with the aid of a stick some twelve months after the accident. His left leg in particular continued to cause him pain, and he developed eczema on this leg requiring the attentions of a skin specialist. He is still receiving physiotherapeutic treatment and continues to improve slowly. He has some numbness in the right hand, and persistent swelling of both lower legs, particularly the left, and accompanying pain. He was an active man before the accident, but is now severely limited in his activities. He will continue to be employed with the Department of Lands. There cannot be an allowance for prospective loss of salary from his lecturing duties, since on the evidence it may well be that a request for his position back would be granted. Further allowance for sick-leave entitlement and further necessity of physiotherapy[56].

$11,000 Male plaintiff came into collision with car while riding his motor-scooter. He suffered shock, concussion and severe cerebral irritation, skull and staphoid bone fractures, loss of blood, and considerable facial laceration, laceration and maceration of two terminal phalanges of index finger of right hand, injury to ring finger, a fracture involving the tibia and fibula of the right leg, as well as abrasions of the left leg. These injuries have not prevented him from working, but have resulted in impaired capacity with a resultant loss of $14 per week for the remainder of his working life (nine years). General damages including pain and suffering fixed at $11,000 in all[57].

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# COMPANY LAW

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

In *Smallwood* v. *Black*[1] Walsh J. suggested that *Kelner* v. *Baxter*[2] stood for a strict rule of law making promoters of companies personally liable on contracts they have made on behalf of the proposed companies. Critical note of this suggestion was made in the last issue of this review (2 *Adelaide Law Review* 388-393). Walsh J. was inclined to hold the defendants in *Smallwood* v. *Black* liable on the strength of this principle, but decided that doing so would amount to a refusal to follow *Newborne* v. *Sensolid (Great Britain) Ltd.*[3] He considered that the Court of Appeal, in *Newborne's* case, had

56. †*Connor* v. *D'Agostino* (1965) L.S.J. Scheme 718 (Hogarth J., November 1965). (Damages reduced by 33⅓%.)

57. †*Sadauskas* v. *Reckitt & Coleman Pty. Ltd.* (1965) L.S.J. Scheme 775 (Mayo J., December 1965). (Damages reduced by 33⅓%.)

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1. [1964-1965] N.S.W.R. 1973.
2. (1866) L.R. 2 C.P. 174.
3. [1953] 1 All E.R. 708, C.A.

created an exception to the supposed rule in *Kelner* v. *Baxter* for cases in which the promoters had signed, not "as agents of" the company, but in the form of a company signature. Walsh J. regarded this distinction as unsound, but adopted it in order to preserve uniformity of English and Australian law. Meanwhile, the case has been decided by the High Court[4].

Walsh J.'s reasoning provided the plaintiffs with a convenient basis on which to attack the judgment of the Full Supreme Court of New South Wales. On appeal to the High Court they followed his Honour's line of reasoning, including his critical assessment of *Newborne* v. *Sensolid*; however, they argued that this case should not be followed in Australia. The plaintiffs' counsel probably realized that Walsh J.'s interpretation of *Kelner* v. *Baxter* was not likely to appeal to the judges of the High Court, for they assigned an alternative source to the principle of personal promoter-liability on pre-incorporation contracts. This alternative argument was as unconvincing as it was ingenious; it was so decisively rejected by the High Court that it seems unnecessary to introduce and examine it here[5]. The High Court also showed convincingly that the promoters' liability in *Kelner* v. *Baxter* had resulted, not from the application of a rule of law, but from the application of a rule of construction[6]. In this respect the joint judgment of Barwick C.J., Kitto, Taylor and Owen JJ. as well as the concurring judgment of Windeyer J. accord substantially with the views of Asprey and Hardy JJ. in the Full Supreme Court[7].

Three aspects of the High Court decision in *Black* v. *Smallwood* seem particularly important:

1. Walsh J.'s interpretation of *Kelner* v. *Baxter* has been decisively rejected; there is no rule of law which makes promoters liable as principals on pre-incorporation contracts merely because of the fact that they have purported to make a contract on behalf of the future company. This is clear as a matter of law, even though it may be deplorable as a matter of policy. As Windeyer J. stated: "I agree that this appeal must be dismissed. I have come to that conclusion without hesitation but with regret. The law requires it, but I do not think that it accords well with a belief that bargains should be kept"[8]. It is indeed typical of cases such as *Black* v. *Smallwood* that the promoters induce contractual expectations when they either know or ought to know that the company they purport to be acting for does not yet exist. Would they have any right to complain if the law were to treat them as personally liable on such contracts?

