an opportunity to present a submission to Cabinet as a body in support of their case.[21] Finding that this had not been done, the judge declared the Cabinet decision void. In view of the potential impact of this decision on the nomination process, it is not surprising that the Commonwealth appealed this decision.

In *Minister for Arts, Heritage and the Environment v Peko-Wallsend*, the Full Court of the Federal Court of Australia overturned the decision of Beaumont J. All the appeal judges found that the decision to nominate was made under the prerogative and that such decisions may, in some circumstances, be open to judicial review. However, Bowen C J was of the view that the whole subject matter of the decision involved complex policy questions relating to the environment, the rights of Aboriginals, mining and the impact on Australia's economic position of allowing or not allowing mining as well as matters affecting private interests such as those of the respondents to the appeal.[22] He concluded that this put the decision beyond review by the court.

Sheppard and Wilcox JJ expressly stated that the case was not based on the exercise by Cabinet of any statutory power, but rather was an exercise of prerogative power.[23] Sheppard J was of the view that the Cabinet being essentially a political organisation not specifically referred to in the Constitution and not usually referred to in any statute, there is much to be said for the view that the sanctions which bind it to act in accordance with the law and in a rational manner are political ones with the consequence that it would be inappropriate for the court to interfere with what it does.[24] In any case, Sheppard J, along with Wilcox J, was of the view that the respondents had been given an adequate opportunity to put their case, through their various communications with the individual Ministers.[25]

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[20] At p 551.
[21] At p 552.
[22] At p 224.
[23] At p 226 and p 254.
[24] At p 227.
[25] At p 228 and p 254.

The main judgment was delivered by Wilcox J. While recognizing the difficulties in cases involving a challenge to a Cabinet decision, including difficulties of determining the motives and matters which were taken into account by a multi-member decision-maker and the confidentiality of Cabinet proceedings, Wilcox J was of the view that there is no reason of principle to deny relief where a case can be made out.[26] Wilcox J found, however, that the decision was not justiciable, not having deprived or altered any of the mining rights or obligations of Peko-Wallsend.[27] Nor did the decision attract the principles of natural justice, Peko-Wallsend having no 'legitimate expectation', as was required by Mason J in *Kioa v West.*[28] The decision to nominate Kakadu Stage 2 had no effect on the respondent's mining interests whatsoever; the only effect it had was the indirect one of making it possible that they could be affected at some time, if the government chose so to act.[29] As Wilcox J found, 'it is not enough that the subject decision might create a climate conducive to a subsequent decision adverse to the interests or expectations of some person'.[30] An additional argument against justiciability was the fact that the decision primarily involved Australia's international relations. Just as the court would not review a decision to enter into a treaty, so it would not review the decision to nominate Kakadu Stage 2 for recognition and better protection under the existing Convention.[31]

The appeal was thus allowed and the orders made by the learned primary judge were set aside. The Kakadu National Park Stage 2 was included with Stage 1 on the World Heritage List at the World Heritage Committee's meeting in November 1987.

Interestingly, the Commonwealth has not yet shown any indication of an intention to use the *World Heritage Properties Conservation Act* in relation to Kakadu National Park. It has chosen instead to rely on the *National Parks and Wildlife Act* 1975, under which the Kakadu National Park Stages 1 and 2 were declared. By an amendment to that Act in 1987[32], section 10(1A) was inserted which provides categorically that 'no operations for the recovery of minerals shall be carried out in the Kakadu National Park'.

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[26] At p 247.
[27] At p 252.
[28] (1985) 159 *CLR* 550 at pp 582-3.
[29] At p 252.
[30] *Ibid.*
[31] At p 253.
[32] No 15 of 1987.

