21/07; [2007] VSC 86

SUPREME COURT OF VICTORIA

ALMA HILL CONSTRUCTIONS PTY LTD v ONAL

Kaye J

21, 30 March 2007 — (2007) 16 VR 190

CIVIL PROCEEDINGS – EQUITY – DAMAGED MOTOR VEHICLE REPAIRED BY REPAIRER – DEBT FOR REPAIRS ASSIGNED TO ANOTHER ENTITY – MOTOR REPAIRER PAID BY ASSIGNEE – CLAIM BY ASSIGNEE AGAINST OWNER OF REPAIRED VEHICLE – NO NOTICE OF THE ASSIGNMENT GIVEN TO OWNER UNDER S134 OF *PROPERTY LAW ACT* 1958 – DEBT UNPAID BY OWNER – CLAIM MADE AGAINST OWNER BY ASSIGNEE – FINDING BY MAGISTRATE THAT AS NO NOTICE GIVEN ASSIGNEE UNABLE TO SUE OWNER IN ITS OWN NAME TO RECOVER DEBT – WHETHER MAGISTRATE IN ERROR – WHETHER JOINDER OF ASSIGNOR A REQUIREMENT OF SUBSTANCE OR OF PRACTICE – UNJUST ENRICHMENT CLAIM IN THE ALTERNATIVE – PRINCIPLES OF – WHETHER FREE ACCEPTANCE BY OWNER OF BENEFIT PROVIDED BY ASSIGNEE – FINDING BY MAGISTRATE THAT OWNER HAD NOT BEEN UNJUSTLY ENRICHED - WHETHER MAGISTRATE IN ERROR: *PROPERTY LAW ACT* 1958, S134.

O's motor vehicle was damaged in a motor vehicle collision and taken to Ms for repairs. Ms carried out the repairs and returned the vehicle to O. Some time later Ms assigned to AHCP/L all its rights and interest in the debt owed to Ms by O. Relying on that assignment, AHCP/L issued proceedings to recover the debt from O. The claim was based on AHCP/L being the assignee of the debt owed by O. to Ms and alternatively, a claim against O. based on the principle of unjust enrichment. At the hearing of the claim, the magistrate considered, *inter alia*, the case of *Thomas v National Australia Bank Limited & Ors* [1999] QCA 525; [2000] 2 QdR 448. In declining to follow *Thomas' case*, the magistrate found that AHCP/L could not sue in its own name to recover from O. without prior notice of the assignment having been given to O. In relation to the alternative claim based on unjust enrichment, the magistrate concluded that the doctrine of unjust enrichment did not apply as AHCP/L and O. were "strangers" to each other. As the factoring agreement between AHCP/L and Ms was a commercial undertaking in which O. played no part, O. had not derived a benefit from AHCP/L in respect of which O. should make restitution to AHCP/L. The magistrate dismissed the claim with costs. Upon appeal—

HELD: Appeal allowed in respect of the magistrate's decision based on the assignment in equity of the debt. Appeal in respect of the claim based on unjust enrichment refused. Matter remitted to the magistrate for re-hearing in accordance with law.

1. Since no notice had been given to O. of the assignment to AHCP/L of the debt owed by the respondent to Ms pursuant to s134 of the *Property Law Act*, the assignment was an equitable assignment and not a legal assignment. The question for the magistrate was whether an equitable assignee can sue the debtor in its own name to recover the debt when no notice of the assignment has been given to the debtor.

2. In *Thomas' case*, the Queensland Court of Appeal was required to address the question whether an assignee in equity must first give notice to the obligor of the assignment before commencing an action against him. The Court held that the assignee's title is complete without notice of the assignment to the obligor, so as to enable suit to be brought against the obligor before notice is given to him. The Court further held that the requirement that the assignor be joined as a party to the proceeding is a procedural requirement, and not a substantive requirement, which in appropriate cases a court may waive. Unless it could be demonstrated that *Thomas' case* was manifestly wrong, the decision is of persuasive authority and should have been followed by the magistrate.

3. Having regard to the authorities, strong support for the decision in *Thomas' case* can be found for the propositions set out by the Queensland Court of Appeal. Accordingly, the magistrate was in error in declining to follow *Thomas' case* and in holding that AHCP/L was required to give notice of the assignment to O. before the action commenced.

***Showa Shoji Australia Pty Ltd v Oceanic Life Limited* (1994) 34 NSWLR 548; [1994] NSW Conv R 66,062, followed.**

***Mountain Road (No 9) Limited v Michael Edgley Corporation Pty Ltd* [1999] 1 NZLR 335, not followed.**

4. The significant weight of authority supports the proposition that the requirement that the assignor be joined as a party to the proceeding, in the case of an equitable assignment, is a requirement

of practice or procedure. As a matter of either principle or authority, the joinder of the assignor is not a necessary component of the cause of action asserted by the assignee against the debtor.

5. The concept of unjust enrichment has evolved as a principle in a number of claims for restitution over the last two decades. Whatever the precise limits of the doctrine, it is clear that there has evolved a claim based on a concept described in the cases by the label "free acceptance" or an "incontrovertible benefit". The plaintiff must establish that the "benefit" on which the claim is based is constituted by the receipt by the defendant of the services provided by the plaintiff and secondly, the benefit provided was the benefit actually received by the defendant.

***Brenner v First Artists' Management Pty Ltd and Anor* [1993] VicRp 71; [1993] 2 VR 221, applied.**

6. The "service" which was provided by AHCP/L was a monetary advance to Ms. The "service" received by O. was of an entirely different nature namely, the repairs performed by Ms. The "benefit" received by O. was not the "benefit" provided by AHCP/L. The "benefit" was received by O. before the "benefit" was bestowed on AHCP/L. Accordingly, there could not have been any "free acceptance" of the "benefit" so provided by AHCP/L. In those circumstances, it could not be said that O. received a benefit from AHCP/L in circumstances in which he should have realised that he would be under an obligation to pay for it. Therefore, AHCP/L was not entitled to recover an amount from O. based on the concept of unjust enrichment.

KAYE J:

1. This is an appeal, pursuant to s109 of the *Magistrates' Court Act* 1989, against an order by the Melbourne Magistrates' Court made on 8 March 2006, dismissing the appellant's claim against the respondent, and ordering the appellant to pay the costs of the respondent. In those proceedings the appellant had claimed the sum of $5,105.46 from the respondent. Although the amount in dispute is relatively small, the decision of the Magistrate, and the appeal, involve issues which are of larger importance to the appellant. In particular the appeal concerns issues relating to the right of an assignee in equity to sue, in its own name, for a debt owed to the assignor of the debt.

2. The background circumstances to the claim of the appellant may be briefly outlined. On 13 November 2002 the respondent's motor vehicle was damaged in a collision with another vehicle. Following the accident the respondent's vehicle was taken to the premises of Mardy's Smash Repairs Pty Ltd ("Mardy's"). The respondent engaged NRA Recovery Service to act on his behalf in assessing the damage to his vehicle, authorising repairs to the vehicle and recovering the cost of repairs from the other driver. The vehicle was duly repaired by Mardy's and returned to the respondent. By a document dated 28 November 2002 on the letterhead of NRA Recovery Pty Ltd, Mardy's, in consideration for the payment of an amount of $3,572.90, assigned to the plaintiff all its rights and interest in the debt owed to Mardy's by the respondent for the repairs. No notice of the assignment of the debt was given to the respondent. Relying on that assignment, the appellant issued the proceedings against the respondent. It also issued the proceedings against the proprietor of Mardy's, but those proceedings were discontinued.

3. The appellant's claim against the respondent was made on two bases. First, it claimed on the basis of being the assignee of the debt owed by the respondent to Mardy's. Alternatively, it made a claim against the respondent based on the principle of "unjust enrichment".

4. The appellant's claim was heard at the Melbourne Magistrates' Court on 1 December 2005. Counsel for the appellant opened the case to the magistrate. Two witnesses were called on behalf of the appellant, and the respondent gave evidence. Counsel for both sides then made oral submissions to the Magistrate. At the conclusion of those submissions the Magistrate requested counsel to each provide to him written submissions as to the two legal issues agitated before him, namely, the right of the appellant to sue the respondent as assignee of the debt owed by the respondent to Mardy's, and the claim by the appellant for restitution on the basis of unjust enrichment. Pursuant to those directions counsel exchanged and filed written submissions on 15 December 2005. On 8 March 2006 the Magistrate delivered written reasons, in which he rejected both claims of the appellant.