2. In the Full Supreme Court, Asprey J. had stated that the defendants, though not bound to perform the contract itself, could be sued for damages for breach of warranty of authority. This followed, in his Honour's view, from a wide interpretation of the rule in *Collen* v. *Wright*[9]. Since this type of liability was not in issue in *Black* v. *Smallwood* (the action was one for specific performance), the High Court did not have to examine the correctness of this suggestion and the joint judgment of Barwick C.J., Kitto, Taylor and Owen JJ. does not refer to

4. (1965-1966) 39 A.L.J.R. 405, *sub nomine Black* v. *Smallwood*.
5. See *id.*, at 406-408.
6. See *id.*, at 405, 406.
7. *Cf.* 2 *Adelaide Law Review* 390-393.
8. (1965-1966) 39 A.L.J.R. 405, at 408.
9. (1857) 8 E. & B. 647.

it. However, Windeyer J. felt qualms about the defendants going scot-free and he agreed with Asprey J.: " . . . the appellants might it would seem have a cause of action in the nature of an action for breach of warranty of authority—that is on an implied warranty that they were directors of an existing company which had power to make a contract to purchase land"[10]. It is to be hoped that these dicta will be regarded as stating the law correctly.

3. A problematical feature of *Black* v. *Smallwood* lies in the wholehearted endorsement by Barwick C.J., Kitto, Taylor and Owen JJ. of *Newborne* v. *Sensolid*[11]. This might well be taken to mean that a promoter who signs in the form of a company signature is never personally liable on the contract regardless of any other factors such as verbal understandings between the parties. To resolve the problem of personal promoter-liability by applying a rule of construction would admittedly accord with the approach of the Common Pleas judges in *Kelner* v. *Baxter*. The defendants in that case had been held liable on the strength of the *ut res magis valeat quam pereat* principle which was applied to the exclusion of all extrinsic evidence of verbal understandings not reflected in the document[12]. With great respect to the learned judges who decided *Kelner* v. *Baxter*, they have failed to distinguish between the conclusion of a contract and the determination of its contents. The latter must certainly largely proceed in exclusive reliance on the terms of the written document. But when the question is whether a party has bound himself at all to the written terms, extrinsic evidence must be freely admissible, even to contradict the document. This has been the law ever since *Pym* v. *Campbell*[13]. The *ut res magis valeat quam pereat* rule is intended to save contracts from being held invalid against the wishes of the parties. In *Kelner* v. *Baxter* it was employed to turn into a contract an arrangement which the excluded evidence might have shown not to have been intended to possess any contractual status at all prior to the incorporation of the company. It is submitted that this was not a legitimate application of the *ut res magis valeat quam pereat* principle. On the other hand, a promoter who signs a pre-incorporation contract in the form of a company signature (as in *Newborne's* case), may agree verbally to be bound personally if and as long as the company should not be liable. *Newborne's* case should not be taken to suggest that evidence of such an undertaking is inadmissible. Such evidence would serve to identify the promoter as the true principal and would therefore not be barred by the parol evidence rule.

*Black* v. *Smallwood* has helped to clarify important aspects of pre-incorporation contracts made by company promoters, contracts which have presented the courts with intricate legal problems in the past and will continue to do so until the rule against company liability on such arrangements is removed by legislation.

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10. (1965-1966) 39 A.L.J.R. 405, at 409.
11. See *id.*, at 408.
12. *Cf. id.*, at 406.
13. (1856) 6 El. & Bl. 379 (Q.B.).

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# CONTRACT

## *Effect of rescission of contract on exception clauses*

In *Suisse Atlantique Société D'Armement Maritime S.A.* v. *N. V. Rotterdamsche Kolen Centrale*[1], the respondents agreed to charter a vessel from the appellants for a total of two years' consecutive voyages. Fixed periods of laytime were provided within which the respondents were obliged respectively to load and discharge the vessel on each voyage. In the event of these being exceeded demurrage was payable at the rate of 1,000 dollars a day. Apparently the respondents found it more economical to pay demurrage than freight and adopted the policy of making as few trips as possible during the period of the charter. The appellants contended *inter alia* that these delays amounted to a fundamental breach of the charterparty which prevented the respondents from relying on the demurrage clause and allowed the appellants to sue for damages at large.

The substance of the judgments of the members of the House of Lords is no doubt well known—that there is no doctrine of fundamental breach as a substantive rule of law, and that generally whether an exception clause will relieve a party from the consequences of breach or not depends upon the construction of the contract. It is not proposed in this note to comment on this aspect of the decision. However, in the course of their judgments several of their Lordships made observations concerning the effect of discharge by breach on the operation of exception clauses which are important in their implications and seem to warrant separate examination. It may be mentioned at the outset that these observations were not essential to the decision because, in this case, the appellants had never accepted the respondents' breach but had instead elected to affirm the contract.

Lord Reid stated that where an innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages, "the whole contract has ceased to exist including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term"[2].

Lord Upjohn said: " . . . It is common ground that had the owners accepted the assumed repudiation and sailed away, thereby terminating the contract, none of its terms survived, and damages for breach of contract would have been at large, including damages for loss of profitable employment of the ship for the term of the charterparty"[3]. Later in his judgment his Lordship again adverted to this point:

> "If I am right in drawing this conclusion then the necessary result, in my opinion, is that the principle upon which one party to a contract cannot rely on the clauses of exception or limitation of liability inserted for his sole protection, is not because they are regarded as subject to any special rule of law applicable to such clauses as being in general opposed to the policy of the law or for some other reason but, just as in the deviation cases, it is the consequence of the application of

1. [1966] 2 W.L.R. 944, H.L.
2. *Ibid.*, at 958.
3. *Id.*, at 976.