

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 6 - Joint Obligations, Third Parties and Assignment
Chapter 18 - Third Parties ¹
Section 1. - Introduction

Preliminary

18-001

Our concern in this Chapter is with the extent to which persons can either take the benefit of, or be bound by, contracts to which they are not parties. Under the common law doctrine of privity of contract, the general rule is that contracts cannot be enforced either by or against third parties. The second limb of this rule (under which a contract cannot impose liabilities on anyone except a party to it) is generally regarded as just and sensible. ² But its first limb (under which a contract cannot confer rights on anyone except a party to it) has been the subject of much criticism, culminating in a Report, issued by the Law Commission in 1996, on Privity of Contract: Contracts for the Benefit of Third Parties. ³ The recommendations of this Report have (where legislation for this purpose was necessary ⁴) been implemented by the Contracts (Rights of Third Parties) Act 1999. The Act does not precisely follow the wording of the Draft Bill attached to the Law Commission's Report, but the changes in the wording do not, in general, ⁵ reflect any major departures from the policy of the recommendations in that Report: their object has rather been to secure the clearer and more effective implementation of that policy. For this reason, it is submitted that reference can appropriately be made to the Report in discussing the provisions of the 1999 Act; and such references will be made in this Chapter.

Present structure of the subject

18-002

It is important at the outset to make a point about the nature of the changes made by the 1999 Act, since this determines the present structure of the subject. A crucial passage in the Law Commission's Report states that "it is important to emphasise that, while our proposed reform will give some third parties the right to enforce contracts, there will remain many contracts where a third party stands to benefit and yet will not have a right of enforceability. Our proposed statute carves out a general and wide-ranging exception to the third party rule, but it leaves that rule intact for cases not covered by the statute." ⁶ The rights conferred on third parties by the 1999 Act therefore have the character of a new statutory exception ⁷ to the common law doctrine of privity; and the 1999 Act will be treated as such an exception in the present Chapter, though because of its importance a separate section will be devoted to it. ⁸ The new exception is, however, limited in two ways. First, a number of situations which have in the past been perceived as giving rise to problems resulting from the doctrine of privity are simply outside the scope of the new statutory exception and so are not affected by the provisions of the 1999 Act at all: this is, for example, true of many of the cases in which third parties who have suffered loss in consequence of the breach of a contract between others have sought a remedy in tort against the party in breach. ⁹ Secondly, the "wide-ranging exception" created by the 1999 Act is, in turn, under that Act, subject to exceptions ¹⁰ to which the third party's new statutory rights do not extend; and the effect of this is that in some ¹¹ of these cases the common law doctrine of privity continues to apply. The 1999 Act also does not affect any rights which the third party has apart from its provisions ¹²: thus it does not deprive the third party of rights which he has because the case falls either outside the scope of the common law doctrine or within one of the exceptions to it recognised either at common law, or in equity or under other legislation. ¹³ The scope of the common law doctrine and these other exceptions therefore continue to call for discussion, particularly because the content

of rights available apart from the 1999 Act in some ways differs from that of the rights available under it.¹⁴ The 1999 Act also (in accordance with the Law Commission's recommendations¹⁵) does not affect the common law rule that a contract cannot impose liabilities on a third party or (in general) otherwise bind him, so that this aspect of the common law doctrine, too, continues to call for discussion. Nor does the Act affect any rights of the promisee to enforce any term of the contract¹⁶: such questions as whether the promisee can recover damages in respect of the third party's loss will therefore continue to be governed by the rules which have been (and no doubt will further be) developed as a matter of common law. There is finally the point that the 1999 Act also does not apply to contracts made before the end of the period of six months beginning on the day on which it was passed and came into force,¹⁷ except where a contract¹⁸ made within that period expressly provides that the Act is to apply to it.¹⁹ The rules of law which were established before the 1999 Act therefore continue to apply to contracts made before the date specified in the Act or in any such contract. They also continue to apply in a significant number of other situations, described above,²⁰ to which the Act does not apply. These rules therefore still require discussion, even though a considerable number of the cases on which they are based would, if their facts occurred now, be decided differently (where they had denied the third party the right to enforce a term of the contract) or be decided on different grounds (where they had given the third party such a right). The result of all these points is that the 1999 Act may have improved, but that it has scarcely simplified, the law on this topic.

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1. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.
 2. See below, para.18-139. The rule that a contract cannot in other respects bind a third party can be inconvenient in cases involving exemption clauses (and is therefore modified in a number of ways discussed in section 5 of Ch.15). It is further qualified in a number of ways to be discussed in section 5 of the present Chapter.
 3. Law Com. No.242 (hereafter "Report"). For an earlier proposal, see Law Revision Committee, 6th Interim Report (Cmd. 5449) Section D.
 4. For a situation in which this was *not* necessary, see Report, para.6.8 n.8, below, para.18-102.
 5. The exception is s.8 of the Act, subjecting the third party's rights to arbitration agreements, contrary to the views expressed in paras 14.14 to 14.19 of the Report: see para.18-100 below, and Vol.II, para.32-039.
 6. Report para.5.16; the importance of the point appears from the fact that it is repeated in almost identical terms in para.13.2 of the Report.
 7. See Lord Bingham's reference in *Heaton v Axa Equity & Law Life Assurance plc* [2002] UKHL 15; [2002] 2 A.C. 392 at [9] to "the limited class of contracts which either at common law or by virtue of the Contracts (Rights of Third Parties) Act 1999 was enforceable by ... a third party." cf. *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at 535 per Lord Clyde, saying that the 1999 Act had "made some inroads on the principle of privity" and Lord Browne-Wilkinson, *ibid.* at p.575, saying that the Act had "fundamentally affected" the law on this topic. It is respectfully submitted that these are more accurate statements than Lord Goff's reference *ibid.* at p.544 to the "abolition" by the Act of the doctrine of privity, and his similar statement in *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 at 40 ("recently abolished by statute"). See also *Ramco (UK) Ltd v International Insurance Co of Hanover* [2004] EWCA Civ 675, [2004] 2 All E.R. (Comm) 866 at [32], treating the third party's right of enforcement under the 1999 Act as an exception to the common law doctrine of privity.
 8. Below, paras 18-090 et seq.
 9. For further discussion of this point, see below, paras 18-024 et seq.

- [10.](#) See s.6 of the Act, discussed in paras 18-116-18-118, below.
- [11.](#) See e.g. ss.6(2) and 6(3); under some of the other exceptions created by the 1999 Act, the third party will be able to get rights by another legal route: e.g. under those stated in ss.6(1) and (5): see para.18-117, below.
- [12.](#) s.7(1), below para.18-119; Report, para.12.12.
- [13.](#) Below, paras 18-080-18-089; 18-126-18-138. For an illustration of a situation in which the third party had rights both under the 1999 Act and under one of the judge-made exceptions to the doctrine of privity, see *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602; [2004] 1 All E.R. (Comm) 481.
- [14.](#) e.g., ss.2 and 3 of the 1999 Act will not apply where the third party has rights apart from the Act; see further para.18-121, below.
- [15.](#) Report, paras 10.32, 7.6.
- [16.](#) 1999 Act, s.4.
- [17.](#) On November 11, 1999, when the Act received the Royal Assent: see s.10(2). Hence, subject to the exception mentioned at n.19 below, the Act does not apply to a contract made before May 11, 1999: see *Mulchrone v Swiss Life (UK) plc* [2005] EWHC 1808, [2006] Lloyd's Rep. I.R. 339 where the contract was made before the latter date, so that the Act did not apply.
- [18.](#) See s.10(3).
- [19.](#) *ibid.*
- [20.](#) At nn.9, 11.

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Section 2. - The Common Law Doctrine

Statement

18-003

The common law doctrine of privity of contract means that a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it. Two questions arise from this statement: who are the parties to the agreement? and has the claimant provided consideration for the promise which he is seeking to enforce?

^{1.} Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.

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(a) - Parties to the Agreement

Who are the parties?

18-004

! Normally, the answer to this question is obvious enough: the parties to the agreement are the persons from whose communications with each other the agreement between them has been reached. There may, indeed, be factual difficulties in identifying these persons ²¹ !; but such difficulties do not generally ²² ! raise any questions of legal principle. Problems as to the legal analysis of established or admitted facts can, however, arise in situations in which there is clearly an agreement, while it is doubtful exactly who the parties to it are; and difficulty in deciding who the parties to a particular contract are may also arise when there are several contracts which affect the same subject-matter and involve more than two parties. The rights of all the parties to such contracts arise independently of the Contracts (Rights of Third Parties) Act 1999 and are not limited by its provisions. ²³ Situations in which such contracts may arise are discussed in the following paragraphs.

Collateral contracts ²⁴

18-005

! A contract between two persons may be accompanied by a collateral contract between one of them and a third person relating to the same subject-matter. In *Shanklin Pier v Detel Products Ltd* ²⁵ the claimants had employed contractors to paint a pier and instructed them for this purpose to buy paint made by the defendants. This instruction was given in reliance on a statement made by the defendants to the claimants that the paint would last for seven years. ²⁶ ! In fact it lasted for only three months. Although the main contract for the sale of paint was between the contractors and the defendants, it was held that there was also a collateral contract between the claimants and the defendants that the paint would last for seven years. The same reasoning may apply where a person buys goods from a dealer and is given a "guarantee" in the name of the manufacturer. Here the main contract of sale is between the customer and the dealer, but it seems that the "guarantee" could also be regarded as a collateral contract between the manufacturer and the customer. ²⁷ Special legislation applies to certain guarantees given to a "consumer" in relation to a contract between such a person and a "trader". Under s.30 of the Consumer Rights Act 2015, ²⁸ where such a guarantee is given in relation to a contract for the supply of goods by a "trader" to a "consumer", ²⁹ then the guarantee "takes effect as a contractual obligation owed by the guarantor" ³⁰ even though the latter is not a party to the supply contract. ³¹ There is no need, in such a case, for the consumer to satisfy the common law requirements (such as consideration or contractual intention) ³² for the creation of a collateral contract. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ³³ also make use of the concept of a "commercial guarantee" given to a consumer "by the trader or producer", ³⁴ the words here italicised being evidently capable of including a person who is not a party to the contract between the "trader" and the "consumer." ³⁵ In relation to such a

guarantee, these Regulations contain no words resembling those quoted above ³⁶ from s.30 of the 2015 Act; and this fact makes it hard to account for what appears to be intended as the legally binding force of the guarantee on the “producer” even where that person is not also the “trader.” This difficulty has been discussed in para.4-028 above. The common law requirements for a collateral contract would of course continue to apply to guarantees given by producers or other third parties to a person who was not a “consumer.” ³⁷

18-006

❗ Collateral contract reasoning has also been used where a contract for the execution of building work between A and B may be performed, wholly or in part, through the instrumentality of a sub-contractor C, nominated by A but engaged by B. Such an arrangement usually gives rise to a contract between A and B and to one between B and C, but not to one between A and C ³⁸ ❗; but it is possible for a collateral contract to arise between these last two parties, ³⁹ making C contractually liable to A. Similarly, where goods are bailed by A to B and A authorises B to sub-bail them to C, and B does so, then a collateral contract may arise between A and C, incorporating “via the agency of the bailee” (B) the terms of the sub-bailment from B to C. ⁴⁰ Yet a further illustration of the possibility that a tripartite relationship may give rise to a collateral contract between parties who have not entered into any express contract with each other is provided by the situation in which an employment agency (A) enters into a contract with a worker (B) whom it supplies to an end user (C). In such cases, there may, in addition to the express contracts between A and B and between A and C, ⁴¹ be an implied (collateral) contract between B and C. ⁴² But the latter possibility is restricted by the usual requirements for such an implication. In particular, an implied contract between B and C will arise only if the implication is “necessary ... to give business reality to the relationship between the parties”, ⁴³ i.e., between B and C. ⁴⁴ Facts relevant to this issue would include the terms of the two express contracts referred to above and the conduct of B and C in the course of the relationship between them while B is rendering the services to C.

Hire-purchase

18-007

The collateral contract device can also be used where a dealer makes a representation to a customer in order to induce him to enter into a hirepurchase contract. The main contract of hire-purchase is usually between the customer and the finance company. Accordingly, a representation by the dealer as to the quality of the goods did not formerly impose any liability on the finance company ⁴⁵; but the dealer could be liable on the representation as a collateral contract. ⁴⁶ If the transaction is a regulated agreement within the Consumer Credit Act 1974 ⁴⁷ a dealer who conducts antecedent negotiations is in certain circumstances deemed to do so as agent of the creditor as well as in his actual capacity. ⁴⁸ The representation can therefore make the finance company liable under the main contract, while the dealer may still be liable on the representation as a collateral contract. ⁴⁹

Payment by cheque, debit or credit card

18-008

A further situation in which a transaction involves several contracts is that in which a supply of goods or services is paid for by the use of a cheque card, debit card or credit card. Such a transaction involves three contracts: one between the supplier and the customer, a second between the customer and the issuer of the card, and a third between the issuer and the supplier of the goods. ⁵⁰ The supplier therefore has a common law right of action against the issuer on this third contract.

Loyalty cards

18-009

Another situation in which a set of commercial relationships operates through a “network of contracts” is described in *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* ⁵¹ a case concerned with “the well known Nectar scheme”. ⁵² As Lord Reed there said, this scheme “involves four parties” ⁵³: (1) the “promoter” of the scheme, i.e. the entity organising it; (2) “collectors”, i.e. members of the scheme, who collect “points”; (3) “sponsors”, i.e. retailers who pay for their customers to have “points” credited to their accounts with the promoter when their cards are swiped by the sponsors; and (4) “redeemers”, i.e. retailers (other than the “sponsors”) from whom “collectors” receive goods or services at no, or at a reduced, cost when their cards are swiped by the redeemers. ⁵⁴ Lord Reed goes on to explain that the scheme operates through three contracts between the promoter and the other parties described above ⁵⁵: a contract between the promoter and the collectors, ⁵⁶ a contract between the promoter and the sponsors, ⁵⁷ and a contract between the sponsor and the redeemers. ⁵⁸ Each of these is an independent contract. It would not be right to describe any one of them as “collateral” to any one of the others except in the loose sense that they all operate together in pursuit of a single commercial objective. The issue in the *Aimia* ⁵⁹ case was not whether any of the contracts described by Lord Reed had come into existence; it was whether the promoter was “entitled to deduct as input tax the VAT element of the payments which it makes to the redeemers”. ⁶⁰ A discussion of this question is beyond the scope of this book; it suffices here to say that the Supreme Court, by a majority, upheld the decision of the Court of Appeal which had answered the question in the affirmative. ⁶¹

Consideration in collateral contracts

18-010

❗ To be enforceable as a collateral contract, a promise must be supported by consideration, ⁶² and in the cases considered in paragraphs 18-005 to 18-009 above there is no difficulty in explaining how this requirement was satisfied. In the *Shanklin Pier* case, the consideration was the instruction given by the claimants to their contractors ⁶³; in the building sub-contractor case, it is similarly the client’s nomination of the sub-contractor; in the guarantee case it is the purchase by the customer of the goods from the dealer ⁶⁴ ❗; in the hire-purchase case it is the entering by the customer into a hire-purchase agreement with the finance company; in the cheque card, debit card or credit card case, it is the supply of the goods by the supplier to the customer, and the discount allowed by the supplier to the issuer of the credit card ⁶⁵; in the loyalty card cases, it is the reciprocal promises or performances of the various parties involved in the operation of the scheme described in paragraph 18-009 above. ⁶⁶ A case in which the problem of consideration gives rise to more difficulty is *Charnock v Liverpool Corp.* ⁶⁷ A car had been damaged and was later repaired under a contract between the owner’s insurance company and a garage. It was held that there was also a collateral contract between the owner and the garage (to do the repairs within a reasonable time), even though the owner did not pay or promise to pay the garage anything. ⁶⁸ The consideration for the garage’s promise was found in the owner’s “leaving his car with the garage for repair.” ⁶⁹ This might not be a detriment to the owner, at least in the factual sense. ⁷⁰ But it was a benefit to the garage in giving it the opportunity of making a contract for the repair of the car with the insurance company; and this benefit constituted the consideration for the garage’s promise to the owner.

Contractual intention in collateral contracts

18-011

A promise will not amount to a collateral contract if it was made without contractual intention. ⁷¹ The need to satisfy this requirement is illustrated (in the present context) by *Alicia Hosiery Ltd v Brown Shipley Ltd*, ⁷² where the owner of goods in a warehouse pledged them to a bank and later sold them. The bank gave the buyer a delivery order addressed to the warehouseman but the latter refused to deliver the goods to the buyer who claimed damages from the bank. It was held that there was a contract between the buyer and the seller, and one between the seller and the bank, but none between the buyer and the bank as no intention to enter into such a contract had been shown. ⁷³ Similarly, in *Independent Broadcasting Authority v E.M.I. Electronics*, ⁷⁴ A had contracted with B for the erection of a television mast, on the terms that the actual work was to be done by C, a

sub-contractor. C, who was not a party to the contract between A and B, wrote to A saying: "We are well satisfied that the structure will not oscillate dangerously." The mast having later collapsed, it was held that C's letter did not have contractual force as there was no animus contrahendi (though C was held liable in negligence). There will, a fortiori, be no collateral contract between A and C where these parties have deliberately chosen not to enter into a direct contract with each other.⁷⁵ And where A acquired shares from B which had previously been bought by B from C on the terms that certain payments were to be made to C in events which later happened, it was held that there was no collateral contract between A and C, obliging A to make the payments.⁷⁶ No intention on A's part to enter into such a contract could be inferred, while C did not know of A at the time of the alleged collateral contract and so equally lacked any intention to contract with A.

Multilateral contracts

18-012

When a person joins a club or other unincorporated association, he may contract with all the other members although he may be quite unaware of their identity and although he may be in direct communication only with the association's secretary.⁷⁷ Similarly, where an insurance policy was expressed to be between the assured and a syndicate of underwriters at Lloyd's, it was held nevertheless to constitute a number of separate contracts between the assured and each of the participating syndicates.⁷⁸ In the case of a company incorporated under the Companies Acts, s.33(1) of the Companies Act 2006 provides that "The provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions." It seems appropriate to continue to refer to the effect of this subsection as giving rise to a "statutory contract"⁷⁹; and so far as this contract takes effect between the members, it continues so to take effect between them in their capacity as such. In the case of a limited liability partnership incorporated⁸⁰ under the Limited Liability Partnerships Act 2000, the mutual rights and liabilities of the members inter se and between the members and the partnership are governed by agreement between the members or between them and the partnership,⁸¹ or, in the absence of such agreement, by regulations made under the Act governing such partnerships.⁸²

Sporting competitions

18-013

Where a number of persons agree to enter into a competition subject to certain rules, it is often doubtful exactly who the parties to the resulting contract are. In one case it was held that the competitors in a regatta contracted not only with the committee of the organising club, but also with each other.⁸³ But in another case it was held that persons who had entered horses for races organised by the Jockey Club had contracted only with the Club and not with each other.⁸⁴

Agency

18-014

Where a person negotiates a contract as agent between his principal and a third party, the contract will generally be between the principal and the third party. But there are situations in which it is not clear whether a person acted as agent or on his own behalf.⁸⁵ In one case, a husband booked tickets on a cross-Channel ferry for himself and his wife and children. It was said that there was a "contract of carriage between the [wife] and the [carriers],"⁸⁶ presumably made by the husband as his wife's agent. Where a husband and wife lunched together at a restaurant, it was again held that there was a contract between the wife and the proprietor, though on the different ground that the husband and wife had each made a separate contract with the proprietor.⁸⁷ But if there were no such separate contracts and the host on such an occasion did not act as agent, it has been said that there would be a contract only between him and the restaurant proprietor.⁸⁸

Sub-Agency

18-015

Similar problems arise where an agent employs a sub-agent.⁸⁹ In some such cases there is privity of contract between principal and sub-agent, while in others the sub-agent is in a contractual relationship only with the agent who employed him. In border-line cases of this kind, it is again clear that there is a contract, but doubtful who the parties to the contract are.⁹⁰

Mortgage valuations


18-016

Problems as to parties can also arise where a house is valued at the instigation of a building society after a prospective purchaser has applied to it for a loan which is to be secured by a mortgage on the house. Where the valuation is carried out by a full-time employee of the building society, there will usually be a contract between the society and its employee, and one between the society and the borrower (under which the society is likely to be vicariously liable for the valuer's negligence) but none between the valuer and the borrower.⁹¹ Where, on the other hand, the valuation is carried out by an independent valuer, there may be a contract between him and the borrower⁹² but this is not necessarily the case. If, for example, the independent valuer were appointed and paid by the society and reported directly to it, there is unlikely to be any contractual relationship between borrower and valuer, though the valuer will be liable to the borrower in tort if as a result of his negligence his report is inaccurate or incomplete and the borrower suffers loss.⁹³

18-017

The reason why in the first of the situations described in para.18-016 above there is no separate contract between the valuer and the borrower is presumably that the valuer has no intention to contract with the borrower since he believes that he is merely carrying out his duties under his contract with the society.⁹⁴ The further suggestion that, in this situation, there is "seemingly no consideration for a contract by the valuer as principal"⁹⁵ is, with respect, harder to follow. It cannot mean that there is no consideration because the valuer is doing no more than performing his contract of employment, for it is now settled that the performance of a contractual duty owed to a third party can constitute consideration,⁹⁶ and in any event the question is whether there is consideration for the valuer's promise, and this consideration must move, not from him, but from the purchaser. Prima facie, such consideration is provided by the payment of the survey fee by the purchaser to the society, or by his entering into the mortgage transaction; and it is immaterial that this consideration does not move (at least directly) to the valuer; for so long as consideration moves from the promisee it need not move to the promisor.⁹⁷ Nor would such consideration be past, even if the fee had been paid before the valuer had been engaged; for the test for deciding whether consideration is past is a functional (rather than a strictly chronological) one, which is satisfied in the situation here under discussion since the consideration and the promise given in return are substantially one transaction.⁹⁸ Indeed, the assumption that it is so satisfied is supported by the view that there can be a contract between an independent valuer and the purchaser,⁹⁹ since the consideration which moves from the purchaser is exactly the same whether the valuer is an employee of the building society or an independent person.

1. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.

21.  e.g. *Stag Line Ltd v Tyne Ship Repair Group (The Zinnia)* [1984] 2 Lloyd's Rep. 211; *Empresa Lineas Maritimas Argentinas v The Oceanus Mutual Underwriting Association*

(Bermuda) Ltd [1984] 2 Lloyd's Rep. 517; *Uddin v Ahmed* [2001] EWCA Civ 240; [2001] 3 F.C.R. 300; *Grecoair Inc v Tilling* [2004] EWHC 2851, [2005] Lloyd's Rep. I.R. 151; *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 A.C. 28; *West Bromwich Albion Football Club v El Safty* [2006] EWCA Civ 1299, (2006) 92 B.M.L.R. 179; *Lakatanmia Shipping Co Ltd v Nobu Su/Hsin Chi Su* [2014] EWHC 3611 (Comm), [2015] 1 Lloyd's Rep. 216 at [68], [73]–[76]; *Navig8 Inc v South Vigour Shipping Co* [2015] EWHC 32 (Comm), [2015] 1 Lloyd's Rep. 436 at [94] per Teare J. ("... identification of the parties to a contract is a question of fact" the answer to which is generally governed by an objective test, the subjective intentions of one party are relevant only "where such intentions are communicated to the other" (ibid.)); cf. *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2007] EWCA Civ 111, [2008] 1 W.L.R. 608, where the question was one of construction or implication; *Grosvenor Casinos Ltd v National Bank of Abu Dhabi* [2008] EWHC 511 (Comm), [2008] 2 Lloyd's Rep. 1.

22.

!A highly specialised group of cases (beyond the scope of this book) concerns bills of lading issued in respect of goods shipped on a chartered ship: see Carver on Bills of Lading, 4th ed. (2017), paras 4–032 to 4–062; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 A.C. 715. The general rule that a person who is named as the consignee in a contract of carriage contained in or evidenced by a bill of lading is not, merely by reason of being so named, "in a true sense an original party to the contract" (*Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte)* [2014] EWCA Civ 1382, [2015] 1 Lloyd's Rep. 97 at [16]), and the various qualifications of that rule, are likewise beyond the scope of this book. They are fully discussed in Carver, 4th ed. (2017), paras 4-001 to 4-031.

23.

Contracts (Rights of Third Parties) Act 1999, s.7(1).

24.

Wedderburn [1959] C.L.J. 58; above, para.13-004.

25.

[1951] 2 K.B. 854; followed in *Wells (Merstham) Ltd v Buckland Sand & Silica Co Ltd* [1965] 2 Q.B. 170, even though in that case no specific main contract was contemplated when the collateral undertaking was given. As to sales by auction, see *Chelmsford Auctions Ltd v Poole* [1973] Q.B. 542, 550; *Morin v Bonhams & Brooks Ltd* [2003] EWHC 467 (Comm); [2003] 2 All E.R. (Comm) 36 at 28, 51; affirmed on other grounds [2003] EWCA Civ 1802, [2004] 1 All E.R. (Comm) 880; below, Vol.II, para.31-011; for similar reasoning, leading to the making of a contract "in the context of an associated and simultaneous set of transactions", see *Moody v Condor Insurance Ltd* [2006] EWHC 100 (Ch), [2006] 1 W.L.R. 1847 at [39].

26.

!Contrast *Royal Bank of Scotland Plc v McCarthy* [2015] EWHC 3626 (QB), where the argument that there was a collateral contract between one of the parties to the main contract and a person who was not a party to the main contract was rejected for want of the requisite "assurance" (at [158]) from the former to the latter person. For a judicial statement of the requirements of a collateral contract, see *Secker v Fairhill Properties Ltd* [2017] EWHC 69 (QB) at [54] per Stuart-Smith J. Those requirements are further discussed in Main Work, Vol.I, paras 18-010 and 18-011. On the facts of the *Secker* case, no collateral contract arose because the relevant defendant had not agreed to "any separate contractual obligation" (at [57] (italics supplied)); cf. [2017] EWHC 69 (QB) at [55]; "separate" here means an obligation additional to those arising under the main contract). The fact that the alleged collateral contract would not have imposed on that defendant any obligation beyond those already incumbent on him under the original (main) contract would tend to negative that party's intention to give the collateral undertaking contractual force: cf. *The Aramis* [1989] 1 Lloyd's Rep. 213, where similar reasoning led the Court of Appeal to refuse to imply a contract for want of contractual intention (see Main Work, Vol.I, para.2-109); in the *Secker* case, the Court rejected the collateral contract argument on the same ground, even though the undertaking alleged to have given rise to that contract was an express one (cf. Main Work, Vol.I, para.18-011). No third party problem arose in the *Secker* case as the main contract was between the same parties as the alleged collateral contract: see [2017] EWHC 69 (QB) at [3] and [4iii].

27.


For legislative control of exemption clauses in such guarantees, see above, Ch.15.

28.

The Act is fully discussed in Vol.II Ch.38; for its s.30, see para.38-491.

- [29.](#) “Trader” and “consumer” are defined in s.2(3)(a) and 2(3)(b) of the 2015 Act.
- [30.](#) 2015 Act s.30(3). Words to the same effect are used in the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.15(1); these Regulations are revoked by s.60 and Sch.1, para.53 of the 2015 Act.
- [31.](#) The 2015 Act applies to contracts made on or after October 1, 2015; see below, Vol.II, para.38-197.
- [32.](#) See paras 18-010 and 18-011 below.
- [33.](#) SI 2013/3134.
- [34.](#) *ibid.*, reg.5.
- [35.](#) “Consumer” and “trader” are defined in reg.4 of the 2013 Regulations (above, n.31).
- [36.](#) At n.28 above.
- [37.](#) As seems to have been the position in the *Shanklin Pier* case, above n.25.
- [38.](#) **I**e.g. *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758; *National Trust v Haden & Young* (1994) 72 B.L.R. 1. Similarly, in *British American Tobacco Switzerland SA v Exel Europe Ltd* [2012] EWHC 694 (Comm), [2013] 1 W.L.R. 317 A had entered into a contract for the carriage of A’s goods with B and B engaged a subcontracting carrier (C) to carry out the carriage operation, but there was “no direct agreement” (at [10]) between A and C. It was held that there was no contract at common law between A and C by virtue of which C could be bound by an exclusive jurisdiction clause in the contract between A and B. Nor could A enforce such a clause by virtue of the “statutory contract” (at [23]) contained in the consignment note issued in pursuance of the CMR Convention which has the force of law in the UK under the Carriage of Goods by Road Act 1965 (see at [46]–[51]; discussion of this point is beyond the scope of the present Chapter). Cooke J.’s decision in *British American Tobacco Switzerland SA v Exel Europe Ltd* [2012] EWHC 694 (Comm), [2013] 1 W.L.R. 397 was reversed on appeal ([2013] EWCA Civ 1319, [2014] 1 W.L.R. 4526) but restored on further appeal to the Supreme Court ([2015] UKSC 65, [2016] A.C. 262: see below, paras 36-141, 36-146).
- [39.](#) *Holland Hannen & Cubitts (Northern) v Welsh Health Technical Services Ltd* (1987) 7 Con.L.R. 14; cf. *Welsh Health Technical Service Organisation v Haden Young* (1987) 37 Build.L.R. 130; *Greater Nottingham Co-operative Soc. Ltd v Cementation Ltd* [1989] Ch. 497; *Linklaters Business Services v Sir Robert McAlpine* [2010] EWHC 2931 (TCC), 133 Con L.R. 211 where there seems to have been a collateral contract between A and C, but none between A and D, a sub-contractor engaged by C. Contrast *National Trust v Haden & Young*, above n.36, where there was no such collateral contract; for C’s possible liability to A in tort, see below paras 18-024-18-041.
- [40.](#) *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113; [2003] Q.B. 1270, at [63]–[65].
- [41.](#) For the nature of this relationship, see *Kalwak v Consistent Group Ltd* [2007] I.R.L.R. 560.
- [42.](#) For recognition of this possibility, see *Dacas v Brook Street Bureau* [2004] EWCA Civ 217, [2004] I.C.R. 1437; *Cable & Wireless plc v Muscat* [2006] EWCA Civ 220, [2006] I.C.R. 975.
- [43.](#) *James v Greenwich LBC* [2008] EWCA Civ 35 at [23], citing *The Aramis* [1989] 1 Lloyd’s Rep. 213 at 224, and applying the general principle stated in para.2-169 above.
- [44.](#) Cases in which this requirement was not satisfied include the *James* case, above n.41; *Cairns v Visteon UK Ltd* [2007] I.R.L.R. 175 and *Croke v Hydro Aluminium Worcester Ltd* [2007] I.C.R. 1303; *Alstom Transport v Tilson* [2010] EWCA Civ 1308, [2011] I.R.L.R. 169 (where B had expressly refused, when invited to do so, to enter into an express contract with C); cf. *Evans v*

Parasol Ltd [2010] EWCA Civ 866, [2011] I.C.R. 37, where the Court of Appeal held that B had an arguable case on the point but evidently regarded it as unlikely that B would be able at the trial to establish that there was a contract between B and C. For further discussion of this line of cases, see Vol.II, para.40-027. For legislative intervention in such situations, see Agency Workers Regulations 2010, SI 2010/93, below para.40-027.

45. *Campbell Discount Co Ltd v Gall* [1961] 1 Q.B. 431; reversed on other points in *Branwhite v Worcester Works Finance Ltd* [1969] 1 A.C. 552 and *United Dominions Trust Ltd v Western* [1976] Q.B. 513.
46. *Brown v Sheen & Richmond Car Sales Ltd* [1950] 1 All E.R. 1102; *Andrews v Hopkinson* [1957] 1 Q.B. 229; *Diamond* (1957) 21 M.L.R. 177; cf. *Astley, Industrial Trust Ltd v Grimley* [1963] 1 W.L.R. 584. As to damages, see *Yeoman Credit Ltd v Odgers* [1962] 1 W.L.R. 215.
47. See Consumer Credit Act 2006, s.2; Vol.II, paras 39-005, 39-019.
48. s.56(2); cf. also s.75.
49. This follows from s.56(2), above, n.46.
50. *Re Charge Card Services* [1987] Ch. 150; affirmed [1989] Ch. 497; cf. *Customs and Excise Commissioners v Diners Club Ltd* [1989] 1 W.L.R. 1196; *First Sport Ltd v Barclays Bank plc* [1993] 1 W.L.R. 1229 (where the card had been stolen and been presented by the thief to the retailer). A different analysis probably applies where the card is issued by the suppliers, as is the practice of some department stores: *Richardson v Worrall* [1985] S.T.C. 693, 720.
51. [2013] UKSC 15, [2013] 2 All E.R. 719.
52. [2013] UKSC 15 at [1].
53. [2013] UKSC 15 at [3].
54. [2013] UKSC 15 at [2].
55. As Lord Reed explains at [11], the analysis that follows in the text above would not apply to “sales promotion or customer loyalty schemes which are operated by retailers as part of their own business.” In such cases, there would be no “promoter” in the sense described above.
56. [2013] UKSC 15 at [3].
57. [2013] UKSC 15 at [4].
58. [2013] UKSC 15 at [5].
59. Above, n.49.
60. [2013] UKSC 15 at [12], [72].
61. [2013] UKSC 15 at [26].
62. cf. *Brikom Investments Ltd v Carr* [1979] Q.B. 467, above, para.4-081, where no third party problem arose.
63. In the *Shanklin Pier* case (above, para.18-005 at n.25) McNair J. said at 856: “I see no reason why there may not be an enforceable warranty between A [the defendant] and B [the plaintiff] supported by the consideration that B should cause C [the contractors employed by the plaintiffs] to enter into a contract with A [viz. to buy the paint from A].”
64.  cf., in another context, *Penn v Bristol & West Building Society* [1997] 1 W.L.R. 1356, 1363 (“entering into some transaction with a third party”). For another case (again not involving any

third party) in which the claimant provided consideration for the defendant's promise giving rise to a collateral contract by entering into the main contract, see *Hughes v Pendragon Sabre Ltd* [2016] EWCA Civ 18, [2016] 1 Lloyd's Rep. 311 at [32], [35]. For this case, see also paras 2-120, 44-020.

65. *Customs and Excise Commissioners v Diners Club Ltd* [1989] 1 W.L.R. 1196. For discussion of the question whether payment for a supply of goods by use of a bank card, so that the payment was made by a third party, constituted "consideration" within EC Directives relating to VAT see *Dixons Retail plc v Revenue and Customs Commissioners* (C-494/12) [2014] Ch. 326, *Court of Justice of the European Union*, at [31]–[38]. This subject is beyond the scope of this Chapter, but it is interesting to note that the CJEU in the *Dixons* case analysed such a situation as consisting of "two transactions" (at [34]), i.e. of (1) a sale of the goods to the purchaser for an agreed price, and (2) a contract for the provision of services by the third party to the supplier of the goods (the services being those of guaranteeing payment and of promoting the supplier's business in various ways (at [34])). This reasoning bears some resemblance to the common law approach to the problem of consideration in the situations discussed in the text above; and this is also true of the Court's conclusion that the requirement of "consideration" stated in Council Directive 77/388/EEC ("the Sixth VAT Directive") art.11A(1)(a) and in Council Directive 2006/112/EC art.73, could be satisfied where payment was made by a "third party" (i.e. by the issuer of the card) at [38]; and that the requirement of "consideration" for a supply of goods or services could therefore be satisfied even though the "consideration" was not "obtained directly from the person to whom the goods or services are supplied" (at [35]).
66. As was pointed out in para.18-009 after n.56, none of the three contracts described in that paragraph is, strictly speaking, "collateral" to any of the others.
67. [1968] 1 W.L.R. 1498.
68. cf. *Godfrey Davies Ltd v Culling and Hecht* [1962] 2 Lloyd's Rep. 349; *Cooter & Green Ltd v Tyrell* [1962] 2 Lloyd's Rep. 377; *Brown & Davies v Galbraith* [1972] 1 W.L.R. 997.
69. [1968] 1 W.L.R. at 1505; cf. *West Bromwich Albion Football Club v El Safty* [2006] EWCA Civ 1299, [2006] B.M.L.R. 179.
70. Above, para.4-006; the transfer of possession might subject the repairer to the obligations of a bailee, but these would not include an obligation to carry out the repairs. For reasoning similar to that in the *Charnock* case (above, n.65), see *International Petroleum Refining & Supply Ltd v Caleb Brett & Son Ltd* [1980] 1 Lloyd's Rep. 569, 594.
71. *Heilbut, Symons & Co v Buckleton* [1913] A.C. 30, 47; above, para.2-169.
72. [1970] 1 Q.B. 95.
73. cf. also *Hannam v Bradford C.C.* [1970] 1 W.L.R. 937; *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All E.R. 220.
74. (1980) 14 Build.L.R. 1; cf. *Lambert v Lewis* [1982] A.C. 225; above, para.2-173.
75. *Fuji Seal Europe v Catalytic Combustion Corp* [2005] EWHC 1649, 102 Con L.R. 47 (where, as in the *I.B.A.* case, above, n.72, C was held liable in tort).
76. *Law Debenture Trust Corp. v Ural Caspian Oil Corp. Ltd* [1993] 1 W.L.R. 138, 142; reversed on another point [1995] Ch. 152.
77. *Hybart v Packer* (1858) 4 C.B.(N.S.) 209; *Gray v Pearson* (1870) L.R. 5 C.P. 568; *Evans v Hooper* (1875) 1 Q.B.D. 45; *Lee v Showmen's Guild* [1952] 2 Q.B. 329 at 341; *Nutting v Baldwin* [1995] 1 W.L.R. 201. But in *Anderton v Rowland*, *The Times*, November 5, 1999, it was held that breach of the rules by one member did not, as a matter of construction, give another member a right of action in damages against the member guilty of the breach. And where a club was owned by a company of which the club's members were shareholders, the rules of the club were held to constitute contracts between each member and the company, and not between the

members inter se: *Peskin v Anderson* [2000] 2 B.C.L.C. 1.

78. *Touche Ross & Co v Colin Baker* [1992] 2 Lloyd's Rep. 207.
79. *Soden v British Commonwealth Holdings* [1998] A.C. 298 at 323, stating the effect of the former s.14 of the Companies Act 1985, which is repealed by s.1295 and Sch.16 of Companies Act 2006 and replaced with modifications by s.33(1) of the 2006 Act. For a full discussion, see above para.10-061; for the position under the Contracts (Rights of Third Parties) Act 1999, see below, para.18-118.
80. For the status of such a partnership as a body corporate, see Limited Liability Partnerships Act 2000, s.1(2).
81. Limited Liability Partnerships Act 2000, s.5(1)(a).
82. *ibid.*, s.5(1)(c).
83. *The Satanita* [1895] P. 248; affirmed sub nom. *Clarke v Dunraven* [1897] A.C. 59, where only Lord Herschell dealt with the point here discussed; cf. *Meggesson v Burns* [1972] 1 Lloyd's Rep. 223; *White v Blackmore* [1972] 2 Q.B. 651 (where there was no contractual intention).
84. *Ellesmere v Wallace* [1929] 2 Ch. 1.
85. See the authorities cited in nn.84-87, below.
86. *Daly v General Steam Navigation Co Ltd (The Dragon)* [1979] 1 Lloyd's Rep. 257, 262; affirmed [1980] 2 Lloyd's Rep. 415; cf. *Wilson v Best Travel Ltd* [1993] 1 All E.R. 353, 355; *Bowerman v Association of British Travel Agents* [1995] N.L.J. 815 (holiday booked for pupil by her teacher); *Vitesse Yacht Charterers SL v Spiers (The Deverne II)* (contract to charter a yacht for a holiday taken by two persons together held to have been made by one of them on behalf of both). For the question whether an f.o.b. seller (A) who ships goods on B's ship for transmission to the buyer (C) does so as principal or as agent for C, see Carver on Bills of Lading, 3rd ed. (2011), para.4-029.
87. *Lockett v A.M. Charles* [1938] 4 All E.R. 170. cf. *Richards v Hughes* [2004] EWCA Civ 266, [2004] P.N.L.R. 35 (arguable that accountant advising parent about setting up a trust fund for the education of children owed a contractual duty, not only to the parents, but also to the children).
88. *Jackson v Horizon Holidays Ltd* [1975] 1 W.L.R. 1468, 1473 (where *Lockett v A. M. Charles Ltd*, above was not cited).
89. Such problems can arise in relation to "forwarding agents" see, e.g. *Jones v European General Express* (1920) 25 Com.Cas. 296; *Elektronska, etc. v Transped, etc.* [1986] 1 Lloyd's Rep. 49.
90. *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145; *Grosvenor Casinos Ltd v National Bank of Abu Dhabi* [2008] EWHC 511 (Comm), [2008] 2 Lloyd's Rep. 1 at [147]-[149]; see generally, Vol.II, Ch.31.
91. *Halifax Building Society v Edell* [1992] Ch. 436. Nor could the borrower enforce a term of the valuer's employment contract by virtue of the Contracts (Rights of Third Parties) Act 1999: see s.6(3), below para.18-118. But it has been held that a valuer who had acted as an agent for another, whether as an employee or not, would not be personally liable in tort to a lender who had suffered loss by reason of the inaccuracy of the valuation (resulting from his carelessness) unless the valuer had indicated that he was prepared to "assume" personal liability for such loss: *Bush v Summit Advances Ltd* [2015] EWHC 665 (QB), [2015] P.N.L.R. 18 at [32], following the principles stated by Lord Steyn in *Williams v Natural Life Foods* [1998] 1 W.L.R. 830, cited in the *Bush* case, above, at [31] and discussed in this book in paras 1-213, 1-214 above.

- [92.](#) *Halifax Building Society v Edell*, above n.89, at 454.
- [93.](#) See *Smith v Eric S. Bush* [1990] 1 A.C. 831.
- [94.](#) cf. above, para.2-190.
- [95.](#) *Halifax Building Society v Edell* [1992] Ch. 436, 454.
- [96.](#) Above, para.4-074.
- [97.](#) Above, para.4-040.
- [98.](#) Above, para.4-026.
- [99.](#) Above, at n.90.