## CONCLUSION

Had Beaumont J's decision not been overturned on appeal, the implications for the identification and protection of World Heritage properties in Australia would have been drastic. Any person with private proprietary rights or privileges in property proposed for World Heritage nomination would have been entitled to natural justice in the making of the decision to nominate. This despite the fact that such decisions are made by a political entity (the Federal Cabinet) in fulfilment of the Commonwealth Government's international legal obligations under the World Heritage Convention. It is clear that the decision to nominate an Australian property for the World Heritage List does not somehow extinguish all private interests in that land. As Barry Cohen, former Minister for the Environment has pointed out, 'there is ... a popular misconception fostered by some in the environment movement that listed areas pass into Federal ownership and assume sacred site status, prohibiting almost all human activity. That is nonsense.'[33] What listing, or nomination for listing, does mean for those with private interests in the land is that any activity which is likely to damage the World Heritage values of the property can be prohibited under the *World Heritage Properties Conservation Act.* Activities which are consistent with the protection, conservation and presentation of the World Heritage values of the property to the public can continue. Indeed, the Commonwealth does not have the constitutional power to prohibit such activities.[34]

There are large private land holdings in the Willandra Lakes World Heritage Region, where some farming activities take place; in the Great Barrier Reef a zoning system operates by which some areas are maintained in their pristine condition for scientific research, while tourist and fishing activities are encouraged in other zones; the tourist developments in the Uluru National Park and on the Lord Howe Island Group are testament to the fact that economic activity does not cease with World Heritage listing. Certainly, in areas which have been listed for their natural wilderness values, such as Tasmania's Western National Parks, the level of activity which is consistent with the World Heritage status of the area may be less. Even so, it is simply not true to say that World Heritage areas are 'locked up'.

It is worth noting that the *World Heritage Properties Conservation Act* has only been used to prohibit activities in two of Australia's seven World Heritage properties; namely, the Western Tasmanian Wilderness National Parks and the North-Eastern Tropical Rainforests. In all other cases the State and Commonwealth Governments and the respective National Parks and Wildlife Services have been able to develop

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[33] *The Bulletin*, May 24th 1988 at p 53.

[34] See the *Tasmanian Dam Case* and *Richardson v The Forestry Commission* (1988) 62 ALJR 158 - for commentary see Tsamenyi and Bedding, *op cit* at n 1.

management plans to ensure the protection of the properties within a framework of consistent activities.

Where the prohibitions under the *World Heritage Properties Conservation Act* amount to an acquisition of land, then the interested party will be entitled to just compensation.[35] Otherwise, the only redress for the person whose interests have been affected is political. It is clear following the decision in *Minister for Arts, Heritage and the Environment v Peko-Wallsend* that legal challenges seeking judicial review of a decision to nominate a property for listing are unlikely to be entertained by the courts.

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[35] Section 17 of the Act provides that 'acquisition of property' is to have the same meaning as in paragraph 51 (xxxi) of the Constitution. Section 17(2) states that 'where, but for this section, the operation of this Act would result in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay compensation of a reasonable amount to the person in respect of the acquisition'. In the event of a dispute proceedings may be instituted by the person in the Federal Court in order to have a reasonable amount determined - section 17(3).

# CASE NOTE

# TRIDENT GENERAL INSURANCE CO LTD

# V

# MCNEICE BROS PTY LTD

The High Court of Australia in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[1] has laid the foundation for re-examination of two of the fundamental principles of contract law, namely (1) the doctrine of privity of contract, and (2) the rule that consideration must move from the promisee.

In the seventeenth century there was no doubt that a person could maintain an action if they had suffered a loss as a result of a breach of a promise made by someone else to another person. As stated in *Provender v Wood*[2] '[a]nd the party to whom the benefit of a promise accrews, may bring his action'.[3] There was at this time a number of authorities consistent with this principle.[4] The development of the doctrine of consideration led to the first inroads into the rule of privity of contract. 'The right to sue came to be seen as depending upon the plaintiff showing that he had provided a sufficient reason to enforce the promise.'[5] In *Bourne v Mason*[6] the plaintiff did not recover because he 'did nothing of trouble to himself, or benefit to the defendant, but is a mere stranger to the consideration'.[7] From this decision until *Tweedle v Atkinson*[8] the issues of whether a third party could sue to enforce a promise made in a contract for their benefit was subject to conflicting decisions.[9] The decision of *Tweedle v Atkinson*[10] firmly established the principle that it was only parties to the contract who might enforce the obligations created in the contract. The plaintiff in that case sought to enforce a promise

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1 (1988) 62 ALJR (hereinafter cited as Trident).

2 (1630) Het 30 124 ER 318.