5. The parts of the reasons of the Magistrate which relate to this appeal, may be summarised briefly. The magistrate accepted that there was a debt owed by the respondent to Mardy's in respect of the cost of the repairs to the vehicle. He also accepted that the factoring agreement between

the appellant and the respondent did constitute an assignment of the debt owed to Mardy's by the respondent. He observed that the failure of the appellant to give notice of the assignment to the respondent under s134 of the *Property Law Act* 1958 did not prevent it being an equitable assignment of the debt by Mardy's to the appellant. He also noted the plaintiff's submission that, although no notice had been given to the respondent, the appellant had the right to sue for the debt in its own name. His Honour noted that the respondent relied, *inter alia*, on the decision of the Court of Appeal of Queensland in *Thomas v National Australia Bank Limited & Ors*[1] in support of that proposition. The Magistrate, in some detail, referred to and examined a number of other authorities concerning the effect of an assignment in equity on the right of the assignee to sue for the assigned debt in the assignee's own name. His Honour concluded:

> "In my opinion, the decision of the Queensland Court of Appeal in *Thomas* is not only contrary to the plain words of the relevant statute, but is also clearly contrary to the weight of the persuasive authority on the question of whether an assignee in equity of a legal chose in action can sue in his own name at law to recover from the debtor without prior notice having been given to that debtor. I respectfully decline to be persuaded by the decision of the Queensland Court of Appeal. It is my opinion therefore that the plaintiff cannot maintain his action in debt as an assignee against the second defendant (the respondent)."

6. The Magistrate then considered the appellant's alternative claim based on unjust enrichment. The Magistrate referred to the decision of the High Court of Australia in *Pavey & Matthews Pty Ltd v Paul*[2] and decision of Warren J (as her Honour then was) in *Andrew Shelton & Co Pty Ltd v Alpha Health Care Limited*[3]. Based on those decisions the Magistrate concluded that the doctrine of unjust enrichment did not and could not apply where, as in this case, the appellant and respondent were "strangers" to each other. The factoring arrangement between the plaintiff and Mardy's was a commercial undertaking in which the respondent played no part. Thus, he held, the respondent had not derived a benefit from the appellant in respect of which the respondent must make restitution to the appellant.

7. The further amended notice of appeal contains six grounds of appeal. However Mr Ian Jones SC, who with Mr J Levine appeared for the appellant, confined his submissions to grounds 1, 2 and 5, namely:

> (a) The magistrate erred in law in holding that an assignee in equity of a legal chose in action cannot sue in his own name to recover the assigned debt from the debtor without having provided notice of the assignment to the debtor before the institution of proceedings (ground 1);
>
> (b) The magistrate erred in law in holding that the decision of the Queensland Court of Appeal in *Thomas v National Australia Bank Limited and ors*[4] was not binding upon him as a matter of precedent (ground 2);
>
> (c) The magistrate erred in law in holding that the respondent had not been unjustly enriched, in receiving repairs to his vehicle, that were not paid for by him and were instead paid for by the appellant (ground 5).

8. It is convenient to deal with the first two grounds together, relating to the claim by the appellant as an assignee in equity. It was common ground before the magistrate, and before me, that since no notice had been given to the respondent of the assignment to the appellant of the debt owed by the respondent to Mardy's pursuant to s134 of the *Property Law Act*, the assignment was an equitable assignment, and not a legal assignment. Mr Jones' principal submission was that the magistrate had incorrectly held that, unless an equitable assignee has first given notice of the assignment to the debtor, the equitable assignee is unable to sue the debtor in its own name to recover the debt. Mr Jones submitted that the magistrate's ruling to that effect was an error of law. He submitted that an equitable assignee may sue for an assigned debt in its own name. He further submitted that the requirement that, in such an action, the assignor be joined as a party, is not a requirement which is fundamental to the maintenance of the cause of action by the assignee, but rather is a requirement of practice. Thus he submitted that, if the magistrate had considered that the assignor should have been added as a party to the proceeding, he should not have dismissed the action, but, rather, should have either given the appellant the opportunity to join the assignor as a party, or, alternatively, stayed the proceeding unless and until the assignee was joined as a party to it. Mr Jones submitted that the magistrate was bound to follow the decision of the Queensland Court of Appeal in *Thomas*' case, unless it was plainly wrong. He submitted that the decision of the Court of Appeal was not plainly wrong, but is good law.

9. In response Mr Matters, who appeared for the respondent, submitted that the magistrate's decision was not that an assignee in equity may not institute proceedings in its own name to recover an assigned debt; rather, the magistrate's decision was that the assignee must join the assignor as a party to such proceeding in order to be entitled to succeed in a claim for the assigned debt. He submitted that the Court of Appeal in *Thomas*'s case was plainly in error in holding that the requirement that the assignor be joined as a party to the proceeding is a requirement of practice or procedure only. Rather, Mr Matters submitted that such a joinder is a necessary component of a claim asserted by an equitable assignee against a debtor. Thus he submitted that the magistrate was not in error in declining to follow the decision of the Court of Appeal in *Thomas*' case and in reaching the conclusion that, without the joinder of the assignor, the assignee could not sue the debtor on the assigned debt.

10. The foregoing submissions raise three issues. The first issue concerns the proper characterisation of the reasons for decision by the magistrate. The second issue is whether those reasons contain an error of law. The third issue is whether, in the case of an equitable assignment, the requirement that the assignor be joined as a party to the proceeding, is a matter of procedure only, or whether it is fundamental to the validity of the claim by the assignee.

11. In respect of the first issue, in my view Mr Jones is correct in maintaining that the magistrate considered that, in order that the appellant, as the assignee in equity of the debt owed by the respondent, be entitled to maintain an action against the respondent for that debt, the appellant must have first given notice to the respondent.

12. The magistrate commenced the part of his reasons, which is relevant to this issue, by referring to s134 of the *Property Law Act*. He observed that a failure to comply with the requirements of s134 of the *Property Law Act* would not prevent the creation of an equitable assignment of the debt. He acknowledged that therefore the assignee may enforce his equitable rights against the assignor, and any "priorities thus created in respect of the assigned property". His Honour then referred to the plaintiff's submission that the appellant had the right to sue in its own name in respect of the debt. He observed that in support of that proposition the appellant relied on the decision of the Court of Appeal in *Thomas*' case. His Honour then referred to the decision of the New Zealand Court of Appeal in *Mountain Road (No. 9) Limited v Michael Edgley Corp Pty Ltd*,[5] the decision of Giles J in *Showa Shoji Australia Pty Ltd v Oceanic Life Limited*[6] and the decision of the House of Lords in *Brandt's (William) Sons and Co v Dunlop Rubber Company Limited*.[7] His Honour expressed the view that the decision of Giles J in *Showa Shoji Australia* was "entirely against" the proposition that an equitable assignee can sue in his own name on a legal chose in action without prior notice to the debtor. Having considered those authorities, and a number of other authorities to which he referred, his Honour reached the conclusion which I have quoted above.[8] Thus he concluded that *Thomas* was contrary to the weight of persuasive authority to the effect that an assignee in equity of a legal chose in action cannot sue in its own name at law to recover from the debtor without prior notice having been given to the debtor. Accordingly the learned magistrate held that the plaintiff could not maintain its action in debt as assignee against the respondent.

13. I am further of the view that, in reaching that conclusion, the learned magistrate was wrong in law. Indeed so much was conceded by Mr Matters, and correctly so. It is clear on all the authorities that it is not necessary for an equitable assignee to give notice to the debtor or obligor in order to perfect the interest of the assignee in equity. Further, the assignee in equity is entitled to commence proceedings in its own name against the debtor or obligor, regardless of whether the assignee (or indeed the assignor) has given prior notice of the assignment to the debtor. The giving of such notice is irrelevant to the right of the assignee in equity to commence such proceedings. However the authorities also make it clear that ordinarily, and indeed save for exceptional cases, the assignee in equity must join the assignor as a party to the proceeding, and, if necessary, as a defendant to it. The authorities, particularly in the last century, have characterised that requirement as one of practice, and not as a requirement which goes to the substance of the cause of action of the assignee in equity against the obligor. As a matter of practice, the Court ordinarily insists that the assignor in equity be joined as a party to the proceeding. However, if the assignor has not been so joined, that is not fatal to the validity of the cause of action asserted by the assignee against the obligor. In such circumstances, the Court should, ordinarily, give the assignee the opportunity to join the assignor in the suit, if necessary by staying the proceeding unless and until the assignor is joined as a party to it.

14. The principles which I have just enunciated may be derived from a number of authorities, to which Mr Jones referred me in his very thorough submissions. Before turning to those authorities it is worthwhile briefly considering the historical context from which the relevant principles derive. It is of course trite law that at common law, with some limited exceptions, it was not possible to effectively assign a contractual right *inter vivos*. On the other hand equity did recognise such an assignment. Such an equitable assignment could not transfer the right of action at law. However it conferred on the assignee the right to invoke the aid of equity in asserting the common law right. Thus, if necessary, equity would compel a defendant to permit an action at law to be brought in his or her name, or might, in an appropriate case, make an order for specific performance requiring the assignor to lend his name to the assignee so that the latter might bring an action at law. However, as a review of the authorities reveals, the requirement, that the assignor be a party to any action based on the assigned right, has become considered as a requirement of practice, rather than as an essential ingredient of the equitable assignee's cause of action. Generally, as the authorities point out, the purpose of the requirement is to bind the assignor to the judgment between the assignee and the debtor, so that the assignor might not later dispute the assignment, or the right of the assignee to receive direct payment of the assigned debt from the obligor.