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Section 2. - The Common Law Doctrine
(b) - Party to the Consideration

Relation to the rule that consideration must move from the promisee ¹⁰⁰

18-018

It is disputed whether the rule that consideration must move from the promisee is the same as or different from the common law rule that only a party to the agreement can enforce it. ¹⁰¹ In the English cases the two rules have always led to the same result, which the judges have sometimes based on the first rule ¹⁰² and sometimes on the second. ¹⁰³ These are, it is submitted, separate requirements: to be entitled to enforce a promise, a person must (at common law) generally show (1) that it was made to him *and* (2) that consideration for it moved from him. The statement that consideration must move *from the promisee* simply assumes that the first requirement has been satisfied. If the rule were stated to be that consideration must move *from the party seeking to enforce the promise* it would be clearly distinct from the rule that only a party to the agreement can sue. A man might, for example, promise his daughter to pay £1,000 to any man who married her. A person who married the daughter with knowledge of and in reliance on such a promise might provide consideration for it, but would not be entitled to enforce it, as it was not addressed to him. ¹⁰⁴

18-019

In *Kepong Prospecting Ltd v Schmidt* ¹⁰⁵ a third party made a claim to enforce a contract under the law of Malaysia, by which consideration need not move from the promisee. In rejecting the claim, the Privy Council said "It is true that s.2(d) of the Contracts Ordinance gives a wider definition of 'consideration' than that which applies in England, particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties." ¹⁰⁶ This decision seems therefore to support the view that the doctrine of privity is distinct from the rule that consideration must move from the promisee.

Promises made to more than one person

18-020

The doctrine of privity does not affect the enforceability by any promisee of promises made to a number of persons, whether jointly or severally or jointly and severally. The question whether one of the promisees can enforce such a promise if he has not provided any part of the consideration for it has been discussed in Chapter 4. ¹⁰⁷

^{1.} Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19

M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.

[100.](#) Above, para.4-037.

[101.](#) Furmston (1960) 23 M.L.R. at 383–384.

[102.](#) See *Tweddle v Atkinson* (1861) 1 B. & S. 393.

[103.](#) See *Price v Easton* (1833) 4 B. & Ad. 433 per Littledale and Patterson JJ.

[104.](#) cf. *Uddin v Ahmed* [2001] EWCA Civ 204; [2001] 3 F.C.R. 300 at [20].

[105.](#) [1968] A.C. 810.

[106.](#) *ibid.*, at 826.

[107.](#) Above paras 4-042-4-045.

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(c) - Development of the Common Law Doctrine

The doctrine established

18-021

In the early authorities, there was support both for the view that a person could not, ¹⁰⁸ and for the view that he could, ¹⁰⁹ enforce a contract to which he was not a party. The point appeared to have been settled in 1861 by *Tweddle v Atkinson*, ¹¹⁰ where A promised B to pay a sum of money to B's son, C, on C's marriage to A's daughter. It was held that C could not enforce against A the promise that A had made to B. This case was usually considered to have established the common law doctrine of privity, ¹¹¹ which was approved by the House of Lords in 1915, when the principle that "only a person who is a party to the contract can sue on it" was said to be a "fundamental" ¹¹² one in English law. This view was, indeed, judicially doubted in a number of cases ¹¹³, but these doubts appeared to have been set at rest in 1961, when the House of Lords again affirmed the existence of the doctrine of privity of contract in holding that a person could not take the benefit of a limitation of liability clause contained in a contract to which he was not a party. ¹¹⁴ The view that a person could not enforce a contract to which he was not a party is also accepted in many later cases. ¹¹⁵ It also underlies the proposals for legislative reform to which reference has already been made. ¹¹⁶ and, indeed, the way in which these were implemented by the Contracts (Rights of Third Parties) Act 1999. ¹¹⁷

Beswick v Beswick

18-022

The leading authority on the present status of the doctrine of privity is *Beswick v Beswick*. ¹¹⁸ A coal merchant transferred his business to his nephew who promised him (inter alia) that he would, after the uncle's death, pay an annuity to the uncle's widow. After the uncle's death, the widow became his administratrix. She brought an action to enforce the nephew's promise, suing both in her own right and as administratrix. In the Court of Appeal it was held, (1) by Lord Denning M.R., that the widow could sue in her own right at common law, notwithstanding the doctrine of privity: this doctrine was "at bottom ... only a rule of procedure" ¹¹⁹ and could be overcome by simply joining the promisee as a party to the action ¹²⁰; (2) by Lord Denning M.R. and by Danckwerts L.J., that the widow could sue in her own right by virtue of s.56(1) of the Law of Property Act 1925 ¹²¹; and (3) by Lord Denning M.R. and by Danckwerts and Salmon L.J.J., that the widow could sue in her capacity as administratrix of the promisee and could in that capacity obtain an order of specific performance against the nephew, obliging him to pay the annuity to her for her own personal benefit. The House of Lords affirmed the decision on the third ground, ¹²² rejected the second ¹²³ and found it unnecessary to express a concluded view on the first. But the speeches all assume the correctness of the generally accepted view that at common law a contract can be enforced only by the parties to it, ¹²⁴ though the House of Lords has on a number of occasions indicated its willingness to reconsider this position. ¹²⁵ Such a reconsideration has indeed been undertaken by a majority of the High Court of Australia, but in a decision in which so many divergent views were expressed that it provides no firm guidance for the

development of the law.¹²⁶ The difficulties of reaching satisfactory results in this area through purely judicial reconsideration are formidable; they arise, in particular, in defining exactly what classes of third parties can acquire rights under the contract, and how these rights might be affected by attempts by the contracting parties to rescind the contract or to vary it, and by defences available between the contracting parties.¹²⁷ A satisfactory solution of such difficulties is more likely to be achieved by legislative reform,¹²⁸ such as that contained in the Contracts (Rights of Third Parties) Act 1999.¹²⁹ In a significant number of situations, however, third parties will not acquire rights by virtue of this Act¹³⁰, and in many such situations the common law doctrine of privity will continue (at least for the time being)¹³¹ to apply.

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1. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.
 108. *Bourne v Mason* (1668) 1 Ventris 6; cf. *Crow v Rogers* (1726) 1 Stra. 592; *Price v Easton* (1833) 4 B. & Ad. 433. For the history, see Holdsworth, *History of English Law*, VIII, pp.11–13, 40; E.J.P. (1954) 70 L.Q.R. 467; Scamell (1955) 8 C.L.P. 131; Palmer, 33 Am.Jl. of Legal History 3 (1989); Ibbetson in Barton, *Towards a History of the Law of Contract*, pp.67, 96–99; Palmer, *The Paths to Privity: The History of Third Party Beneficiary Contracts in English Law* (1992); Andrews, 69 Tulane L.Rev. 69 (1995).
 109. *Dutton v Poole* (1677) 2 Lev. 210; affirmed *T.Raym.* 302. cf. *Thomas v —* (1655) Sty. 461; *Martyn v Hind* (1776) 2 Cowp. 437, 443; *Marchington v Vernon* (1787) 1 B. & P. 101, note (c).
 110. (1861) 1 B. & S. 393.
 111. *Gandy v Gandy* (1884) 30 Ch.D. 57, 69.
 112. *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847, 853; for a similar, earlier, statement see *Keighley Maxsted & Co v Durant* [1901] A.C. 240, 246.
 113. *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 K.B. 500, 514–516; *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 Q.B. 250, 272–275. *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 Q.B. 402, esp. at 426 (explained on other grounds in *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446, 471); *Rayfield v Hands* [1960] Ch. 1; Dowrick (1956) 19 M.L.R. 375. cf. Flannigan (1987) 103 L.Q.R. 564; Andrews (1988) 8 L.S. 14.
 114. In *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446; above, para.15-050. The Court of Appeal had taken a similar view of the continued existence of the doctrine in *Green v Russell* [1959] 2 Q.B. 226. Parts of the passage from the *Pyrene* case at 426 referred to in n.111 above are cited with approval in *AP Moeller-Maersk A/S v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm), [2010] 2 All E. R. (Comm) 1159. It is there said at [45] that Devlin J. had, in the *Pyrene* case, “considered that the seller participated in the contract of affreightment [between buyer and carrier] so far as it affected him”, and so was bound by a term in it limiting the carrier’s liability even though he (the seller) was not a party to that contract. But the attention of the court in the *Moeller-Maersk* case was not drawn to Lord Simonds’ statement in the *Scruttons* case, above at 471 that the *Pyrene* case could be “supported only on the facts of the case which may well have justified the implication of a contract between the parties” (i.e., between seller and carrier, so that there was privity of contract between them). For the “facts of the [Pyrene] case” that appear there to have justified such an implication, see Carver on Bills of Lading, 3rd ed. (2011), para.4–024.
 115. *Rookes v Barnard* [1964] A.C. 1129; *Hepburn v A. Tomlinson (Hauliers) Ltd* [1966] A.C. 451; *New Zealand Shipping Co Ltd v A.M. Satterthwaite Ltd (The Eurymedon)* [1975] A.C. 154; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd (The New York Star)* [1980] 1 W.L.R. 138; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277; *Balsamo v Medici* [1984] 1 W.L.R. 951, 959–960; *Southern Water*

Authority v Carey [1985] 2 All E.R. 1077, 1083; *The Forum Craftsman* [1985] 1 Lloyd's Rep. 291, 295; *Swiss Bank Corp. v Brink's-Mat Ltd* [1986] 2 Lloyd's Rep. 79; *Singer (UK) Ltd v Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164, 167; *J.H. Rayner (Mincing Lane) Ltd v D.T.I.* [1990] A.C. 643, 662; *Cia. Portoraffi Commerciale SA v Panama Inc. (The Captain Gregos)* [1990] 1 Lloyd's Rep. 310, 318; *Law Debenture Trust Corp. v Ural Caspian Oil Corp. Ltd* [1993] 2 All E.R. 355, 365; (reversed on another point, [1995] Ch. 152); *Siu Yin Kwan v Eastern Insurance* [1994] 2 A.C. 199, 207; *Rhone v Stephens* [1994] 2 A.C. 310, 321; *K.H. Enterprise v Pioneer Container (The Pioneer Container)* [1994] 2 A.C. 324, 355; *White v Jones* [1995] 2 A.C. 207, 252, 266; *The Mahkutai* [1996] A.C. 650, 658; *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 1 W.L.R. 1025, 1028; *The Giannis NK* [1998] A.C. 605, 616; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 A.C. 715, esp. at [34], [146]. The point is perhaps left open in *Esso Petroleum Ltd v Hall Russell & Co* [1989] A.C. 643, 662.

^{116.} See, above, para.18-001.

^{117.} Below, paras 18-090 et seq.

^{118.} [1968] A.C. 58; affirming [1966] Ch. 538; reversing [1965] 2 All E.R. 858.

^{119.} [1966] Ch. at 557.

^{120.} For criticism of this view, see para.18-077, below.

^{121.} Below, paras 18-127-18-130.

^{122.} [1968] A.C. 58; Goodhart (1967) 83 L.Q.R. 465; Fairest [1967] C.L.J. 149; Treitel (1967) 30 M.L.R. 687.

^{123.} See below, paras 18-129-18-130.

^{124.} [1968] A.C. 58, 72D, 81G, 92–93, 95G.

^{125.} *ibid.*, at 72; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277, 291, 297–298, 300; *Swain v Law Society* [1983] 1 A.C. 598, 611; cf. *Williams v Natural Life Health Foods Ltd* [1998] 1 W.L.R. 830, 837.

^{126.} *Trident Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 C.L.R. 107, where a claim under a liability insurance policy by a person who was not a party to it was upheld by a majority of five to two. But one member of the majority (Deane J.) was prepared to allow the third party's claim only under the well established trust exception to the doctrine of privity (below, para.18-080-18-088); while another (Gaudron J.) based her decision in favour of the third party, not on contract but on unjust enrichment, and said that this was “not an abrogation of the doctrine of privity of contract” (at 177, and see below, para.18-044). Only three of the seven members of the court can be said to have countenanced such an abrogation, and even their view may be restricted to the special insurance context with which the case was concerned. See also Edgell [1989] L.M.C.L.Q. 139; Kincaid (1989) 2 J.C.L. 160. For a different judicial approach in Canada, proceeding by means of developing an exception to the doctrine in the context of exemption clauses, see *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 S.C.R. 299; Waddams (1993) 109 L.Q.R. 349. cf. *Fraser River and Pile Dredge Ltd v Can-Drive Services Ltd* [2000] 1 Lloyd's Rep. 199, where the Supreme Court of Canada, while refusing to engage in “wholesale abolition” of the doctrine of privity, continued to make “incremental changes” by holding that a third party could take the benefit of a “waiver of subrogation” clause in an insurance policy.

^{127.} See the discussion of these problems in American law (which in principle recognises the rights of third-party beneficiaries) in Corbin on Contracts, Chs 41–44.

^{128.} See Treitel (1966) 29 M.L.R. 657, 665; Reynolds (1989) 105 L.Q.R. 1, 3; above, para.18-001. Judicial reform is favoured by Steyn L.J. in *Darlington B.C. v Wiltshire Northern Ltd* [1995] 1 W.L.R. 68, 76, discussed in para.18-058 below. See also Beale (1995) J.C.L. 103.

- [129.](#) Below, paras 18-090 et seq. cf., in New Zealand, the Contract (Privity) Act 1982.
- [130.](#) Above, para.18-002.
- [131.](#) The passing of the 1999 Act has probably reduced the pressure for judicial reform.

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General

18-023

The common law doctrine of privity means, and means only, that a person cannot acquire rights, or be subjected to liabilities, *arising under* a contract to which he is not a party. For example, it means that, if A promises B to pay a sum of money to C, then C cannot sue A for that sum. ¹³² Similarly, if a contract between A and B contains a term purporting to exempt C from tortious liability to A, the doctrine of privity may prevent C from relying on that term in an action in tort brought against him by A. ¹³³ But it does not follow that a contract between A and B cannot affect the legal rights of C indirectly. For example, in the situation just described, a clause in the contract between A and B can form the basis on which a separate collateral contract comes into existence between A and C, containing a promise by A to make the relevant terms of the contract between A and B available for the benefit of C ¹³⁴; such an agreement may also give rise to a bailment or sub-bailment between A and C by virtue of which C may be entitled to the benefit of, or be bound by, limitation or exemption clauses in the contract between A and B, even though the relationship between A and C is not contractual ¹³⁵; an agreement between A and B under which A accepts from B part payment of a debt owed by C to A in full settlement of that debt can benefit C by precluding A from suing C for the balance of the debt ¹³⁶; and a fortiori full performance by B of C's obligation to A can discharge that obligation. Conversely, a building contract between A and B may benefit C by defining his rights: e.g. by specifying the time at which payment becomes due to C under a subcontract between B and C for the execution of part of the work. ¹³⁷ It is also possible for a contract between A and B to affect C adversely, ¹³⁸ as in the bailment situation described above ¹³⁹; other ways in which a contract between A and B may so affect C are more fully discussed later in this Chapter. ¹⁴⁰ In the following paragraphs, our concern is with a number of further situations in which a contract between A and B can operate to the advantage of C: in particular, with situations in which C may, where A has committed a breach of that contract, have a right of action against A in tort.

^{1.} Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.

^{132.} *Tweddle v Atkinson* (1861) 1 B. & S. 393; above, para.18-021.

^{133.} *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446; paras 15-050, 18-021 above; but there may be a contract between A and C, as in *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd (The Eurymedon)* [1975] A.C. 154; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd (The New York Star)* [1980] 1 W.L.R. 138; above, para.15-051. Contrast, in Canada, *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 S.C.R. 299. And see *The Mahkutai* [1996] A.C. 650, where the actual decision is based, not on the doctrine of privity, but on the fact that an exclusive jurisdiction clause was not, as a matter of construction, one of the "exceptions, limitations, provisions, conditions and liberties" of the

contract on which the third party sought to rely. Hence it was not necessary to decide whether the English courts should, in cases of this kind, adopt the Canadian view taken in the *London Drugs* case [1992] 3 S.C.R. 299, but Lord Goff at 665 in *The Mahkutai* left the point open.

134. This is often the effect of so-called Himalaya Clause in bills of lading: see *The Eurymedon*, above, n.131; *The New York Star*, above, n.131; contrast *The Mahkutai*, above, n.131 where such a clause failed to protect C for the reason given in that note; and *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 A.C. 715, at [34], [93], [147], [196] where the relevant term was invalid under Art.III.8 of the Hague Rules; and see *The Starsin* at [155] for criticism of the expression “collateral contract” in this context. Cf. *Whitsea Shipping and Trading Corp v El Paso Rio Clara Ltd (The Marielle Bolten)* [2009] EWHC 2552 (Comm), [2010] 1 Lloyd’s Rep. 648 where the contract was referred to at [34] as “The Himalaya contract” and was not invalid under Art.III.8 as (unlike the relevant contract in *The Starsin*) it was not a “contract of carriage” within that provision (above, para.15-134); and see generally the discussion of Himalaya Clauses in paras 15-051 to 15-052 above and in Carver on Bills of Lading, 3rd ed. (2011), paras 7-046—7-066.
135. e.g. *Elder Dempster & Co v Paterson Zochonis & Co* [1924] A.C. 522; *Morris v C.W. Martin & Co* [1966] 1 Q.B. 716, 729; above, para.15-057; Vol.II, paras 33-026, 33-027; Carver on Bills of Lading, 3rd ed. (2011) paras 7-027 to 7-045; 7-093 to 7-110.
136. *Hirachand Punamchand v Temple* [1911] 2 K.B. 330; above, para.4-128 (where the effect on such facts of the Contracts (Rights of Third Parties) Act 1999 is also discussed); cf. *Johnson v Davies* [1999] Ch. 117 at 130, and *Chelsea Building Society v Nash* [2010] EWCA Civ 1247, discussed above, para.4-128 n.750. As a general rule, payment of a debt by a third party discharges the debt only if the payment is made with the intention of discharging the debt and with the debtor’s authority: see *Crantrave Ltd v Lloyd’s Bank plc* [2000] Q.B. 917, where the first of these requirements was not satisfied. The inference that C authorised B to pay C’s debt to A, or that C had ratified such a payment, so that the payment discharged the debt, may be drawn from the existence of a family relationship (such as that of a father and his children): see *Treasure & Son Ltd v Dawes* [2008] EWHC 2181 (TCC). The rule that payment of a debt by a person other than the debtor will discharge a debt only if the payment is made with the debtor’s authority does not apply where the payment is made under legal compulsion: see *Electricity Supply Nominees Ltd v Thorn EMI Retailers Ltd* (1992) 63 P. & C.R. 143 at 148–149, per Fox L.J., applied in *Ibrahim v Barclays Bank plc* [2012] EWCA Civ 640, [2012] 2 Lloyd’s Rep. 13 at [46], [49]; this result follows even though the “compulsion” has arisen out of “a contractual obligation voluntarily assumed by the third party”: *ibid.*, at [49], in this case by a bank honouring its undertaking, given in a letter of credit, to pay the beneficiary the amount owed by the debtor; and see below para.29-105.
137. *Co-operative Wholesale Society Ltd v Birse Construction Ltd* (1997) 84 B.L.R. 58.
138. e.g. *West of England Shipowners Mutual Insurance Association (Luxembourg) v Cristal Ltd (The Glacier Bay)* [1996] 1 Lloyd’s Rep. 370; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 A.C. 221.
139. See above at n.133.
140. Below paras 18-140-18-153.

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(a) - Liability in Negligence to Third Parties

Duty of care may be owed to third party

18-024

While the primary effect of a contract between A and B is to oblige the parties to perform their promises to each other, the contract may also impose on A a duty of care to C, the breach of which will enable C to sue A in tort for negligence. The contract may, for example, have this effect because it gives rise between A and C to the relationship of passenger (or cargo-owner) and carrier, ¹⁴¹ bailor and sub-bailee, ¹⁴² or of building owner and subcontractor. ¹⁴³ On a similar principle a company (A) has been held liable in tort to an employee (C) of one of its subsidiaries (B) for asbestosis contracted by C in the course of his employment with B, even though there was no contract between A and C. ¹⁴⁴ In a number of cases persons providing professional services, such as solicitors, ¹⁴⁵ insurance brokers, ¹⁴⁶ safety consultants ¹⁴⁷ valuers and surveyors ¹⁴⁸ have been held liable in tort to persons other than their immediate clients ¹⁴⁹ for negligence in the performance of their contracts with these clients. Sometimes the provider of the services is liable in tort because his negligence in performing the contract with his client of itself causes loss to a third party: e.g. where a solicitor's negligence in failing duly to carry out his client's testamentary instructions causes an intended gift to a prospective beneficiary to fail. ¹⁵⁰ Sometimes the defendant's negligence results in his making a misrepresentation to the third party and the loss is suffered by the latter in consequence of his acting in reliance on that representation: e.g. where a valuer employed by A negligently makes a report on the structure of a house and the report is communicated to B and induces him to buy the house for more than its true value ¹⁵¹; or where an accountant employed by X negligently makes a report on the affairs of a company and the report induces Y to invest money in the company and to suffer loss by reason of the falsity of the report. ¹⁵² The types of relationships out of which such liability in tort for misrepresentation can arise are more fully discussed in Chapter 7. ¹⁵³ The only point to be made here is that such liability can be incurred to the claimant even though the misrepresentation giving rise to it is made in the performance of a contract to which he is not a party.

The Junior Books case

18-025

A controversial extension of tort liability to a third party was made in *Junior Books Ltd v Veitchi Co Ltd*, ¹⁵⁴ where B had undertaken to build a factory for C by a contract which entitled C to nominate subcontractors. C nominated A as flooring sub-contractor; A in consequence entered into a contract with B; but no contract came into existence between A and C. ¹⁵⁵ The floor later cracked and, on the assumption that this was due to A's negligence in doing the work, it was held that A was liable to C for the loss suffered by C in consequence of the fact that the work had to be done again. At first sight, this represented a considerable encroachment on the common law doctrine of privity; but the following discussion will show that later decisions have taken a highly restrictive view of the scope of the *Junior Books* case.