3 *Ibid.*

4 See for example *Manwood and Burstons Case* (1587) 2 Leon, 203, 74 ER 479; *Levett v Hawes* (1599) Cro Eliz 619, 652, 78 ER 860, 891; *Rippon v Norton* (1602) Cro Eliz 881, 78 ER 1106. R. Flannigan, *Privity. The End of a Era (Error)'* (1987) 103 LQR 546 contains a very good discussion of the historical foundation of the doctrine of privity of contract.

5 Greig D and Davis J, *The Law of Contract*, Law Book Company 1987 at 986.

6 (1670) 1 Vest 6, 86 ER 5.

7 *Ibid* at 6.

8 (1861) 1 B & S 393, 121 ER 762.

9 Compare *Carnegie v Waugh* (1823) 1 LJ (KB) 89 (Third Party could enforce the contract) with *Price v Easton* (1833) 4 B & Ad 433, 110 ER 518 (Third Party denied right to sue on the contract).

10 (1861) 1 B & S 393, 121 ER 762.

made by his father-in-law to his father that upon the marriage of the plaintiff, he would pay two hundred pounds to the plaintiff as a marriage settlement. The money was not paid and the plaintiff sued the executor of his father-in-law's estate but was held not entitled to enforce a promise made to his father and not to him.

From this time, the doctrine of privity has become regarded as a fundamental principle of English Law[11] though at times the doctrine has been questioned.[12] In Australia it has been said that it is an 'elementary general rule that only persons entitled to the benefits or bound by the obligation of a contract are the parties to it'.[13]

**The facts of Trident General Insurance Co Ltd v McNiece Bros Pty Ltd**

The respondent, McNeice Bros 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 the Appellant, Trident General Insurance Co Ltd. The Assured were defined as "Blue Circle Southern Cement Limited, all its subsidiary, associated and related Companies, all Contractors and Sub-Contractors and/or Suppliers'. The policy further provided that the

> The Insurance ... indemnifies the Assured against all sums which the Assured shall become legally liable to pay in respect of
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> (1) Death of or bodily injury to or illness of any person not being a person who at the time of the occurrence is engaged in and upon the service of the Assured under a Contract of service or apprenticeship ...

On the 4th July, 1979 Garry Hammon was seriously injured whilst driving a crane at the construction site. At the relevant time he was working under the direction of the McNeice site engineer. Hammond subsequently brought an action against McNiece Bros and recovered a sum of $541,768.16 less workers compensation payments already received.

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[11] See the judgment of Viscount Haldane LC *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847, 853.

[12] See the view of Lord Denning in *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, 514-515; *Drive Yourself Hire Co v Strutt* [1954] 1 QB 250, 272-274. See also English Law Revision Committee *Sixth Interim Report* Cmd 5449 para 48; Lord Reid in *Beswick v Beswick* [1968] AC 58, 72 Lord Scarman in *Wooder Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277, 300 and Lord Diplock in *Swain v Law Society* [1983] 1 AC 611.

[13] *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43, 80.

McNiece Bros sought indemnity from Trident General Insurance for the amount awarded to Hammond. The Appellants denied liability.[14]

McNeice Bros then brought an action in the New South Wales Supreme Court against Trident General Insurance seeking an indemnity. The matter came before Yeldham J at first instance. His Honour held that there was a contract between McNiece Bros and Trident General Insurance because McNiece Bros, through Blue Circle had provided consideration for part of the premium paid to the insurer. Accordingly McNiece Bros were entitled to an indemnity.

Trident General Insurance appealed to the Court of Appeal. McHugh JA, who delivered the principal judgment found that McNiece Bros had not provided consideration to the insurer, nor were they a party to the contract. However he went on to hold that a beneficiary under a policy of insurance can sue on that policy even though he is not a party to the policy and has provided no consideration.[15]

Trident General Insurance appealed to the High Court arguing that the doctrine of privity of contract and the notion that consideration must move from the promisee are fundamental principles of contract law and should not be overturned by judicial decision.

