

---

---

# Enforcement of Third Party Rights in Queensland Pursuant to Property Law Act 1974 (Qld), s55

---

Des Butler\*

Twentyfive years ago the common law rule of privity of contract was largely abolished in Queensland by the enactment of *Property Law Act 1974 (Qld)*, s55. Subsection 1 provides that:

A promisor who, for a valuable consideration moving from the promisee, promises to do or refrain from doing an act or acts for the benefit of a beneficiary shall, upon acceptance by the beneficiary, be subject to a duty enforceable by the beneficiary to perform that promise.

Any interpretation of the section, including the construction of terms such as “promisor”, “beneficiary”, “promise”, “acceptance” and available defences, is to be gleaned from a handful of reported cases (including obiter in a High Court decision) and a number of unreported Queensland decisions. In many of these decisions the section was called upon by way of alternative argument rather than being the main focus of the action.<sup>1</sup>

---

\* LLB (Hons), PhD, Assistant Dean (Research), Faculty of Law, Queensland University of Technology, Member of Centre for Commercial and Property Law, QUT.

1 There have, however, been a few cases in which the only issue has been the claim of a third party beneficiary which have been resolved in favour of the beneficiary by an unremarkable application of the section: see, eg, *Batchelor v Ocean Downs Pty Ltd* (unreported, Qld SC, Ambrose J, 16 September 1985) (promise in contract of a sale of real estate agency to continue the employment of the manager of the agency); *Orpin v AGC (Advances) Ltd* (unreported, Qld SC, de Jersey J, 8 October 1987) (payment of sum by promisee to satisfy a debt owed by the beneficiary to the promisor in return for the promisor releasing the beneficiary from a registered mortgage).

## 1. "Promisor"

In *Re Davies*<sup>2</sup> the vendor leased the ground floor of its building to the lessees for use as a restaurant for a term of two months with options to renew for successive periods of three years. By a deed executed in 1983, the vendor promised that if the building was sold during the period of the term or any extension thereof, the vendor would obtain a promise by the purchaser to abide by the option provisions in the lease. In March 1985 the vendor entered into a contract to sell the building to a trustee, Brookfield. Under cl 35 of the contract Brookfield promised to recognise the options in the lease and by cl 36 agreed to obtain a similar promise from any successor in title. By a letter dated 14 June 1985 the solicitor for the vendor informed the solicitor for the lessees about the inclusion in the agreement of the two clauses.

On 19 September 1985, Brookfield transferred its assets to a new trustee, Wickham. Under the relevant deed Wickham agreed to be bound by all of Brookfield's covenants and obligations. On 12 September 1986, the lessees purported to exercise the option under the lease. On 16 October 1986, the solicitor for the lessees wrote to the solicitor for the new trustee expressly accepting the benefit of the promise contained in cl 35.

It was held that lessees could not enforce a claim against the new trustees. The promise in cl 5 could only be enforced against the promisor who made it, Brookfield. In the absence of an assignment of Brookfield's personal obligations, cl 35 gave no rights against the new trustee, who merely stood in the shoes of Brookfield. Under the deed between Wickham and Brookfield, the new trustee did no more than to assume the old trustee's duties under the trust.

## 2. "Beneficiary"

A party may clearly be a "beneficiary" for the purposes of s55 if he or she is expressly named in a contract as receiving the benefit of performance of work under a contract. For example, in *Re Eagle Star Trustees Ltd*<sup>3</sup> the owner of land at 80 Albert Street, Brisbane engaged a builder, White, to construct a building which, in accordance with a concept plan, was to feature innovative external walls almost entirely sheeted in glass without a visible framework. There was a lack of expertise among builders in Brisbane and possibly Australia with the expertise to construct the special external walls as required by the owner. White had no expertise in the area, and so it engaged a subcontractor, Hennessey, which was regarded as having the necessary expertise to design and erect the proposed glass curtain walls. The glass curtain walls proved unsuccessful, with a large number of panes spontaneously shattering due to the presence of nickel sulphide impurities in the glass. It was held that the express statement in the subcontract that Hennessey agreed to carry out and

---

2 [1989] 1 Qd R 48.

