ENFORCEMENT OF INSURANCE CONTRACTS BY OR ON BEHALF OF THIRD PARTIES

David S Brian[*]

The object of this article is to identify and analyse various actions which may assist a third party who is refused indemnification by an insurer on the ground that she was not privy to the contract of insurance.

Enforcement of the contract pursuant to the Contracts (Privity) Act 1982 is identified as the most appropriate option that is potentially available to a third party. However, in order for the Act to apply to insurance policies it will be necessary for the Court of Appeal to over-rule or distinguish a body of case law on the Act which has arisen from cases concerning nominees.

I INTRODUCTION

The doctrine of "privity of contract" precludes a third party from enforcing a contract made for his benefit. For example, in the leading case of *Tweddle v Atkinson*[1] the respective fathers of a bride and groom entered into an agreement to pay specified sums of money to the groom. The bride's father died without making his agreed payment so the groom sued the executor for the money. The Court of Queen's Bench shortly disposed of the case on the basis that a stranger to the consideration cannot take advantage of a contract, even though it was made for his benefit.

Although *Tweddle v Atkinson* appears to have been solely decided on the basis that there was an absence of consideration moving from Tweddle to his father-in-law, later cases also required that a person seeking to enforce a contract must be a party to the agreement. That "privity of contract" in fact consists of two discrete common law rules was confirmed by the House of Lords in *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd*[2]

* Barrister and Solicitor of the High Court of New Zealand. This article is based on a research paper submitted by the author towards the LLM degree at Victoria University of Wellington.

1 (1861) 1 B& S 393 [121 ER 762].

2 [1915] AC 847.

There is a contrary view, that the requirement that a person must be a party to the agreement to sue on it is merely an alternative way of stating the consideration requirement, but the distinction is academic in cases concerning third parties and insurance contracts.

The privity rules are relevant to insurance contracts that purport to cover third parties as insurers can attempt to deny claims made by such third parties on the basis that they lack privity. A party to the contract can sue the insurer for breach of contract, but the traditional view is that the party can only receive nominal damages as it has not suffered loss. Two cases are used to illustrate the problem and to provide case studies for discussion purposes.

A Vandepitte

The first case is *Vandepitte v Preferred Accident Insurance Corporation of New York*,[3] a Privy Council decision on an appeal from the Supreme Court of Canada. The central issue was whether a Ms Berry, who had been at fault in an automotive accident while driving her father's car, was covered by her father's motor vehicle policy.[4] The final clause of the policy stated that certain indemnities provided by the policy would also apply, inter alia, to any person driving the car for private purposes with the permission of the insured. The appellant could not argue that Ms Berry had personally contracted with the defendant, but sought to bring her within the privity rules by arguing that her father had contracted as her agent or that she was a beneficiary of a trust of the promise. The agency argument was rejected on the grounds that:

(i) there was no evidence that Ms Berry had any conception that she had entered into a contract of insurance;

(ii) there was no evidence that the father intended to insure anyone but himself. The generality of the language alone is not sufficient to establish the requisite intention;

(iii) even if the father had intended to insure on his daughter's behalf, he had no authority to do so and she did not purport to adopt or ratify the contract;

(iv) as a matter of construction, the clause at issue drew a distinction between "the insured", being the father, and "any other person or persons"; and

(v) there was no consideration moving from Ms Berry.

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3 [1933] AC 70.

4 The current AMP General Insurance (NZ) Ltd Private Type Motor Car Policy provides essentially similar coverage for third parties, and it will also be referred to in this article as a relevant example of industry practice.

With regard to the trust argument, the Privy Council affirmed the general rule that a party to a contract can constitute itself a trustee for a third party of a right under a contract with the beneficiary being able to sue (joining the trustee as a defendant) if the trustee refuses to sue on behalf of the beneficiary. This argument, too, was rejected on the basis that there was no evidence that the father intended to create a beneficial interest for his daughter; the intention must be affirmatively proved and it cannot necessarily be inferred from the general words of the policy.

B Trident

The operation of the privity rules in cases such as *Vandepitte* has occasioned much criticism, both academic and judicial. A different result was reached in the second case, *Trident General Insurance Co Ltd v McNiece Bros Proprietary Ltd*,[5] a decision of the High Court of Australia. Blue Circle Southern Cement Limited had entered into a contract of insurance with Trident on 13 June 1977. The policy covered, inter alia, public liability at three construction sites and "the assured" were defined as Blue Circle and all its subsidiary, associated and related companies, all contractors and sub-contractors and/or suppliers. McNiece was the principal contractor at one of the sites covered by the policy, but had been engaged by Blue Circle subsequent to the policy being issued. In July 1979 a Gary Hammond was seriously injured while driving a crane at the site. He was working under the direction of a McNiece engineer at the time but his employer was Faro Constructions, a firm that organised workers for contractors like McNiece. Hammond sued McNiece and was awarded $541,768, less workers' compensation payments already received. McNiece sought indemnification under the insurance contract but Trident denied liability on the ground that McNiece lacked privity.

The keenness of the courts to do "justice" is evident from the decisions at each instance; all three courts that heard the case found for McNiece, but on different grounds in each case. In the Supreme Court of New South Wales, Yeldham J held that:[6]

(i) McNiece was in contemplation as one of the assured at the date the policy was issued;

(ii) consideration was provided by McNiece to Trident because Blue Circle had taken into account between itself and McNiece "in a financial way" that it had contracted with Trident on behalf of McNiece;

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5 (1988) 165 CLR 107.

6 Above n 5, 112.

(iii) it was not established that Blue Circle had actual authority to contract with Trident on behalf of McNiece, but service of the statement of claim constituted ratification of the contract by McNiece;

and thus there was an enforceable contract between McNiece and Trident.

The New South Wales Court of Appeal upheld the decision of Yeldham J, but on quite different grounds:[7]

(overturning the basis of the decision of Yeldham J)

- Blue Circle alone was responsible for payment of the premium, so McNiece did not provide consideration;
- McNiece was not a party to the contract by agency as it was not ascertainable as a principal when the policy was issued;
- even if Blue Circle intended to act as agent for McNiece, there was no act of McNiece amounting to ratification;

(upholding the result)

- commercial necessity, practice and wide-spread use have combined to create an exception to the privity rules in the case of insurance;
- the common law allows a beneficiary specified or referred to in an insurance contract to sue on that contract.

The Court refused McNiece leave to raise the trust argument, but McHugh JA nonetheless stated that a trust will invariably be imputed in the case of a liability insurance policy.