Tort and contract liability distinguished

18-026

In the situations described in paragraphs 18-024 and 18-025 above, A's liability to C is in tort and not on the contract between A and B as such: both the basis and the standard of liability may differ according to whether A is being sued on the contract by B or in tort by C. Thus in the *Junior Books* case it does not seem that A would have been liable in tort to C if A had wrongfully repudiated his contract with B and done no work under it at all, with the result that completion of the building was delayed and C suffered loss. ¹⁵⁶

Omissions

18-027

In one group of cases, A has indeed been held liable in tort to C for simple failure to take steps in the performance of his (A's) contract with B. These are cases, such as *White v Jones*, ¹⁵⁷ which hold that where a solicitor (A) negligently fails to carry out his client's (B's) instructions to make a will in favour of C, then A can, after B's death, be held liable in tort to C for the value of the benefit lost by C as a result of A's failure to act. But one reason for this conclusion was that A's omission made him liable in tort, as well as for breach of contract, *even to his own client* B. ¹⁵⁸ This would not have been the position if, in the *Junior Books* case, ¹⁵⁹ A had wrongfully repudiated his contract with B or had simply failed to do any work under it: such a repudiation or omission would have made A liable to B only for breach of contract (and not in tort). The "disappointed beneficiary" cases are also distinguishable from the building contract cases for other reasons to be discussed in para.18-039 below; and they therefore do not support any general proposition that A's omission to perform his contract with B can give a cause of action in tort to C merely because, as a result of the omission, C suffers loss. Indeed, in *White v Jones* itself Lord Goff ¹⁶⁰ recognised the general principle that in tort there was no liability for pure omissions; but he subjected ¹⁶¹ it to an exception where, as in that case, there had been an "assumption of responsibility" ¹⁶² by A towards C. The basis of that assumption seems to have been that A undertook a duty of care in relation to the provision of professional services, making him liable even to B in tort (as well as for breach of contract) for failure to act with due diligence and care. This reasoning would not apply to cases of A's simple failure to take any steps in the performance of his building contract with B, causing loss to C.

Further differences between tort and contract liability

18-028

Further differences between contract and tort liability in cases involving three parties are that the contract between A and B might have made A strictly liable to B, ¹⁶³ without proof of negligence, while negligence was an essential element of C's cause of action in tort against A; that in contract, B would have a cause of action against A as soon as the defective work was done, while in tort C's cause of action would only accrue when the resulting loss was suffered ¹⁶⁴; and that in B's action on the contract it is only necessary to show that the contract has been made and broken, while in C's action in tort, C must establish that there was a relationship between himself and A by virtue of which A owed him a duty of care and that C has suffered loss as a result of A's breach of that duty ¹⁶⁵; and that, while in contract liability for economic loss is imposed as a matter of course, in tort such liability arises only where there is an "assumption of responsibility" by the party in breach giving rise to "duties of care co-extensive with [that party's] contractual obligations." ¹⁶⁶ Whether the party in breach has assumed such responsibility depends partly on the nature of the contract and partly on its terms. Thus such an assumption is readily inferred where the breach is committed by a person who has contracted to render professional services to a client ¹⁶⁷; but is unlikely to be inferred where the breach in question is one by a builder of a building contract, especially where such a contract expressly sets out the builder's warranties of quality and the client's remedies in the event of their breach and where it further contains an exclusion clause ¹⁶⁸ which is inconsistent with the builder's alleged assumption of responsibility for economic loss suffered by the employer in consequence of

the breach.

Restrictions on scope of the duty of care

18-029

A relationship giving rise to a duty of care ¹⁶⁹ is not established merely by showing that C has suffered foreseeable loss as a result of A's defective performance of his contract with B. In the *Junior Books* case, there were many special factors giving rise to such a relationship: A were nominated as sub-contractors by C; A were specialists in flooring and knew of C's requirements; C relied on A's special skills in laying floors; and A must have known that defects in the work could necessitate repairs and lead to C's suffering economic loss. ¹⁷⁰ These factors (and in particular the extent of C's reliance on A's special skills) may have given rise to a "special relationship" and hence to a duty of care. ¹⁷¹ But such factors are unlikely to arise in the ordinary case where C suffers loss as a result of the defective performance by A of his contract with B. Accordingly, later authorities ¹⁷² have emphasised the exceptional nature of the circumstances in the *Junior Books* case. It has been said that those circumstances were "unique" ¹⁷³; that the case "cannot now be regarded as a useful pointer to the development of the law" ¹⁷⁴; or as "laying down any principle of general application in the law of tort" ¹⁷⁵; that "it is really of no use as an authority on the general duty of care" ¹⁷⁶; and that the statement of principle in Lord Brandon's dissenting speech is to be preferred to the views of the majority. ¹⁷⁷ The authority of the case is further undermined by the fact that the reasoning of the majority is to a considerable extent based on earlier decisions ¹⁷⁸ which (so far as they hold defendants liable for economic loss) ¹⁷⁹ have since been overruled by the House of Lords. ¹⁸⁰ In consequence of these developments, the decision in the *Junior Books* case has been described as "discredited", ¹⁸¹ as "virtually extinguished" ¹⁸², and "as aberrant, indeed as heretical". ¹⁸³

18-030

The duty owed by A to C in tort may also be less extensive than that owed by A to the other contracting party. This was, for example, the position where A was employed as solicitor by B who was guarantor of C's mortgage. It was held ¹⁸⁴ that, although A might owe a duty of care to C, this duty did not extend to requiring A to explain the implications of the mortgage to C, since the imposition of such an extensive duty might give rise to a conflict between A's duty to his own client (B) and the alleged duty to C.

Persons to whom duty is owed

18-031

The law finally restricts the range of persons to whom the duty of care may be owed. Where, for example, a valuer was requested by a borrower to address a valuation of the property on which the loan was to be secured to "the prospective lender," it was held that the valuer owed no duty to that lender's assignee. ¹⁸⁵ Similarly, counsel who had given advice to his client in litigation has been held to owe no duty of care in respect of that advice to the other party to the litigation ¹⁸⁶; and a solicitor engaged by one party to a transaction will not normally owe a duty of care to the other party, since the imposition of such a duty could give rise to a conflict of interest. ¹⁸⁷ Such a duty may, however, arise in exceptional circumstances, e.g. where, in relation to a loan to be secured on a leasehold flat, the borrower engaged the defendants as his solicitors and they knew that the lender had not engaged and did not intend to engage his own solicitor. The defendants were held liable in tort to the lender for failing effectively to secure the loan on the flat. ¹⁸⁸ The existence of a duty of care to a person with whom the defendant was not in any contractual relationship may also be negated by the fact that that person has an adequate remedy in respect of the loss in question against another potential defendant. ¹⁸⁹

Duty restricted by terms of contracts

18-032

The scope of any duty of care owed by A to C may, finally, be restricted by the terms of the contracts between A and B and between B and C. These contracts may be relevant for this purpose either in specifying exactly what it is that A is required to do, or in showing that C has assented to a term of the contract which validly excluded A's liability for defective performance. ¹⁹⁰

Economic loss and physical harm

18-033

Except where there is a special relationship between the parties, as in the misrepresentation cases discussed in Chapter 7, and in those in which the third party's claim is based on the defendant's breach of a contract, such as one to perform professional services, which involves, in addition to his obligations under that contract to the other party to it, an assumption of responsibility to a third party, ¹⁹¹ a claimant cannot rely on the breach of a contract to which he was not a party as giving him a cause of action in tort merely ¹⁹² because, as a result of the breach, he has suffered economic loss, that is loss not taking the form of either personal injury or of physical damage to his property. ¹⁹³ The importance of this point is illustrated by *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)*, ¹⁹⁴ where the defendants had been nominated as suppliers of glass for incorporation in a building which was being erected by the claimants as main contractors for a client in Abu Dhabi. The glass had been sold by the defendants to a sub-contractor engaged by the claimants, so that there was no contract between claimants and defendants; the glass was perfectly sound but not of the colour specified in the contract of sale or in the main building contract. In consequence of this shortcoming, the claimants were not paid by their client and so suffered financial loss; but it was held that the defendants' breach of their contract with the sub-contractors did not give the claimants any right of action in tort against the defendants merely because that breach had caused the claimants to suffer financial loss. Similarly, it was held in *Balsamo v Medici* ¹⁹⁵ that a sub-agent who negligently paid over the proceeds of the sale of the principal's property to a fraudulent impostor was not liable in tort to the principal for such negligence in handling the money; nor was he liable to the principal in contract as there was no privity of contract between the sub-agent and the principal. To uphold a tort claim in such a situation would, it was said, "come perilously close to abrogating the doctrine of privity altogether." ¹⁹⁶ A doctor employed by a company to assess replies of job applicants to medical questionnaires has likewise been held to owe no duty in tort to those applicants ¹⁹⁷; while conversely a consultant surgeon who had given negligent advice in breach of his contract with a professional football player has been held not liable for financial loss suffered by the club which had employed the player but with which the surgeon was not in any contractual relationship. ¹⁹⁸

Requirement of "proximity"

18-034

The point that is emphasised in cases such as the *Simaan* and *Balsamo* cases ¹⁹⁹ is that the claimants in them suffered no physical harm as a result of the defendants' acts or omissions. It does not follow that the mere fact of the claimant's having suffered foreseeable harm in this way is a sufficient condition of the defendant's liability in tort. The claimant must, in addition, show that there was a relationship of "proximity" between him and the defendant, and that it is fair, just and reasonable to impose a duty of care on the defendant. ²⁰⁰ The last of these requirements was held not to have been satisfied in *The Nicholas H*, ²⁰¹ where a ship classification society had, in breach of its contract with shipowners, advised them that their ship could proceed on her current voyage until the cargo which she was then carrying had been discharged. In the course of that voyage the ship sank, and it was held that the owners of the cargo had no cause of action in tort against the society in respect of the loss of their cargo. The main reason given by the House of Lords for this conclusion was that the shipowners were, in turn, in breach of their contract of carriage with the cargo-owners; and that it was not fair, just or reasonable to impose on the classification society a liability to the cargo-owners in tort ²⁰² since this would not be subject to the limitations of liability available to the shipowners under international Conventions ²⁰³ which have the force of law. The effect of holding classification societies liable in tort to cargo-owners would be to deprive shipowners of the benefits of these Conventions since the societies would pass this liability on to shipowners; and this would be an undesirable conclusion, ²⁰⁴ particularly as loss suffered by cargo-owners in excess of the Convention

limits was “readily insurable.” ²⁰⁵

Defects in the very thing supplied insufficient

18-035

Even where A’s negligence in the performance of his contract with B has resulted in damage to “property,” the scope of C’s tort remedy is further restricted by the fact that “property” in this context normally refers to property belonging to C *other* than the very thing supplied by A under his contract with B. ²⁰⁶ Thus where A sold goods to B who resold them to C, it was held that A would not be liable in tort to C merely because those goods disintegrated on account of a defect in them amounting to a breach of A’s contract with B. ²⁰⁷ Nor, where goods are bought from a retailer, is the manufacturer liable to the buyer in tort ²⁰⁸ for negligence if the goods are defective and the defect is discovered before any injury, or harm to other property, has resulted. Even if the goods deteriorate by reason of the defect, the buyer’s only loss is the financial or economic loss which he suffers because the defect has made them less valuable or because he discards them or incurs the cost of repairing them. Loss of this kind is not generally recoverable in tort, ²⁰⁹ though there may be an exception to this general rule where the defect is a source of danger in respect of which the claimant could become liable to third parties, so that money has to be spent in averting this danger. ²¹⁰ The *Junior Books* case appears, indeed, to be inconsistent with the general rule; for the only “property” which could be said to have been damaged was the factory floor (which had cracked), and that damage was no more than a defect in the very thing supplied by A. The fact that A was nevertheless held liable in tort to C is now explicable (if at all) only by reference to the same special, or “unique,” factors ²¹¹ which were there held to have given rise to the relationship of proximity in that case.

Claimant having no title to thing damaged

18-036

Even where A’s breach of his contract with B does result in physical damage, the mere fact that the loss so occasioned falls on C will not necessarily give C a right of action in tort against A in respect of that loss. In *The Aliakmon* ²¹² A, a carrier, had contracted with B for the carriage of a quantity of steel coils which B had sold to C. The goods were damaged, as a result of A’s negligent breach of the contract of carriage, after the risk in them had passed to C under the contract of sale, but while B remained their owner. C had no claim under the contract of carriage as he was not a party to it ²¹³; and the House of Lords held that he also had no cause of action against A in tort in respect of the loss which he had suffered as a result of remaining liable for the full price of the goods in spite of the fact that they had been damaged in transit. This conclusion was based on a long line of authority ²¹⁴ which had established “the principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss or damage to property, he must have had either the legal ownership of or a possessory title ²¹⁵ to the property concerned at the time when the loss or damage occurred”. ²¹⁶ Later authorities have mitigated the rigor of this principle in two ways. First it has been held that a claim in tort could also be brought by a beneficial owner in equity of the property, so long as he joined the legal owner of it as a party to the proceedings ²¹⁷; and secondly, where the loss is caused by a continuing process it suffices for the claimant to have had title to the property when the cause of action in respect of it accrued. ²¹⁸ But it is not enough for him at the relevant time “to have only had contractual rights in relation to such property.” ²¹⁹ The House of Lords refused to create an exception to this principle where (as in *The Aliakmon*) the contractual right which C had under his contract of sale with B was one to have property and possession of the goods transferred to him at a later date. The main reason for this refusal was that the contract of carriage between A and B was expressed to be subject to an international Convention ²²⁰ which gave A (as carrier) the benefit of certain immunities from, and limitations of, liability; and to have held A liable in tort to C would have produced the undesirable result of depriving A of the protection of that contract, ²²¹ since C (being a stranger to it) was no more bound by its terms than entitled to assert rights under it.

Tort and contract damages contrasted

18-037

Where a third party can recover damages in tort for the negligent performance of a contract between two others, the damages in such a tort action will not normally be assessed in the same way as they would be in a contractual action. In particular, certain kinds of loss are generally regarded as being recoverable only in a contractual action. This follows from the general principle that the object of awarding damages for breach of contract is to put the claimant into the same position as that in which he would have been if the contract had been performed, while in an action in tort that object is to put him back into the position in which he was before the tort was committed. The distinction is well illustrated by *Muirhead v Industrial Tank Specialities Ltd* ²²² where the plaintiff, who owned a lobster farm, had entered into a contract for the installation of pumps, which later failed because of a defect in their electric motors. There was no contract between the plaintiff and the supplier of the motors but the plaintiff's claim against that supplier succeeded in tort in respect of the physical damage caused by that failure (i.e. the value of the lobsters which had died); and "any financial loss suffered by the plaintiff in consequence of that physical damage." ²²³ (i.e. the loss of profits on the sale of *those* lobsters). But a further claim "in respect of the whole economic loss suffered" ²²⁴ by the plaintiff (i.e. for loss of profits that he would have made from the installation, had it not been defective) was rejected: such damages might have been recoverable from the installer of the pumps in contract but they could not be claimed from the suppliers of the motors in tort.

18-038

❗ Considerable difficulty again arises in this connection from the *Junior Books* ²²⁵ case. The main question discussed in that case was whether any economic or financial loss could be recovered in a tort action in the absence of any allegation that the cracks in the floor were a source of danger to persons or to other property. In the exceptional circumstances of the case, this question was answered in the affirmative and on that basis most of the items of loss, in respect of which damages were said to be recoverable, can be explained in terms of the principles governing the assessment of damages in tort: this is, for example, true of the profits lost and of the wages and overheads wasted while the factory was closed for repairs to the floor. But it was also said that factory owners were entitled to the *cost of replacing the floor* ²²⁶; and such an award would, by putting them into the position in which they would have been if the sub-contractor's promise had been performed, amount to an award of contract damages in spite of the fact that there was no contract between the factory owners and the subcontractors. ²²⁷ ❗ On the normal basis of assessment in tort, the damages in respect of defects in the floor should not have included the cost of replacing the floor with a good one. ²²⁸ In the *Junior Books* case, Lord Keith explained this aspect of the case on the ground that, in replacing the floor, the factory owners had simply mitigated the loss of profit resulting from the defects in the floor originally provided ²²⁹; and it is well established that expenses reasonably incurred in mitigation are recoverable. ²³⁰ But as this reasoning was not adopted by the other members of the House of Lords, an alternative explanation was given in the *Muirhead* case, namely that the same special (or unique) factors in the *Junior Books* case, which gave rise to the duty of care there, ²³¹ also explain the assessment of damages. ²³² This narrow view of the *Junior Books* case is supported by dicta in the *Junior Books* case itself ²³³; by the fact that there is no subsequent similar ²³⁴ case in which a third party has recovered damages in tort to put him into the position in which he would have been if the contract between two others *had been performed* (as opposed to that in which he was *before it was broken*); and by the fact that many later decisions ²³⁵ have made it highly unlikely that such damages will, in a future tort case of this kind be awarded to a third party. On the contrary, two House of Lords decisions have specifically rejected such claims. ²³⁶ In each case, a lessee claimed damages in tort for the cost of remedying defects allegedly due to the negligence of a building contractor in the performance of a contract to which the lessee was not a party. In each case, the contractor was held not liable to the lessee in tort, even if he was negligent, ²³⁷ since the defects had been discovered before they had caused any personal injury, or damage to other property belonging to the lessees. To make the contractor liable for the purely economic loss suffered by the lessee in remedying the defect would "impose upon [the contractor] for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of" ²³⁸ his work. Such a result would have been inconsistent with the common law doctrine of privity; and these cases reinforce the view that tort liability in negligence to third parties has not wholly subverted (though it may have limited the scope of) that doctrine.

Damages in “disappointed beneficiary” cases

18-039

The general principle that a third party cannot recover damages in tort to put him into the position in which he would have been if a contract between two others had been performed is, at least at first sight, hard to reconcile with cases such as *White v Jones*,²³⁹ where A had instructed his solicitor B to draw up a will containing bequests in favour of his daughters C and D, but B negligently and in breach of his contract with A had done nothing to carry out these instructions by the time of A's death. The House of Lords by a majority held that B was liable in tort to C and D, and that the damages to which they were entitled consisted of the amounts which they would have obtained under A's will, if B had duly carried out A's instructions.²⁴⁰ The case presented certain special features, namely that C had discussed A's testamentary intentions with B, and that the letter setting out A's wishes had been drafted by D's husband. The majority do not seem to restrict the principle of liability to such special circumstances²⁴¹ though they accept that there must be “boundaries to the availability of the remedy” which “will have to be worked out ... as practical problems come before the courts.”²⁴² It is, for example, an open question whether such a remedy would be available to a prospective beneficiary who had no previous connection with the testator or knowledge of his testamentary intentions; and it has been said that the solicitor would not be liable for the amount of the intended benefit where it would have been reasonable for the beneficiary to have taken proceedings against the estate for rectification of the will and so to have obtained that benefit.²⁴³ But where the principle (whatever its precise scope may turn out to be) does apply, its effect is to put C into the position in which he would have been if the contract between A and B had been properly performed. Such cases are, however, distinguishable in several respects from those which hold that building contractors are not liable to third parties in respect of purely economic loss caused by defective work.²⁴⁴ In the building cases, the third party's complaint is that he has not received the benefit of the contractor's performance. In the disappointed beneficiary cases, the benefit of which the third party is deprived is not that of the solicitor's work: the lost benefit was to be provided, not by the solicitor, but by the testator; it was not to be created by the solicitor's work, but existed independently of it. The third party is not entitled to the cost of curing the defects in the solicitor's work (e.g. to the cost of employing another solicitor to give effect to the testator's intention²⁴⁵). On the contrary, it has been held that, if the defect is discovered when cure is still possible, the solicitor owes no duty to the beneficiary.²⁴⁶ There are also the points that, if any duty is to be imposed on the solicitor to the disappointed beneficiary, the only realistic measure of damages is the value of the lost benefit; and that no more than nominal damages could be recovered from the solicitor by the client's estate, since it would have suffered no loss. The negligent solicitor would thus escape all substantial liability if he were not held liable to the disappointed beneficiary for the value of the lost benefit. In the building contract cases, on the other hand, the employer will usually have a substantial remedy against the defaulting builder for damages, amounting either to the cost of curing the defects in the work or to the difference between the value of the work which was done and that which should have been done; and such a remedy may be available to the employer, not only in respect of his own loss, but also (in appropriate circumstances) in respect of loss suffered by the third party.²⁴⁷ For these reasons, it is submitted that the building contract cases can be distinguished from disappointed beneficiary cases such as *White v Jones*.

