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Précis Paper

Trident v McNiece – 30 Years On

An in-depth discussion of the seminal insurance contract case of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, and its repercussions for the doctrine of contractual privity.

Discussion Includes

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Précis Paper

Trident v McNiece – 30 Years On

1. In this edition of BenchTV, Don Grieve QC (Barrister – Sir Anthony Mason Chambers, Sydney) and Stephen Epstein SC (Barrister – Nigel Bowen Chambers, Sydney) discuss the seminal insurance contract case of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, and its repercussions for the doctrine of contractual privity.

Background to the case

2. *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 ("*Trident v McNiece*") was originally decided in April 1985 in the Commercial Division of the Supreme Court of NSW by Yeldham J. It was then appealed to the NSW Court of Appeal, and finally to the High Court. Stephen Epstein SC and Don Grieve QC both appeared at trial before Yeldham J.

3. Don Grieve QC's involvement in the case began with his being briefed by law firm Sly & Russell in 1984 to advise a Mr Tony Sherlock, who had been appointed the receiver of McNiece Bros Pty Ltd ("McNiece") by the ANZ Bank. Mr Sherlock presented Don Greive QC with McNiece's statement of claim against two insurers, National Employer's Mutual (NEM) and Trident General Insurance (Trident).

Facts

4. McNiece had entered into a contract with Blue Circle Southern Cement Ltd ("Blue Circle"). Under this contract, McNiece was to construct an extension to a cement manufacturing plant in the Southern Tablelands. During the course of the work covered by the contract, one of the workers engaged by McNiece, a Mr Gary Hammond, was seriously injured by one of McNiece's mobile cranes, and sued McNiece for damages.

5. Hammond's action against McNiece came on for hearing in 1984, shortly before Don Grieve QC was presented with McNiece's statement of claim. The defence of this action had been undertaken by McNiece's public liability insurer, however, on the eve of the trial, that insurer disclaimed liability, asserting that NEM, McNiece's workers' compensation insurer, ought to have covered it.

6. Although McNiece applied for an adjournment, this was refused by the trial judge, Enderby J, and the action was heard in McNiece's absence. Enderby J found in favour of Hammond for a sum of $540,000.

7. The fact that Enderby J did not allow McNiece to join NEM and Trident in this action left McNiece in a position where he had to bring a separate action against the two insurers.

8. McNiece's assets were insufficient to meet its liability to the bank, and in light of this, Mr Sherlock's concern as McNiece's receiver was whether or not there was a likelihood that he or the bank could be liable to Hammond if Mr Sherlock were to discontinue the action. McNiece was advised that from a legal perspective, Mr Sherlock, on behalf of the bank and as the receiver of McNiece, was entitled to discontinue the action. However, from a moral perspective, it could be argued that the action, being maintained for the ultimate benefit of Hammond, ought to have been maintained. Ultimately, the bank decided that it would undertake the action.

McNiece's respective claims against NEM and Trident

9. McNiece's claim against NEM was propounded on the basis that as Hammond was one of its employees, NEM, under the statutory policy it had issued, was liable to indemnify McNiece.

10. McNiece's claim against Trident was more complicated, however. Blue Circle had negotiated an insurance contract with Trident under which the insured parties were described as being "Blue Circle, all its subsidiary and related companies, its contractors, subcontractors and suppliers". Mc Niece's case against Trident was that McNiece was within that class as a contractor, and therefore entitled to be indemnified under that policy. This proposition clearly invoked the doctrine of contractual privity which can be stated as such: where A and B have made a contract under which A, upon the occurrence of a certain event, agrees to pay C a sum of money, C cannot sue to enforce that contract since it is not a party to it, and has provided no consideration for A's promise.

11. It was this doctrine of privity that McNiece challenged in its case against Trident.

Yeldham J and his decision at first instance

12. Yeldham J was a judge known for his strong sense of fairness, something which was evident in the case of *Fairey Australasia v Joyce* [1981] 2 NSWLR 314. In that case, his Honour made an unusual pre-trial direction to ensure fairness for the plaintiff, by insisting that the matter would not proceed unless the defendant air conditioning manufacturer arranged to have the air conditioning in the plaintiff's home repaired.

13. In *Trident v McNiece*, Yeldham J's decision at first instance was in favour of McNiece as against Trident, but not so as against NEM. This was on the basis that McNiece was not Hammond's employer, as Hammond had actually been engaged by a labour hire company, Farrow Constructions. Thus, NEM's workers' compensation insurance policy was not engaged.