15. In considering the authorities, a useful starting point is the decision of the Queensland Court of Appeal in *Thomas v National Australia Bank Limited*. The present appellant principally relied on that authority before the magistrate in support of the proposition that it was entitled to maintain its claim against the respondent in its own right. In *Thomas*' case the appellant had a cause of action against the respondents. He was declared bankrupt in October 1991, whereupon his rights of action passed to his trustee in bankruptcy. The bankruptcy terminated in 1994. In January 1996 the trustee assigned the right of action to the appellant, who then commenced proceedings against the respondents. The appellant did not join the trustee in bankruptcy as a party to the proceeding. Nor had he given prior notice of the assignment to the respondent. A preliminary question was tried as to whether the appellant was entitled to bring and maintain the action notwithstanding that no notice of the assignment had been given to the respondent. The primary judge held that since no such notice had been given, the appellant had no right to bring and maintain the action. Accordingly, the primary judge dismissed the action. That decision was reversed by the Queensland Court of Appeal.

16. On appeal, the respondents supported the primary judge's reasons, but also contended that the order dismissing the action could be upheld on the basis that the trustee in bankruptcy, being the assignor of the chose in action, was a necessary party to the appellant suit. It was submitted that since the trustee had not been joined, the suit was a nullity. That question was of some significance, since, if the action was a nullity, the period of limitation had passed, and the plaintiff would not be able to commence fresh proceedings against the respondent.

17. Thus the first issue in *Thomas* which the Court of Appeal was called upon to address, was the question whether an assignee in equity must first give notice to the obligor of the assignment, before commencing action against him. The leading judgment was delivered by Pincus JA. His Honour considered a number of authorities to which I shall later refer, including the decision of the New Zealand Court of Appeal in *Mountain Road (No. 9) Limited v Michael Edgley Corporation Pty Ltd*.[9] Pincus JA observed that although there was authority tending "both ways" on the issue, the weight of Australian authority was against the view adopted in the *Mountain Road* case, and supported the proposition that the assignee's title is complete without notice of the assignment to the obligor, so as to enable suit to be brought against the obligor before notice is given to him.[10] On the second issue, Pincus JA also considered a number of authorities, to some of which I shall later refer. They included *William Brandt's Sons and Co v Dunlop Rubber Company Limited*,[11] *Performing Right Society Limited v London Theatre of Varieties Limited*,[12] and *National Mutual Life Nominees Limited v National Capital Development Commissioner*.[13] Based on those authorities his Honour concluded that the absence of the assignee as a party to the proceeding did not render the proceeding a nullity. His Honour considered that the requirement that the assignor be a party to the proceeding was one of practice. In the circumstances of that case, Pincus JA considered that there was no practical advantage in joining the trustee in bankruptcy as a party to it. On that basis he held that the action was correctly constituted without joining the assignor (the trustee in bankruptcy).[14]

18. Both McMurdo P[15] and Thomas JA[16] expressed agreement with the reasons of Pincus

JA. Further, McMurdo P held that, in any event, notice of the assignment had been given to the respondents, at the time at which the respondents were served with the statement of claim in which the assignment was pleaded. In his concurring judgment, Thomas JA held, *inter alia*, that notice of the assignment was given to the respondent by service of the statement of claim which stated the fact of the assignment. However, I do not infer from his Honour's reasons that his Honour considered that such a notice was necessary to perfect the right of the assignee to sue in equity. Rather it would seem that his Honour considered that the giving of such notice, in the pleading, constituted sufficient notice for the Queensland statutory equivalent of s134 of the *Property Law Act*.[17]

19. Pausing there, *Thomas v National Australia Bank Limited* is thus clear authority for the two propositions relied on by the present appellant. First, it is authority for the proposition that it is not necessary for the assignee in equity to give notice of the assignment to the obligor, before commencing suit against the obligor. Secondly, the Court of Appeal held that the requirement that the assignor be joined as a party to the proceeding is a procedural requirement, and not a substantive requirement, which, in appropriate cases, a court may waive.

20. The decision of the Queensland Court of Appeal in *Thomas*' case, although not binding on this Court, is of persuasive authority. Courts of first instance, including this Court, as a matter of precedent, follow a decision of an intermediate appellate court of another State, unless that decision can be demonstrated to be manifestly wrong.[18] As I have already stated, Mr Matters has accepted that the decision of the Court of Appeal in *Thomas* is correct in respect of the first issue decided by it, namely, that an assignee in equity may institute proceedings, in his own name, without first giving notice to the obligor. Mr Matters submitted, however, that as a matter of principle, the decision of the Queensland Court of Appeal was plainly wrong on the second issue determined by it, namely, that the requirement that the assignor be joined as a party was a requirement of practice or procedure. In my view, the authorities relied upon by Mr Jones, and to which I shall refer, provide strong support for the decision of the Queensland Court of Appeal, and for the proposition that the requirement that the assignor be joined as an action is now considered to be a requirement of practice or procedure only.

21. It is appropriate that I first consider the basis upon which the learned magistrate declined to follow the first principle established in *Thomas*' case, namely that it is not necessary that an assignee in equity give notice of the assignment to the obligor, before the assignee commences an action against the obligor. Mr Matters conceded that if the magistrate did base his decision on the proposition that the giving of such notice is necessary, then his Honour was in error in doing so. That concession by Mr Matters is plainly correct.

22. There is a strong body of authority for the proposition that it is not necessary that an assignee in equity is required to give notice of the assignment to the obligor, in order that his interest as assignee be complete, not only as against the assignor, but also against the assignee. Of course, the giving of such notice is important in a number of different contexts. For example, it may affect competing priorities of other assignees of the debt.[19] Further, the provision of notice by the assignee to the obligor is important to ensure that the debt is paid to the assignee.[20] In the absence of appropriate notice an assignee may be bound by payments made by the obligor in ignorance of the assignment.[21]

23. A number of relevant authorities, relating to the proposition that notice is not required to effect an equitable assignment, were discussed in the judgment of Pincus JA in *Thomas*' case. The proposition is not in issue before me, but in deference to the learned magistrate, I should briefly refer to some of those authorities.

24. In *Ward and anor v Duncombe and ors*,[22] the House of Lords was concerned with an issue of competing priorities between assignees of a fund which was vested in trustees. Lord Macnaghten referred to the rule in *Dearle v Hall*[23] and observed:[24]

> "In defence of the rule in *Dearle v Hall* [1828] EngR 574; 3 Russ 1; 38 ER 475, it has been said that notice is necessary in order to 'perfect' the title of the assignee – in order to 'complete' his title. Those expressions have frequently been used; but they are, I venture to think, little more than mere phrases. Notice does not render the title perfect. Notice is not even a step in the title until it was made so by the decision of *Foster v Cockerell*.[25] Apart from the rule in *Dearle v Hall*, an assignee of

> an equitable interest from a person capable of disposing of it has a perfect equitable title, although the title is no doubt subject to the infirmity which attaches to all equitable interests. That infirmity is not and cannot be cured or removed by notice to the trustees."

25. In *Re City Life Assurance Company Limited*,[26] the mortgagee of an endowment policy assigned the mortgage, in equity, to certain trustees for another class of policy holders. No notice of the assignment was given to the mortgagor. The company was subsequently wound up. In those circumstances the Court of Appeal held that as the equitable assignment of the debt owed by the policy holder was complete, there was no mutual credit or debt between the company and the policy holder which would come within s31 of the *Bankruptcy Act*, and accordingly the policy holder had no right of set-off in relation to it. Pollock MR identified the relevant issue as whether the system of set-off, which had been held to be applicable between the simple case of a policy holder and the liquidator of the company, also applied between a policy holder whose policy had been assigned in equity and was then held by the trustees. His Lordship rejected the proposition that there was any such set-off, stating:

> "It is clear that as between the assignor and the assignee an assignment is complete without notice given. If modern authority for that is needed it will be found in *Gorringe v Irwell India Rubber and Butta Purcha Works*[27] where Cotton LJ says:
>
> > 'It is contended that in order to make an assignment of a chose in action, such as a debt, a complete charge, notice must be given to the debtor. It is true that there must be such a notice to enable the title of the assignee to prevail against a subsequent assignee. That is established by *Dearle v Hall*, but there is no authority for holding this rule to apply as against the assignor of the debt. Though there is no notice to the debtor the title of the assignee is complete as against the assignor.'
>
> Therefore the company had assigned policies of these policy holders by an assignment which was good as between them and the trustees as assignees."[28]

26. Notwithstanding the above authorities the learned magistrate considered that the decision in *Thomas*, as to the need for provision of notice by the equitable assignee, was contrary to the weight of authority. The magistrate reached that decision based on a consideration of the judgment of the House of Lords in *William Brandt's Sons and Co v Dunlop Rubber Co Limited*, the judgment of Giles J in *Showa Shoji Australia Pty Ltd v Oceanic Life Limited*,[29] the decision of the Court of Appeal of England in *Warner Bros Records Inc v Rollgreen Limited and ors*,[30] and the decision of the New Zealand Court of Appeal in *Mountain Road (No. 9) Limited v Michael Edgley Corporation Pty Ltd*. In my view, the first two authorities to which I have just referred do not support the proposition relied upon by the learned magistrate. The decision in *Warner Bros* has been the subject of debate, and it is of uncertain authority. The decision of the New Zealand Court of Appeal is, in my view, out of step with the weight of English and Australian authority. In my respectful view, the Queensland Court of Appeal was correct (and certainly not "plainly wrong") in declining to follow that decision.