The High Court of Australia also found for McNiece but all seven judges rejected the suggestion that there was a pre-existing common law exception to the privity rules. Mason CJ, Wilson and Toohey JJ were, however, prepared to follow the lead of the Court of Appeal and allow a third party to enforce a contract of insurance provided there was a contractual intention to benefit the third party. The question of whether the third party must also establish that she relied on the promise was not, however, conclusively resolved. Mason CJ and Wilson J noted that it was likely that there would be some degree of reliance by the third party. Toohey J went further and required that the third party must show that it was likely in the circumstances that she would rely on the promise - this appears to be an objective rather than a subjective test. The creation of an exception to the privity rules in the case of an insurance contract was viewed by the three Justices as being a principled

7 (1987) 8 NSWLR 270.

development of the law. They also thought it would be easy to find a trust on the facts but acknowledged that trusts can give rise to other problems, not the least of which is that they can severely circumscribe the freedom of the contracting parties. This problem was addressed by Mason CJ and Wilson J and their solution was that the rights of third parties under a contract should be subordinated to those of the contracting parties except insofar as the third party has relied on the promise to its detriment.

Brennan, Deane and Dawson JJ did not accept the 'principled development' approach. Their basic stance was that there could be no exceptions to the privity rule without formulating a completely new theory of promissory liability to replace the bargain theory. They were, however, prepared to take a liberal approach to finding a trust in such cases. Brennan and Dawson JJ would have allowed *Trident's* appeal, but Deane J would have stood the case over to allow the trust argument to be addressed. Gaudron J found for McNiece on the basis of unjust enrichment, holding that the right of the third party does not arise under the contract but nonetheless its right to sue ordinarily corresponds in content and duration with the obligation under the contract.

Strictly speaking, *Trident* upholds the privity rules as only three of the seven judges supported the creation of a common law right for third parties to enforce contracts that are intended to benefit them. However, the effect of the decision in Australia is to allow third parties who are purportedly covered by an insurance contract to enforce it if consideration for the promise has been provided by the promisee.

This article addresses the application of several contract and tort remedies to *Vandepitte* and *Trident* type cases.

II CONTRACTS (PRIVITY) ACT 1982

The Contracts (Privity) Act 1982 abrogates the privity rules by allowing designated third parties to enforce contractual promises to benefit them, unless the contract does not intend to give them an enforceable right. The operative provision is s 4:

> 4. Deeds or contracts for the benefit of third parties -
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> 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:
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> Provided that this section shall not apply to a promise which, on 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 operation of the Act has been largely uneventful, with only pre-incorporation contracts and nominee provisions causing difficulties. Two issues have arisen in the nominee cases, being the degree of specificity necessary to satisfy the designation requirement and the need for the benefit to be conferred under the contract containing the promise, and both issues are relevant to the question of enforcement of insurance contracts by third parties. In addition, the issue of whether the promise was intended to be enforceable by the third party also needs to be addressed.

A Designation

In *Coldicutt v Webb and Keeys*[8] Hillyer J accepted both that "nominee" is a designation by description, and that the only purpose for including the term in the contract was to allow the nominee to complete the contract. A contrary view was taken by Wylie J in *McElwee v Beer*.[9] He stated that "designated by description" connotes "a person identifiable at the time of the contract, not someone who by capricious choice of the contracting party may subsequently be brought within the description".[10]

The position of nominees was considered by the Court of Appeal in *Field v Fitton*.[11] The case concerned the sale of a property to "Brent Paulin or nominee" for $200,000. Two days after entering into the sale and purchase agreement Paulin entered into an agreement with Fitton to appoint Fitton as his nominee in return for a payment of $15,000. The Fields made clear that they would only settle with Paulin.[12] They served a settlement notice on his solicitors, and they cancelled the contract when the notice was not complied with. The issue was whether a caveat lodged by Fitton should lapse.

Bisson J, who delivered the judgment of the court, first discussed the position of Fitton without reference to the Contracts (Privity) Act. He noted that the Paulin/Fitton agreement clearly provided that Fitton was to complete the purchase as the nominee of Paulin, and that a nominee cannot enforce a contract. However, despite the nomenclature used, Bisson J characterised the transaction as an on-sale as Paulin had assigned his rights under the original sale and purchase agreement to Fitton. Such an assignment obviates any privity difficulties and allows the assignee to enforce the contract. Thus if Fitton had complied with the settlement notice that the Fields had served on Paulin (which had been immediately

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8 Unreported, 1 June 1983, High Court, Whangarei Registry, A50/84.

9 Unreported, 19 February 1987, High Court, Auckland Registry, A445/85.

10 Above n 9, 30.

11 [1988] 1 NZLR 482.

12 The Fields were concerned about stamp duty, and thought it would be unlawful to settle the transaction in a manner that did not disclose the intermediate transaction between Paulin and Field.

passed on to Fitton) he could have enforced the contract. The court held that the Fields were entitled to cancel the contract because Fitton had neither submitted a transfer for execution nor tendered the amount due on settlement,[13] and that Fitton's caveatable interest in the land lapsed upon the Fields exercising their right to cancel the contract.

Bisson J. then considered the argument that Fitton had rights as a third party under ss 4 and 8 of the Contracts (Privity) Act which would support a caveatable interest. He held that a bare nominee could not satisfy the designation requirement as it could be anyone at all. To qualify, an unnamed nominee provision would need to be qualified by a descriptive phrase or classification. A second difficulty identified by the court was that the mere addition of the words "or nominee" was not sufficient to impute an intention to given an enforceable right to the nominee. The judgment does not refer to any other cases on the Act and does not explicitly address the issue of whether the third party must be identifiable at the time of the contract.

The views of the Court of Appeal are naturally of great importance but, with respect, the discussion of the Act in *Field* was unnecessary as the finding that Fitton could enforce the sale and purchase agreement as assignee meant that the Act could not improve his position. Accordingly, the Court's comments could be viewed as obiter.[14]

The cases identify a continuum along which the designation requirement must be placed. At one end is the ability to be able to identify each third party at the date of the contract (*McElwee*) and at the other end is the situation where identity of a third party is only relevant at the time it seeks to enforce the promise (*Coldicutt*). The exact position of *Field* on the continuum is not clear, but it appears to represent an intermediate position between the other two cases.