Analogous situations

18-040

The principle of the “disappointed beneficiary” cases²⁴⁸ has been extended to a number of closely analogous situations. One such extension was made in *Carr-Glynn v Frearsons*²⁴⁹ where the solicitors' negligence took the form, not of failing to secure the proper execution of the will, but of failing to take steps to ensure that property specifically bequeathed to the beneficiary remained within the client's estate after her death.²⁵⁰ Loss was thus suffered by the estate but the solicitors were nevertheless held liable to the intended legatee since the proceeds of any claim by the estate would have benefited, not that legatee, but the person entitled under the will to the residuary estate,²⁵¹ thus defeating the intention of the testatrix.²⁵² The decision can be explained on the ground that “the estate” is something of a legal abstraction, the loss being in fact suffered by the individual who under the will would, but for the solicitors' negligence, have received the property which was lost to “the

estate”; and that the court looked behind that abstraction ²⁵³ so as to fashion a remedy for that individual. The alternative possibility that the estate might have had a claim against the solicitors in respect of the intended legatee’s loss ²⁵⁴ was not considered, nor was any attempt made to reconcile the result with those building contract cases (discussed above ²⁵⁵) in which a third party was held to have no remedy in tort against the contractor for pure economic loss. The principle of the “disappointed beneficiary” cases has also been extended to the situation in which the benefit of which the claimant was deprived as a result of the defendant’s negligence was one which would have arisen on the death of the other contracting party, not under a will, but under a pension scheme. This was the position in *Gorham v British Telecommunications plc*, ²⁵⁶ where an insurance company sold a policy to a customer who had made it clear to the company that he was buying the policy to provide for his wife and dependent children in the event of his predeceasing them. The company negligently failed to advise the customer that these dependants would in that event have been better off if he had joined his employers’ pension scheme; and it was held that the company was liable to the dependants for loss of benefits under the employers’ scheme up to (but not beyond) the time when the company had corrected its original advice. The principle of *White v Jones* ²⁵⁷ applied because (as in that case) the customer had not himself suffered any loss, so that, if the dependants’ claims had been rejected, then neither the persons who had suffered loss nor anyone else would have had any claim for established negligence; and because the advice had been given “in a context in which the interests of the dependants were fundamental to the transaction.” ²⁵⁸ In both these respects, the case was closely analogous to that of a disappointed testamentary beneficiary. ²⁵⁹ The principle of those cases may also apply by analogy in favour of a claimant who has been deprived by the defendant’s breach of a contract to which the claimant was not a party of benefits which the claimant would, but for the breach, have obtained where those benefits would have arisen, not under a will, but under a trust. ²⁶⁰ By way of further extension of the “disappointed beneficiary” cases, solicitors might also be liable to a person other than one of their own clients for losses suffered by that person as a result of the solicitors’ negligence in relation, not to the making of a will, but to the giving of inheritance tax advice to the client. ²⁶¹

18-041

The “disappointed beneficiary” and analogous cases ²⁶² go further than any other group of negligence cases in encroaching on the common law doctrine of privity of contract. Perhaps for this reason, they were described as “an unusual class of cases” in *Goodwill v Pregnancy Advisory Service*. ²⁶³ In that case, the defendant had arranged for one M to have a vasectomy and, after the operation had been carried out, told him that it had been successful and that he no longer needed to use any other method of contraception. Some three years later, M formed a sexual relationship with the claimant, to whom he communicated the information given to him by the defendant relating to the vasectomy; she ceased to use any method of contraception after having consulted her own general practitioner who told her that there was only a minute chance of her becoming pregnant. The vasectomy having undergone a spontaneous reversal, the claimant became pregnant by M and one reason for holding that the defendant was not liable to her in damages was that a doctor performing a vasectomy could not realistically be described as having been employed to confer a benefit on his patient’s future sexual partners. The case was also said to be unlike the “disappointed beneficiary” cases in that dismissal of the claim would not produce the “rank injustice” ²⁶⁴ that would arise in those cases if in them the only person with a claim against the negligent solicitor were the testator’s estate, which would have suffered no loss. In a sterilisation case, a substantial remedy for negligence (if established) would normally be available to the patient him (or her) self. Such damages may be recoverable ²⁶⁵ even though, because the operation is carried out under the National Health Service (NHS) there is no contract between the patient and either the doctor who performs the operation or the hospital in which it is performed. Such liability is generally thought to arise, independently of contract, under the normal principles which determine when the relationship between two persons is such as to impose on one of them a duty of care owed to the other, the breach of which is actionable in tort. In *Rees v Darlington Memorial Hospital NHS Trust*, ²⁶⁶ Lord Scott did indeed suggest that such liability could be explained on the ground that “The NHS patient is entitled to the benefit of the contractual duty owed by the doctor pursuant to his contract with his NHS employers (cf. *White v Jones*) ...” ²⁶⁷ But no reference was made to this point by any of the other members of the House of Lords, a majority of whom awarded damages to the claimant on the basis that the hospital trust was liable on ordinary principles of tortious negligence, which Lord Scott was also prepared to apply as an alternative basis ²⁶⁸ for the award. It is not clear whether the “conventional” ²⁶⁹ sum awarded by the majority was intended to be compensatory ²⁷⁰ or to be based instead simply, as Lord Bingham said, on “some measure of recognition of the wrong done”. ²⁷¹ The case is therefore not direct authority on

whether such an award is more closely analogous to damages for breach of contract ²⁷² than to one for tort. ²⁷³

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1. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.
 141. *Austin v G.W. Ry* (1867) L.R. 2 Q.B. 442; *Sammick Lines Co v Owners of the Antonis P. Lemos* (*The Antonis P. Lemos*) [1985] A.C. 771.
 142. *Moukataff v B.O.A.C.* [1967] 1 Lloyd's Rep. 396; *Bart v B.W.I.A.* [1967] 1 Lloyd's Rep. 239 (where the claim failed as the sub-bailee's duty was limited to one to keep safely, and did not extend to transmission of the package); *Hispanica de Petroles SA v Vencedora Oceanica Navegacion SA* (*The Kapetan Markos NL*) (No.2) [1987] 2 Lloyd's Rep. 321. Such a sub-bailment may also operate to the disadvantage of C (the head bailor) in that he may be bound by an exemption or lien clause in the contract between A (the head bailee) and B (the sub-bailee): see *Morris v C.W. Martin Ltd* [1966] 1 Q.B. 716, 719; *K.H. Enterprise v Pioneer Container* (*The Pioneer Container*) [1994] 2 A.C. 324; *Spectra International plc v Hayesock Ltd* [1997] 1 Lloyd's Rep. 153; reversed on another ground [1998] 1 Lloyd's Rep. 162; *Sonicare International Ltd v EAFT Ltd* [1997] 2 Lloyd's Rep. 48; *T. Comedy (UK) Ltd v Easy Managed Transport Ltd* [2007] EWHC 611, [2007] 2 Lloyd's Rep. 397 at [64]. This application of the principle of sub-bailment results in the head bailor's being bound by terms in the contract between the head bailee and the sub-bailee. It must be distinguished from the situation in which the sub-bailee claims the benefit of a term in the contract between the head bailor and the head bailee, as in the *Elder Dempster* case, above n.133: see *The Mahkutai* [1996] A.C. 650, 667–668, Carver on Bills of Lading, 3rd ed. (2011) paras 7–099, 7–100. No sub-bailment arises merely because a sub-agent has received the proceeds of the sale of the principal's property from the buyer: *Balsamo v Medici* [1984] 1 W.L.R. 951.
 143. *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd* [1999] 1 W.L.R. 9 where the loss caused by the subcontractor's negligence was physical damage to property of the owner other than the very thing supplied by the sub-contractor, so that the various difficulties discussed in relation to the *Junior Books* case [1983] 1 A.C. 520 (below, paras 18-025 to 18-029 and 18-038) did not arise.
 144. *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 W.L.R. 3111 at [79].
 145. See the authorities cited in n.148 below.
 146. *Punjab National Bank v de Boinville* [1992] 1 W.L.R. 1138, 1152; cf. *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145; *Aiken v Stewart Wrightson Members Agency Ltd* [1995] 1 W.L.R. 1281; *BP plc v Aon Ltd* [2006] EWHC 424, [2006] 1 All E.R. (Comm) 789; *Crowson v HSBC Insurance Brokers Ltd* [2010] Lloyd's Rep. I.R. 441 at [8]; Cane in (ed. Rose) *Consensus ad Idem*, Essays in the Law of Contract in Honour of Guenter Treitel, 96.
 147. *Driver v William Willett (Contractors) Ltd* [1969] 1 All E.R. 665; cf. *Dove v Banham's Patent Lock Ltd* [1983] 1 W.L.R. 1436; *Bailey v HSS Alarms Ltd*, *The Times*, June 20, 2000; contrast *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* (*The Nicholas H*) [1996] A.C. 211. And see *Hines v King Sturge LLP* [2010] CSIH 86, 2011 S.L.T. 2 where C, who had suffered physical harm and economic loss as a result of a fire in a building owned by A, was held to have an arguable claim in tort against B, who had been employed by A as manager of the building, in respect of B's failure to maintain the building's fire alarm.
 148. *Yianni v Edwin Evans & Sons* [1982] QB 438; cf. *Bourne v McEvoy Timber Preservation* (1975) 237 E.G. 496; *Davies v Pally* [1988] 20 E.G. 74; *Roberts v J. Hampson & Co* [1990] 1 W.L.R. 94; *Smith v Eric S. Bush* [1990] 1 A.C. 831 (where *Yianni's* case is cited with approval at 852–853, 864, 875); *Merrett v Babb* [2001] EWCA Civ. 214; [2001] Q.B. 1174; *Niru Battery*

- Manufacturing Co v Milestone Training Ltd* [2002] EWHC 1425 (Comm); [2002] 2 All E.R. (Comm.) 705, at [60]; affirmed [2003] EWCA Civ 1466, [2004] 1 All E.R. (Comm) 193; *J. Jarvis v Sons Ltd v Castle Wharf Developments* [2001] EWCA Civ, 19; [2001] Lloyd's Rep. P.N. 208 (quantity surveyor employed by developer held to owe a duty to contractor working on the project, but claim failed for want of reliance); *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2003] EWCA Civ 1283; [2003] Lloyd's Rep. P.N. 53 (architects held to owe duty of care to subsequent occupiers but not to be in breach of it by reason of the limited nature of the services to be provided by them under the contract with their client); cf. *Halifax Building Society v Edell* [1992] Ch. 436, 454; contrast *Beaumont v Humberts* [1989] 29 E.G. 104.
149. See also *Knight v Lawrence* [1991] 1 E.G.L.R. 143; *Barings plc v Coopers & Lybrand* [1997] 1 B.C.L.C. 498; *Medforth v Blake* [1999] N.L.J. 929.
150. Below para.18-027; *Ross v Caunters* [1980] Ch. 287; *White v Jones* [1995] 2 A.C. 207; cf. *Smith v Claremont Haynes*, *The Times*, September 3, 1991; *Al Kandari v J.R. Brown & Co* [1988] Q.B. 665; *Rind v Theodore Goddard* [2008] EWHC 459 (Ch), [2008] P.N.L.R. 24. Contrast *Clarke v Bruce Lance & Co.* [1988] 1 W.L.R. 881 (solicitor acting for testator in a different transaction held to owe no duty to beneficiary); *Worby v Rosser* [2000] P.N.L.R. 140 (solicitor engaged by testator to draw up a new will held to owe no duty to beneficiary under an earlier will). For earlier discussion of *Ross v Caunters*, above, see *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] Q.B. 659, 794–795; affirmed on other grounds [1990] 2 All E.R. 947; *Van Oppen v Clerk of the Bedford Charity Trustees* [1989] 1 All E.R. 273, 289; affirmed [1990] 1 W.L.R. 235; *Caparo Industries plc v Dickman* [1990] 2 A.C. 605, 635; *Murphy v Brentwood DC* [1991] 1 A.C. 398, 486.
151. See the authorities cited in n.146, above; cf. *VTB Capital plc v Nutritek International Corporation* [2013] UKSC 5, [2013] 2 A.C. 337 at [139], quoted below in para.18-139 n.779; contrast *Gran Gelato Ltd v Richcliff Group Ltd* [1992] Ch. 560 (vendor's solicitor not liable to purchaser for negligently representing his client's state of mind).
152. See the overruling of *Candler v Crane Christmas & Co* [1951] 2 K.B. 164 in *Hedley Byrne v Heller & Partners Ltd* [1964] A.C. 465; cf. *Caparo Industries plc v Dickman* [1990] 2 A.C. 605, 625; *Morgan Crucible Co plc v Hill Samuel Bank plc* [1991] Ch. 295; *Killick v Pricewaterhouse Coopers* [2001] 1 B.C.L.C. 65; *Law Society v KPMG Peat Marwick* [2000] 1 W.L.R. 1921 (accountants employed by solicitors held to owe a duty of care to Law Society as trustee of its compensation fund); contrast *James McNaughton Paper Group v Hicks Anderson & Co* [1991] 2 Q.B. 113, where the circumstances in which the report was prepared negated the duty.
153. Above, paras 7-086 to 7-094.
154. [1983] 1 A.C. 520; Jaffey [1983] C.L.J. 37; Palmer and Murdoch (1983) 46 M.L.R. 213; Jaffey (1985) 5 L.S. 77; Reynolds (1985) 11 N.Z.U.L.R. 215; Stapleton (1988) 104 L.Q.R. 213, 389; Huxley (1990) 53 M.L.R. 361; Beyleveld and Brownsword (1991) 54 M.L.R. 48. The Contracts (Rights of Third Parties) Act 1999 would probably not apply on such facts: below para.18-096.
155. In *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundations Ltd* [1989] Q.B. 71 there was such a contract between A and C, and it was held that A's duty to C was governed by that contract alone, and not by the general law relating to the tort of negligence; cf. *Welsh Health Technical Services v Haden Young* (1987) 37 Build.L.R. 130; *Sonat Offshore SA v Amerada Hess Development Co* [1988] 1 Lloyd's Rep. 145, 159; *Red Sea Tankers Ltd v Papachristidis (The Hellespont Ardent)* [1997] 2 Lloyd's Rep. 547, 593; *Whitecap Leisure Ltd v John H Rundle* [2008] EWCA Civ 429, [2008] 2 Lloyd's Rep. 216 at [53]–[55]; but it has been recognised that breaches of duty arising out of certain contractual relationships may be actionable in tort as well as in contract; see e.g. *Forsikringsaktieselskapet Vesta v Butcher* [1989] A.C. 852, 860, affirmed, without reference to this point, *ibid* 880; cf. *Nitigrin Eirann Teoranta v Inco Alloys Ltd* [1992] 1 All E.R. 854, 856–857; *Saipem SpA v Dredging VO2 BV (The Volvox Hollandia)* (No.2) [1993] 2 Lloyd's Rep. 315, 322; *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145; *Holt v Payne Skillington* [1996] P.N.L.R. 179; *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep. 487, 512–514; *Weldon v GRE Linked Life Insurance Ltd* [2002] 2 All E.R. (Comm) 914 at 926–927; *How Engineering Services Ltd v Southern Insulation (Medway) Ltd* [2010] EWHC 1878 (TCC), [2010] B.L.R. 537 at [22]; STV

Central Ltd v Semple Fraser LLP [2015] CSIH 35, 2015 S.L.T. 313 at [22] (contract), [27] (delict); the same is true in the relationships described at nn.139 and 140 above. In *Sunny Metal and Engineering Pte Ltd v Ng Khim Ming Eric* (2006) 110 Con. L.R. 115 a subcontractor who had entered into a contract not only with the main contractor but also with the owner was said to owe a duty of care to the latter in both contract and tort (High Court of Singapore).

- 156. In *G.A.F.L.A.C. v Tanter (The Zephyr)* [1984] 1 Lloyd's Rep. 58, 85, it was said at first instance that even the law of torts can sometimes impose "positive duties ... recognised ... only because a party has voluntarily undertaken them." This suggestion was disapproved on appeal; [1985] 2 Lloyd's Rep. 529; cf. *White v Jones* [1995] 2 A.C. 207, 261. No issue of privity arose in *The Zephyr*, the dispute was as to contractual intention (above, paras 2-168, 4-201).
- 157. [1995] 2 A.C. 207 (below, para.18-039). cf. *Hooper v Fynmores* [2001] W.T.L.R. 1019.
- 158. See n.153, above.
- 159. [1983] 1 A.C. 520.
- 160. at 258.
- 161. *ibid.*, at 268.
- 162. cf. the discussion in para.4-201 above of A's possible liability to B for omissions where the relationship between A and B is not contractual because no consideration moved from B. In the cases with which the discussion in the present chapter is concerned, there is no doubt as to the existence of a contract with B, while the cases discussed in para.4-201 do not raise any third party problems.
- 163. e.g. on facts such as those of *Donoghue v Stevenson* [1932] A.C. 562 liability for breach of contract in respect of defects in the goods sold would be strict (*Frost v Aylesbury Dairy Co Ltd* [1905] 1 K.B. 608), while the tort liability of, or to, a third party would have depended on negligence. This difference between contract and tort liability in such cases is reduced in importance by Pt I of the Consumer Protection Act 1987, introducing strict "product liability" to the ultimate consumer. But such liability is subject to important qualifications, so that it does not extend to many of the situations with which the discussion in this chapter is concerned.
- 164. *Dove v Banham's Safety Locks Ltd* [1983] 1 W.L.R. 1463; cf. *Bell v Peter Browne & Co* [1990] 2 Q.B. 495; and *Robinson v P.E. Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206, where a period of limitation longer than that applicable to the contract claim applied (by virtue of Limitation Act 1980, s.14A) to the tort claim, which failed for the reason given at n.166 below.
- 165. *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 A.C. 281. The question whether the claimants in that case had a claim against the defendants in contract (where proof of loss is not a requirement of a cause of action) was left open by Lords Hope (at [59]), Scott (at [74]) and Mance (at [105]). But that question could arise only where there was a contractual relationship between claimant and defendant; and the discussion in the text above is of situations in which there is *no* such relationship.
- 166. *Robinson v P E Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206 at [68], [72], [83], [84].
- 167. *ibid.*, at [74], [80]; see, for example, the "disappointed beneficiaries" cases, discussed in para.18-039 below.
- 168. See below, para.18-032 n.188.
- 169. Above, para.18-024.
- 170. [1983] 1 A.C. 520, 546.

- [171.](#) *Murphy v Brentwood DC* [1991] 1 A.C. 398, 466, 481.
- [172.](#) Below, para.18-038, nn.233 and 234.
- [173.](#) *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177, 202; cf. *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 1 All E.R. 273, 289; affirmed [1990] 1 W.L.R. 235; *Duncan Stevenson MacMillan v A.W. Knott Becker Scott Ltd* [1990] 1 Lloyd's Rep. 98; *Nitrigin Eirann Teoranta v Inco Alloys Ltd* [1992] 1 W.L.R. 498, 504.
- [174.](#) *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758, 784.
- [175.](#) *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177, 202.
- [176.](#) *ibid.*, at 215.
- [177.](#) *ibid.*, at 202, 215; *Department of the Environment v Thomas Bates & Son Ltd* [1989] 1 All E.R. 1075, 1084; affirmed [1991] 1 A.C. 499; *Islander Trucking Ltd v Hogg Robinson & Gardner Mountain (Marine) Ltd* [1990] 1 All E.R. 826, 829; cf. *Murphy v Brentwood DC* [1991] 1 A.C. 398, 466, 469; and, in Scotland, *Strathford East Kilbride Ltd v Film Design Ltd*, 1997 S.C.L.R. 877.
- [178.](#) *i.e. Anns v Merton LBC* [1978] A.C. 728; *Dutton v Bognor Regis B. Co Ltd* [1972] 1 Q.B. 373.
- [179.](#) *Stovin v Wise* [1996] A.C. 923, 949.
- [180.](#) *Murphy v Brentwood DC* [1991] 1 A.C. 398. Contrast in Australia *Bryan v Maloney* (1995) 182 C.L.R. 609; in New Zealand (as accepted by the Privy Council) *Invercargill City Council v Hamlin* [1996] A.C. 624; in Canada *Winnipeg Condominium Corp. v Bird Construction Co Ltd* (1995) 121 D.L.R. (4th) 193 (where the defect made the building dangerous); and in Singapore *RSP Architects Planners & Engineers v Ocean Front Ltd* (1998) 14 Const.L.J. 139.
- [181.](#) *Société Commerciale de Reassurance v ERAS International Ltd* [1992] 1 Lloyd's Rep. 570, 599.
- [182.](#) *Saipem SpA v Dredging VO2 BV (The Volvox Hollandia)* (No.2) [1993] 2 Lloyd's Rep. 315, 322; *Losinjska Plovidba v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep. 395, 401.
- [183.](#) *Robinson v P.E. Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206 at [9].
- [184.](#) *Woodward v Wolfertrans*, *The Times*, April 8, 1997.
- [185.](#) *Barex Brothers Ltd v Morris Dean & Co* [1999] P.N.L.R. 344.
- [186.](#) *Connolly-Martin v Davis*, [1999] Lloyd's Rep. P.N. 790.
- [187.](#) *Dean v Allin & Watts* [2001] EWCA Civ 758; [2001] 2 Lloyd's Rep. 249, at [33].
- [188.](#) This was the actual result in *Dean v Allin & Watts*, above.
- [189.](#) *Briscoe v Lubrizol Ltd* [2000] I.C.R. 694; *Realstone Ltd v J & E Shepherd* [2008] CSOH 31, [2008] P.N.L.R. 21.
- [190.](#) *Junior Books case* [1983] 1 A.C. 520, 546, applied in *Southern Water Authority v Carey* [1985] 2 All E.R. 1077; doubted (though in another context) in *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785, 817 (below para.18-036); see also *Pacific Associates Inc. v Baxter* [1990] 1 Q.B. 993; cf. *Norwich C.C. v Harvey* [1989] 1 All E.R. 1180, 1187; *John F. Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC), [2007] TCLR 6; *Robinson v P.E. Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206 (above, para.18-028), where the outcome was based in part (see at [84]) on the facts that the contract contained terms excluding the defendant building contractor's liability to his own client


for economic loss and that these terms satisfied the requirement of reasonableness to which they were subject under the Unfair Contract Terms Act 1977. No third party issue arose in this case. And see above para.15-057.