## The High Court Judgments

### *The Joint Judgment of Mason CJ and Wilson J*

This judgment was primarily descriptive in nature with their Honours undertaking an historical examination of the authorities concerning the doctrines of privity and consideration. They noted that 'This Court has hitherto accepted that a third party cannot sue upon a contract and that a stranger to the consideration cannot maintain an action at law upon it'.[16] After making this statement of principle they go on and consider the criticisms directed at the rules, including those criticisms made by United Kingdom Law Revision Committee[17], together with criticism from the judiciary.[18] They then note the statutory exceptions to the rules.[19] After stating that 'There is much substance in the criticisms directed at the

[14] This statement of facts is derived from the joint judgment of Mason CJ and Wilson J in *Trident* (1988) 62 ALJR 508, 509-510.

[15] For a summary of the lower court proceedings see the judgment of Mason CJ and Wilson J *ibid* at 510-511. The decision of the Court of Appeal is recorded at (1987) 8 NSWLR 270.

[16] *Trident* (1988) 62 ALJR 508, 511.

[17] *Ibid* at 511-512.

[18] *Ibid* at 512.

[19] *Ibid*.

traditional common law rules'[20], their Honours consider some of the problems generated by the doctrine of privity[21] concluding that 'In the ultimate analysis the limited question we have to decide is whether the old rules apply to a policy of insurance ... [and] we conclude that the principled development of the law requires that it be recognized that McNiece was entitled to succeed in the action'.[22]

The significance of the joint judgment is unclear. After an exhaustive examination of the authorities concerning the common law principles and of the criticisms of the rule they resolve the matter by enacting a limited exception to the doctrine of privity of contract and the rule that consideration must move from the promisee. The limited exception is to apply in cases involving policies of insurance. In this writer's opinion a more principled development of the law would necessitate not the making of an exception to the traditional position but the application of a flexible doctrine that would mitigate against any harshness of the strict common law position.

*Gaudron J*

Her Honour achieved the same result reached by Mason CJ and Wilson J. However, she differed in two important aspects. First, in no way did she abrogate the doctrine of privity of contract or the notion that consideration must move from the promisee. Second, she allowed the third party the right to bring an action to secure the benefit of the promise. However, the right was not one to sue on the contract but a right independent and separate from the contract. The right to bring the action arose from the concept of unjust enrichment as accepted by the High Court in *Pavey and Mathews Pty Ltd v Paul.*[23] Her Honour quoted[24] from the judgment of Deane J in *Pavey and Mathews Pty Ltd v Paul.*[25]

> That is not to deny the importance of the concept of unjust enrichment in the law of this country. It constitutes a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination by the ordinary processes of legal reasoning, of the question whether the law should, ;in justice

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[20] *Ibid.*

[21] See for example the discussion relating to the trust of contractual promise. *Ibid* at 513-514.

[22] *Ibid* at 515.

[23] (1987) 162 CLR 221.

[24] *Trident* (1988) 62 ALJR 508, 538.

[25] (1987) 162 CLR 221, 256-257.

> recognize such an obligation in a new or developing category of case'.

Accordingly, applying this notion of unjust enrichment to the facts before her, she states in dismissing the appeal:

> In my view 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.[26]

Her Honour goes on to comment that the existence of qualifications and exceptions to the rules of privity and consideration do not obviate the need for unjust enrichment but rather 'should be seen as demonstrating the necessity for the recognition of such an obligation.[27]

The judgment of Gaudron J is in my submission consistent with precedent, acceptable on the facts and develops the law in a logical orderly manner. Implicitly her judgment recognizes the continuing role of precedent but through the imposition of the concept of unjust enrichment her Honour is able to achieve a result consistent with what the justice of the case demands.

*Toohey J*

The judgment of Toohey J is very similar to that of Mason CJ and Wilson J. After consideration of the criticisms emanating from both England and Australia he states that the rules in respect of consideration and privity are 'not so well entrenched as to be incapable of change'.[28] His Honour then formulates his *ratio decidendi* in these terms:

> 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 order 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

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[26] *Trident* (1988) ALJR 508, 538.
[27] *Ibid.*
[28] *Ibid* at 535.

> to the insurer and notwithstanding that the contractor is not a party to the contract between the insurer and assured.[29]

His Honour's judgment like that of the joint judgment is restricted to policies of insurance. The important of this decision to contract law generally is similarly unclear.