3 Unreported, Qld SC, Ambrose J, 25 March 1994.

complete the glass curtain works “to the satisfaction of the principal and the company” (ie, the owner and the builder White), especially in the context of the lack of available builders with the necessary expertise, characterised the owner as a beneficiary of the subcontract between the builder White and Hennessey.

A live issue regarding “beneficiary” is whether a person who is not named in the promise but who incidentally is benefitted by the promise can enforce the promise under s55. There is authority supporting both competing views, with the better view seeming to be that an “incidental beneficiary” cannot rely on the section.

In *Re Burns Philp Trustees*<sup>4</sup> the mortgagor owned land at the Gold Coast on which a unit development was planned. A mortgage was granted in favour of Burns Philp. There were two subsequent securities: a bill of encumbrance in favour of Mexican Village and a mortgage in favour of the Commonwealth Bank. There were also unsecured creditors. The mortgagor struck financial problems and the first mortgagor, Burns Philp, sold the land and paid out its debt. The surplus from the sale was insufficient to pay out the remaining debts. Indeed, if the surplus had been used towards either of the Mexican Village or the Commonwealth Bank debts, there would have been no funds to pay any of the other claimants. In September 1993 there was a meeting between Mexican Village and the unsecured creditors. The view was expressed that if there was a forbearance exercised by the various claimants so that the project proceeded through to fruition, the various creditors could hope to be paid in full. To ensure that the unsecured creditors would be paid, or perhaps merely to induce them to exercise the necessary forbearance, Mexican Village agreed with each of them that it would relinquish its prior entitlement to payment. At the meeting and in the deed recording the terms of agreement, attention was not given to the position of the Commonwealth Bank, and the significance of its position and the size of its debt were overlooked.

The Commonwealth Bank claimed the benefit of the promise by Mexican Village to relinquish its prior entitlement, contained in the agreement between it and the other creditors. The Commonwealth Bank claimed that since Mexican Village had relinquished its priority, the Bank as the next registered creditor was entitled to the whole of the surplus in payment of its debt.

Justice Macrossan rejected the Commonwealth Bank’s argument on the grounds that the clear intention of the agreement was to adjust entitlements only as between the parties to the agreement. There was no promise to do or refrain from doing anything for the benefit the Commonwealth Bank, which was mentioned nowhere. The Bank could therefore not rely on s55.

A similar result was achieved by White J in *Robt Jones (363 Adelaide Street) Pty Ltd v First Abbott Corporation Pty Ltd*.<sup>5</sup> This case involved similar facts and some of the same parties as *Re Eagle Star Trustees Ltd*: the owner of land at 363 Adelaide Street wished to construct a building that featured innovative glass curtain external walls that showed no apparent framework. The owner in this case engaged a

\*

4 Unreported, Qld SC, Macrossan J, 17 December 1986.

5 Unreported, Qld SC, White J, 28 October 1997.

developer, Abbott Holdings, which in turn engaged the same builder, White. White then engaged the same subcontractor, Hennessey, for the purposes of the supply and installation of the glass curtain. Subsequently, numerous panes of the glass used for the curtain wall spontaneously shattered due to the presence of nickel sulphide impurities. The case was a complex one involving claims in both contract and negligence by the owners against a range of defendants including the developer Abbott, the builder White, the glass subcontractor Hennessey, and several architectural companies and their directors.

In so far as is relevant to s55, the owners argued that it could claim the benefit of a provision in the building contract between the developer Abbott and the builder White under which White was obliged to obtain certain warranties and to ensure that Abbott would have the benefit of those warranties. White performed its obligations by obtaining the necessary warranties from Hennessey in the subcontract.

Justice White held that even if those warranties (which mainly concerned materials and workmanship for aluminium fixings, use of glass that could withstand excessive heat, wind or rain and works being watertight and free from deterioration) were apt to cover the deficiency in the glass, the owners were unable to claim any benefit from them. It was clear from the building contract that the beneficiary of the warranties in the subcontract between White and Hennessey would be the developer Abbott Holdings. The incidental benefit that would be enjoyed by the owners was not enough to constitute the promises, that is the warranties, as creating or appearing to create a duty enforceable by the owners.