It is appropriate to consider the legislative history and the effect of the different interpretations when considering how broadly the designation requirement should be read. The Act implemented the report of the Contracts and Commercial Law Reform Committee,[15] and the Committee's approach is consistent with *Coldicutt* (or vice versa): the report concluded that "... it should not be a requirement that beneficiaries be identified or in existence at the time of contract".[16]

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13 Fitton had argued that he was not required to submit a transfer or tender the amount due because the Fields had made it clear that they would not convey the property to Fitton. This argument was rejected by the court on the facts.

14 But I note that Chilwell J in *Karangahape Road International Village Ltd v Holloway* [1989] 1 NZLR 83 was of the view that he was bound by the Court of Appeal decision in *Field*.

15 *Privity of Contract*, Presented to the Hon Minister of Justice on 29 May 1981.

16 Above n 15, para 8.2.3.

A requirement that third parties be identifiable at the time the contract is entered into would produce capricious results. For example, a bill of lading contains an exclusion clause for damage to goods and the exclusion is stated to extend to the employees of the carrier. Jack is an employee as at the date the parties contract, but Jill is taken on as an employee on the following day. The result would be that Jack but not Jill could enforce the exclusion clause.

The Minister of Justice (the Hon JK McLay) twice referred to the facts of *Vandepitte* in the course of introducing the Contracts (Privity) Bill in the House, and on the second occasion he left no doubt that the proposed Act was intended to apply to *Vandepitte* cases:[17]

> Let us have a quick look at the two cases I mentioned in my introductory remarks, just on which side common sense falls. The first one related to an insurance company that refused to pay damages arising out of a car accident when a young woman was driving that car because the policy that normally covered such damage was held by her father. Recovery was refused, on the grounds that there was no privity of contract between the daughter and the insurance company. Well, good old insurance companies accept all risk and resist all claims. I wonder whether the Member for Island Bay really believes that the application of the rule of privity of contract makes sense, because I do not - and that is why the Bill is being introduced today.

This again supports the Contracts and Commercial Law Reform Committee/*Coldicutt* approach as, like with the case of a nominee, an authorised driver of another's car could be anyone, an exchange student from Africa who holds an international drivers licence for instance. It is not until such a person is given permission that her identity is known, so it is not possible for the parties to know the identity of all such drivers at the time of the contract.

Nine submissions on the Bill were made to the Statutes Revision Committee. Eight of them generally supported the Bill, with the only exception being the submission made by the Insurance Council of New Zealand.[18] The Insurance Council did not accept the need for reform, but if the Bill was to proceed it submitted that it should only apply in respect of insurance policies to persons named in the policy or, at most, to persons who are members of a class that is clearly defined in the policy. The submission that reform was not needed was given a short shrift, with the Justice Department report on the Bill noting both the conservatism of the insurance industry and the fact that it has often benefitted from the

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17 (1982) 443 NZPD 156.

18 Submissions of the Insurance Council of New Zealand on the Contracts (Privity) Bill, 28 May 1982, SR/82/386.

privity rules.[19] With regard to the submission that the Bill should be confined to named individuals or clearly defined classes for the purposes of insurance policies, the Report stated that an amendment would be proposed to clause 4 to clarify that it would only apply to beneficiaries specified individually or as a class and that this should meet the Insurance Council's concern. It further noted that insurers could limit the coverage afforded or purportedly afforded by their policies and stated that if they accept a broadly drawn policy, and the premium, they should be obliged to perform their side of the bargain.

However, the Bill as reported back from the Statutes Revision Committee (and as subsequently enacted) may have "over-clarified" the designation requirement. The amended clause 4 is reproduced below:[20]

4. Deeds or contracts for the benefit of third parties-

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 *(identified or)* 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:

Struck Out

(2) This section does not apply to a promise which, on the proper construction of the deed or contract, is not intended to create an obligation enforceable at the suit of that person.

New

Provided that this section shall not apply to a promise which, on 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 critical change is the deletion of the words "identified or" from the fourth line. On its own it undermines the argument that the Act is meant to apply to third parties who cannot be identified at the time of the contract, such as casual drivers of motor vehicles and contractors who are engaged subsequent to the policy being taken out. But it can be argued that they were deleted because of fears that the original wording would allow enforcement by third parties who were not intended to have that right and that the insertion of the

19 Contracts (Privity) Bill 1982, Report of the Department of Justice, 10 November 1982.

20 Words struck out are shown in italics within bold round brackets, or with black rule at beginning and after last line; words inserted are shown in roman underlined with a double rule, or with double rule before first line and after last line.

words "designated by name, description, or reference to class", were intended to have the same general effect as the deleted words in respect of third parties who were intended to have enforceable rights. This is consistent with the comments made by the Minister of Justice when moving that the Bill be read a second time:[21]

> The main concern expressed by all those who made submissions was that, in making the changes proposed, the Bill should not inadvertently extend rights to third parties who would benefit under contracts but who were clearly beyond the contemplation of the contracting parties at the time the contracts were made, and who were not intended to be given enforceable rights under those contracts ... Accordingly, changes have been made to clause 4 to ensure that that it is unlikely to happen.

The argument is further supported by the non-deletion of the words "whether or not the person is in existence at the time when the deed or contract is made". You cannot identify what does not exist, but you can tell whether it comes within a designated description or class when it comes into existence. It is also pertinent that the Statutes Revision Committee did not insert "who is identifiable at the time the deed or contract is made" or similar, which would be expected if it had decided to make such a radical change to the clause. Another example of the arbitrary results that could arise otherwise can be given with reference to the *Trident* facts - McNiece Bros Pty Ltd would not be able to enforce the contract under the Act if it had been incorporated[22] prior to the policy being taken out, but if it was incorporated subsequently it would be able to use the Act.

Logically, the designation issue should be resolved in favour of either the *Coldicutt* or the *McElwee* approach. The Court of Appeal in *Field* did not clearly define its stance and it could either be the same as that of Wylie J in *McElwee*, in which case it does not present a third option, or it could require a more precise description of the class of third parties without requiring that they be identifiable at the time of contract. If the latter, the Court of Appeal would appear to be placing an unnecessary gloss on the statutory test which would only require that the contract purport to confer a benefit on a third party who comes within a class or description and who can be identified at the time it wishes to enforce the benefit. The concern of the Court of Appeal as to the specificity of the designation or description should properly be addressed when the court considers the question of whether, on the proper construction of the contract, it is intended to create an enforceable obligation; a very broad or designation or description may indicate that an enforceable obligation is not intended.

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21 (1982) 449 NZPD 5114.