27. The decision of the House of Lords in the *William Brandt's* case is an illustration of one of the reasons why it is important for an equitable assignee to give notice of the assignment to the obligor. It is not, however, authority for the proposition that the right of the assignee, as against the obligor, is not complete until such notice is given. In that case the appellant bank financed Kramrisch and Co, who were rubber merchants in Liverpool. That firm later became bankrupt. Kramrisch and Co agreed with the appellant that goods sold by it should be paid for by a remittance direct by the purchasers to the bank. Goods were sold by Kramrisch and Co to the respondents. The appellant forwarded to the respondents notice in writing that Kramrisch and Co had made over to the bank the right to receive the purchase money, and requested the respondents to sign an undertaking to remit the purchase money to the bank. Notwithstanding that notice, the respondents paid the debt to another creditor of Kramrisch and Co. The appellant claimed the amount of the debt against the respondent. The claim succeeded at first instance, but the Court of Appeal reversed that decision. In turn the House of Lords reversed the decision of the Court of Appeal and restored the decision of the trial judge. The leading speech was delivered by Lord Macnaghten. His Lordship observed that it did not matter what form the equitable assignment took. His Lordship stated that the language of the assignment is immaterial if its meaning is plain. He then stated:[31]

> "All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice he does so at his own peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor."

28. In this case the magistrate construed the foregoing passage as authority for the proposition that there must be notice to the debtor in order that the equitable assignment be effective. However, in my view, in its proper context, the above extract from the speech of Lord Macnaghten was referring to the consequences to a debtor if the debtor, having received due notification of the equitable assignment, nonetheless disregards it and pays the debt, not to the assignee, but to the assignor (or, as in *William Brandt's* case, to the assignor's creditor). Thus *William Brandt's* is, as I have stated, a useful illustration of the proposition that it is important that an equitable assignee protect its rights to payment from the debtor, by giving notice of the assignment to the debtor. However that decision is not authority for the proposition relied on by the magistrate in this case, namely, that the giving of such notice is essential in order to perfect the right of the equitable assignee to sue the debtor on the assigned debt.

29. The decision of the Court of Appeal in *Warner Bros Records Inc v Wallgreen Limited* was considered, both by the Court of Appeal of New Zealand in the *Mountain Road* case, and by the magistrate in this case, as authority for the proposition that the provision of notice to the obligor is essential to entitle the assignee in equity to assert his rights against the obligor. That case concerned an agreement by the singer Rod Stewart to perform exclusively for Mercury Record Productions. Subsequently, without notice to Stewart, the option was assigned to Phonogram in equity. Phonogram purported to exercise the option in its own name. The Court of Appeal held that, as no notice of the assignment had been given to Stewart, the assignee could not validly exercise the option in its own name.

30. In the course of his judgment Lord Denning MR stated that it was a "settled principle of equity that in order to perfect the title of an assignee of a debt notice to the debtor is necessary."[32] His Lordship then went on to hold that if an assignee of an option wishes to exercise it, then it is essential that notice of the assignment should first be given to the grantor. His Lordship stated:

> "The grantor cannot be expected to act on a letter purporting to exercise the option which comes out of the blue from someone or other of which he knows nothing. He must be told that it comes from an assignee who has taken an assignment. Notice is therefore necessary to perfect the right of the assignee to exercise the option."[33]

31. Pausing there, it is worth observing that the contract between Mercury and Stewart was for the performance of personal services by a musical artist. It is understandable that, where such a contract contained an express provision for its assignment, it would be implicit that such an assignment should only be exercised on due notice to the grantor of the option. Although it is by no means clear, it is at least arguable that that is the effect of the paragraph which I have just quoted from the judgment of Lord Denning.

32. Roskill LJ agreed with the judgment of Lord Denning MR. In effect, his Lordship stated that since notice was not given to the obligor (Stewart), the assignment remained one in equity, and never became a legal assignment. Thus his Lordship stated that the assignee was never in the position to enforce the contractual right against the obligor in its own name and for its own benefit.[34] On the other hand, Sir John Pennycuick expressed his views differently. His Lordship stated that, notwithstanding the equitable assignment of the option, the assignee was not thereby placed in a contractual relationship with the obligor (Stewart); thus the assignee was not in a position to exercise the option directly against the obligor. Unless and until the equitable assignment is converted into a legal assignment, Phonogram had no more than a right in equity to require Mercury to protect its interest by exercising the option itself.[35]

33. In *Showa Shoji Australia Pty Ltd v Oceanic Life Limited*, Giles J explained the decision of the Court of Appeal in *Warner Bros.* His Honour expressed the view that that decision did not disturb the entitlement of the equitable assignee of a debt to seek to recover the debt, although the assignee is not in a direct contractual relationship with the debtor. Rather, *Warner Bros* stands for the proposition that an assignment in equity does not substitute the assignee for the position of the assignor in the contract between the assignor and the obligor. Unless and until

such notice is given then the obligor continues to look only to the assignor, and does not deal with the assignee.[36]

34. In the present case, the learned magistrate considered that the Giles J's analysis is "entirely against" the proposition that an equitable assignee may sue in his own name on a legal chose in action without prior notice to the debtor. I do not agree. To the contrary, Giles J, in *Showa Shoji* restricted the decision *Warner Brothers* in the manner I have just explained. In doing so, his Honour expressly stated:[37]

> "Notice (to the obligor) may preserve priority, but it is unnecessary for the validity of the assignment as between the parties. In the absence of notice the obligor may receive a good discharge from the assignor, and that no doubt is what Lord Denning MR had in mind when he spoke of perfecting the assignee's title."

35. I turn then to the decision of the New Zealand Court of Appeal in *Mountain Road (No. 9) Limited v Michael Edgley Corporation Pty Ltd* which was also relied upon by the magistrate in this case. In that case the appellant was a manufacturer of fabric for a tent. By a process of assignments, the first respondent, Michael Edgley Corporation Pty Ltd, became the assignee in equity of causes of action against the appellant arising out of faults in the fabric. No notice of the assignment had been given to the appellant. Tipping J, who delivered the judgment of the Court, held that although an equitable title is vested in the assignee immediately as against the assignor, nonetheless notice of the assignment to the obligor "has consistently been regarded as necessary to give the assignee title to claim the benefit of the chose in action against (the obligor)."[38]

36. Tipping J drew that conclusion from a number of cases, including *William Brandt's* and *Warner Bros Records*. As I have already indicated, I do not consider that the statement of principle of Lord Macnaghten in *William Brandt's* case stands for any such proposition. Further, it is debatable whether the decision of the Court of Appeal in *Warner Bros* supports the proposition stated by Tipping J in *Mountain Road*. Certainly, in *Showa Shoji*, Giles J considered that it does not. In *Thomas*' case, Pincus JA noted that only Lord Denning MR, in *Warner Bros*, expressly stated that notice was necessary to "perfect" the equitable assignee's title.

37. In *Thomas'* case Pincus JA, while observing that there are authorities which "tend both ways", concluded that the weight of authority on the point, as least as far as Australia is concerned, favoured the proposition that notice of the equitable assignee's title is not necessary to enable the assignee to commence suit against the obligor.[39] In my respectful opinion, that conclusion by Pincus JA is correct. Certainly, in light of the authorities which I have canvassed, that conclusion could not be characterised as being "plainly wrong". It follows that the magistrate should have considered himself bound by the judgment of the Court of Appeal in *Thomas*, and should have followed it. Likewise I consider that I should follow that decision. Accordingly, I accept the first proposition contended for by the appellant, namely, that, contrary to the decision of the learned magistrate, it was not necessary for the appellant, as the equitable assignee of the debt, to have given notice of the assignment to the respondent, before commencing the Magistrates' Court proceeding against the respondent to recover that debt.