14. Yeldham J favoured McNiece's case on the basis of a relationship of agency, which he held was available under Blue Circle's policy with Trident. As such, Yeldham J held that Trident was liable to McNiece.

Progress of the matter before Yeldham J

15. As to McNiece's claim against NEM, anomalies in the workers' compensation legislation, which had been the subject of earlier NSW Court of Appeal authority, *Employers' Mutual v Hutcherson* (1976) 2 NSWLR 302, meant that it was not possible to deem Hammond an employee of McNiece. As such, a relationship of actual employment had to be proved, which ultimately was not possible.

16. As to McNiece's claim against Trident, the absence of any direct contract of insurance presented difficulties in proceeding against that company.

Appeal by Trident to the NSW Court of Appeal

17. The Court, comprised of Hope, Priestley and McHugh JJA, was particularly interested to know whether there was some way of circumventing the doctrine of privity.

18. The Court ultimately found that Trident's appeal lacked substance, and that an exception to the doctrine of privity should be made where insurance liability policies were concerned. Trident did not accept this decision and applied for special leave to appeal to the High Court.

Application by Trident for special leave to appeal to the High Court

19. Don Grieve QC opposed Trident's special leave application on the ground that s 48 of the *Insurance Contracts Act 1984* (Cth) ("the *Insurance Contracts Act*") covered the field, and left the point moot.

20. However, the Justices hearing the special leave application were of the opinion that the question was of substantial importance and that special leave ought to be granted.

Section 48 of the *Insurance Contracts Act 1984* (Cth)

21. Had s 48 of the *Insurance Contracts Act* been in force at the time of Hammond's action against McNiece, it would have availed McNiece altogether and left Trident with no defence at all. However, the legislation did not come into effect until 1 January 1986.

22. Section 48(1) of the *Insurance Contracts Act* provides:

> A third party beneficiary under a contract of general insurance has a right to recover from the insurer, in accordance with the contract, the amount of any loss suffered by the third party beneficiary even though the third party beneficiary is not a party to the contract.

23. Section 48(2) of the *Insurance Contracts Act* provides:

> Subject to the contract, the third party beneficiary:
>
> (a) has, in relation to the third party beneficiary's claim, the same obligations to the insurer as the third party beneficiary would have if the third party beneficiary were the insured; and
>
> (b) may discharge the insured's obligations in relation to the loss.

24. Section 48(3) of the *Insurance Contracts Act* provides:

> The insurer has the same defences to an action under this section as the insurer would have in an action by the insured, including, but not limited to, defences relating to the conduct of the insured (whether the conduct occurred before or after the contract was entered into).

Appeal by Trident to the High Court

25. There was a division of opinion on the case in the High Court.

26. Brennan J, in dissent, expressed considerable discomfort with the idea that the Court of Appeal could effectively assume the role of a legislator.

27. Brennan, Deane and Dawson JJ, who might be described as conservatives on this issue, were in dissent, while Mason CJ, Wilson, Toohey and Gaudron JJ made up the majority.

28. Deane J's dissenting judgment exemplifies the division of views in the High Court:

> Circumstances can undoubtedly arise in which accepted processes of legal reasoning require a court, usually a final appellate court, to reverse the development of the law by disowning established principle. However, where the established principle is as entrenched, by authority and in legal

> conception, as is the principle of privity, such a reversal can only be justified by precisely defined and compelling reasons advanced as part of a plainly identified process of legal reasoning. (at [5])

29. The point upon which the High Court was divided was whether or not the exceptions to the doctrine of privity could solve the problems that arose in the case. The progressive majority thought that the exceptions could not do so, while the conservative minority held the contrary opinion.

Problems created by the doctrine of privity

30. The problems created by the doctrine of privity are best summarised in the 29th edition of *Anson's Law of Contract* as follows:

> It is said that the privity rule serves only to defeat the intentions of the contracting parties and the legitimate expectations of the third party, who may have organised its affairs on the faith of the contract, that it undermines the social interest of the community in the security of bargains, and that it is commercially inconvenient. In the standard situation, the person who suffered a loss cannot sue, while the person who suffered no loss can sue, but may only be able to obtain nominal damages. Where the object of the contract is to benefit a third party, the effect of this is tantamount to ruling that the object of the contract is unenforceable. The exceptions and circumstances are complicated and not always available, particularly to those who do not have access to sophisticated legal advice. Moreover, their technicality has led to artificiality and uncertainty.

