be concealed by her hair. Some tenderness of the scars will be present for some time, and other minor disabilities associated with the jaw and cheek fractures will persist. Her principal injury calling for compensation is the anxiety-state from which she still suffers, but from which she should with courage be able to recover.[43]

M. C. HARRIS*

COMPANY LAW

Contracts made by promoters on behalf of companies yet to be incorporated

It is a well-settled principle of English and Australian law that a company cannot validly ratify contracts made in its name by promoters or agents prior to its incorporation. Some American courts have held corporations liable in such situations on a principle of 'adoption';[1] others have taken the more cautious view that a contract made with a non-existent company is merely a 'continuing offer' and the 'ratification' by the company after its creation an acceptance.[2] Although this latter approach seems consistent with established principles of Australian contract law, it has not as yet been expressly adopted here. Even if it were to receive recognition, it would create only an insecure expectation of future liability of the prospective company, since it would make the transaction subject to the rules on the termination of continuing offers. Thus, the position of pre-incorporation contractors *vis-á-vis* companies is likely to remain unsatisfactory. Such persons will continue to look to the promoters for the fulfilment of their contractual expectations. For this reason, the legal nature of such claims against promoters is a matter of considerable practical importance. A recent decision of the Full Court of the Supreme Court of New South Wales was concerned with this problem.

In *Smallwood* v. *Black*[3] the plaintiffs purported to enter into an agreement for the sale of forty-four acres of land at Ingleburn, N.S.W., to the 'Western Suburbs Holdings Pty. Ltd.'. Under 'signature

43. **Enwright* v. *Knight* (1965) L.S.J. Scheme 382 (Napier C.J., July 1965). (An appeal to the Full Court against this assessment was dismissed in a judgment delivered on 12 November 1965, which has not, at the date of going to press, been reported.)

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1. 18 *American Jurisprudence* (2nd ed.) 'Corporations', sec. 120, nn. 6-9.
2. *Id.*, at nn. 10, 11.
3. [1964-1965] N.S.W.R. 1973; see also the decision of Jacobs J. in [1964] N.S.W.R. 1121, *sub nomine Black* v. *Smallwood and Cooper.*

of purchaser' in the printed form contract prepared by the Real Estate Institute of New South Wales appeared the name of the company, and underneath were appended the signatures of the defendants, Smallwood and Cooper, followed by the word 'directors'. The document bears the date of 22 December 1959, but in fact the company was not incorporated until 5 February 1960. After its incorporation the company repudiated the transaction and eventually the plaintiffs sued the signatories for specific performance. Jacobs J. granted specific performance on the ground that the defendants, having represented that the company was in existence, were now estopped from denying their personal liability on the contract. The learned judge did not shrink from admitting that the contract was binding only on the defendants and not on the plaintiffs; indeed, this admission was essential to his judgment since it enabled him to distinguish the case before him from *Newborne* v. *Sensolid (Great Britain) Ltd.*,[4] which had decided that the promoter has no cause of action against the third party in a very similar situation. Jacobs J.'s judgment meant that the plaintiffs had, in effect, an election whether to treat the contract as a complete nullity (in which case the directors had no cause of action at all against them) or as a contract binding the directors personally rather than the company (in which case the directors had to pay the purchase price but could, of course, insist on having title to the land transferred to them). This result seems fairly well adapted to the natural merits of the situation. But to say that a result is equitable does not necessarily mean that it is legally justifiable. There may be such things as contracts by estoppel, but it seems clear (and the Full Court so held) that the contract in *Smallwood* v. *Black* was not one. Even if held to their representation that the company existed on the date of the contract, the promoters would still not be liable on the contract itself. Although Walsh J., in the Full Court, came close to upholding Jacobs J.'s decree, he had no doubt that this could not be done on grounds of estoppel:

> In my opinion, if they are liable at all this could not be upon the basis of any estoppel against a denial by them that the company was incorporated. Nobody wants to assert that it was. An assertion by the plaintiffs that, as between themselves and the defendants, it must be taken to have been incorporated by reason of an estoppel, would be meaningless in the present suit and certainly would not advance the case of the plaintiffs. As I have said, the relevant principle of liability is not, in my view, based upon any estoppel.[5]

The reason why Walsh J. was partial towards Jacobs J.'s decree was that he believed there to be a general principle of law making pro-

4. [1953] 1 All E.R. 708.
5. [1964-1965] N.S.W.R. 1973, 1983 ff.