- ^{191.} As, for example, in *Henderson v Merrett Syndicates Ltd* [1995] A.C. 145, *White v Jones* [1995] A.C. 207 and *BP plc v Aon Ltd* [2006] EWHC 424, [2006] 1 All E.R. (Comm) 789; and see the other authorities cited in para.18-024 above, nn.143-147; cf. *Parkinson v St James & Seacroft University NHS Trust* [2001] EWCA Civ. 530; [2002] Q.B. 266; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 A.C. 309, esp. at [131]. For a possible extension of the scope of such an “assumption” beyond contracts for professional services, see n.191, below.
- ^{192.} The restrictions, discussed in this paragraph, on the recoverability of damages in tort in respect of economic loss do not apply where the claimant suffers such loss in consequence of damage caused by the defendant's tortious conduct to a profit-earning thing owned by the claimant: *Network Rail Infrastructure Ltd v Conarken Group Ltd* [2011] EWCA Civ 644, [2012] 1 All E.R. (Comm) 692.
- ^{193.} *Tate & Lyle Industries Ltd v G.L.C.* [1983] 2 A.C. 509, 530–531; cf. *London Congregational Union Inc. v Harriss* [1988] 1 All E.R. 15, 25; *Simaan General Contracting Co Ltd v Pilkington Glass Ltd (No.2)* [1988] 1 Q.B. 758, 781; *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundation Ltd* [1989] Q.B. 71, 94; *Verderame v Commercial Union Assurance Co plc.*, *The Times*, April 2, 1992; *Preston v Torfaen B.C.* [1993] E.G.C.S. 137; *Abou-Rahmah v Abacha* [2005] EWHC 2662 (QB), [2006] 1 All E.R. (Comm) 268 at [67]; affirmed [2006] EWCA Civ 1492, [2007] 1 All E.R. (Comm) 827 on other grounds, there being no appeal against the dismissal of the negligence claim: see at [7]. cf., as to the restricted scope of such a duty, *Hill Samuel Bank v Frederick Brand Partnership* (1994) 10 Const.L.J. 72. See also *West Bromwich Football Club v El Safty* [2006] EWCA Civ 1299, (2006) B.M.L.R. 179 at [58]–[63], [80]–[84]; *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 A.C. 1 at [99] (“Even liability for causing economic loss by negligence is very limited”); *An Informer v A Chief Constable* [2012] EWCA Civ 197, [2013] Q.B. 579 at [67] (no duty of care on police authority, either in contract or in tort, to protect police informer against “pure economic loss” (at [57])). For discussion of the tests which determine whether a defendant owes a duty of care in tort not to cause economic loss to the claimant, see *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 A.C. 181 where the claimant suffered such loss because the defendant bank failed to comply with an injunction which the claimant had obtained to freeze an account held by one of the bank's customers; and it was held that the bank owed no such duty to the claimant. The case does not directly affect the discussion in this Chapter since the claimant's loss did not result from any breach of the contract between the bank and its customer. In *European Gas Turbines Ltd v MSAS Cargo International Ltd* [2001] C.L.C. 880 a cargo-owner (C) recovered damages from a sub-contracting carrier (A) for purely economic loss resulting from breach of A's subcontract with the contracting carrier (B) as to the mode of carriage. There was no contract between A and C so that this conclusion is at first sight hard to reconcile with the other authorities cited in this note. The case may be explicable on the ground that C's agent had notified A of the importance to C of carriage by the stipulated mode and that A had accepted this position so as to give rise to an “assumption of responsibility” (cf. above, at n.188) to C to observe that stipulation.
- ^{194.} [1988] 1 Q.B. 758.
- ^{195.} [1984] 1 W.L.R. 951; Whittaker (1985) 48 M.L.R. 86. It seems that on facts such as those of *Balsamo v Medici* the requirements of s.1(1), (2) and (3) of the Contracts (Rights of Third Parties) Act 1999 (below, paras 18-091 to 18-195) would not now be satisfied. cf. also *Michael Salliss & Co v E.C.A. Call* (1984) 4 Const. L.J. 125.
- ^{196.} [1984] 1 W.L.R. 951, 959–960. The soundness of the decisions discussed in this paragraph is not questioned in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, where the liability in tort of a subagent to a principal with whom he was in no contractual relationship was said at 195 to be based on the “most unusual” situation in that case. cf. *Hamble Fisheries Ltd v L. Gardner & Sons Ltd (The Rebecca Elaine)* [1999] 2 Lloyd's Rep. 1 at 8: “the dubious and lethal colonisation by the tort of negligence of the conceptual territory of contract” (engine

manufacturer held not liable in negligence for purely economic loss, caused by failure of the engine, to owner of fishing boat with whom he was not in any contractual relationship); *Amiri Flight Authority v BAE Systems Ltd* [2003] 1 Lloyd's Rep. 50 at [35], varied, without reference to this point, [2003] EWCA Civ 1447; [2003] 2 Lloyd's Rep. 767.

197. *Kapfunde v Abbey National plc*, [1998] I.R.L.R. 583 disapproving *Baker v Kaye* [1997] I.R.L.R. 219 so far as it holds that a duty was owed by the doctor to the applicant.
198. *West Bromwich Albion Football Club v El Safty* [2006] EWCA Civ 1299, (2006) 92 B.M.L.R. 179.
199. Above, para.18-033 at nn.192, 193.
200. For these requirements, see, inter alia, *Caparo Industries plc v Dickman* [1990] 2 A.C. 605, 617–618 (where it is also said at 632 that “these requirements are, at least in most cases, merely facets of the same thing”); *Murphy v Brentwood DC* [1991] 1 A.C. 398, 480, 486; *X (Minors) v Bedfordshire C.C.* [1995] 2 A.C. 633, 739.
201. *Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H.)*, [1996] A.C. 211; see also the *X (Minors)* case, above, n.198 at 749; *Reeman v Department of Transport* [1997] 2 Lloyd's Rep. 648; *Architype Projects Ltd v Dewhurst McFarlane & Partners* [2003] EWHC 3341, [2004] P.N.L.R. 38; *R.M. Turton & Co Ltd v Kerslake & Partners* [2000] Lloyd's Rep. P.N. 967 (New Zealand CA).
202. Nor had there been an “assumption of responsibility” (above, para.18-033) since the cargoowners were “not even aware of [the classification society's] examination of the ship.” [1996] A.C. 211, 242.
203. The Convention in question related to tonnage limitations; effect was given to this Convention by Merchant Shipping Act 1979 s.17 and Sch.4, now superseded by Merchant Shipping Act 1995, s.185 and Sch.7, Part I. The reasoning of the House of Lords is equally applicable to the contractual limitations and exceptions which protect the carrier under the Hague-Visby Rules, which have the force of law by virtue of Carriage of Goods by Sea Act 1971 s.1(2) and Sch.: see *Marc Rich & Co v Bishop Rock Marine (The Nicholas H)* [1996] A.C. 211, 238; (and see below, para.18-036 n.218 for the possible replacement of the Hague-Visby Rules by the Rotterdam Rules). No similar policy reasons for protecting an aircraft inspection authority from liability for personal injury to a passenger were said to exist in *Perrett v Collins* [1998] 2 Lloyd's Rep. 225; cf. *Watson v British Boxing Board of Control Ltd* [2001] Q.B. 1134. Contrast *Sutradhar v Natural Environment Research Council* [2006] UKHL 33, [2006] 4 All E.R. 490 where a body which had carried out hydrogeological tests of artesian wells was held not liable to a consumer who had developed arsenical poisoning as a result of drinking water from the wells. *Perrett v Collins* (above) was distinguished at [37] on the ground that there, but not in the *Sutradhar* case, the defendants had a “measure of control” over the activity which caused the injury to persons with whom they had no contractual relationship.
204. cf. below para.18-036 at nn.218 and 219.
205. *The Nicholas H* [1996] A.C. 211, 242.
206. *Robinson v P.E. Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206 at [93] (“the crucial distinction is between a person who supplies something defective and a person who supplies something which, because of its defects, causes loss or damage to something else”); cf. *ibid.*, at [94] and the reference at [68] to “personal injury or damage to other property”; for this case, see above, para.18-028.
207. *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 W.L.R. 1; cf. *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177, 202, 216; *Reid v Rush & Tompkins Group plc* [1990] 1 W.L.R. 212, 224; *Warner v Basildon Development Corp.* (1991) 7 Const.L.J. 146; *Holding & Management (Solitaire) Ltd v Ideal Homes Northwest Ltd* [2004] EWHC 2408, 96 Con. L.R. 114; affirmed [2005] EWCA Civ 59; cf. *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] EWCA Civ 549; [2002] 2 All E.R. (Comm) 335 at [18] (where

- contaminated ingredient used in manufacturing had made the finished product useless); *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 2931 (TCC), 13 Con. L.R. 133 (building sub-contractor held to owe no duty in tort to the employer in respect of the cost of replacing corroded pipes, because damage to them was “damage to the thing itself” (at [114], [119]) supplied by the sub-contractor), followed in *Broster v Galliard Docklands Ltd* [2011] EWHC 1722 (TCC), [2011] B.L.R. 569 (designer of houses not liable in tort for economic loss suffered by the current occupier of one of the houses as this was damage to the thing itself supplied by the designer).
208. For possible liability under a manufacturer’s guarantee, see above, para.18-005.
209. *Murphy v Brentwood DC* [1991] 1 A.C. 398, 469, 475; cf. *Nitrigin Eirann Teoranta v Inco Alloys Ltd* [1992] 1 W.L.R. 498.
210. *Losinjaska Plovida v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd’s Rep. 395, 402, where it was also arguable that the defective thing supplied by the defendant had caused physical harm to *other* property in which the claimant had a prior interest as lessee.
211. Above, para.18-029 at n.171.
212. *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785; Treitel [1986] L.M.C.L.Q. 294; Markesinis (1987) 103 L.Q.R. 354, 384–390; Tettenborn [1987] J.B.L. 12; cf. *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd’s Rep. 128; *Mitsui & Co Ltd v Flota Mercante Grancolombiana SA (The Ciudad de Pasto)* [1988] 1 W.L.R. 1145; *Anonima Petroli Italiana S.p.A. v Marlucidez Armadora SA (The Filiatra Legacy)* [1991] 2 Lloyd’s Rep. 337 at 339; *Mitsui & Co v. Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd’s Rep. 311 at 326; *The Hamburg Star* [1994] 1 Lloyd’s Rep. 399 at 404–405; *The Seven Pioneer* [2001] 2 Lloyd’s Rep. 57 (High Court of New Zealand). For a possible qualification, see *Virgo Steamship Co SA v Skaarup Shipping Corp. (The Kapetan Georgis)* [1988] 1 Lloyd’s Rep. 352.
213. The benefit of the contract of carriage had not been transferred to C under Bills of Lading Act 1855, s.1 as the property in the goods had not passed to him. On the facts of *The Aliakmon* rights under the contract of carriage would now be transferred to C by virtue of the Carriage of Goods by Sea Act 1924, s.2: see *White v Jones* [1995] 2 A.C. 207, 265. But cases can still be imagined where this would not be the case: see Carver on Bills of Lading, 3rd ed. (2011) para.5-108.
214. Stretching from *Cattle v Stockton Waterworks Co* (1875) L.R. 10 Q.B. 453 to *Candlewood Navigation Corp. v Mitsui O.S.K. Lines (The Mineral Transporter)* [1986] A.C. 1.
215. A bailor of goods has been held to have a sufficient possessory title even after the transfer by him of his contractual rights under the contract giving rise to the bailment: *East West Corp. v DKBS 1912* [2003] EWCA Civ 83; [2003] 1 Lloyd’s Rep 265 at [38]–[39], [49], [86]; *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11, [2008] 1 Lloyd’s Rep. 462 at [46].
216. [1986] A.C. 785 at 809.
217. *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] 1 Q.B. 86 at [119]; the same possibility had been foreshadowed by Lord Brandon in *The Aliakmon*, above n.210, at 812.
218. *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2001] EWCA Civ 56; [2001] 1 Lloyd’s Rep. 437, at [96] per Rix L.J., whose judgment was on this point affirmed on appeal: [2003] UKHL 12; [2004] 1 A.C. 715 at [40], [64], [90], [139].
219. [1986] A.C. 785, 809. Griew, (1986) 136 N.L.J. 1201 suggests that the principle may have been qualified by Latent Damage Act 1986, s.3; but there is no hint in the legislative history of s.3 that such a qualification was intended. It can, in any event, only apply where the damage was still latent when the claimant became owner; and this was not the position in *The Aliakmon*. The point was left open in *The Starsin*, above, [2001] EWCA Civ, 56 at [119]–[128], [134], [202], [203], and not discussed in the House of Lords [2003] UKHL 12, above n.216.

- [220.](#) i.e. the Hague Rules set out in the Schedule to the Carriage of Goods by Sea Act 1924, now superseded in England by Carriage of Goods by Sea Act 1971, known as the Hague Visby rules. These rules will in turn be superseded if a new “Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea” (also known as “the Rotterdam Rules”) is given the force of law in the United Kingdom. This Convention was drafted by UNCITRAL (document A/63/17, Appendix 1) and approved by the United Nations in December 2008 (General Assembly Resolution 63/112 § 2).
- [221.](#) cf. *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758, 782–783. For the suggestion that the position may be different where the potential tortfeasor has no such protection, see *Triangle Steel & Supply Co v Korean United Lines Inc.* (1985) 63 B.C.L.R. 66, 80 (the reasoning of which is in other respects inconsistent with that of *The Aliakmon*). See also *Sidhu v British Airways plc* [1997] A.C. 430, 450–451 stating that, in a case governed by the Conventions on international carriage by air, the only persons having the right to sue in respect of loss or damage to the goods were those specified in the Conventions for this purpose; in an action by such persons, the carrier would be entitled to the protection of the Conventions; see also *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] UKHL 72, [2006] A.C. 495 at [3], [27], [29] and [62]. Under such Conventions, the carrier may be protected by their terms even against a person who is not a party to the contract but has a cause of action against the carrier by virtue of his title to the goods. It has been held that such an action can be brought only subject to the “scheme of liability” imposed by the Conventions: *Western Digital Corp. v British Airways plc* [2001] Q.B. 733 at 750, 754–755, 769; and see *Hook v British Airways plc* [2011] EWHC 379 (QB), [2011] 1 All E.R. (Comm) 1128 at [28], [29]. Where an original shipper transfers his contractual rights to a third party, he may retain rights against the carrier in bailment, but such rights will remain subject to the contractual terms on which the goods were originally bailed by him to the carrier: see *East West Corp. v DKBS 1912 A/S* [2003] EWCA Civ, 83; [2003] Q.B. 1509, especially at [50], [69].
- [222.](#) [1986] Q.B. 507; Whittaker (1986) 49 M.L.R. 469; Oughton [1987] J.B.L. 370.
- [223.](#) [1986] Q.B. at 533.
- [224.](#) *ibid.*
- [225.](#) [1983] 1 A.C. 520; above, paras 18-025 to 18-035; Grubb [1984] C.L.J. 111; *Holyoak* (1983) 99 L.Q.R. 591; *Smith and Burns* (1983) 46 M.L.R. 1 & 7.
- [226.](#) This was one of the items claimed; the question whether the claim was proved was not before the House of Lords, which decided only that there was a cause of action in respect of it if negligence were established.
- [227.](#)  The case was governed by Scots law, which recognises a *jus quaesitum tertio*, but the conditions giving rise to such a right were not satisfied. Nor were they satisfied in *Marquess of Aberdeen and Temair v Turcan Connell* [2008] CSOH 183, [2009] P.N.L.R. 18 where those conditions are stated at [47]: “the parties to the contract must intend to benefit the particular third party ... and the party upon whom the benefit is conferred must be identified in the contract.” The Scottish Law Commission’s proposals for the reform and clarification of this branch of Scots law are contained in the Commission’s Review of Contract Law: Report on Third Party Rights, Scot Law Com No.245 (2016), which contains, in its Ch.2, a summary of the present law on the subject. The Draft Contract (Third Party Rights) (Scotland) Bill appended to this Report differs significantly from the English Contracts (Rights of Third Parties) Act 1999 (discussed in Vol.I, paras 18-090 et seq.). The above Report was substantially implemented when the Contract (Third Party Rights) (Scotland) Bill 2017 was passed by the Scottish Parliament, with some amendments, on September 21, 2017 (see paras 3 and 4 of the Policy Memorandum accompanying the Bill).
- [228.](#) cf. *Murphy v Brentwood DC* [1991] 2 A.C. 398, 469. Lord Roskill in the *Junior Books* case at 545 discusses (without reaching a definite conclusion) the question whether the pursuer in *Donoghue v Stevenson* [1932] A.C. 562 could have recovered damages “for the diminished value of the ginger beer”—not for the cost of replacing the contaminated with pure ginger beer.

Even the former basis of assessment would seem to be ruled out by the authorities cited in para.18-035, n.205, above.

[229.](#) [1983] 1 A.C. 520, 536.

[230.](#) cf. below para.26-102.

[231.](#) Above para.18-029.

[232.](#) [1986] Q.B. 507, 523, 533–535.

[233.](#) [1983] 1 A.C. 520, 533 (per Lord Fraser, who took the same narrow view of the *Junior Books* case in *The Mineral Transporter* [1986] A.C. 1, 24–25); and [1983] 1 A.C. 520, 546 (per Lord Roskill).

[234.](#) For the different treatment of the “disappointed beneficiary” and analogous cases, see below, paras 18-039-18-041.

[235.](#) i.e. *Tate & Lyle Industries Ltd v G.L.C.* [1983] 2 A.C. 509; *Balsamo v Medici* [1984] 1 W.L.R. 951; *Candlewood Navigation Corp. v Mitsui O.S.K. Lines (The Mineral Transporter)* [1986] A.C. 1; *Muirhead v Industrial Tank Specialities Ltd* [1986] Q.B. 507; *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785; *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 W.L.R. 1; cf. also *Smith v Littlewoods Organisation Ltd* [1987] A.C. 241, 280; *Yuen Kun Yeu v Att.-Gen. of Hong Kong* [1988] A.C. 175; *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758; *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundation Ltd* [1989] Q.B. 71, 84; *Davies v Radcliffe* [1990] 1 W.L.R. 821; *Parker-Tweedale v Dunbar Bank plc* [1991] Ch. 12, 24; *Deloitte Haskins & Sells v National Mutual Life Nominees* [1993] A.C. 774.

[236.](#) *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177; *Department of the Environment v Thomas Bates & Son Ltd* [1991] 1 A.C. 449.

[237.](#) In the *D. & F. Estates* case, there was no such negligence as the builders had employed competent sub-contractors.

[238.](#) *D. & F.* case (above, n.234) [1989] A.C. 177, 207; cf. *ibid.* at 211–212.

[239.](#) [1995] 2 A.C. 207 (Lords Keith and Mustill dissenting), approving the result (though not the reasoning) in *Ross v Caunters* [1980] Ch. 287, where B’s negligence took the form, not of simply failing to carry out A’s instructions, but of carrying them out ineffectively; this was also the position in *Martin v Triggs Turner Burtons* [2009] EWHC 1920 (Ch), [2010] P.N.L.R. 3, where a widow recovered damages from solicitors for negligently carrying out her late husband’s instructions to draft his will, so that her benefits under it were less than they would have been if those instructions had been duly carried out (at [74]). cf. *Esterhuizen v Allied Dunbar Assurance plc* [1988] 2 F.L.R. 668 (similar liability of company providing will making services) and (in Australia) *Hill v Van Erp* (1997) 142 A.L.R. 687, a case of actual misfeasance by the solicitor.

[240.](#) Or if B had committed some other breach of duty, as in *Feltham v Bouskell* [2013] EWHC 1952 (Ch), [2013] W.T.L.R. 1363, where B not only delayed in carrying out his instructions in drawing up A’s will but also committed a further breach of duty by encouraging beneficiaries under A’s earlier will to challenge the new will. C settled the claim of these beneficiaries and recovered the sums so paid from B (at [81]–[85], [113]–[117]) as damages under the reasoning of *White v Jones* (above, n.237): see [2013] EWHC 1952 (Ch) at [56]–[59].

[241.](#) [1995] 2 A.C. 207, 295.

[242.](#) *ibid.*, at 269. The alleged beneficiary’s claim clearly cannot succeed without proof of the requisite testamentary intention in his favour: see *Gibbons v Nelsons* [2000] Lloyd’s Rep. P.N. 603.