38. I have therefore reached the conclusion that, contrary to the decision of the magistrate, the failure of the appellant to give notice of the equitable assignment to the respondent did not disentitle the appellant to claim the debt from the respondent in its own name. That conclusion enlivens the second issue raised by Mr Jones' submissions, namely, whether the failure of the appellant to have joined Mardy's as a party to the litigation is necessarily fatal to the validity of the claim made by the appellant against the respondent. In my view, the significant weight of authority supports the proposition relied upon by Mr Jones, namely, that the requirement that the assignor be joined as a party to the proceeding, in the case of an equitable assignment, is a requirement of practice or procedure. Contrary to the submission of Mr Matters, I do not consider that, as a matter of either principle or authority, the joinder of the assignor is a necessary component of the cause of action asserted by the assignee against the debtor.

39. This issue was expressly raised by the respondent to the appeal in *Thomas v National Australia Bank Limited*. There, Pincus JA considered the relevant authorities and concluded:[40]

> "The proposition that the absence of the assignor from the proceedings instituted rendered them a nullity is plainly wrong."

40. His Honour then considered whether as a matter of procedure the trustee in bankruptcy (the assignor) should have been joined. His Honour expressed the view that there was no reason for joining the trustee in bankruptcy, and that to do so would only exacerbate the delays and costs in the proceeding. Thus in the circumstances of that case, as a matter of practice, his Honour held that it was not necessary for the assignor to be joined. As I have stated, McMurdo P and Thomas JA both agreed with the reasons for judgment of Pincus JA. The decision in *Thomas* is of persuasive authority. No argument has been advanced which satisfies me that it is plainly wrong. To the contrary, the decision is in conformity with the weight of authority, including the decisions directly referred to by Pincus JA.

41. In the *William Brandt's* case, to which I have already referred, Lord Macnaghten stated:[41]

> "Strictly speaking, Kramrisch and Co, or their trustee in bankruptcy, should have been brought before the Court. But no action is now dismissed for want of parties, and the trustee in the bankruptcy had really no interest in the matter. At your Lordship's Bar the Dunlops disclaimed any wish to have him present, and in both courts below they claimed to retain for their own use any balance that may remain after satisfying Brandt's."

42. In *Performing Right Society Limited v London Theatre of Varieties Limited*,[42] the plaintiff, which was an equitable assignee of the performing rights in certain music, sought an injunction against the defendants for breach of copyright. The House of Lords held that the interests of the plaintiffs, being equitable only, did not entitle the plaintiffs to a permanent injunction without joining the legal owners of the copyright as parties to the action. Some of the speeches of the House of Lords identified the requirement that the assignor be joined as a requirement of practice, and not as a requirement which vitiated the claim of the plaintiff *in limine*.[43] Thus Lord Sumner stated:[44]

> "The recognition of an equitable title or a valid title in equity and the grant of relief to a person, so entitled, without joinder of the legal owner are distinct matters. The second is not necessarily involved in the first. The latter is essentially a matter of practice, and the established practice ought not to be disturbed, or at any rate only very sparingly. As it is certain that there is no practice to regard the joinder of the legal owner as generally unnecessary, it is for the appellants to show that it has been the practice to dispense with it in cases such as the present."

43. In *Weddell and anor v JA Pearce and Major and anor*,[45] the plaintiffs had a cause of action against a firm of solicitors. Subsequently the plaintiffs were declared bankrupt. Two years later the trustee in bankruptcy assigned to the plaintiffs the causes of action against the firm of solicitors. The plaintiffs commenced proceedings against the firm, without joining the trustee in bankruptcy as a party. The defendant issued a summons seeking to set aside the writ on the grounds that the plaintiffs lacked the necessary *locus standi* to bring the action. The Registrar upheld the defendants' contentions, and ruled that the action was a nullity from its commencement. Scott J allowed the appeal of the plaintiff, holding that the failure to join the trustee in bankruptcy did not vitiate the commencement of the proceedings. His Lordship stated:[46]

> "Its seems, therefore, that an equitable assignee can sue in his own name. He cannot, however, recover damages or a perpetual injunction without joining as a party the assignor in whom legal title to the chose in action is vested. The same would apply to recovery of a debt. The reason for this is, however, a pragmatic one. The debtor must not be at risk of suit by the legal owner of the chose. To put the point another way, the debtor must, if he is adjudged liable, be in a position to obtain a complete discharge from his liability by paying the plaintiff, the equitable assignee ... (His Lordship then referred to *William Brandt's* case and the *Performing Rights Society* case). ... In neither of the authorities to which I have referred was the action, begun by an equitable assignee without the assignor being joined as a party, treated as a nullity. ... It is, I think, a common practice for an action commenced by an equitable assignee to be stayed pending joinder, either as co-plaintiff or as co-defendant, of the assignor ... In my judgment, therefore, it is clearly established that an action commenced by an equitable assignee without joining the assignor is not a nullity. It may be liable to be stayed until the proper parties have been joined, but it is not a nullity."

44. There are a number of other authorities which express a like conclusion. They include: *Three Rivers District Council and ors v Governor and Company of the Bank of England*;[47] *National Mutual Life Nominees Limited and ors v National Capital Development Commission and ors*;[48] *Showa Shogi Australia Pty Ltd v Oceanic Life Limited*;[49] *Long Leys Co Pty Ltd v Silkdale Pty Ltd*.[50] Indeed, in *Jenkins v Visualeyes Pty Ltd*,[51] Hargrave J (*obiter*) cited *Thomas'* case (among others)

in expressing the view that the respondent (obligor) in the case before him had been correct in conceding that in that case it was not necessary for the assignor (which was a deregistered company) to be made a party to the proceeding.[52] Thus, I consider that the second proposition relied upon by the appellant is good law, namely, that the requirement that the assignor be joined as a party to the proceeding is a requirement of practice or procedure, and is not an essential ingredient of the cause of action relied on by the appellant.

45. It follows from the foregoing that the learned magistrate was in error in rejecting the first basis upon which the appellant made its claim, namely, the assignment to it of the debt owed by the respondent to Mardy's. It was not necessary for the appellant to have first given notice of the assignment to the respondent before commencing the proceeding. Thus the learned magistrate erred in dismissing the claim by the appellant on that basis. It is common ground that if I come to that conclusion, then I should remit the matter to the magistrate which I propose to do. In accordance with s109(6) I shall remit the matter to the magistrate for re-hearing in accordance with the findings of the fact already made by him, and in accordance with the principles of law which I have set out above. In particular the re-hearing is to proceed on the basis that as a matter of practice the assignor of the debt, namely, Mardy's Smash Repairs Pty Ltd (in liquidation) should be joined as a party to the proceeding, unless the learned magistrate considers that, in accordance with the principles I have stated, such joinder is not required. If the learned magistrate is of the conclusion that joinder of Mardy's is required by those principles, then he should stay the further hearing of the proceeding unless and until the plaintiff has joined Mardy's Smash Repairs Pty Ltd (in liquidation) as a party to the proceeding.

46. When the matter returns to the magistrate for re-hearing it is important to bear in mind that the claim made by the appellant against the respondent is a claim for the debt which, but for the assignment, the respondent would have owed to Mardy's. There is no direct material before me as to the amount of that debt. The transcript of the proceedings before the magistrate was tendered in evidence before me. In those proceedings Ms Burnell gave evidence on behalf of the plaintiff. She stated that proceedings were instituted (apparently in the respondent's name) against the other driver who was alleged to have been responsible for the accident. Judgment was entered for $3,892.90 together with interest and costs. I expect that that amount equated to the cost of the repairs effected by Mardy's, and thus the amount of the debt owed by the respondent to Mardy's, and which was the subject of the assignment to the appellant. That assumption is supported by the particulars of claim which were also tendered in evidence before me. They plead that the amount "factored" under the arrangement between the appellant and Mardy's was $3,672.99. The exact amount should be clarified, if necessary by appropriate evidence, before the magistrate. Obviously the respondent would not be liable to the appellant for any of the "factoring" charges and fees rendered by the appellant to Mardy's. As I have stated, the respondent would only be liable to the appellant for the amount of the debt owed by the respondent to Mardy's, and which was assigned by Mardy's to the appellant.

47. The conclusions which I have reached so far dispose of grounds 1 and 2 of the further amended notice of appeal. The other ground relied on by the appellant, ground 5, was that the magistrate erred in law in holding that the respondent had not been unjustly enriched in receiving repairs to his vehicle, that were not paid for by him, and were instead paid for by the appellant. It is necessary to deal with this ground of appeal. If it succeeds, then it is common ground that I need not remit the matter to the magistrate, but, instead, I should enter judgment for the appellant against the respondent in the appropriate amount.