22 The Acts Interpretation Act 1924 defines "person" to include a company unless inconsistent with the context of the Act, and there is no suggestion that the Contracts (Privity) Act 1982 applies only to natural persons.

This issue obviously requires determination by the Court of Appeal in a fully argued case. The possible outcomes are considered below.

First, the court could uphold *McElwee* and rule that the Act is only available to third parties who can be identified at the time of the contract. This would preclude most, if not all, third parties from relying on a *Vandepitte*/AMP contract. The caveat is because the court could hold that immediate family members residing with the insured are identifiable due to the high level of foreseeability that they will both use the car and rely on the policy. Third parties under a *Trident* contract would be covered unless, like McNiece Bros, they were engaged subsequent to the time of the contract (but then if they were not in existence/incorporated at that time they may also be covered).[23]

Second, it could affirm what appears to be the *Field* position and hold that a third party need not be identifiable at the time of the contract, but must nonetheless be described or classified with greater particularity than just "nominee" or similar. The fate of third party drivers is not clear under this scenario, but it is possible that the court would take cognizance of the fact that third party drivers of a private car would almost invariably have a pre-existing relationship with the insured and thus hold that this nexus provides sufficient particularity for the Act to apply.[24] The *Trident* third parties would all comfortably satisfy the test as the policy was limited to parties with links to Blue Circle and specified construction contracts and specified sites.

The third scenario is for the court to resile from the position it took in *Field*, whatever precisely that was, and uphold the *Coldicutt* approach. This would be the best outcome for third parties under insurance contracts. It would also accord most closely with the scheme and the purpose of the Act. The ease with which *Field* could be ignored will depend upon whether its discussion of the Act was obiter, as I suggested previously, or was part of the ratio of the case. If the former, a court at any level could do the deed, but otherwise a panel of five Court of Appeal judges is required to overturn a previous decision of that court.[25]

B Benefit Conferred by the Contract

Several High Court decisions[26] have held that the Act also does not apply to nominees because the benefit is not conferred by the contract the nominee is seeking to enforce, being the sale and purchase agreement, but rather it is conferred by the party that nominates it. It

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23 See above n 22.

24 This would allow it to distinguish *Field* which appears to have been a "flick-on" sale by a party to the contract to an unrelated third party.

25 [1987] 2 NZLR 145.

26 *McElwee, Brown v Healy* Unreported, 25 July 1988, High Court, Auckland Registry, A147/84.

is suggested by the Law Commission that the same argument could apply in cases where the third party is chosen by one of the contracting parties subsequent to the time of the contract. It gives as an example an exclusion clause which is expressed to be for the benefit of independent contractors who do work for one of the parties, and notes that it could be argued that the benefit is conferred by the party who appoints the contractor.[27]

If correct, it would deny coverage to third parties such as McNiece Bros under *Trident* contracts. It could also deny coverage to third party drivers on the basis that the benefit is conferred by the insured when she gives the third party permission to drive the vehicle.

With respect, the argument appears to be based on an unduly narrow view of the section as the nomination of itself is useless without the sale and purchase agreement. It is odd that a statutory reform which is intended to liberalise the law of contract is interpreted in such a way as to frustrate the apparent intention of the parties to confer a right of enforcement on a third party.

It is possible that the Court of Appeal will take a different view, but otherwise it is highly likely that other contracts such as those purporting to afford insurance cover to third parties will be distinguished. Insurance contracts of the kinds discussed in this paper can be materially distinguished from nominee cases on at least two different bases. The first is that the sole purpose of the nomination is to allow the nominee access to the benefit of the "primary" contract, being the sale and purchase agreement. But in *Trident* and *Vandepitte* cases access to the benefit of the insurance contract is incidental to the engagement of the contractor or the driving of the car and each activity has a purpose independent of the existence of the insurance contract. The second basis for distinguishing is that an "or nominee" contract is an either or affair; only the party or the nominee can take the benefit of the primary contract. The insurance contracts purport from the outset to cover the insured and the third parties.

C Intention to Create an Enforceable Obligation

The proviso to s 4 excludes from its operation "... a promise which, on 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". Hence there is no need for the contract to state that a third party can enforce it, but a statement to the contrary would obviously be fatal to a third party action.

This issue was touched on by the Minister of Justice when moving that the Bill be read a second time. He referred to the fact that it is patently inappropriate to extend enforcement rights to third parties in respect of certain types of contracts and gave as examples contracts

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27 New Zealand Law Commission *Contract Statutes Review - Report No. 25* (Wellington, 1993) 224.

for the bulk supply of municipal services such as electricity or water to consumers, noting that it would be both highly inconvenient and contrary to the parties' intentions to allow consumers to sue on such contracts. Insurance contracts are far removed from the types of contract referred to by the Minister; the insured deliberately seeks third party coverage, the insurer issues a policy on that basis and calculates the premium accordingly, and the promise is to provide a direct benefit to the third party. These circumstances, together with the almost universal practice of insurers to indemnify third parties in respect of valid claims, should satisfy the intention criterion in all but the most exceptional of cases.

D Summary

The case-law on the Act potentially poses an obstacle for third parties seeking to use it in order to enforce an insurance contract. However, the genesis of the case-law has been claims, not always overly-meritorious, by nominees and this appears to have influenced the courts' approach to the "designation" and "benefit conferred by the contract" issues. In the case of insurance contracts, the proper construction of the contract will ordinarily support a finding that it intended to create an enforceable obligation at the suit of the third party and this should influence the courts to take a more liberal approach in respect of such contracts. The more likely scenario is that insurance contracts will be distinguished from the nominee cases, but it is also possible that the Court of Appeal will over-rule its own decision in *Field* and take a more liberal approach generally.

III TORT

The possibility of a third party suing the insurer for negligent misstatement and/or for breach of a duty of care of the type recognised by the House of Lords in *White v Jones*[28] are examined under this heading.

A Negligent Misstatement

To succeed in a negligent misstatement action the third party must establish that the insurer owed it a duty of care, that the duty was breached by the insurer making a negligent misstatement, that the third party relied on the misstatement, and that the third party suffered economic loss as a result of that reliance.

With regard to the duty of care issue, our Court of Appeal and the House of Lords have diverged in respect of the approach to be taken to determine whether a duty of care is owed in any given situation. The Court of Appeal has basically stuck with the two step approach first used in *Anns v Merton London Borough Council*[29] whereas the House of Lords has

28 [1995] 1 All ER 691.