moters who contract on behalf of non-existent companies liable personally on contracts so made. The learned judge considered that this principle had been established by *Kelner* v. *Baxter*.[6] The ratio of that case applied, so Walsh J. suggested, regardless of whether the third party (or indeed both promoters and third party) knew or did not know that the company had not yet been incorporated. This seemingly indiscriminate view of the operation of the rule in *Kelner* v. *Baxter* resulted, so Walsh J. suggested, from the fact that the question of knowledge had not been treated as relevant in any of the more recent English or Australian cases.[7] Walsh J. recognized only two exceptions to the liability of promoters: (1) there will be no liability if it is excluded expressly by clear language in the document (nothing short of such clear language will suffice); (2) there will be no liability if the ratio in *Newborne* v. *Sensolid*[8] applies. According to Walsh J. the latter exception depends on the way in which the promoters have signed. The mere presence of a personal signature in conjunction with the company seal and followed by the word 'director' is no indication that the promoter has signed as agent for the company, it merely constitutes what Walsh J. called a 'company signature'.[9] If, however, so the learned judge continued, there is something more, accompanying the mere signature, which indicates that the promoter was acting as the agent of the company (regardless of how it is worded) then the rule in *Kelner* v. *Baxter* applies and the promoter will be personally liable on the contract. This distinction seems to make the decision depend on a purely fortuitous circumstance which has little to do with the actual nature of the promoter's action for and on behalf of the company. In fairness to Walsh J. it must be pointed out that the distinction did not appeal to him as sound; he adopted it only because there was no contrary Australian authority and for the sake of preserving uniformity of English and Australian law.

Asprey J. came to the same conclusion but his approach was fundamentally different. The learned judge did not consider that *Kelner* v. *Baxter* stood for so wide a principle of liability:

> *Kelner* v. *Baxter* . . . is not, in my opinion, an authority for the proposition that the person signing the document as an agent is, as a matter of law, personally liable on the document if, when he executes it, he *bona fide,* but mistakenly, believes that

6. (1866) L.R. 2 C.P. 174.
7. The learned judge pointed out that the question of knowledge or belief of either or both parties was not treated as relevant in either *Newborne's* case or in *Summergreene* v. *Parker* (1950) 80 C.L.R. 304 or in *Vickery* v. *Woods* (1952) 85 C.L.R. 336.
8. [1953] 1 All E.R. 708.
9. [1964-1965] N.S.W.R. 1973, 1983.

> his principal is then in existence and has authorized him to sign it.[10]

To Asprey J. the liability in *Kelner* v. *Baxter* resulted not from the application of a rule of law but from the application of a rule of construction. Despite isolated *dicta*[11] which he proposed should be read *sub modo,* Asprey J. claimed that the whole of the judgment clearly displayed 'not the language of the application of an absolute rule of law which makes the "agent" liable on the contract because his principal is non-existent; it is the language apt to be used in ascertaining the intention of the signatories from the language employed by them'.[12] His Honour emphasized that both parties knew of the non-existence of the company, and that this fact appeared on the face of the contract;[13] both these features he regarded as crucial. Since the company did not exist the court concluded that the parties must have intended the defendants personally to have been the contracting parties. On this reading of *Kelner* v. *Baxter,* which, with respect, seems preferable to that of Walsh J., the case stands for nothing more rigid and absolute than the following proposition, ably formulated by Williston and quoted with approval by Asprey J.:

> . . . it must generally be presumed that the parties intended to make a binding contract, and if they knew that none was possible with the supposed principal because, for instance, it was a corporation not yet formed . . . it is often a fair inference that a contract with the purported agent was contemplated.[14]

Asprey J. considered *Kelner* v. *Baxter* distinguishable, since the non-existence of the company was not disclosed on the face of the contract in the present case. As a matter of construing the contract before him, His Honour decided that the defendants were not liable on the contract itself at all; this, so His Honour held, followed simply from the fact that the signed contract showed unambiguously the intention on the part of both parties that the contract should be concluded between the plaintiffs and Western Suburbs Holdings Pty. Ltd. to the exclusion of any other party or parties.

This finding was sufficient to dispose of the appeal. By way of *obiter dictum,* however, His Honour also examined the question

10. [1964-1965] N.S.W.R. 1973, 1998.
11. Notably the statement by Erle C.J.: 'The cases which have been cited fully bear out the proposition that, if there be no existent principal, such a contract binds the persons professing to contract as agents.' (*Kelner* v. *Baxter* (1866) 36 L.J.C.P. 94, 97).
12. [1964-1965] N.S.W.R. 1973, 1999.
13. The contract in *Kelner* v. *Baxter* stated expressly that the defendants in that case were acting 'on behalf of the proposed Gravesend Royal Alexandra Hotel Company Limited' – (1866) L.R. 2 C.P. 174, 177.
14. [1964-1965] N.S.W.R. 1973, 1997.

whether the defendants were liable to the plaintiffs on some other basis.