- [243.](#) On the question whether it would have been reasonable for the beneficiary to take rectification proceedings, contrast *Walker v Geo. H. Medlicott & Son* [1999] 1 All E.R. 685 with *Horsfall v Hayward* [1999] F.L.R. 1182.
- [244.](#) Above, para.18-038 at n.234. cf. also *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 A.C. 309 at [131].
- [245.](#) Cf. *Marquess of Aberdeen and Temair v Turcan Connell* [2008] CSOH 183, [2009] P.N.L.R. 18, where a beneficiary under a trust, who was not a party to the contract between the settlor and the latter's solicitor, was said at [48] to have "no claim under the principle of *White v Jones*" (above, at n.237) in respect of expenses incurred, after discovery of the effect of the solicitor's breach of duty in the administration of the trust, in curing that breach. It was the settlor who had an arguable case against the solicitor in respect of that loss (at [53]); and insofar as the loss had been incurred by the beneficiary, the settlor had an arguable case for recovery of such loss "on behalf of" the beneficiary (at [54]); cf. below, paras 18-054 et seq.
- [246.](#) *Hemmens v Wilson Browne* [1995] Ch. 223. But a claim by a person in a position analogous to that of a disappointed beneficiary may be available where the consequences of the adviser's negligence do not become apparent for many years after the transaction in question: *Richards v Hughes* [2004] EWCA Civ 266, [2004] P.N.L.R. 35.
- [247.](#) Below, paras 18-055 et seq.
- [248.](#) Above, para.18-039.
- [249.](#) [1999] Ch. 326.
- [250.](#) The testatrix was joint owner of the property in question and the solicitors had negligently failed to advise her to sever the joint tenancy, so that on her death her share passed to the other co-owner by right of survivorship.
- [251.](#) For the right of an executrix to recover damages for the benefit of a residuary legatee in respect of loss to the estate caused by the negligence of a solicitor engaged by the executrix to administer the estate, see *Chappell v Somers & Blake* [2003] EWHC 1644 (Ch); [2004] Ch. 19, below, para.18-049 at n.298.
- [252.](#) cf. *Corbett v Bond Pearce* [2001] EWCA Civ 531; [2001] 3 All E.R. 769, where residuary gift in favour of a disappointed beneficiary was held invalid in legal proceedings the costs of which were paid out of the testatrix's estate. The solicitors whose negligence was the cause of the invalidity of that gift then settled the disappointed beneficiary's claim for the full value of the residuary estate, undiminished by those costs. It was held that the solicitors were not liable to the estate for such costs since to hold them so liable would (1) make them liable twice over the same loss; and (2) result in benefiting persons whom the testatrix (in accordance with her final testamentary intentions as expressed in the invalid will) no longer wished to benefit.
- [253.](#) In a way somewhat reminiscent of the process, well known in company law, of "lifting the corporate veil."
- [254.](#) See below, para.18-054, et seq. and n.249 above.
- [255.](#) Above at n.234.
- [256.](#) [2000] 1 W.L.R. 2129.
- [257.](#) [1995] 2 A.C. 207, above, para.18-039.
- [258.](#) *Gorham's case*, above n.254, at 2142.
- [259.](#) cf. the reference in *Dean v Allin & Watts* [2001] EWCA Civ 758; [2001] 2 Lloyd's Rep. 249 (above, para.18-031) at [69] by Robert Walker L.J. to the "very special problems" which had

arisen in *White v Jones* and *Gorham's* case, evidently not sharing the view of Lightman J. in *Dean v Allin & Watts*, above at [40] that the decision there represented a further extension of the principle in *White v Jones*.

- [260.](#) See *Richards v Hughes* [2004] EWCA Civ 266, [2004] P.N.L.R. 35.
- [261.](#) For a case of such alleged negligence, see *Vinton v Fladgate Fielder* [2010] EWHC 904, [2010] S.T.C. 1868, where the above suggestion is made at [23], [24].
- [262.](#) Above, paras 18-039, 18-040.
- [263.](#) [1996] 1 W.L.R. 1397.
- [264.](#) [1996] 1 W.L.R. 1397, 1403; cf. above, n.257 and the description of *White v Jones* as having been “decided on special facts” in *Williams v Natural Life Health Foods* [1998] 1 W.L.R. 830 at 837.
- [265.](#) For limits on damages in such cases, see *McFarlane v Tayside Health Board* [2000] 2 A.C. 59; a full discussion of damages in “wrongful birth” cases is beyond the scope of this book.
- [266.](#) [2003] UKHL 52; [2004] 1 A.C. 309.
- [267.](#) *ibid.*, at [131].
- [268.](#) *ibid.*, at [132].
- [269.](#) *ibid.*, at [8].
- [270.](#) *ibid.*, at [123] per Lord Millett (“compensation by way of damages”) and at [148] per Lord Scott (“a conventional sum to compensate the respondent”).
- [271.](#) *ibid.* at [8]; in Lord Bingham’s view, such an award “would not be, and would not be intended to be, compensatory”. Lord Nicholls at [17] seems to take the same view.
- [272.](#) A view perhaps supported by Lord Scott at [148] (“to compensate the respondent for loss of the benefit that she was entitled to expect”); but see also at [131], regarding the distinction between contract and tort as irrelevant.
- [273.](#) A view perhaps supported by Lord Millett at [125], describing the purpose of the award as being “to compensate” for the ... injury to the parents’ autonomy.”

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(b) - Liability to Third Parties for Intimidation

Tort of intimidation

18-042

The tort of intimidation is committed where A induces B to act to the detriment of C by threatening B with some unlawful course of conduct. In *Rookes v Barnard* ²⁷⁴ the House of Lords decided that a threat by A to break his contract with B is for this purpose a threat to do an unlawful act. Such a threat may therefore entitle C to sue A for intimidation; and in bringing such an action C will to some extent be relying on a contract to which he is not a party. But the suggestion ²⁷⁵ that this position “outflanks” the common law doctrine of privity has been rejected by the House of Lords. ²⁷⁶ In the case put, C does not sue to enforce A’s promise to B. “His cause of action is quite different.” ²⁷⁷ C’s complaint is not that A has broken his contract with B, but that A has coerced B into acting to C’s detriment.

18-043

In *OBG Ltd v Allen* ²⁷⁸ Lord Hoffmann classified intimidation as “only one variant of the broader tort usually called ‘causing loss by unlawful means’”. ²⁷⁹ This classification calls for no further discussion here as it does not affect the relationship between the doctrine of privity of contract and liability in tort for intimidation.

¹. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.

²⁷⁴. [1964] A.C. 1129. For restrictions on the scope of such liability where the unlawful conduct takes the form of acts done in the contemplation or furtherance of a trade dispute, see Trade Union and Labour Relations (Consolidation) Act 1992, s.219, as amended by Trade Union Reform and Employment Rights Act 1993, s.49(1) and Sch.8, para.72; for an extension of the principle in favour of an individual whose expected supply of goods or services is disrupted by unlawful acts inducing industrial action, see Trade Union and Labour Relations (Consolidation) Act 1992, s.235A, as inserted by Trade Union Reform and Employment Rights Act 1993, s.22.

²⁷⁵. Wedderburn (1961) 24 M.L.R. 572, 577; accepted by Pearson L.J. in *Rookes v Barnard* [1963] 1 Q.B. 623, 695, but later rejected: below at n.274.

²⁷⁶. *Rookes v Barnard* [1964] A.C. 1129, 1168, 1200, 1208, 1235; Hamson [1961] C.L.J. 189; [1964] C.L.J. 159; Hoffmann (1965) 81 L.Q.R. 116, 124–128.

²⁷⁷. *Rookes v Barnard* [1964] A.C. 1129, 1208; if C were suing to enforce the contract, the damages

might be quite different.

[278.](#) [2007] UKHL 21, [2008] 1 A.C. 1.

[279.](#) *ibid.*, at [7]; “broader” because causing loss by unlawful means “does not require threats”: *ibid.*

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(c) - Liability to Third Parties in Restitution?

Restitution in respect of promisor's unjust enrichment

18-044

It has been suggested in Australia that the third party may have a claim in restitution where the promisor has received payment (or some other performance) from the promisee and has then failed or refused to perform the promise in favour of the third party; and that the measure of recovery on such a claim is the amount promised. ²⁸⁰ The suggestion was made where premiums under a policy of liability insurance for the benefit of a third party had been paid by the promisee to the promisor (the insurance company) which had then refused to pay the third party. The promisor's liability to the third party in restitution was said to be based on his unjust enrichment, and to arise in spite of the fact that there was no correlative impoverishment of the third party. But while it is true that liability in restitution is not based on loss to the claimant, it is (in the case put) based on gain to the defendant and it is hard to see what justification there can be for wholly disregarding this *basis* of restitutionary liability in determining its *measure*. And the argument that, to hold the promisor liable to the third party for the amount promised was "not an abrogation of the doctrine of privity of contract," ²⁸¹ merely because the liability was said to arise in restitution, is, it is submitted, inconsistent with the practical result of making the promisor so liable. We have seen that, in England, the promisor is not liable in tort where the practical effect of imposing such liability would be to abrogate the common law doctrine of privity ²⁸²; and it is hard to see why the position should be different merely because the alleged basis of liability is called restitution rather than tort. The suggestion that the promisor is liable in restitution to the third party for the amount promised, merely because the promisor has received performance from the promisee is, moreover, inconsistent with the reasoning of *Beswick v Beswick*, ²⁸³ where it was assumed that the third party had no common law right to sue the promisor in her own name, in spite of the fact that the promisor had received performance in full from the promisee. The view that claims of the kind here discussed fall outside the scope of the doctrine of privity of contract must therefore be viewed with scepticism. The argument based on restitution would in any event be of no avail to the third party where the promisor was willing to pay and the issue was merely whether the promisor should pay the third party or the promisee ²⁸⁴; in such cases the promisor would not just be unjustly enriched so that there would be no basis for restitutionary liability.

The above discussion is based on the assumption that the promisor would be unjustly enriched if he were allowed to retain a payment received *from the promisee* in spite of his failure to perform his promise to pay the third party. There is the further possibility that the promisor may have received a benefit *from a third party*: for example, where A contracts to grant a development lease to B, a company controlled by C, and C incurs expense in improving A's land in anticipation of the development, which then fails to take place because of A's failure to perform his contract with B. In such a case, it is arguable that C may have a restitution claim against A. ²⁸⁵ To allow such a claim would not be inconsistent with the doctrine of privity since in such a case C's claim is not based on any promise made by A to B for the benefit of C; no such promise has been made. The basis and measure of any restitution claim which C may have against A is more closely analogous to cases in which restitution is granted in respect of benefits conferred under anticipated contracts which fail to come into existence. ²⁸⁶

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1. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.
- [280.](#) *Trident Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 C.L.R. 107, per Gaudron J.; this view does not seem to have been shared by any other member of the Court; Soh (1989) 105 L.Q.R. 4.
- [281.](#) 165 C.L.R. at 177.
- [282.](#) Above, paras 18-033, 18-037.
- [283.](#) [1968] A.C. 58; above, para.18-022.
- [284.](#) See below, para.18-075; cf. such cases as *Re Schebsman* [1944] Ch. 83 and *Re Sinclair's Life Policy* [1938] Ch. 799 (below para.18-081).
- [285.](#) *Brennan v Brighton B.C. (No.2)*, *The Times*, May 15, 1997, (1997) E.G. 76 (CS), where B was a company which had been wound up and so could no longer sue A for breach of the contract between them.
- [286.](#) Above, paras 2-218, 2-219; below, paras 29-070 and 29-071.

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(a) - Effects of a Contract for the Benefit of a Third Party

General

18-045

Although a contract for the benefit of a third party generally does not, at common law, entitle the third party to enforce rights arising under it, the contract remains nevertheless binding between promisor and promisee. The fact that the contract was made for the benefit of a third party does, however, give rise to special problems so far as the promisee's remedies against the promisor are concerned. Actual performance of the contract may also lead to disputes between promisee and third party.

¹ Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.

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(i) - Promisee's Remedies

Specific performance

18-046

The promisee (or those acting for his estate) may seek specific performance of the contract. If, as in *Beswick v Beswick*, ²⁸⁷ such an order is obtained, the third party will in fact receive the benefit contracted for. But the scope of the remedy of specific performance is limited in various ways; these limitations, and their applicability to cases involving third parties, will be discussed in Chapter 27 below. ²⁸⁸ In the following paragraphs we shall therefore consider what other remedies may be available to the promisee if the contract is broken.

Restitution

18-047

The promisee might claim restitution of the consideration provided by him on the ground that the promisor would be unjustly enriched if he retained that consideration while failing or refusing to perform his promise in favour of the third party. But the promisor's part performance of the promise in favour of the third party could defeat this remedy, ²⁸⁹ and it might also be unjust to restrict the promisee (or his estate) to it: for example, return of premiums could be a quite inadequate remedy where a policy of life insurance had been taken out for the benefit of a third party and had matured. ²⁹⁰

Claim for the agreed sum

18-048

The promisee might sue for payment to himself of the agreed sum. It may be objected that to allow such a claim would force the promisor to do something which he had never contracted to do, viz. to pay the promisee when he contracted to pay the third party; and one view therefore is that the promisee cannot sue for the agreed sum, ²⁹¹ save in the exceptional circumstances to be described later in this Chapter. ²⁹² But the objection to allowing the promisee to claim payment to himself loses most of its force where the promisor would not in fact be prejudiced by having to pay the promisee rather than the third party (so long as such payment gave him a good discharge). In such a case, the contract may, on its true construction, be one to pay the third party or as the promisee shall direct, ²⁹³ so that it would not be inconsistent with its terms to allow the promisee to claim payment for himself. The promisee is a fortiori so entitled where the contract is one to pay him (the promisee) as nominee for the third party ²⁹⁴: such a contract is not one for the benefit of a third party ²⁹⁵ in the sense of one purporting to give that party a right against the promisor.

Damages in respect of promisee's loss

18-049




The promisee might claim damages where he has suffered loss as a result of the promisor's failure to perform in favour of the third party. But in *Beswick v Beswick* the majority of the House of Lords ²⁹⁶ evidently thought that no such loss had been or would be suffered by the promisee, and that accordingly the damages recoverable by the uncle's (i.e., the promisee's) estate for breach of the nephew's promise would be merely nominal. This would have been the case because, as Lord Upjohn said, the promisee "died *without any assets* save and except the agreement which he hoped would keep him and then his widow for their lives." ²⁹⁷ It seems possible to deduce from this statement that damages might have been substantial if the promisee had had other assets—either because the widow might then have had a claim against those assets if the promise were not performed ²⁹⁸ or because the promisee or his estate would in fact, even if not legally obliged to do so, have made some other, wholly voluntary, provision for the widow. The loss suffered by the promisee would be the cost of making such an alternative provision, and there is some authority for the view that damages for breach of contract may be recovered to compensate for such loss even though the provision is wholly voluntary. ²⁹⁹ A fortiori the promisee can recover substantial damages where he is under a legal obligation to make a payment to the third party and where this obligation would have been discharged if the promisor had paid the third party in accordance with the contract. Where loss is suffered by the promisee, substantial damages can, moreover, be recovered by the promisee even though the promisee is legally bound to pay those damages over to a third party. Thus where loss of income was suffered by the estate of a deceased person as a result of the negligence of solicitors retained by that person's executrix to administer the estate, the executrix recovered substantial damages in respect of that loss in her representative capacity as owner of the deceased's estate. ³⁰⁰ It made no difference that she was not entitled beneficially to the estate and was therefore obliged, as executrix, to hand over the damages to the residuary legatee under the deceased's will.

Whose loss?

18-050

! The question whether loss had been suffered by the promisee arose in *Glory Wealth Shipping Pte Ltd v Flame SA*, ³⁰¹ ! where a contract between A and B would, if the contract had been duly performed by B, have resulted in B's making payments to A, who, because it had become insolvent and wished to "protect its monetary assets" ³⁰² ! from its creditors, directed B to make those payments to two companies (C1 and C2) which "were not acting as agents of [A] and so would not have held the [moneys] on behalf of [A]". ³⁰³ ! In breach of the contract between A and B, B failed to make the stipulated payments; and Teare J. held that this breach had caused a loss to A of (as was found by the arbitrators) more than USD 3 million. ³⁰⁴ ! The reason for this conclusion was that, but for B's breach, A would have been "entitled to receive the [payments] ... and to dispose of [them]" ³⁰⁵ ! and the breach had "deprived [A] of the right to receive and dispose of [the payments]". Just as it would not matter to the assessment of loss if [A] had intended to give the [payments] away once it had received [them], so it matters not that [A] had previously decided that the payments should be [made to C1 and C2]". ³⁰⁶ !

! The question whether the loss had been suffered by the promisee or by a third party arose in *De Jongh Weill v Mean Fiddler Holdings* ³⁰⁷ ! where the claimant had been engaged by the defendant company as a financial consultant. He was to be remunerated partly by a specified fee but also on the terms that "warrants to purchase shares in the [defendant] company will be granted to a company representing my family interests." ³⁰⁸ ! It was clear from the antecedent negotiations that the grant of these warrants was to be the claimant's principal remuneration ³⁰⁹ ! and that "it was *he* who was

to benefit in reality and the idea of a nominated company was just the way *he* was to be paid.” ³¹⁰  Judge Bruce Coles Q.C., after referring ³¹¹  to part of the discussion of the promisee’s remedies in a previous edition of this book, ³¹²  held that the loss resulting from the defendant’s failure to issue the warrants to the nominated company had been suffered by the claimant himself and that damages in respect of it were therefore recoverable under the principle stated in paragraph 18-049 above.

Damages in respect of third party’s loss: general rule

18-051

The starting point of the discussion in paragraphs 18-051 to 18-069 below is the general rule that, in an action for damages, the claimant cannot recover more than the amount required to compensate him for his loss, ³¹³ so that the a promisee cannot, in general, recover damages for breach of a contract made for the benefit of a third party ³¹⁴ in respect of loss suffered, not by the promisee himself, but by that third party. ³¹⁵ This general rule, was, indeed, denied by Lord Denning M.R. in *Jackson v Horizon Holidays Ltd*, ³¹⁶ where the defendants had contracted with the claimant to provide holiday accommodation for the claimant, his wife and their two three-year-old children; and it was assumed that the wife and children were not parties to the contract. ³¹⁷ The accommodation fell seriously short of the standard required by the contract, and the claimant recovered damages including £500 for “mental distress.” ³¹⁸ Lord Denning said that this sum would have been excessive compensation for the claimant’s own distress. ³¹⁹ He nevertheless upheld the award on the ground that the claimant had made a contract for the benefit both of himself and of his wife and children ³²⁰, and that he could recover damages in respect of their loss as well as in respect of his own. But the authorities cited in support of this conclusion seem to contradict, rather than to favour, it. ³²¹ Moreover, in *Beswick v Beswick* ³²² a majority of the House of Lords said that the promisee’s estate could have recovered no more than nominal damages as it had suffered no loss. ³²³ This is scarcely consistent with the view that the promisee under a contract for the benefit of a third party is, as a general rule, entitled to damages in respect of the third party’s loss. James L.J. in *Jackson’s* case seems to have regarded the £500 as compensation for the claimant’s own distress. ³²⁴ No doubt this was increased by his witnessing the distress suffered by his wife and children; and if the promisee himself suffers loss he should not be prevented from recovering for it in full merely because the contract was in part one for the benefit of third parties, who also suffered loss. ³²⁵

18-052

Lord Denning’s approach to the question of damages in *Jackson’s* case was disapproved by the House of Lords in *Woodar Investment Development Ltd v Wimpey Construction Co Ltd* ³²⁶; though the actual decision in *Jackson’s* case was supported on the ground that the damages there were awarded in respect of the claimant’s own loss ³²⁷, or alternatively on the ground that cases such as the booking of family holidays or ordering meals in restaurants ³²⁸ might “call for special treatment.” ³²⁹ In the *Woodar* case itself, a contract for the sale of land provided that on completion the purchaser should pay £850,000 to the vendor and also £150,000 to a third party. The vendor claimed damages on the footing that the purchaser had wrongfully repudiated the contract and the actual decision was that there had been no such repudiation, ³³⁰ so that the issue of damages did not arise. But the question, what damages would have been recoverable in the *Woodar* case if there had been a wrongful repudiation, was described as “one of great doubt and difficulty” ³³¹; presumably it would turn on such factors as whether the vendor was under a legal obligation to ensure that the third party received the payment, or whether, on the purchaser’s failure to make the payment, the vendor had actually made it, or procured it to be made, from other resources available to him.

Criticism of the general rule

18-053

The assumption underlying *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* ³³² thus seems to be that damages for breach of a contract for the benefit of a third party cannot, as a

general rule, be recovered by the promisee in respect of a loss suffered only by the third party. At the same time, this position was described as “most unsatisfactory”³³³ and said to be in need of reconsideration, either by the legislature or by the House of Lords in its judicial capacity.³³⁴ It is unsatisfactory because it can give rise to what has been called a “legal black hole”³³⁵ that is, to a situation in which the promisor has committed a plain breach which has caused loss to the third party whom the contracting parties intended to benefit³³⁶ but none to the promisee, and in which no other remedy³³⁷ (than damages in respect of the third party’s loss) is available against the promisor. The general rule was again criticised in *Forster v Silvermere Golf and Equestrian Centre*,³³⁸ where the claimant transferred land to the defendant who undertook to build a house on it and to allow the claimant and her children to live in it rent free for life. It was held that the claimant could recover damages in respect (1) of her own loss but not (2) in respect of any rights of occupation which her children might have enjoyed after her death. Dillon J. described the second of these conclusions as “a blot on our law and most unjust.” It is submitted (on the basis of the explanation of *Beswick v Beswick*³³⁹ given above)³⁴⁰ that any expenses incurred by the claimant in making alternative provision for the accommodation of her children after her death could have been recovered as forming part of her own loss.³⁴¹ On the other hand, it is unlikely that the claimant could have secured the intended benefit for her children by seeking specific performance, for it does not seem that the defendant’s obligation to build was defined with sufficient precision to enable the court to enforce it specifically.³⁴²

Damages in respect of third party’s loss: exceptions in general

18-054

⚠ Judicial awareness of the unsatisfactory results which can flow from the general rule stated in para.18-051 above and reaffirmed in the *Woodar* case³⁴³ has led the courts to create a number of exceptions to that rule. For example substantial damages for breach of contract can be recovered by a trustee even though the loss is suffered by his cestui que trust³⁴⁴; by an agent even though the loss is suffered by his undisclosed principal³⁴⁵; by a local authority even though the loss is suffered by its inhabitants³⁴⁶; and by a shipper of goods for breach of his contract of carriage with the shipowner in respect of the loss of the goods, even though that loss is suffered by a person to whom the shipper has sold the goods and to whom the risk and property in them has passed but who has not himself

acquired any rights under the contract of carriage against the ship-owner³⁴⁷ ⚠: it will be convenient to refer to this last rule as “the *Albazero* exception”, after the leading modern case in which it is recognised.³⁴⁸ In all these exceptional cases, a person recovers substantial damages for breach of

contract, even though the breach caused loss, not to him, but only to a third party.³⁴⁹ ⚠ A similar possibility is recognised in the law of tort which, like the law of contract, starts with the principle that the claimant can recover “no more and no less than he has lost.”³⁵⁰ But where a third party voluntarily renders services in caring for a claimant who has suffered personal injury as a result of a tort, the claimant can recover damages from the wrongdoer in respect of the value of those services; and the “central objective” of such an award has been described as “compensating the voluntary carer,”³⁵¹ for whom such damages must be held on trust by the claimant.³⁵² In substance, though not in form, the claimant in such a case recovers damages in respect of the loss which has been suffered by the third party in (for example) giving up his or her job so as to look after the injured claimant.