The waters were muddied, however, by the High Court decision in *Northern Sandblasting Pty Limited v Harris*.<sup>6</sup> The landlord of residential premises undertook, before tenants entered into possession, to have a defective electrical appliance repaired. A licensed electrician performed the repairs negligently with the result that those in possession of the premises were placed at risk of death or injury. The plaintiff, the daughter of the tenants, received a severe electric shock and suffered permanent and disabling injuries. Under the *Property Law Act 1974* (Qld), the landlord had a duty to maintain the premises "in a condition reasonably fit for human habitation". A similar duty arises under the *Residential Tendencies Act 1975* (Qld).

A number of different grounds were relied upon by different judges in the 4-3 decision in favour of the plaintiff, including s55 and the tort of negligence. One ground involved the argument that if the duties to provide premises in a condition reasonably fit for human habitation were seen as taking effect as a promise in the contract between the landlord and the tenants, the plaintiff as the daughter of the tenants and who also was known by the landlord to be living in the house, was an incidental beneficiary of that promise and could enforce it under s55. This argument found favour with Kirby J, with whom Gaudron J concurred: "The tenancy agreement between the [landlord] and the [plaintiff's] parents was obviously for her benefit".<sup>7</sup>

---

6 (1997) 188 CLR 313.

7 *Ibid* at 413.

By contrast, Brennan CJ strongly rejected the suggestion that an incidental beneficiary could rely on s55:

From the context of s55, it appears that the identity of the beneficiary must be ascertainable from the terms of the promise made. The beneficiary is not any person who, in the event, would have been benefited had the promise been fulfilled. If that had been the intention of the legislature, the duty which s55 imposes would have been owed to the world at large or, at least, to any person who may foreseeably have been benefited by the discharge of that duty.<sup>8</sup>

Allowing s55 to apply in a case like the present, he thought, would make it impossible to predicate on any logical basis the categories of beneficiaries who might be entitled under s55.<sup>9</sup>

As a matter of strict doctrine of precedent, weight cannot be given to Kirby J's comments because they are the words of a dissenting judge. By contrast, great weight may be assigned to Brennan CJ's rejection of incidental beneficiaries since he was a member of the majority. The complication arises because Gaudron J agreed with Kirby J's comments in this regard but nevertheless also was a member of the majority.

### 3. "Promise"

"Promise" is defined in s55(6)(c) as a promise (a) which is or appears to be intended to be legally binding, and (b) which creates or appears to be intended to create a duty enforceable by a beneficiary. A term merely regulating the relationship between promisor and promisee will not be enforceable by a third party if it does not amount to a promise to benefit the third party and create an enforceable duty.<sup>10</sup>

In *Northern Sandblasting v Harris* three of the seven judges - Gummow J with whom Dawson and Toohey JJ agreed in this respect - held that the definition in s55(6)(c) was in terms which were not apt to include an obligation inserted in a contract by operation of statute. Instead, "promise" was treated by s55 in terms of intention. It was one thing to acknowledge that the statutes imposed contractual obligations on the landlord in relation to the state of the premises, but another to then make the leap to allowing those obligations to be enforced as a promise under s55.<sup>11</sup> Chief Justice Brennan agreed that s55 had no application to terms implied in a lease or residential tenancy contract by force of statute. Section 55 only applied to

---

8 *Ibid* at 329.

9 *Ibid*.

10 See, eg, *Davis v Archer Park Newsagency Rockhampton* (unreported, Qld SC, Demack J, 17 July 1984) (Gold Lotto entrant, not paid for having winning numbers due to destruction by fire of original coupon, unable to recover from newsagent on basis of term in agency contract between Gold Lotto organisers and newsagent requiring safekeeping of original coupons by newsagent).