*Brennan J*

After a brief recitation of the facts, his Honour considers first the 'declaration by the Court of Appeal that policies of liability insurance are a common law exception to the doctrine of privity of contract'.[30] His Honour, after reference to factors such as commercial necessity, commercial practice, widespread use of this type of insurance policy and statutory inroads into the doctrine[31] states 'To hold that policies of liability insurance are an exception to the doctrine of privity, some criterion must be found to distinguish the exception from the general rule. I can find none.'[32] He then considers the historical development of the rule and the criticisms that it has attracted concluding that the doctrine has been settled and is one of general application.[33] His Honour was of the view that the question before the court was whether the doctrines of privity and consideration should be overruled.[34] After discussion of the law of trusts, estoppel and damages[35] he resolves that the appropriate development of the law is in these areas and not to 'turn aside from the familiar path of privity, trust, agency and estoppel'.[36] Accordingly the appeal was allowed.

His Honour's judgment is orthodox and along the lines of recognized judicial method.[37] It is very difficult to find any reason in logic or policy for admitting a limited exception to the doctrine of privity. However, the appropriate direction of the law may not exist along the familiar path of trust, agency and estoppel but along the not so familiar path of unjust enrichment as proffered by Gaudron J.

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[29] *Ibid* at 536.
[30] *Ibid* at 516.
[31] *Ibid*.
[32] *Ibid*.
[33] *Ibid* at 517.
[34] *Ibid* at 518.
[35] *Ibid* at 519-522.
[36] *Ibid* at 522.
[37] See Sir Own Dixon 'Concerning Judicial Method' in *Jesting Pilate* (1965) Law Book Co, p 152, 158.

*Dawson J*

This judgment is very similar to that of Brennan J. His Honour comments that the invitation by counsel was 'not so much to engage in judicial creativity as to engage in the destruction of accepted principle'.[38] His Honour was not prepared to do this. 'The role of the Court must be limited ... it is neither a legislature nor a law reform agency. It would do more harm than good to attempt to reach a right result by the wrong means.'[39]

*Deane J*

His Honour's judgment is similar to that of Gaudron J in that he utilizes another legal principle to the facts before him rather than enact a limited exception to the rules of privity and consideration. The legal principle that he adopts, however is that of the trust. He concludes:

> I am of the view that a third party assured under a policy of liability insurance will ordinarily be entitled to maintain proceedings to enforce the promise to indemnify him if the policy expresses or manifests an intention that the third party should have an enforceable right to insist upon the benefit of the indemnity ... I am unable to take the final step of seeing McNiece's right to obtain the benefit of the indemnify as arising otherwise than under a trust of the benefit of the insurer's promise.[40]

Accordingly, having found that *prima facie* a trust was created he deemed the appropriate order was to stand the matter over allowing the parties to file papers alleging the existence of a trust. Interestingly, considering Gaudron J's judgment, he was not prepared to consider the application of estoppel or unjust enrichment as they had not been argued before him nor had they been argued in the lower courts.[41]

## Significance of the Decision

The significance of this decision is difficult to estimate. Three of the seven judges (Mason CJ, Wilson J and Toohey J) all created a limited exception to the doctrine of privity. If there is no reason in logic or policy[42] for this exception from the general principle, then all contracts for

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[38] *Ibid* at 531.

[39] *Ibid* at 532.

[40] *Ibid* at 527.

[41] *Ibid* at 525.

[42] See the comments of Brennan J. *Ibid* at 516.

the benefit of third parties will possibly come under review. Alternatively it may be argued that as the other four judges did not create any exception to the doctrine of privity, in essence therefore reaffirming the principle, third party beneficiaries of a contract may have no reason to consider themselves as having a right of action based on the contract. In this writer's view the correct direction for the Court lies not in re-examination of the doctrine of privity and consideration but in the application of doctrines such as trust, estoppel and unjust enrichment to the obligations created in the contract. The third party would then have an action 'having its source in law rather than in the contract'.[43] The advantage of this approach is that the law will not be seen as reversing 120 years of settled doctrine but rather as applying a flexible and discretionary concept to suit the needs of the particular facts before the court. In this way the law will develop in a principled and orderly manner with an underlying stability and certainty but retaining the discretion to achieve a right result by the right means.

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[43] Per Gaudron J. *Ibid* at 537.