29 [1977] 2 All ER 492.

resiled from that position, preferring instead the incremental approach adopted in cases such as *Caparo Industries plc v Dickman*[30] and *Murphy v Brentwood District Council.*[31]

A five member Court of Appeal considered the different approaches in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd.*[32] Their Honours concluded that New Zealand should retain the two step approach as it has been employed for some time without apparent dissatisfaction, and the same considerations are addressed under each approach.

But even if the same considerations are addressed under each approach, they do not necessarily produce the same result. The difference is highlighted by the leading cases on negligent misstatement. In *Scott Group Ltd v McFarlane*[33] the Court of Appeal (Woodhouse & Cooke JJ) held that the auditors of a public company's accounts owed a duty of care to a person who relied on the company's accounts when making a take-over offer for the company in circumstances where there was a plain risk of a take-over being attempted and it was virtually certain that the accounts would be relied upon by the offeror. Richmond P dissented, being of the view that:[34]

> ... it does not seem reasonable to attribute an assumption of responsibility unless the maker of the statement ought in all the circumstances, both in preparing himself for what he said and in saying it, to have directed his mind, and to have been able to direct his mind, to some particular and specific purpose for which he was aware that his advice or information would be relied on. In many situations that purpose will be obvious. But the annual accounts of a company can be relied on in all sorts of ways and for many purposes.

Caparo also concerned a take-over made in reliance on the audited accounts of the target company. The plaintiff claimed that the auditors owed a duty of care to investors and potential investors. It also alleged that the auditors ought to have foreseen that the target was vulnerable to a take-over bid and that the bidder would rely on the accounts for that purpose. The House of Lords held that the criteria for imposing a duty of care in pure economic loss cases not involving a fiduciary or a contractual relationship are foreseeability of damage, proximity of relationship, and public policy considerations. The proximity criterion was described in very similar terms to those of Richmond P above,[35] and

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30 [1990] 1 All ER 568.

31 [1990] 2 All ER 908.

32 [1992] 2 NZLR 282.

33 [1978] 1 NZLR 553.

34 Above n 33, 566.

35 The passage is cited with approval by Lord Bridge at 578 - 579 and Lord Oliver at 594 - 595 and 598.

the following excerpt from the judgment of Lord Oliver succinctly summarises why the House of Lords came to a different conclusion from the Court of Appeal in respect of an almost identical fact situation to that of *Scott Group*:[36]

> To widen the scope of the duty to include loss caused to an individual by reliance on the accounts for a purpose for which they were not supplied and were not intended would be to extend it beyond the limits which are so far deducible from the decisions of this House. It is not, as I think, an extension which either logic requires or policy dictates and I, for my part, am not prepared to follow the majority of the [English] Court of Appeal in making it.

Caparo limits proximity in negligent misstatement cases to circumstances in which advice is tendered or a statement is made in respect of a particular transaction or type of transaction and the advisor or maker of the statement knows or ought to know that it will likely be relied upon by a particular person or class of persons for that purpose. It is interesting to note that four of the five judges in *South Pacific* refer to *Caparo* but not *Scott Group*. The exception is Cooke P, a member of the Court in *Scott Group*, who refers to that case but ignores *Caparo*.

In both the *Vandepitte* and *Trident* circumstances the policy itself would be the statement at issue. In terms of *Caparo* the statement is made in respect of a particular type of transaction, being indemnity insurance in respect of specified risks. The insurer would presumably have knowledge, actual or inferred, that the policy would be relied upon for that purpose by a particular class of persons, being third parties purportedly covered by the policy. This would be particularly so in the *Trident* circumstances as the nature of the undertaking and its associated risks would make it highly likely that sub-contractors would address the issue of insurance.

The *Vandepitte* situation is more problematic as it can reasonably be postulated that many people do not turn their mind to the question of whether there is insurance when they drive another's car. Secondly, of those that do so, many would not know the specific terms of the policy and/or the identity of the insurer. Given that the proximity test for negligent misstatement is primarily designed to preclude unlimited liability, this purpose would not be undermined by reading the "likely to be relied on" criterion liberally in *Vandepitte* circumstances as the economic loss flows from the use of the vehicle and so the insurer can only be potentially liable in respect of one driver at any time. Furthermore, one major accident would effectively bring the policy to an end as the vehicle would no longer be operative. This is quite different from the *Caparo* scenario, which could give rise to thousands of claims in respect of the one statement. Lastly, actual reliance will still need to be proved by a plaintiff in order to succeed with a claim.

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36 Above n 30, 601.

With regard to the need for the statement to be made to the third party, it is not necessary that there be any direct contact between the parties. It is sufficient that the insurer knew that the insured would pass the information on to members of an identifiable class who would rely upon it for a specific purpose.

The final consideration is whether it is reasonable to impose a duty of care. In the writer's view it is that insurers acting in the course of their business and receiving premiums for doing so should be responsible for the correctness of statements made in their policies.

The circumstances are such that a duty of care is likely to be found in terms of the English approach. Accordingly, it is reasonable to expect that a duty of care would also be found to exist under the more liberal New Zealand approach.

The next hurdle for the third party plaintiff is establishing that the insurer breached the duty of care by making a negligent misstatement. The orthodox view is that only negligent misstatements of fact or negligent advice are relevant, and that statements of intention are not relevant. However, the Court of Appeal in *Meates v Attorney-General*[37] held that a statement of future intention can be actionable if it was meant to be acted on and the maker of the statement was in an exclusive position to give effect to it. This extension was not well received by the Privy Council in *Meates v Westpac Banking Corporation Ltd*[38] with their Lordships expressing difficulty with the concept that a person should take reasonable care to fulfil a non-binding promise. The learned authors of *The Law of Torts in New Zealand*[39] suggest that the extension more properly comes within promissory estoppel as it has been developed in Australia by *Waltons Stores (Interstate) Ltd v Maher.*[40]

In brief, the *Vandepitte* policy stated that certain indemnities would also be available to third persons riding in or driving the car, with the permission of the insured or of an adult member of his family, in the same manner and under the same conditions as applied to the insured. The AMP policy[41] provides that the insurer will indemnify any person driving any vehicle specified in the policy schedule, and the Trident policy simply defined "The Assured" as being "Blue Circle Southern Cement Limited, ... all Contractors and Sub-Contractors ...".

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37 [1983] NZLR 309.