11 (1997) 188 CLR at 382.

duties created by “de facto” promises.<sup>12</sup>

Justice Kirby (with whom Gaudron J concurred), on the other hand, held that not only did the statutes create contractual duties but that s55 could be used by a beneficiary to take the benefit.

Although there appears to be a clear majority on the issue, again strict doctrine of precedent may cause difficulties: of those against the applicability of s55 only Brennan CJ and Toohey J were in the majority of the decision, while Gaudron J (but not Kirby J) also found in favour of the plaintiff.

A promise to benefit a beneficiary may be made subject to the fulfilment of specified preconditions. Failure to satisfy the preconditions will prevent s55 arising as an issue.<sup>13</sup>

#### 4. “Acceptance”

Subsection 6 defines “acceptance” as:

An assent by words or conduct communicated by or on behalf of the beneficiary to the promisor, or to some person authorised on his behalf, in the manner (if any), and within the time, specified in the promise or, if no time is specified, within a reasonable time of the promise coming to notice of the beneficiary.

In *Re Eagle Star Trustees Ltd*<sup>14</sup> it was held that the owner-beneficiary accepted the benefit of the promise contained in the subcontract by the subcontractor Hennessey to perform work in the form of erecting the glass curtain walls to the owner’s satisfaction. This acceptance occurred when the owner agreed to a request by the subcontractor to assent to a variation in the job specifications contained in the sub-contract to permit the use of glass panes warranted by their manufacturer for 10, rather than 15, years. Accordingly, the owner of the property was able to enforce against the subcontractor Hennessey the contractual obligations it undertook in the job specifications which formed part of the sub-contract.

In a number of respects, the subsection expressly refers to agents: the acceptance may be communicated by *or on behalf* of the beneficiary, to the promisor *or to some person authorised on his or her behalf*. However, by the terms of the subsection the “reasonable time” for acceptance does not start until the promise comes to the notice of *the beneficiary*. Nevertheless, it may still be sufficient if the promise comes to the notice of the beneficiary’s agent. In *Re Davies* the Full Court of the Queensland Supreme Court held that the beneficiary (the lessees) had failed to communicate their assent to Brookfield (the promisor) within a reasonable time of the clause coming to their attention - on or about 14 June 1985. This in fact was the date of a letter from the solicitor for the vendor to the *solicitor for* the beneficiary, rather than

---

12 *Ibid* at 329.

13 *Remar v Graham-Hall-Downer Pty Ltd* (unreported, Qld SC(FC), 17 November 1988).

14 Unreported, Qld SC, Ambrose J, 25 March 1994.

the beneficiary themselves.<sup>15</sup>

An issue addressed by the trial judge in *Re Davies*, but not the Full Court, relates to the beneficiary's intention when accepting. Ryan J held that an additional ground for holding that the benefit had not been properly accepted under s55 was that the beneficiary's assent did not on its face purport to "accept" the promise. It was insufficient for there to be words or conduct merely *consistent* with an acceptance for the purposes of s55.<sup>16</sup> Similarly, in *Robt Jones (363 Adelaide Street) Pty Ltd v First Abbott Corporation Pty Ltd*<sup>17</sup> it was held that informing the promisor of the name of the name of the purported beneficiary was merely a provision of information and did not amount to an attempt to accept the relevant term of the contract. This view might be contrasted with the view expressed by Kirby J, with which Gaudron J agreed, in *Northern Sandblasting v Harris* that the beneficiary had communicated her acceptance by conduct because the landlord knew that she had entered into possession of the premises with her parents.<sup>18</sup>

A case that focused on "acceptance" was the recent Queensland Court of Appeal decision in *Hyatt Australia Ltd v LTCB Australia Ltd*.<sup>19</sup> Discovery Bay owned a hotel which was managed by Hyatt. Under the management agreement Discovery Bay promised that the land on which the hotel stood would be kept free of mortgage or encumbrances. In 1988, Discovery Bay obtained finance secured by mortgages over its land, including that on which the hotel stood. In deference to the management agreement, the bill of mortgage was to include a clause by which the mortgagee agreed that while the management agreement remained in force, the mortgagee would not interfere with the operation of the hotel by Hyatt. In November 1988 Hyatt forwarded an "acknowledgment of security" which included a statement that Hyatt consented to the grant of the mortgage and "acknowledges and confirms" that the mortgage did not "materially and adversely affect the operation of the hotel" by Hyatt. The mortgage was finally signed on 21 July 1992. Subsequently, Discovery Bay went into receivership and a dispute arose between the mortgagee and Hyatt concerning disposal of proceeds from the operation of the hotel.