48. As I have already stated, the learned magistrate held that the doctrine of "unjust enrichment" relied on by the appellant only applies where the relevant services, in respect of which the claim is made, are rendered by the plaintiff to the defendant. In this case the "services" provided by the appellant – the advance of funds for the repairs – were rendered, not to the respondent, but to Mardy's. At all times the respondent and the appellant were "strangers to each other". The magistrate held that it was not accurate to say that the respondent had accepted services from the appellant. Thus his Honour held that this was not a case to which the doctrine of unjust enrichment should apply.

49. Mr Jones submitted that the respondent had received an "incontrovertible benefit" at the expense of the plaintiff, since the repairs to the respondent's vehicle had been paid for by the

appellant. He submitted that those circumstances were sufficient to found a claim by the appellant based on the principles of unjust enrichment. Mr Jones submitted that the magistrate erred in considering that, in order that those principles apply, there must be a relationship between the appellant and the respondent. Mr Jones referred me to the decision of the House or Lords in *Lipkin Gorman v Karpnale Limited*[53] and the decision of the High Court in *Australia and New Zealand Banking Group Limited v Westpac Banking Corporation*[54] in which, he contended, the principles of unjust enrichment were applied notwithstanding that there was no relationship between the plaintiff and the defendant.

50. In response Mr Matters submitted that, in order that the principles of unjust enrichment apply, there must either be a request by the defendant for the provision of the relevant benefit, or alternatively "free acceptance" in the sense that a reasonable person would have understood that the services were being provided in circumstances which imported an obligation for the recipient to pay for them. Mr Matters referred me to the judgment of Byrne J in *Brenner v First Artists' Management Pty Ltd*.[55] Mr Matters submitted that there was, in this case, no request by the respondent to the appellant for the "benefit" provided by the respondent; nor was there "free acceptance" by the respondent of the benefit provided by the appellant. Mr Matters further submitted that where, as in this case, there was a contractual relationship between Mardy's and the respondent, there is no place for the interposition of the principles of unjust enrichment. Further he submitted that if the principles of unjust enrichment otherwise applied to the circumstances of this case, the respondent had a defence to that claim. In particular he submitted that the respondent had provided "consideration" for the benefit conferred by the appellant, such consideration consisting of the promise by the appellant to pay Mardy's for the repairs.

51. Before considering those submissions it is important to identify, so far as possible, the relevant facts relating to the factoring arrangement between the appellant and Mardy's. The evidence before the magistrate, which has been tendered in this present proceeding does not contain much detail as to that matter. However, from the transcript it appears that Mardy's assessed the cost of repairs to the appellant's vehicle on 22 November 2002. Mr Can, the principal of Mardy's, stated that the repairs were carried out in the next three or four days. Further, and more importantly, he stated, in re-examination, that the appellant only advanced the funds, upon completion of the repairs. In other words, it is not accurate to say that the appellant funded the repairs as they were being carried out. Rather, the repairs were carried out, and a debt was thus incurred for them by the respondent to the appellant. That debt was then the subject of the "factoring agreement" between the appellant and Mardy's. By that agreement dated 28 November 2002 Mardy's assigned its rights and interest in the debt in consideration of the appellant advancing the sum of $3,572.90 to Mardy's.

52. The precise nature of the factoring arrangement is not spelt out in the transcript or in the magistrate's reasons. However, the particulars of claim set out the terms of the factoring agreement. Those terms, as pleaded, provided for a 6.5% rollover fee of $238.74 to be applied to "any money not repaid" at the conclusion of the agreement and at each 90 day period thereafter. The particulars also pleaded that the "advance was secured by the assignment of the debt owed to the repairer and company by the owner of the repaired vehicle". Paragraph 10 of the particulars specifically pleaded that at the conclusion of the agreed term, the repairer (Can) and the "company" (Mardy's) had failed to pay the principal and rollover fees to the appellant. Thus the claim which the appellant sought to prove, pursuant to his particulars of claim, was described in terms which are similar to those of a loan agreement. The debt owed to Mardy's was assigned, not absolutely, but as security for the repayment of the debt.

53. As I have stated, Mr Jones has submitted that the respondent received an "incontrovertible benefit", namely the repairs to his vehicle, at the expense of the appellant. That proposition is the foundation of Mr Jones' contention that the magistrate ought to have found that the principles of unjust enrichment apply to this case. However, as the foregoing analysis of the facts reveals, the proposition relied on by Mr Jones has a beguiling simplicity to it. The benefit received by the respondent was the repairs to his vehicle. That benefit was bestowed on the defendant by Mardy's, who provided that service. At the time at which the service was provided, the appellant had no role in the relationship between Mardy's and the respondent. After the services were complete, and the "benefit" bestowed on the respondent, the appellant then entered into the factoring agreement with the repairer, Mardy's. In effect, it advanced to Mardy's the amount of

the debt owed to Mardy's by the respondent for the repair of the vehicle. In my view, for reasons which I shall set out below, the concept of "unjust enrichment" does not extend to impose on the respondent, in the circumstances thus outlined, an obligation to pay the cost of repairs to the vehicle, not to Mardy's, but to the appellant.

54. The concept of "unjust enrichment" has evolved as a principle in a number of claims for restitution over the last two decades. The development of that concept was significantly stimulated by the decision of the High Court in 1987 in *Pavey and Matthews Pty Ltd v Paul*.[56] That case did not concern the question whether the principles of "unjust enrichment" operated to create a new category of recovery outside categories of claim already recognised in law. The case concerned a contract by a licensed builder which was unenforceable by statute. The question was whether the builder could, nonetheless, make a claim in *quantum meruit*. In turn that question turned on whether such a claim depended on the existence of an implied contract between the parties, which, also, would be unenforceable by the terms of the statute. The High Court (Brennan J dissenting) held that the right to recover on a *quantum meruit* does not depend on the existence of an implied contract, but in a claim in restitution based on the concept of unjust enrichment. In an often cited passage, Deane J stated:[57]

> "To identify the basis of such actions as restitution and not genuine agreement is not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate. The circumstances in which the common law imposes an enforceable obligation to pay compensation for a benefit accepted under an unenforceable agreement have been explored in the reported cases and in learned writing and are unlikely to be greatly affected by the perception that the basis of such an obligation, when the common law imposes it, is preferably seen as lying in restitution rather than in the implication of a genuine agreement when in fact the unenforceable agreement left no room for one. That is not to deny the importance of the concept of unjust enrichment in the law of this country. It constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case. ... "

55. Although the decision of the High Court in *Pavey v Matthews* concerned the doctrinal underpinning of an existing category of claim (*quantum meruit*), nonetheless the cases have recognised that that concept might also, in appropriate circumstances, give rise to new categories of claim. However, the authorities have emphasised that the concept of "unjust enrichment" is not, of itself, a cause of action. Rather it explains the conceptual basis of a number of established causes of action. It also provides, in an appropriate case, for the recognition of claims in restitution, in accordance with proper legal principle.[58]

56. The authorities have similarly emphasised that caution must be exercised in relying on the concept of unjust enrichment as the basis for recognising a claim which does not come within an established category already recognised by the law. In particular, care must be taken, in recognising such claims, not to disturb established rights and obligations under contract and the like.[59]

57. Whatever the precise limits of the doctrine, it is clear that there has evolved a claim based on a concept described in the cases by the label "free acceptance" or an "incontrovertible benefit". That concept has been applied in a number of cases, including by Byrne J in *Brenner v First Artists' Management Pty Ltd and anor*,[60] by Warren J (as her Honour then was) in *Andrew Shelton & Co Pty Ltd v Alpha Health Care Limited*,[61] and by the Full Court of the Supreme Court of South Australia in *W. Cook Builders Pty Ltd (in liq) v Matthew Lumbers and ors*.[62]

58. The basis on which such claims are recognised was examined by Byrne J in *Brenner's* case. His Honour stated:[63]

> "In such a case, the gist of the claim is that the defendant has actually or constructively accepted the benefit of the plaintiff's services in circumstances where it would be unjust for that party to do so without making restitution to the plaintiffs. ... The circumstances in which the law considers it unjust to accept the benefit without payment are to be discerned from the principles to be extracted from the decided cases."

59. His Honour then identified the applicable principles as follows,[64] in terms which have been later quoted and adopted in subsequent authorities:[65]

> "It was submitted on behalf of the defendant that the test was whether each of the parties thought at the relevant time that the work would be recompensed. I think that the Court is not concerned with the actual state of mind of the parties or either of them ... Moreover the enquiry must in my view be principally directed to the position of the party to be charged, for the thread running through this area of law is the injustice of the enrichment of that party. In my opinion the appropriate enquiry is whether the recipient of the services, as a reasonable person, should have realised that a person in the position of the provider of the services would expect to be paid for them and did not take a reasonable opportunity to reject those services ... ".