38 Unreported, 5 June 1990, PC 43/89. The comments were obiter dictum only.

39 SMD Todd (ed) *The Law of Torts in New Zealand* (Law Book Co Ltd, Sydney, 1991) 154.

40 (1988) 164 CLR 387.

41 Above n 4.

In all three cases it can be argued that the policy conveys an intention by the insurer to indemnify certain third parties, the language of the policy indicates that the intention was meant to be acted on, and the insurer was in an exclusive position to give effect to that intention by indemnifying the third party.

Unless the High Court distinguishes *Meates* on the facts, this argument should be upheld at that level. Its fate in the Court of Appeal would be less certain. It was invited to overrule *Meates* in *Shing v Ashcroft*,[42] but declined to do so because of a lack of prior notice and because the Court did not consider it essential to the argument.

The third parties can also argue that the respective clauses convey the impression that they have enforceable rights under the contract. This argument does not rely on *Meates*, and the statement is arguably made negligently as insurers are generally large corporates which should know the correct position regarding the standing of third parties under insurance contracts. The argument is strongest under the *Trident* policy as it included various classes of third parties within its definition of "The Assured". The other two policies clearly distinguish between the assured and others purportedly covered, but the impression in each case is strengthened by the surrounding wording. The *Vandepitte* policy provided that the indemnity was payable first in respect of any claim of the insured's, with any amount of the cover not so paid being available for third party claims. This reinforces the impression that the third party had rights, albeit inferior to those of the insured. The AMP policy reinforces the impression by providing that the third party's coverage was dependent, inter alia, on her observing, fulfilling and being subject to the terms of the policy insofar as they could apply to her.

As noted previously, proving reliance on the statement could well be a problem for casual users of a private motor vehicle. If the insured does not pass the information on to the third party then that should be the end of the matter. But what if the insured tells the third party that the policy covers her, but does not disclose the identity of the insurer? *Harris and another v Wyre Forest District Council and another*[43] is authority for the proposition that the identity of the alleged tortfeasor is not always necessary. The House of Lords held that the second respondent, a valuer, was liable in respect of his negligently prepared valuation report even though his identity and the report were not disclosed to the plaintiffs. It was sufficient that the plaintiffs knew that the valuation report would have been prepared, and that the Council would not have lent them money if the report was not satisfactory. This approach should be taken in insurance cases if it is found that a duty of

42 Above n 25.

43 [1989] 2 All ER 514.

care exists as it would otherwise make liability in respect of statements made with the knowledge that they would be relied upon dependent upon a caprice.

The major difficulty for *Vandepitte* third parties would be convincing the court that they would otherwise have not driven the vehicle or that they would have taken out their own insurance policy had they known that the purported coverage was subject to the decision of the insurer as to whether it would in fact honour the policy. An added complication is the fact that insurers almost invariably do pay out, so it would not be a stark choice between coverage and non-coverage, but between guaranteed coverage and almost guaranteed coverage.

The same comments generally apply to *Trident* third parties, but given the risks and commercial nature of the undertaking they would be better placed to convince the court that nothing less than guaranteed coverage would be acceptable to them.

Under either type of policy, establishing loss should not be a problem if the reliance criterion is satisfied.

B White v Jones

By a 3:2 majority the House of Lords in *White v Jones*[44] held that a firm of solicitors which had negligently failed to draw up and have executed a new will prior to the death of the testator was liable in tort to the intended beneficiaries for the amounts they would have received under the proposed will.[45] The duty owed by the solicitors to the intended beneficiaries shadowed the duty owed by the solicitors to the testator.

The features of the case which led the majority (Lords Goff, Browne-Wilkinson, and Nolan) to find a duty of care were that the solicitors could reasonably foresee that their negligence in performing a task that they voluntarily undertook to complete may deprive the intended beneficiaries of their inheritance in circumstances where neither the testator nor the estate have a remedy because they have suffered no loss. Reference was also made to the role of solicitors in society, with it being important that they be accountable, and to the importance of legacies as a means of improving the lot of recipients and of allowing a testator to dispose of her property as she sees fit. The majority saw the duty as being consistent with,[46] or an extension of, existing principle. The minority (Lords Keith and

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44 Above n 28.

45 This duty of care was recognised by the Court of Appeal in *Gartside v Sheffield, Young & Ellis* [1983] NZLR 137. The material facts of each case are the same, but the two courts took different paths to the same result.

46 Lord Goff saw the case as coming under the *Hedley Byrne v Heller* [1964] AC 465 principle, and Lord Nolan saw it as coming within the criteria laid down in *Caparo* (above n 30) and *Murphy* (above n 31). Lord Browne-Wilkinson viewed the case as an extension of the *Hedley Byrne* principle.

Mustill) were of the view that finding a duty of care would represent a departure from, rather than a principled development of, decided cases.

The extension/departure was necessary for the plaintiffs to succeed as the case contained a number of features that militated against the finding of a duty of care on traditional grounds: the solicitors were guilty of an omission rather than an action, the loss was of an expectation, and the plaintiffs had not acted in reliance on the solicitors carrying out the instructions.

While acknowledging that there are similarities between *White v Jones* and the case of a third party under an insurance contract - the insurer can reasonably foresee economic damage to the third party if the insurer refuses indemnity, no remedy may be available, and insurance and the role of insurers are also very important to society - the writer is of the view that this does not constitute a breach of the duty of care identified in *White v Jones*. The duty, arguably, owed by the insurer to the third party is to write a policy of insurance that satisfies the insured's requirements, which can be taken to include the requirement that designated third parties also be *effectively* insured. However, the policy is "negligent" not because of any act or omission by the insurer, but because of the operation of the privity and damages rules. The third party can obtain the right to enforce the policy in contract by being joined as a party to the contract and by providing consideration to the insurer, but then you have a quite different contract. Also, this solution is simply not feasible for third parties such as a one time driver of an insured's car. It is therefore submitted that a duty is not breached by writing a standard insurance policy that does not/cannot provide enforcement rights in contract for third parties covered by it.

A more appropriate action in tort for a disappointed third party is, as is discussed under the immediately preceding heading, that of negligent misstatement. *White v Jones* strengthens this argument as it extends the boundaries for economic loss cases and thereby strengthens the third party's claim - the positions of the intended beneficiary under the will and the third party under the insurance contract vis-a-vis the solicitor and the insurer are comparable as the solicitor and insurer are each aware that their actions will affect the financial well-being of the beneficiary and the third party, but the third party will also often be able to demonstrate reliance and detriment.