The major issue was that the purported acceptance (in November 1988) preceded by some three and a half years the promise sought to be accepted (on 21 July 1992). The Court of Appeal had no difficulty recognising the concept of an "anticipatory acceptance" which was in advance of the promise to benefit a third party. Their Honours drew an analogy with the notion of a conditional acceptance which takes effect as a counter-offer itself capable of acceptance by a further promise. The simplest way of frustrating such an anticipatory acceptance - if that was what the promisor and promisee wished to achieve - was simply to refrain from going on to make the primary promise. If the primary promise is never made, there will be

---

15 [1989] 1 Qd R 48 at 49, 51.

16 Unreported, Qld SC, Ryan J, 22 December 1986.

17 Unreported, Qld SC, White J, 28 October 1997.

18 (1997) 188 CLR at 413.

19 [1996] 1 Qd R 260.

nothing for the anticipatory acceptance to fasten onto.<sup>20</sup>

In the course of its decision, the Court made two further comments regarding acceptance. First, issuing a writ commencing proceeding is sufficient conduct manifesting an intention to accept the promise. Secondly, when determining whether there has been acceptance within a reasonable time, it is a relevant factor that the decision-makers for the various parties are located in far apart places such as Japan, Hong Kong and the United States.<sup>21</sup> Apart from an issue of whether geographic location is necessarily of any, or any great, relevance in this technological age, a question not addressed in this obiter comment is how it juxtaposes against the decision in *Re Davies* that "reasonable time" commences when the promise comes to the attention of the beneficiary's agent.

## 5. Defences

Subsection 4 provides that:

Subject to subsection (1), any matter which would in proceedings not brought in reliance on this section render a promise void, voidable or unenforceable, whether wholly or in part, or which in proceedings (not brought in reliance on this section) to enforce a promissory duty arising from a promise is available by way of defence shall, in the like extent, render void, voidable or unenforceable or be available by way of defence in proceedings for the enforcement of a duty to which this section gives effect.

In *Wallis v Downard-Pickford (North Queensland) Pty Ltd*<sup>22</sup> the plaintiff police officer was transferred from Ayr to Dalby. As part of the transfer arrangements, the Commissioner of Police entered into a contract for the transport of the plaintiff's furniture and effects. These goods were packed in forty separate containers and there were an additional fortyseven items. When the goods arrived, damage totalling over \$1,600 was discovered. However, no written statement declaring the nature and value of the goods was given to the carrier, with the prima facie result that under s6 of the *Carriage of Goods by Land (Carrier's Liability) Act 1967* (Qld) the carrier's liability was limited to a total of \$200.

The Full Court of the Queensland Supreme Court referred to the Law Reform Commission's explanatory note describing the intended object of the subsection as being "to ensure that defences such as mistake, fraud, misrepresentation, Statute of Frauds and Statute of Limitations, payment, etc, which may be available to the promisor against the promisee are also available to the former against the beneficiary."<sup>23</sup> In other words, the subsection is:

---

20 *Ibid* at 264.

21 *Ibid* at 266.

22 (1992) ATPR 41-197.

23 QLRC, Report No 16, at 40-41.

... concerned for the obvious reasons of justice to ensure that the beneficiary coming in from outside, as it were, to enforce the promise for his own benefit, will not be unduly advantaged by being placed in a stronger position than the original promisee had that person himself sought to enforce the promises.<sup>24</sup>

However, the Court of Appeal could find no reason to believe that s55(4) should be interpreted as an exclusive statement of the matters that could modify or abate the amount recoverable when the third party beneficiary sued the promisor.<sup>25</sup> Where a statutory enactment imposed a limit on liability, such as that contained in the *Carriage of Goods by Land (Carrier's Liability) Act 1967* (Qld), s6, liability was affected beyond the terms expressly agreed by the parties or which were implied in their contractual arrangements. Accordingly, s6 operated to directly limit the extent of liability which a third party beneficiary could enforce under s55 just as much as it limited the amount which a directly contracting promisee could recover.