60. It is clear from the cases to which I have already referred, that those principles are applied where the benefit provided by the plaintiff is the benefit received by the defendant, in circumstances where the recipient would have realised that the provider of the particular services would be expected to be paid for them. The recent decision of the Full Court of South Australia in *W Cook Builders Pty Ltd v Lumbers and ors*[66] is a good illustration of that principle. In that case the defendants entered into a contract with W. Cook and Sons Pty Ltd ("Sons") for the construction of their house. Unbeknown to the defendants the Cook group of companies had undergone a reconstruction. As a consequence the building work was carried out solely by another company in the group, W. Cook Builders Pty Ltd ("Builders"). The defendants remained ignorant of the existence or involvement of Builders throughout the works. Nonetheless, applying the above principles, the Full Court of South Australia (Vanstone J dissenting) held that the foregoing principles applied so as to entitle the plaintiff (Builders) to recover, on a *quantum meruit*, from the defendant a reasonable amount for the construction of the house. The majority (Sulan and Layton JJ), in their joint judgment, held that on the facts of the case the defendants received an incontrovertible benefit, namely the construction of their home. Further their Honours held that the defendants had "freely accepted" that benefit. Their Honours stated:[67]

> "However, more than simple acceptance of a benefit is involved. It is necessary to establish that the defendant acquiesced in the provision of the service, in circumstances where a reasonable person should have realised that a person in the plaintiff's position would expect to be paid for that service. It is also necessary to establish that the defendant had a reasonable opportunity to reject the provision of the service and did not do so. In our view the exact identity of the person providing the benefit is not a necessary component, so long as the benefit is obtained and accepted."

61. A similar conclusion was reached by Warren J (as she then was) in *Andrew Shelton and Co Pty Ltd v Alpha Healthcare Limited*, to which I have already referred. In that case the plaintiff was engaged as an adviser to Sun Health Care Group Aust Pty Ltd ("Sun"), to provide financial consultant services in respect of a proposed merger involving Sun. Ultimately the plaintiff conducted work on the proposal, not for Sun, but for a company associated with it, Alpha Healthcare Limited ("Alpha"). The plaintiff made a claim against Alpha (*inter alia*) based on the principles of unjust enrichment. Warren J upheld that claim, holding that the principles stated by Byrne J in *Brenner's* case applied. Her Honour held that Alpha had received the benefit of the services provided by the plaintiff. She then turned to the next question, namely "whether <u>those</u> services were freely accepted."[68] Her Honour held that Alpha knew of the services provided by the plaintiff and freely and knowingly accepted the benefit of those services. Accordingly her Honour upheld the claim by the plaintiff.

62. In that context I return to the decision of Byrne J in *Brenner's* case. In that case the plaintiffs had entered into an agreement with an entertainer, Daryl Braithwaite, for the provision of management services to him. In the course of time the first defendant, First Artists Management Pty Ltd, also became involved in the management of Braithwaite's professional activities. As a consequence the plaintiffs entered into an agreement with the first defendant to provide managerial and like services to the first defendant. Subsequently the first defendant terminated that agreement. The plaintiffs made a claim against the first defendant and Braithwaite as second defendant. As the first defendant was dissolved, the plaintiffs pursued their claim for remuneration against Braithwaite on a contractual basis or alternatively a *quantum meruit* basis. Byrne J held that there was no binding or enforceable contract for management services between the plaintiffs and Braithwaite. However his Honour upheld the claim by the plaintiffs based on a *quantum meruit*, applying the principles contained in the part of his judgment which I have already quoted earlier.

63. The judgment of Byrne J in *Brenner* is important in a number of respects for the purposes of this case. First, his Honour held that it was not necessary for the plaintiffs to establish that the defendant had derived an economic benefit from the provision of the relevant services; rather the "benefit" on which the claim was based was constituted by the receipt by the defendant of the services provided by the plaintiffs.[69] Secondly and importantly, the claim recognised by his Honour was one in which the benefit provided by the plaintiffs was the benefit actually received by the defendant. Thus his Honour held that the plaintiffs were not entitled to recover for the services provided to the first defendant (First Artists Management), notwithstanding that Braithwaite ultimately benefited from them. His Honour stated:[70]

> "When as I have found in this case certain of the services were provided at a time when the plaintiffs understood that they would in due course be recompensed by FAM and that it was for FAM that they were providing the services, there can be no room for restitution by the defendant, Braithwaite. The fact that Braithwaite under his contract with FAM ... stood to benefit from the income of FAM derived as a result of the services does not impose on him an obligation of the kind contended for by the plaintiffs. This result must follow from the fact that the services were provided at the request of FAM and any recompense in the absence of contract must be sought from that quarter."

64. In light of those principles I now return to the fact of this case. The "service" which was provided by the appellant in this case was a monetary advance by the appellant to Mardy's. The "service" received by the respondent was of an entirely different nature, namely the repairs performed by Mardy's. Even if the financial advance by the appellant had occurred before, and not after, the carrying out of the repairs, I would not consider that the principles which I have discussed above would entitle the appellants to claim restitution of that amount from the respondent. For, the "benefit" received by the respondent was not the "benefit" provided by the appellant. Even in such a hypothetical case, the benefit provided by the appellant (to Mardy's) and the benefit received by the respondent were quite different. Further and in any event, in the present case Mardy's performed the work for the respondent, and the respondent received the benefit of that work, before the appellant made its advance to Mardy's. The "benefit" was received by the respondent before the "benefit", on which the appellant relies, was bestowed by the appellant. *A fortiori*, there could not have been any "free acceptance" of the "benefit" so provided by the appellant. In those circumstances it could not be said, in line with the principles enunciated by Byrne J in *Brenner's* case, that the respondent received a benefit from the appellant in circumstances in which he should have realised that he would be under an obligation to pay for it.

65. In essence, then, the simple point is that the so-called "benefit" bestowed by the appellant was not, and could not have been, the benefit ultimately received by the respondent. Indeed the point is made even more stark by a further circumstance, which is not necessary for the conclusions which I have already reached. On the facts which I have recited, the arrangement between the appellant and Mardy's bears the hallmarks of a loan agreement, secured on the assignment to the appellant of the debt owed to Mardy's by the respondent. In other words, as observed by the magistrate, there was, independent of the services received by the appellant, a commercial relationship between Mardy's and the appellant in which the respondent played no part. That circumstance only serves to highlight the clear distinction between, on the one hand, the advance of funds by the appellant to Mardy's (which is relied upon by the appellant in this case as the "benefit"), and the "benefit" received by the respondent, namely the repairs carried out to his vehicle by Mardy's.

66. For the above reasons I do not consider that the appellant, on the facts before the magistrate, was entitled to recover an amount based on the concept of unjust enrichment. With that analysis in mind I turn to the reasons for decision of the magistrate on this point. In my view, and contrary to the submissions made by Mr Jones, the magistrate did not simply hold that the absence of any relationship between the appellant and the respondent stood in the path of the application of the principles of unjust enrichment. As the learned magistrate correctly pointed out, the respondent accepted services from the repairer; it was not accurate to say that the respondent accepted any services from the appellant. Nor could he, given the fact that the two were unknown to each other.

67. It follows that the fifth ground of appeal relied upon by the appellant should fail. The magistrate was, in my view, correct in holding that the concept of unjust enrichment did not entitle the appellant to claim against the respondent.

68. For the purpose of completeness, I should refer briefly to two authorities relied upon by Mr Jones, namely, the decision of the House of Lords in *Lipkin Gorman v Karpnale Limited* and the decision of the High Court in *Australia and New Zealand Banking Group Limited v Westpac Banking Corporation*. Mr Jones submitted that those authorities demonstrated that it is not necessary that there be a relationship between the plaintiff and the defendant in order to give rise to a claim for unjust enrichment. That proposition may well be correct, but it does not disturb the requirement that the services provided by the plaintiff must be freely accepted by the defendant. Indeed, the decision of the Full Court of South Australia in *W Cook Builders Pty Ltd v Lumbers* (above) vindicates that proposition relied on by Mr Jones. However in that case, the plaintiff stood, effectively, in the shoes of the party with whom the defendants had a relationship. Thus, the service provided by the plaintiffs was the service which the defendants "freely accepted". In those circumstances the application of principle justified extending the claim in *quantum meruit* to the facts of that case.

69. The case of *Lipkin Gorman* concerned a claim by a firm of solicitors, whose employee had stolen moneys from its trust account, against the owner of a casino at which the defendant had gambled those stolen funds. The House of Lords held that the claim by the plaintiff was based on the obligation of the recipient of a stolen money to pay an equivalent sum to the victim if the recipient has been unjustly enriched.[71] In such a case, the funds, of which the plaintiff had been deprived, constituted the benefit to the recipient. Notwithstanding that the plaintiff and the defendant in that case were not in a relationship, nonetheless the benefit received by the plaintiff was the same as the detriment incurred by the plaintiff. A similar observation may be made about the decision of the High Court in *Australian New Zealand Banking Group Limited v Westpac Banking Corporation.* In that case, the plaintiff by mistake overpaid money to the account of a customer of the respondent. The court, as a matter of substance, looked to whether the relevant benefit, mistakenly paid by the plaintiff, was to the benefit of the receiving bank or its client.[72] Again, there was no issue as to the identity between the detriment to the plaintiff and the corresponding benefit to the defendant.