31. Another example illustrating the problems created by the doctrine of privity is where a man enters into a contract with a builder to renovate his mother's house. If the builder fails to perform the job properly, only the son can sue, while the mother cannot. However, in such a circumstance, it can be said that the son has suffered no loss and is therefore only entitled to nominal damages. On the other hand, the mother, who has lost the benefit of a proper job, has no right to sue.

32. The doctrine of privity originates in the 1861 Queen's Bench decision of *Tweddle v Atkinson* [1861] EWHC QB 157, which explains the justification for the rule as follows:

> It would be a monstrous proposition to say that a person was a party to a contract for the purposes of suing upon it for his own advantage, and not a party for the purposes of being sued.

Exceptions to the doctrine of privity

33. Notwithstanding this justification for the doctrine in *Tweddle v Atkinson*, there are numerous recognised exceptions to it, both under statute and common law. These are:
    i. trusts;
    ii. agency;
    iii. estoppel; and
    iv. unjust enrichment.

i. Trusts

34. The exception to the privity doctrine found in the law of trusts is in the form of the doctrine of equity, which recognises that a person may hold property in trust for the benefit of another person. A number of cases therefore suggest that the doctrine of privity can be avoided by saying that A holds the benefit of B's promise in trust for C.

35. In *Trident v McNiece*, Deane J in dissent, taking a more generous view of the privity doctrine, cited the decision of Fullagar J in *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1955) 95 CLR 43 to the effect that it is difficult to understand the reluctance sometimes shown by the courts to infer a trust in such cases. Deane J concluded at [13] that, "[t]he question whether a particular contract itself creates a trust of the benefit of one or more of the promises which it contains is primarily a question of the construction of the terms of the contract".

36. In short, Deane J considered that a trust could readily be implied in *Trident v McNiece*, and devised orders which would have enabled McNiece to take advantage of that proposition. In the end result, Deane J agreed with the majority in concluding that Trident's appeal should be dismissed, but for reasons different to those of the majority.

37. Despite Deane J's comments in *Trident v McNiece*, in subsequent cases, the courts have not been so eager to find the existence of a trust. On this particular point, they appear to have returned to the law as it was before *Trident v McNiece*.

38. Such a case is *Burleigh Forest Estate Management v Cigna Insurance* [1992] 2 Qd R 54, where the Full Court of the Supreme Court of Queensland emphatically rejected an attempt to invoke a trust in relation to a performance bond in a building contract. Similarly, the High Court recently denied the existence of a trust in *Korda v Australian Executor Trustees (SA) Ltd* [2015] HCA 6.

ii. Agency

39. Another mechanism which has been adopted in some cases to circumvent the doctrine of privity is asserting a relationship of agency. However, this approach was rejected by the NSW Court of Appeal in *Trident v McNiece*.

iii. Estoppel

40. A third possible exception to the privity doctrine discussed by the High Court in *Trident v McNiece* is asserting estoppel against an insurer.

41. This was taken up in the judgment of Deane J, but a different view was expressed by Mason CJ and Wilson J, who did not consider that estoppel provided an adequate exception to the privity doctrine.

iv. Unjust enrichment

42. A further possible exception to the privity doctrine is the doctrine of unjust enrichment, referred to by Deane J in *Trident v McNiece*.

43. It was on the basis of the principle of unjust enrichment that Gaudron J agreed with Mason CJ and Wilson and Toohey JJ that Trident's appeal should be dismissed. It seems clear that Gaudron J did not share the view that the doctrine of privity should be abrogated at all. Because of these views, Gaudron J was in dissent as to whether the privity doctrine should be treated as abolished for present purposes.

View of the progressive majority

44. In the early part of their judgment, Mason CJ and Wilson J briefly outlined the history of the principle of contractual privity, noting that it was considered, at least in the United Kingdom, to be firmly entrenched. They then went on to observe that despite its supposed entrenchment, the doctrine had been the subject of significant criticism, particularly among law reform committees in Australia and the United Kingdom.

45. Their Honours then considered that there was a great deal of substance in the criticisms that had been directed at the doctrine of privity.

46. In the words of Mason CJ and Wilson J at [21]:

> The orthodox view is that ordinarily the promisee is entitled to nominal damages only because non-performance by the promisor, though

resulting in a loss of the third party benefit, causes no damage to the promisee.

Mason CJ and Wilson J concluded by observing that rules which generate uncertainty in their application to ordinary contracts commonly entered into by the citizen call for reconsideration.