A final point to note is that the majority in *White v Jones* recognised a duty of care in part because the intended beneficiaries would not otherwise have a means of redress. This factor will not be present in the insurance situation if the third party has another remedy, such as enforcement of the contract pursuant to the Contracts (Privity) Act, available to her.

IV LINDEN GARDENS

The fundamental problem with insurance contracts that cover third parties is that the doctrine of privity precludes the third party from suing under the contract for damages if the

insurer refuses to honour her valid claim, and the insured can only receive nominal damages on the contract in respect of that breach as she personally has suffered no loss. This unsatisfactory state of affairs has been remedied by the House of Lords, albeit in relation to a quite different type of contract, in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd.*[47]

The essential facts of each case are as follows. Linden Gardens was the assignee of a leasehold interest in several floors of a commercial building. There was an existing but as yet unknown breach of an asbestos removal contract at the time of the assignment. The contract was between the assignor and the contractor. Clause 17 of the contract prohibited its assignment without the written consent of the other party, but the assignor had nonetheless purported to assign the benefit of the contract to Linden Gardens. The assignor had received market value for asbestos-free premises so suffered no loss in respect of the breach. Accordingly, it was not a party to the proceedings.

St Martin's Property Corp began a property development which was to include shops, offices, and flats. It entered into a building contract with the defendant, the contract containing an assignment clause practically identical to the one in *Linden Gardens*. For tax reasons Property Corp assigned all its interest in the property to an associated company, St Martin's Investments Ltd. It also purported to assign the benefit of the building contract to Investments, but again the consent of the contractor had not been sought or obtained. There were no subsisting relevant breaches of the building contract at the time of the assignment, but there was subsequently a problem with a leaking podium deck. Remedial work costing £800,000 plus VAT was carried out and this was originally paid for by Corporation, which then recovered the amount from Investments. Unlike the situation with *Linden Gardens*, the assignor (Corporation) was a party to the proceedings along with Investments even though it had not suffered any loss as a result of the contractor's breach.

The House of Lords held that the attempted assignments of contractual rights in breach of the contractual prohibitions were ineffective. This determined the *Linden Gardens* appeal in favour of the contractor as the only plaintiff, being Linden Gardens, therefore lacked privity and so had no cause of action in contract. The position was different in the *St Martin's* appeal as the assignor and the assignee were both plaintiffs, and the ruling that the assignment of contractual rights had been ineffective meant that Corporation remained a party to the building contract.

The defendant did not dispute that Corporation was entitled to damages, but submitted that it could only receive nominal damages as it had parted with its interest in the property

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47 [1993] 3 All ER 417. Two consolidated appeals were heard, the other being *St Martin's Property Corp Ltd v Sir Robert McAlpine & Sons Ltd.*

prior to the occurrence of the breach and, further, it had received full value for its assignment to Investments. The Court of Appeal had avoided this result on the basis that Corporation was liable to Investments for breach of contract in failing to effectively assign the benefit of the building contract to Investments. The court held that the measure of damages for this breach was the cost of remedying the leaking podium deck as Investments could have recovered that amount from the defendant if the assignment of contractual rights had been effective. The defendant accepted that Corporation was liable in contract to Investments, but argued that the damage claimed was too remote. This argument was accepted by the House: "One party to a contract cannot be liable for damages flowing from the doing of an act by the other party which the contract itself expressly forbids".[48] The House did, however, uphold the award of substantial damages to Corporation on a different basis.

The principal speech was given by Lord Browne-Wilkinson who held that the case fell within the rationale of the rule in *Dunlop v Lambert*.[49] That case held that a consignor of goods could recover substantial damages for the failure of the carrier to deliver the goods even though the consignor had parted with the property in the goods prior to the breach. Lord Browne-Wilkinson adopted the formulation of the case's rationale as given by Lord Diplock in *The Albazero*:[50]

> The only way in which I find it possible to rationalise the rule in *Dunlop v Lambert* so that it may fit into the pattern of the English law is to treat it as an application of the principle, accepted also in relation to policies of insurance on goods, that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into.

Applying the rationale to the facts of the *St Martin's* case, Lord Browne-Wilkinson observed that: the contract was for a large development and both parties knew that it would be occupied, and possibly purchased, by third parties; it could therefore be foreseen that damage caused by a breach would also cause loss to a later owner; rights would not automatically vest in the occupier or owner for the time being who sustained the loss. His

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48 Above n 47, 433 (per Lord Browne-Wilkinson).

49 (1839) 6 C1 & F 600, 7 ER 824.

50 [1976] 3 All ER 129, 136-137.

Lordship was of the view that it was appropriate on those facts to treat the parties as having entered into the building contract on the basis that Corporation would be able to enforce it for third parties who suffered from defective performance but who could not acquire rights to personally enforce the contract:[51]

> It is truly a case in which the rule provides "a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it".

Lords Keith, Bridge, and Ackner dismissed the contractor's appeal in *St Martin's* for the reasons given in the speech of Lord Browne-Wilkinson. Lord Griffiths agreed with the result but preferred to base his judgment on a broader ground. This broader ground is detailed later in this article.

With regard to the case itself, had the same facts arisen in New Zealand the assignee would almost certainly have based its claim in tort as the New Zealand courts have taken a more liberal approach than their English counterparts with regard to finding a duty of care in negligence cases. The need to recognise this new cause of action can therefore be viewed as a direct result of the *Murphy v Brentwood District Council*[52] decision.

A second point concerns the parameters of the decision. *Dunlop v Lambert* concerned the carriage of goods and *St Martin's* extends it to construction contracts, but can it also apply to insurance contracts? If the decision is truly based on *Dunlop v Lambert* it would seem that the answer is "no". Lord Diplock's formulation of the rationale of that case, referred to previously, limits it to cases where there has been a transfer of the proprietary interest. A third party under an insurance contract is not a transferee. This conclusion is inferentially supported by the judgments of Lords Goff and Mustill in *White v Jones*. Lord Goff refers to *St Martin's* as a "transferred loss case", an expression not found in any of the judgments in the case itself, and notes that the plaintiffs in *White v Jones* would have difficulty bringing themselves within the exception as they were seeking to recover damages for a loss that the contracting party (the testator) could not himself have suffered. He did not, however, completely rule out the possibility that *St Martin's* could be successfully invoked by the contracting party in a case involving a loss that could only fall on the third party. Lord Mustill also refers to "transferred loss" although interestingly he is hesitant to include *St Martin's* as a transferred loss case. But he does place greater weight on the fact that only the third party could suffer the loss at issue to exclude a contract solution in *White v Jones*. Lord Browne-Wilkinson studiously avoids all mention of *St Martin's* in his judgment, and Lords Keith and Nolan are also silent on the subject.