70. It follows that the decisions relied upon by Mr Jones do not invalidate the decision of the magistrate in respect of the appellant's claim for unjust enrichment. As I have stated in the circumstances of this case there was no free acceptance by the respondent of the "benefit" relied on by the appellant in support of that cause of action.

71. For the foregoing reasons I have therefore reached the following conclusions:

> (1) The learned magistrate erred in dismissing the claim by the appellant based on the assignment in equity to it of the debt owed by the respondent to Mardy's Smash Repairs Pty Ltd for the repair of his vehicle. I therefore uphold grounds 1 and 2 of the further amended grounds of appeal.
>
> (2) The learned magistrate was not in error in rejecting the claim made by the appellant against the respondent based on unjust enrichment. I therefore reject ground 5 of the further amended notice of appeal.
>
> (3) In accordance with my conclusions on grounds 1 and 2 I shall remit the case to the learned magistrate for re-hearing in accordance with the principles contained in these reasons for judgment and in particular with the direction:
> (a) that the appellant as equitable assignee of the debt owed by the respondent to Mardy's, is entitled to maintain a claim against the respondent in respect of that debt without prior notice to Mardy's;
> (b) that as a matter of practice, the assignor of the debt, Mardy's, should be joined as a party to the proceeding, unless the learned magistrate, in the exercise of his discretion, considers that such a joinder is not required in the circumstance of this case. If the learned magistrate is of the conclusion that the joinder of Mardy's is required by the principles contained in my reasons for judgment, then he should stay the further hearing of the proceeding unless and until the appellant has joined Mardy's as a party to the proceeding.

72. Accordingly, and subject to hearing from counsel, I propose to make the following orders:

> 1. That the appeal from the decision of the Melbourne Magistrates' Court on 8 March 2006 in case No. SO2161005 between the appellant as plaintiff and the respondent as second defendant be allowed.
>
> 2. The order of the Melbourne Magistrates' Court made on 8 March 2006 dismissing the appellant's claim against the respondent, and ordering the appellant to pay the costs of the respondent, be set aside.

3. The matter be remitted to the magistrate who heard the matter for re-hearing based on the evidence and findings of fact already made by the magistrate and in accordance with the principles stated in these reasons for judgment and in particular with the direction:

(a) that the appellant as equitable assignee of the debt, owed by the respondent to Mardy's Smash Repairs Pty Ltd, is entitled to maintain a claim against the respondent in respect of that debt without prior notice to Mardy's Smash Repairs Pty Ltd (in liquidation);

(b) that as a matter of practice, Mardy's Smash Repairs Pty Ltd (in liquidation) as the assignor of the debt, should be joined as a party to the proceeding, unless the learned magistrate, in the exercise of his discretion, considers that such a joinder is not required in the circumstance of the case. If the learned magistrate is of the conclusion that the joinder of Mardy's Smash Repairs Pty Ltd (in liquidation) is required by the principles stated in these reasons for judgment, then he should stay the further hearing of the proceeding unless and until the appellant has joined Mardy's Smash Repairs Pty Ltd (in liquidation) as a party to the proceeding.

73. I shall hear counsel on any question of costs.

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[1] [1999] QCA 525; [2000] 2 Qd R 448; .
[2] [1987] HCA 5; (1987) 162 CLR 221; (1987) 69 ALR 577; 61 ALJR 151.
[3] [2002] VSC 248; (2002) 5 VR 577.
[4] Above.
[5] [1999] 1 NZLR 335.
[6] (1994) 34 NSWLR 548; [1994] NSW Conv R 66,062.
[7] [1905] AC 454.
[8] At [5].
[9] Above.
[10] At 456.
[11] Above.
[12] [1924] LR AC 1.
[13] (1975) 6 ACTR 1; (1975) 37 FLR 404.
[14] At 458-9.
[15] At 449, 452.
[16] At 460.
[17] *Property Law Act* 1974 (Queensland) s199.
[18] *Body Corporate Strata Plan No. 4303 v Albion Insurance Company Limited* [1982] VicRp 70; [1982] VR 699 at 705 (Kaye J); (1982) 2 ANZ Insurance Cases 60-490.
[19] See *Dearle v Hall* (1828) 3 Russ 1 especially at 29; 38 ER 475 especially at 485-6 (Plummer MR).
[20] *William Brandt's Sons and Co v Dunlop Rubber Company Limited*, above.
[21] *Tooth v Brisbane City Council* [1928] HCA 20; (1928) 41 CLR 212 at 222 (Isaacs J).
[22] [1893] AC 369.
[23] Above.
[24] At 392.
[25] [1835] EngR 320; 6 ER 1508; 3 Cl & F 456.
[26] [1926] Ch 191.
[27] (1886) 34 Ch D 128, 132.
[28] Pages 215-16.
[29] (1994) 34 NSWLR 548; [1994] NSW Conv R 66,062.
[30] [1976] 1 QB 431.
[31] At p462.
[32] At p442.
[33] At p442.
[34] At p444.
[35] At pp560-561.
[36] At 560-561.
[37] At 561.
[38] At 343.
[39] At 456.
[40] At 458.
[41] At 462.
[42] [1924] LR AC 1.
[43] See especially at 14 (Viscount Cave LC), 18-19 (Viscount Finlay).
[44] At 29.
[45] [1988] Ch 26; [1987] 3 All ER 624; [1987] 3 WLR 592.
[46] At 40-41.
[47] [1996] QB 292 at 298-9 (Staughton LJ), 308, 309 (Peter Gibson LJ); [1995] 4 All ER 312; [1995] 3 WLR 650.
[48] (1975) 6 ACTR 1 at 7 to 8 (Blackburn J); (1975) 37 FLR 404.

[49] Above at 561 (Giles J).
[50] (1991) 5 BPR 11, 512 at 11, 518 (Sheller JA); [1992] NSW Conv R 55-612; [1992] ANZ Conv R 223.
[51] [2005] VSC 218; [2005] ANZ Conv R 394.
[52] At [119] to [121].
[53] [1981] 2 AC 548; [1992] 4 All ER 512; [1991] 3 WLR 10.
[54] [1988] HCA 17; (1988) 164 CLR 662; (1988) 78 ALR 157; (1988) 62 ALJR 292.
[55] [1993] VicRp 71; [1993] 2 VR 221.
[56] [1987] HCA 5; (1987) 162 CLR 221; (1987) 69 ALR 577; 61 ALJR 151.
[57] At 256-7; *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353 at 378-9; 109 ALR 57; (1992) 24 ATR 125; (1992) 66 ALJR 768; 66 ALLR 768.
[58] *W. Cook Builders Pty Ltd (in liq) v Matthew Lumbers and Ors* [2007] SASC 20; [2007] SASC 20 at [62] (Sulan and Layton JJ), *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd* [2006] VSCA 6 at [10] (Chernov JA); [48] (Nettle JA); [2006] V Conv R 54-713; 1 BFRA 612.
[59] See *Roxborough v Rothmans of Pall Mall Australia Limited* [2001] HCA 68; (2001) 208 CLR 516 at 544-5 (Gummow J); (2001) 185 ALR 335; (2001) 76 ALJR 203; (2001) 48 ATR 442; (2001) 22 Leg Rep 2; *Angelopoulos and Anor v Sabatino and Anor* [1995] SASC 5230; (1995) 65 SASR 1 at 10-11 (Doyle CJ).
[60] [1993] VicRp 71; [1993] 2 VR 221.
[61] [2002] VSC 248; (2002) 5 VR 577.
[62] Above.
[63] At 257.
[64] At 259-60.
[65] See for example *W. Cook Builders Pty Ltd (in liq) v Matthew Lumbers and Ors* (above) at [60]; *Angelopoulos and anor v Sabatino and anor* (above) at 11 (Doyle CJ); *ABB Power Generation Limited v Chapple and ors* [2001] WASCA 412 at [21]; (2001) 25 WAR 158.
[66] Above.
[67] At [82].
[68] At [127] (emphasis added).
[69] At 257-8.
[70] At 261.
[71] At 559 (Lord Templeman), 578 (Lord Goff).
[72] At 673-4.

APPEARANCES: For the appellant Alma Hill Constructions Pty Ltd: Mr I Jones SC with Mr J Levine, counsel. Isaac Brott & Co, solicitors. For the respondent Onal: Mr S Matters, counsel. Jones King Lawyers.