47. They then canvassed the availability of the remedy of specific performance, an equitable remedy granted by the court, where it is demonstrated that damages are inadequate, and concluded that even where specific performance was available, the third party was nonetheless dependent on the willingness of the promisee to pursue that remedy, in the absence of a trust, a relationship of agency, or an enforceable agreement between the promisee and the third party.

48. Like Deane J, Mason CJ and Wilson J expressed the view that a trust should be inferred when the language of the parties, construed in its context, demonstrates an intention of that nature on the parties' behalf. Nonetheless, Mason CJ and Wilson J considered that there would still be cases where the third party would not have a remedy, because of lack of sufficient evidence of the requisite intention.

49. Mason CJ and Wilson J then addressed three practical policy considerations said to justify the privity rule. Firstly, they said that the rule precludes the risk of double recovery from the promisor by the third party as well as the promisee. Secondly, they observed that the privity rule imposes an effective barrier to liability on the part of a contracting party to a vast range of potential plaintiffs. Thirdly, they described that the recognition of an unqualified entitlement in the third party to sue on a contract would severely circumscribe the freedom of action of the parties to the contract, particularly the promise.

50. It was obvious, at this stage, that Mason CJ and Wilson J considered that Parliament would have to address these three issues of policy if the privity rule was to be abandoned altogether. It was for this reason that Mason CJ and Wilson J decided that the justice of the case required that they do no more than create a further exception to the privity principle. This was that, where a public risk or liability insurance contract is involved, the third party should be recognised as having a right to sue for its enforcement.

51. It was on this limited basis that Mason CJ and Wilson J decided that Trident's appeal should be dismissed.

52. Toohey J, the third member of the majority, was concerned whether the doctrine of privity was so well entrenched that nothing short of legislative interference could budge it (at [22]).

53. The kernel of Toohey J's judgment is his statement at [27] that the High Court should adopt the following proposition:

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

Overview of the division of opinion in the High Court

54. The High Court in *Trident v McNiece* was split into several factions.

55. The conservatives (minority) were emphatically of the opinion that the NSW Court of Appeal was unjustified in its approach, while the progressives (majority) felt that the doctrine of privity should be regarded as admitting a narrow exception to accommodate for contracts which were public liability insurance policies.

Did the High Court in Trident v McNiece effectively bring about an abolition of the doctrine of privity?

56. In the opinion of Don Grieve QC, it would be going too far to suggest that this outcome was established by the case, given the divergence of opinion of the High Court.

57. In formulating the argument which he advanced to the High Court in *Trident v McNiece*, Don Grieve QC found considerable assistance in a number of dissenting judgments of Lord Denning, a long-standing critic of the privity doctrine.

58. In *Donoghue v Stevenson* [1932] AC 562, where the tort of negligence was recognised for the first time, the minority had expressed their dissent on the basis of the privity principle. In *Trident v McNiece*, Don Grieve QC invited the High Court to take the same approach to the law of contract as the House of Lords had taken to the law of tort in *Donoghue v Stevenson*, however, the High Court declined

59. To say that the right of the contracting parties to vary or modify the contract should be qualified only to the extent that the third party has not acted on the contract to their detriment is akin to recalling the estoppel exception raised by Deane J in *Trident v McNiece*.

60. If Parliament were to interfere with the doctrine of privity, in Don Grieve QC's view it would be preferable for it to legislate to provide that C should be recognised as a party to the contract, with all of the rights and obligations that parties to contracts have.

61. Finally, the Parliaments of the States have an obligation to give the question of contractual privity further consideration, and should do so sooner rather than later.

BIOGRAPHY

Don Grieve QC

Barrister, Sir Anthony Mason Chambers, Sydney

Don was admitted to the Bar in 1973, taking silk in 1983. Don has maintained a diverse practice at the Bar. This versatility is demonstrated by his appearance as leading counsel in numerous High Court appeals, such as: *Commonwealth v Amann Aviation* (1992) 174 CLR 64 (contractual damages); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [1999] HCA 27 (constitutional law); *Batterham v QSR Ltd* (2006) 225 CLR 237; [2006] HCA 23 (industrial law).

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Stephen was admitted to the Bar in 1982 and appointed Senior Counsel in 2000. Stephen practises predominantly in commercial law, with a particular focus on company and insolvency law. Stephen has extensive experience, appearing frequently at first instance and on appeal in both the Supreme Court of NSW and the Federal Court of Australia. Stephen is also an active lecturer and has written several articles for legal publications covering a variety of professional matters.

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