His Honour discounted the possibility of liability being based on deceit, since the defendants had been acting in good faith. It is, however, well established that good faith is no defence to an action based on breach of warranty of authority and Asprey J. suggested that the defendants might well be held liable if they were sued for damages on this basis. To be sure, *Smallwood* v. *Black* involved a case somewhat different from the classical cases of breach of warranty of authority. In those cases (notably *Collen* v. *Wright*,[15] cited by Asprey J.[16]) the person represented by the purported agent to have been the principal did in fact exist, but had not given the agent the authority which he represented he possessed. The rule in such cases is that there will be liability for breach of warranty of authority even where the agent acted in good faith and without negligence.[17] In *Smallwood* v. *Black* there was not and could not have been any authority in the defendants to act for the 'Western Suburbs Holdings Pty. Ltd.', because that company did not exist when the contract was made. The problem simply was whether this distinction made any difference in principle:

> The question in the present case is whether the principles to which I have adverted apply in a case where the 'agent' believed that his principal existed and that he was authorized by that principal to execute a contract in the name of his principal but the principal was not in existence.[18]

Asprey J. felt that no binding authority existed preventing him from adopting the view that in both types of cases the essential element was present, namely, the representation by the alleged agent of an authority which did not, in truth, exist, and that therefore both cases should be treated alike. The reason for the 'defect of the authority' was, in His Honour's view, not a material factor.

Newborne v. *Sensolid (Great Britain) Ltd.*[19] presented none of the difficulties to Asprey J. which Walsh J. had had to contend with. The reason why Leopold Newborne had not been able to sue personally on the contract was simply that on the true construction of the document he was not a contracting party. For the same reason the Sensolid Company could not have sued Newborne *on the contract.* They could, however, so Asprey J. submitted, 'have successfully sued

15. (1857) 8 E. & B. 647.
16. [1964-1965] N.S.W.R. 1973, 1994.
17. Cf. Powell: *The Law of Agency* (2nd ed. 1961), 253.
18. [1964-1965] N.S.W.R. 1973, 1997.
19. [1953] 1 All E.R. 708.

Leopold Newborne for breach of warranty of authority and, depending upon the facts as to his knowledge of the existence of Leopold Newborne (London) Ltd., in an action of deceit'.[20] With respect, this is a satisfactory explanation and it means that the case does not make any new law at all. Walsh J. also adverted briefly to the question whether the defendants were liable for breach of warranty of authority. His Honour conceded[21] that holding the defendants liable on this basis might well appear to be 'a logical extension' of the rule in *Collen* v. *Wright*. The learned judge refused to adopt the notion of what he called 'an implied warranty that the principal was in existence'[22] because there was no authority for it and because it seemed to him to conflict with his view of *Kelner* v. *Baxter*, namely that promoters acting for non-existent companies must either be liable on the contract itself or not at all. With respect, *Kelner* v. *Baxter* does not stand for such a broad proposition and if the law is not to stagnate, lack of authority should be no reason against the beneficial extension of the *ratio* of a case.

Hardie J. in a short but incisive judgment substantially agreed with the main part of Asprey J.'s judgment;[23] he also insisted that *Kelner* v. *Baxter* was no more than the application of a rule of construction and had not established a rule of law. The learned judge stressed the fact that this very question had been before Williams J. in *Hollman* v. *Pullin*[24] and that Williams J. had emphatically rejected the wide interpretation of *Kelner* v. *Baxter* to which Walsh J. subscribed. Hardie J. declined to deal with the problem whether the defendants could be held liable for breach of warranty of authority, a question which, as he rightly pointed out, was not before the court.

Smallwood v. *Black* is an important case since it sheds much light on the vexed problems raised by contracts made by promoters on behalf of companies prior to their incorporation. It is submitted with respect that Asprey J.'s approach to these problems provides elegant and just solutions which are in no way incompatible with established principles or binding authority.

HORST K. LÜCKE*

20. [1964-1965] N.S.W.R. 1973, 2002.
21. *Id.*, at 1985.
22. *Id.*, at 1985.
23. *Id.*, at 1986 ff.
24. (1884) Cab. & El. 254.

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