## 6. Summary

These cases permit a number of conclusions to be drawn about the operation of s55:

1. A s55 promise is personal to the promisor who makes it. Without an effective assignment, it cannot be enforced against someone stepping into the promisor's shoes.<sup>26</sup>
2. It would seem that a person not named or identifiable in the promise but who incidentally obtains a benefit from the promise is unable to rely on s55 to enforce the promise.<sup>27</sup>
3. It would seem that a "promise" for the purposes of s55 must be intended by the parties, or at least the promisor, and not be imposed by operation of law, such as terms implied into a contract by statute.<sup>28</sup> An issue might arise in relation to promises imposed upon the promisor by other means, such as equitable estoppel.
4. A promise comes to the attention of the beneficiary, for the purposes of calculating whether there has been acceptance within a "reasonable time" when it comes to the notice of the beneficiary's agent, or at least the beneficiary's solicitor.<sup>29</sup>

---

24 (1992) ATFR 41-197 at 40,651.

25 See also *Remar v Graham-Hall-Downer Pty Ltd* (unreported, Qld SC(FC), 17 November 1988 ) where it was suggested that matters such as waiver and prevention of performance might be relied upon in an appropriate case.

26 *Re Davies* [1989] 1 Qd R 48.

27 *Re Burns Philp Trustees* (unreported, Qld SC, Macrossan J, 17 December 1986); Brennan CJ in *Northern Sandblasting Pty Limited v Harris* (1997) 188 CLR 313; cf, however, the contrary effect of comments by Kirby J (with whom Gaudron J agreed).

28 *Northern Sandblasting Pty Limited v Harris* (1997) 188 CLR 313 per Brennan CJ and Dawson, Toohey and Gummow JJ.

29 *Re Davies* [1989] 1 Qd R 48.

5. A promise to benefit a beneficiary may be made subject to the fulfilment of specified preconditions, in which case a failure to satisfy the preconditions will prevent the beneficiary from relying on s55.<sup>30</sup>
6. It would seem that the acceptance must on its face purport to be an assent to the promise and not merely be consistent with an assent.<sup>31</sup> A mere supply of information, such as the name of the purported beneficiary is insufficient.<sup>32</sup>
7. An anticipatory acceptance, which precedes the promise it relates to, may be effective.<sup>33</sup>
8. Issuing a writ, thereby commencing proceedings on the basis of the promise, is a sufficient means of acceptance.<sup>34</sup>
9. Geographical location of the parties' respective decisionmakers may be a relevant factor to be taken into account when deciding whether the acceptance has been communicated within a reasonable time.<sup>35</sup>
10. Subsection (4) does not exhaustively list the grounds which modify or exclude the promisor's liability to the third party beneficiary. In particular, a statutory modification or limitation will apply to an action by the beneficiary in the same way as it would apply to an action by a contracting party.<sup>36</sup>

---

30 *Remar v Graham-Hall-Downer Pty Ltd* (unreported, Qld SC(FC), 17 November 1988).

31 *Re Davies* (unreported, Qld SC, Ryan J, 22 December 1986).

32 *Robt Jones (363 Adelaide Street) Pty Ltd v First Abbott Corporation Pty Ltd* (unreported, Qld SC, White J, 28 October 1997); cf, however, comments that would appear to indicate otherwise by Kirby and Gaudron JJ in *Northern Sandblasting v Harris* (1997) 188 CLR 313.

33 *Hyatt Australia Ltd v LTCB Australia Ltd* [1996] 1 Qd R 260.

34 *Ibid.*

35 *Ibid.*

36 *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (unreported, Qld CA, 30 October 1992.)