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51 Above n 47, 437. The quote within the quote is from Lord Diplock, above n 50, 137.

52 [1991] 1 AC 398.

The position of a third party under an insurance contract is, however, analogous to that of Investments with regard to the foreseeability of loss to it if the contract is breached by the insurer and the fact that it cannot hold the insurer liable for the breach in contract. Accordingly, ignoring for the moment the immediately preceding discussion on the nature of the loss and the need for a transfer, the insurance contract could also be categorised as a proper case in which to treat the parties as having entered into the contract on the basis that the promisee could enforce the contract for the benefit of the third party. This approach does not appear to be too far removed from finding a constructive trust. And if a case comes within this category, why should it matter whether the type of foreseeable loss arising as a direct consequence of a breach of contract is one that could be suffered indifferently by a party or a third party to the contract, or whether there has been a transfer of property? In either situation both the justification for allowing the party to enforce on behalf of the third party is the same, and the loss is suffered by the third party and not the party. The restrictions may have more to do with caution than with consistency.

A more radical solution to the problem faced by Investments was favoured by Lord Griffiths. He was prepared to hold that the measure of damages available to a party to a contract in respect of a breach should be the cost of securing performance of her bargain. This approach does not require the party to show loss in the traditional sense, rather she has a recoverable loss because she did not get what she paid for. This approach would obviously assist a disappointed third party under an insurance contract. Lord Browne-Wilkinson also considered this approach and viewed it favourably, but he preferred to decide the case on the narrower ground on the basis that the ramifications of the more general approach should be explored before it is adopted:[53]

> There is therefore much to be said for drawing a distinction between cases where the ownership of goods or property is relevant to prove that the plaintiff has suffered loss through the breach of a contract other than a contract to supply those goods or property and the measure of damages in a supply contract where the contractual obligation itself requires the provision of those goods or services. I am reluctant to express a concluded view on this point since it may have profound effects on commercial contracts which effects were not fully explored in argument. In my view the point merits exposure to academic consideration before it is decided by this House. Nor do I find it necessary to decide the point since, on any view, the facts of this case bring it within the class of exceptions to the general rule to which Lord Diplock referred in *The Albazero*.

Lord Keith expressed sympathy with the broader approach and Lord Bridge stated that he was attracted to it, but each of them agreed that the appeal should be dismissed on the

53 Above n 47, 435.

narrower ground. Lord Ackner concurred with the decision without reference to either ground.

The narrower ground adopted by the House does not offer too much hope for a third party insured but the broader ground would certainly assist, particularly if it is developed so as to allow the third party to compel the insured to enforce the contract. A clearer picture will no doubt emerge when the ambit of the case is defined in future judgments. With regard to *St Martin's* reception by the New Zealand judiciary, the only reported reference to the case is by Richardson J in *Invercargill City Council v Hamlin*,[54] which involved a negligence claim by a house owner against the Council in respect of its inspection of the house's foundations. His Honour suggested that a cautious stance be taken in respect of the radical approach:[55]

> In [*St Martin's*] Lord Wilkinson-Browne at p.112 noted that the radical approach might have profound effects on commercial contracts and invited academic consideration. As only one aspect of the wider question of risk allocation under building control regimes and having regard to the current position in this country, any move down that path would require a wide-ranging analysis and assessment of all the economic and social implications.

One of the issues that will need to be resolved if only the narrow approach from *St Martin's* is adopted is the question of over-lapping remedies. Lord Browne-Wilkinson's judgment states that the assignor's right to substantial damages is dependent upon there being no remedy available to the party that suffers the loss, but it is not clear as to whether he is referring to no contractual remedy being available or no remedy of any nature being available. If the former then New Zealand parties in the position of *St Martin's* could elect to pursue an action in tort or in contract, but otherwise they will be forced to rely on a negligence claim only.

The final point to note under this heading is that the approach taken by the Court of Appeal in *St Martin's* to damages does not involve any radical departure from the traditional view of the law, and thus should be upheld by the New Zealand courts in appropriate cases. For example, if Blue Circle was to provide insurance cover as part of its contract with McNiece Bros or if it had stated that cover was provided then it would be liable to McNiece Bros in contract or tort if Trident refused to indemnify McNiece Bros. The refusal by Trident would be in breach of its contract with Blue Circle and Blue Circle could recover substantial damages in respect of the breach because its loss, being the amount of damages it would be required to pay to McNiece Bros, would be reasonably foreseeable to Trident.

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54 [1994] 3 NZLR 513, 529.

55 Above n 54.

V CONCLUSION

Several possible remedies available to a third party who is refused indemnity by an insurer have been canvassed in this article. In the writer's view the most appropriate solution is provided by the Contracts (Privity) Act 1982. The wording of that Act appears to encompass promises to benefit third parties so, unlike the other options, there *should* be no need to stretch or even distort an existing remedy in order to assist a third party. Second, enforcement of the contract will result in the third party receiving precisely the amount promised under the contract - this avoids uncertainty as to the amount that may be recovered which may arise with other remedies. Third, the Act also caters for associated matters such as variation or discharge of the contract by the parties, enforcement by the third party, and defences available to the insurer. With other possible remedies these matters may need to be worked out by the courts. A fourth benefit for third parties is that they do not need to prove reliance on the promise in order to enforce it. Reliance is a requirement under tort remedies and it could prove to be a stumbling block, particularly in the case of occasional third party drivers seeking to enforce a motor vehicle insurance policy. The non-requirement of reliance is balanced by the proviso to s 4 which provides that the Act does not apply to a promise which, on the proper construction of the contract, is not intended to be enforceable by the third party. It is the writer's opinion that the possible difficulties arising from the case-law on nominee contracts will be overcome by the Court of Appeal either over-ruling its decision in *Field* or, the more likely scenario, by distinguishing insurance contract cases.

Of the other remedies the "radical" approach to contract damages advocated by Lord Griffiths in *Linden Gardens* could also assist greatly, particularly as neither reliance by the third party nor an intention by the promisor to give rights to the third party appear necessary, but matters such as whether the third party can compel the promisee to bring a breach of contract action have yet to be determined. Negligent misstatement may be available to third parties who can establish sufficient proximity, but the cost of such an action would make it a viable option only if a large amount of money was at stake.