Further exceptions: building contracts³⁵³

18-055

⚠ The list of exceptions stated in para.18-054 above should not be regarded as closed and the possibility of extending them or of creating further exceptions is illustrated by a line of building contract cases beginning with *Linden Gardens Trust v Lenesta Sludge Disposals Ltd.*³⁵⁴ ⚠ The speeches in that case raise the further question (also discussed in a number of later cases³⁵⁵) how far the process of extending the development there initiated can be taken in the direction of allowing the promisee to recover damages in respect of the third party’s loss merely because the contract which has been broken was one for the benefit of a third party. In the *Linden Gardens* case, a building contract between parties described in it as employer and contractor provided for work to be done by

the contractor by way of developing a site owned by the employer as shops, offices and flats. The site (but not the benefit of the contract) was later transferred by the employer to a third party, and it was assumed ³⁵⁶ for the purpose of the proceedings that the third party had suffered financial loss as a result of having to remedy breaches of the building contract committed after the transfer. In an action for breach of the building contract brought by the employer, the contractor argued that no loss had been suffered by the employer as he was no longer owner of the land when the alleged breaches occurred, and that the employer was therefore entitled to no more than nominal damages. In the House of Lords, this argument was rejected, and the employer's claim upheld, ³⁵⁷ on two distinct grounds, discussed in paras 18-056 and 18-057 below.

The "broader ground": promisee's expense of curing the breach ³⁵⁸

18-056

⚠ Lord Griffiths upheld the employer's claim on what has become known as the "broader ground" ³⁵⁹ that the employer "ha[d] suffered financial loss because he ha[d] to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver." ³⁶⁰ He added that "the court will of course wish to be satisfied that the repairs have been or are likely to be carried out." ³⁶¹ This approach is, it is submitted, consistent with the explanation given in *Beswick v Beswick* ³⁶² of the fact that the damages there recoverable by the promisee were regarded as no more than nominal: the court there could not be satisfied that the substitute provision for the widow was likely to be made, precisely because the promisee lacked the means to make it. ³⁶³ The essence of Lord Griffiths' reasoning is that the promisee recovers damages in respect of the loss which he himself suffers in ensuring that the third party receives the intended benefit. The "broader ground" therefore cannot apply where there is no practical possibility of curing the breach and so of securing the intended benefit to the third party. This was the position in the "family holiday" cases discussed in para.18-052 above.

The "narrower ground": loss suffered by third party as transferee of the affected property ³⁶⁴

18-057

⚠ Although Lord Keith had "much sympathy" ³⁶⁵ with, and Lord Bridge was "much attracted by," ³⁶⁶ ⚠ Lord Griffiths' reasoning, discussed in para.18-056 above, they (as well as Lord Ackner) preferred to base their decision on the "narrower ground" ³⁶⁷ stated by Lord Browne-Wilkinson. This treats the loss as having been suffered by the third party rather than by the employer, but concludes that the employer could nevertheless recover substantial damages as the case fell within the rationale of

Albazero exception ³⁶⁸ ⚠ to the general rule that a party can recover damages only in respect of his own loss. The rationale of this exception was that, in the carriage of goods cases to which it applies, the shipper and carrier must have contemplated that property in the goods might be transferred to third parties after the contract had been made, and that the shipper must therefore be treated in law as having made the contract of carriage for the benefit of all persons who might after the time of contracting acquire interests in the goods. ³⁶⁹ This rationale applied equally to the facts of the *Linden Gardens* case since the contractor could foresee that parts of the new development were going to be "occupied and possibly purchased by third parties" so that "it could be foreseen that damage caused by a breach would cause loss to a later owner." ³⁷⁰ The contractor could also foresee that a later owner would not have acquired rights under the building contract against the contractor since that contract expressly prohibited assignment by the employer without the contractor's written consent, which had not been sought. The effect of the *Linden Gardens* case was thus to extend the scope of the *Albazero* exception from contracts for the carriage of goods by sea to contracts generally, but the *Linden Gardens* case was consistent with two factors which had restricted the scope of that exception: namely that (a) the loss or damage was caused to property which had been transferred by one of the contracting parties to the third party; and (b) the third party had not acquired any rights under the building contract ³⁷¹ and it was foreseeable (by reason of the prohibition against assignment) that he would not do so. The significance of these factors is further considered in two later cases to be discussed in paras 18-058 and 18-060, below. The "further exceptions" ³⁷² ⚠ to the

general rule that a contracting party cannot recover damages in respect of loss suffered by a third party, as well as the “broader” and “narrower” grounds for these exceptions ³⁷³ ! are discussed by the Supreme Court in *Swynson Ltd v Lowick Rose LLP*. ³⁷⁴ ! In that case two loans were made by a company (A) controlled and beneficially owned by an individual (here referred to as C) to another company (X) to finance the buy-out of a further entity (Y). These loans were made at the instigation of C and in reliance on a report prepared by the defendant, a firm of accountants engaged by A and X ³⁷⁵ !; C was not a party to this contract. It was common ground that the accountants had been negligent in preparing the report. ³⁷⁶ ! The original two loans were paid off with money lent by C to X under a refinancing agreement; and one of the issues ³⁷⁷ ! before the Supreme Court was whether A could recover damages in respect of the loss suffered by C when this third loan remained unpaid. In support A’s claim in respect of this loss, A and C relied on the “*Albazero* exception” ³⁷⁸ ! and on the “further exceptions” referred to above. ³⁷⁹ ! The Supreme Court referred to these exceptions as being based on “the principle of transferred loss” ³⁸⁰ ! and recognised that the operation of this principle might be justified on either a “broader” or on a “narrower” ground; these two grounds are discussed in paras 18-055 and 18-056 of the Main Work. But in the *Swynson* case the Supreme Court concluded that A’s claim for damages in respect of C’s loss could not succeed on either of these grounds. It could not succeed on the “narrower” ground because C “did not suffer loss in his capacity as owner of property” ³⁸¹ ! or because A “did not contract with [the accountants] on behalf of” ³⁸² ! C. Nor could it be supported on the “broader” ground, (though there was “much to be said for the broader principle” ³⁸³ !) since it was “no part of the object of the engagement [of the accountants by A] ... to benefit [C]” ³⁸⁴ !; indeed, the latter point would defeat a claim by A in respect of C’s loss based on the “narrower”, no less than such a claim based on the “broader” ground. ³⁸⁵ !

No transfer of affected property from promisee to third party

18-058

! In *Darlington B.C. v Wiltshier Northern Ltd* ³⁸⁶ a local authority (the council) wished to develop land which it already owned. The building work was to be done by the defendant; finance was to be provided by a bank but this could not be done in the most obvious way, by a loan from the bank to the council, since such an arrangement would have violated government restrictions on local authority borrowing. The transaction was therefore cast in the form of two contracts: (1) a building contract in which the bank was the employer and the defendant the building contractor, and (2) a contract between the council and the bank, by which the bank undertook to procure the erection of the buildings on the site, to pay all sums due under the building contract and to assign to the council the benefit of any rights against the defendant to which the bank might be entitled at the time of the assignment. Clause 4(5) of this second contract provided that the bank was not to be liable to the council “for any incompleteness or defect in the building work,” and it was this provision which was the principal source of the difficulties in the case. The bank duly assigned its rights against the defendant to the council which claimed damages as such assignee from the defendant in respect of defects in the work. Since an assignee cannot recover more than the assignor could have been done if there had been no assignment, ³⁸⁷ the question therefore arose what the bank could have recovered; and it was argued that it could have recovered no more than nominal damages since it had suffered no loss, having no interest in the land (or buildings) on which the work had been done and being protected by clause 4(5) from any liability to the council for defects in the work. ³⁸⁸ But the Court of Appeal rejected this argument and held that the bank could have recovered substantial damages from the defendant in respect of the council’s loss and that it was this right which had been assigned to the council. This amounted to an extension ³⁸⁹ of the *Linden Gardens* case to a situation in which there was *no* transfer of the property affected by the breach from the promisee to the third party. This extension was later approved by the House of Lords, ³⁹⁰ ! so that, at least in the context of defective performance of building contracts ³⁹¹ such a transfer is no longer a necessary condition of

the promisee's right to recover damages in respect of the third party's loss.

Assignment of promisee's contractual right after transfer of affected property



18-059

The effect of an assignment by the promisee (A) of his contractual rights against the promisor (B) to the third party (C) is further considered in *Offer-Hoare v Larkstore Ltd.* ³⁹² In that case, a landowner (A) had commissioned B to report on the suitability of a site for development. The site was later sold by A to C who began work on it; during this work, there was a landslip which damaged adjoining properties, the owners of which made claims against C. A then assigned his rights under his contract with B to C who, as such assignee, claimed damages from B for breach of B's contract with A. B argued that C could recover no more than the loss that could have been recovered by A from B at the time of the assignment and that A at that time no longer had any claim for substantial damages against B since A had ceased to own the site before the assignment and before the landslip. The argument was rejected on the ground that A had acquired a cause of action for breach of contract against B when the report was produced and could have recovered substantial "damages for the landslip" ³⁹³ if A had remained owner of the land. The principle that an assignee cannot recover more than the assignor did not apply. The purpose of that principle was to protect the debtor from having to pay more to the assignee than he would have had to pay to the assignor "*had the assignment never taken place*". The principle is not intended to enable the contract breaker/debtor to escape all legal liability for breach of contract." ³⁹⁴ As B's exposure to the damages claimed was "the consequence of the landslip" and not "the consequence of the assignment," ³⁹⁵ the principle did not protect B, so that C, standing in the shoes of A, recovered substantial damages from B. There is also judicial support for the view that, if the assignee (C) had itself suffered loss as a result of the promisor's (B's) breach of its contract with the assignor (A), then it would be arguable that C could recover damages from B in respect of that loss, even if no loss had been suffered by A. ³⁹⁶



Third party having independent contractual rights against promisor

18-060

❗ In *Alfred McAlpine Construction Ltd v Panatown Ltd* ³⁹⁷ (the *Panatown* case), the facts resembled those of the *Darlington* case (discussed in para.18-058 above) in that a building contract was again made, not between the building contractor and the company which owned the site (the owner), but between that contractor and another company (the employer) associated with the owner; the object of adopting this tripartite structure was to avoid VAT. On the day on which this contract was made, a separate contract (the "Duty of Care Deed") was made between the owner and the contractor. The obligations imposed on the contractor by this Deed were not precisely co-terminous with those imposed on him by the building contract; and the Deed did not, while the building contract did, contain an arbitration clause. The employer alleged that the building work was seriously defective and in arbitration proceedings claimed damages from the contractor, who argued that the employer should recover no more than nominal damages since any loss resulting from the alleged defects in the work had been suffered, not by the employer (as the employer had never owned the property), but by the owner. The House of Lords, by a majority, upheld the contractor's argument and so rejected the employer's claim for substantial damages in respect of the owner's loss. It was accepted by the majority ³⁹⁸ and by one of the dissentients ³⁹⁹ that, as a general rule, a contracting party could not recover damages in respect of loss suffered, not by himself, but by a third party; and the question therefore arose whether the case could be brought within an exception to that general rule. This raised, in turn, the question whether either of the grounds for the decision in the *Linden Gardens* case ⁴⁰⁰ supported the employer's claim. It will be recalled that the "narrow" ground for that decision was derived from the "*Albazero* exception" under which a shipper of goods can sometimes recover damages in respect of a third party's loss. ⁴⁰¹ That exception is, however, subject to the restriction that it does not apply where the third party had himself acquired contractual rights against the carrier, ⁴⁰² usually by the transfer to the third party of a bill of lading. ⁴⁰³ In the *Panatown* case, the majority held (and the dissentients accepted) that the case fell within this restriction, so that the "*Albazero* exception" (and hence the "narrower ground" in the *Linden Gardens* case) did not apply because the Duty of Care Deed gave the owner an independent contractual right against the contractor. This point

was, moreover, decisive even though that right did not arise under a *building* contract, so that in this respect the restriction was somewhat expanded: in the carriage by sea cases, the restriction normally ⁴⁰⁴ came into operation because the third party had acquired rights under a contract of *carriage*. Nevertheless, it is respectfully submitted that this aspect of the *Panatown* case is consistent with the rationale of the restriction. In the carriage by sea cases, this could and did apply even though the *content* of the third party's contractual right against the carrier was not the same as that of the shipper's right ⁴⁰⁵ ; and it was based on the reasoning that, where the third party had its own contractual rights against the carrier, the exception did not apply "because it was not needed." ⁴⁰⁶ It was not needed because, where the third party had its own contractual rights against the party in breach, there was no risk of the "legal black hole" ⁴⁰⁷ which had driven judges to create exceptions to the general rule that a contracting party can recover damages only in respect of his own loss. ⁴⁰⁸ 

18-061

 The majority in the *Panatown* case further held that the existence of the third party's rights against the contractor under the Duty of Care Deed also precluded the employer from recovering damages under the "broader ground" ⁴⁰⁹ given by Lord Griffiths in the *Linden Gardens* case. In view of the existence of those rights, the employer had no pecuniary interest in curing the defects in the contractor's work. ⁴¹⁰ Hence he had not suffered, nor would he suffer, any loss of his own, in consequence of the contractor's breach, and under the "broader ground" it is in respect of his *own* (not of the third party's) loss that the promisee recovers damages. This conclusion can, on the facts of the *Panatown* case, be supported for two further reasons. First, the creation or extension of exceptions to the general rule that a party can recover damages only in respect of his own loss is, and should be, driven and limited by necessity ⁴¹¹ : that is, by the need to guard against the risk of "legal black holes" of the kind described in para.18-053 above; and in the *Panatown* case there was no such risk. ⁴¹² Secondly, the decision gives effect to the "contractual scheme" ⁴¹³ created by the parties; and this point, so far from being undermined by the fact that the contractor's obligations to the owner under the Duty of Care Deed were not precisely co-terminous with his obligations to the employer under the building contract, is reinforced by this fact. As the parties had taken the "plain and deliberate course" ⁴¹⁴ of giving the owner a "distinct entitlement" ⁴¹⁵ against the contractor in respect of defects in the work, and as this entitlement was to be governed by the terms of one contract (the Duty of Care Deed), it followed that there was no good practical reason for holding the contractor liable in respect of the same defects on the terms of another contract (the building contract) for substantial damages to the employer, to whom these defects had caused no loss of his own. The fact that the "general rule" stated in para.18-051 above has been the subject of frequent judicial disapproval no doubt gives rise to the temptation to continue the process of eroding it by creating new or extending existing exceptions to it. But that criticism has occurred mainly in cases in which the third party problem was an inescapable consequence of normal commercial factors such as those which existed in the *Linden Gardens* case. The pressure for eroding the unpopular general rule is much less strong where the third party problem is, so to speak, manufactured by the parties for an ulterior motive, such as avoiding Government restrictions on borrowing, as in the *Darlington* case, or avoiding tax, ⁴¹⁶ as in the *Panatown* case, where, in the view of the majority, any such pressure was eliminated for the further reason that the third party had his own contractual remedy against the party in breach under a separate contract between these parties.

Outstanding problems

18-062

The *Panatown* case is significant not only for the points it decides, but also for those which it leaves open. Some of these are discussed in paras 18-063 to 18-073 below.

Status of the "broader ground"

18-063

The first such point relates to the effect of the *Panatown* case⁴¹⁷ on the status of Lord Griffiths' "broader ground" in the *Linden Gardens* case.⁴¹⁸ This ground forms the basis of the two dissenting speeches⁴¹⁹ in the *Panatown* case, and it is not the subject of any adverse comment from the majority,⁴²⁰ whose speeches do not rule out the possibility of its being applied in the, perhaps more common, situation in which the third party has *no* contractual rights of his own against the promisor in respect of loss suffered by him in consequence of the defective services rendered under the contract between promisor and promisee. It seems that, even in such a situation, the majority would deny the employer's right to recover substantial damages under the "broader ground" unless *either* the condition stated by Lord Griffiths is satisfied, i.e. "the repairs have been or are likely to be carried out,"⁴²¹ or the employer has entered into a separate contract with the owner (the third party) undertaking liability in respect of defects in the contractor's work.⁴²² Where neither of these requirements is satisfied, the result of allowing the promisee (the employer) to recover the cost of repairs as damages for his own loss would be "unattractive" in that it would enable him to "put the money in his own pocket"⁴²³ without carrying out or paying for the repairs: the technique of requiring him to hold the damages for the third party applies, on the authorities,⁴²⁴ only where damages are recovered (under one of the exceptions to the general rule) in respect of the *third party's*, not in respect of the promisee's *own* loss. It follows that the requirements stated above⁴²⁵ do not apply where the promisee's claim can succeed on the "narrow ground": in this respect, that ground is, paradoxically, broader than the "broader ground".

Scope of the "broader ground"

18-064

If the "broader ground" is accepted for cases in which the third party has *no* contractual rights of his own against the promisor, then a further problem arises as to its scope. The example given by Lord Griffiths in support of the "broader ground" is one in which loss is caused by reason of the *defective* performance of a contract to render *services*.⁴²⁶ The case put by him⁴²⁷ is that of a husband who contracts with a builder to have his wife's house repaired; if the builder does the work defectively the husband is (so long as the other requirements of the "broader ground" are satisfied) entitled (in the example) to substantial damages, i.e., to the cost of putting the defects right. Two questions then arise. The first is whether the rationale of the "broader ground" applies to cases in which the breach consists of a simple *failure* or *refusal* to perform (as opposed to cases of defective performance). And the second is whether it applies where the obligation which is not performed is one to do something other than to render services. The two questions come together in a case where, for a consideration provided or to be provided by A, a promise is made by B to A to pay a sum of money to C and B fails or refuses, wholly or in part, to perform that promise. Those were, in substance, the facts of *Beswick v Beswick*⁴²⁸ where the majority of the House of Lords took the view that the damages recoverable by the estate would be no more than nominal. That may not, indeed, amount to a direct rejection of the "broader ground" in such cases. The reason given in *Beswick v Beswick* for the view that the promisee's damages would there have been merely nominal was that A's estate had no assets out of which it could make the payments to C which B had promised, but failed, to make.⁴²⁹ But it is not clear whether in substance that reasoning is inconsistent with the "broader ground"; for, if the cost to A of securing the benefit intended for C is to be defrayed *out of the damages*, then it should not matter that A cannot provide that benefit out of his *other* assets, at least so long as A is solvent. The views expressed in *Beswick v Beswick* on the question of damages recoverable by the estate should, it is submitted, now be read subject to developments of the law as to damages in respect of a third party's loss in a number of later cases. The most directly relevant of these is the *Woodar* case⁴³⁰ where it appears to be assumed that, as a general rule⁴³¹ A cannot recover substantial damages from B for B's failure to perform his promise to A to pay a sum of money to C. This conclusion seems to be based on the assumptions that the loss is C's and that A cannot generally recover damages in respect of C's loss. It does not seem to preclude the possibility of A's recovering damages in respect of any loss which he himself might have suffered in consequence of B's breach: e.g. because A was under a contractual obligation to procure the payment to C or because A, acting reasonably, has made alternative provision for C.⁴³² Even in the absence of such factors, it is submitted that, in the light of the developments since the *Woodar* case,⁴³³ the law should take account of the possibility that, unless B were held liable for substantial damages to A, then he might be under no substantial liability at all: in other words, that there would be a "legal black hole."⁴³⁴ In *Beswick v Beswick* and the *Panatown* case there were no such "black holes": in the former case, because of the availability of a satisfactory remedy for A against B by way of specific performance in favour of C,⁴³⁵ in the latter

because of the availability of a satisfactory remedy for C against B in damages under the separate contract between these parties. ⁴³⁶ If there is no such remedy and if the conditions in which A can (under the “broader ground”) recover damages in respect of his own loss are not satisfied, ⁴³⁷ then the lack of any such remedy should, it is submitted be a ground for allowing A to claim damages in respect of C’s loss. The need to avoid the legal “black hole” should generate this remedy; and this view is supported by *Offer-Hoar v Larkstore Ltd* ⁴³⁸ where, as noted in paragraph 18-059 above, C, suing as A’s assignee, recovered substantial damages in respect loss suffered by C. Mummery L.J. justified this conclusion by saying ⁴³⁹ that, if B’s contrary argument had succeeded, then B would have been liable to no-one for its breach, a conclusion which was evidently regarded as reducing that argument ad absurdum. Rix L.J. similarly said that the courts were willing to develop the law “to prevent the loss caused by the defendant’s breach from disappearing into the proverbial black hole” ⁴⁴⁰ and that they were “anxious to see, if possible, that where a real loss has been suffered, then there should, if at all possible, be a real remedy which directs recovery from the defendant to the party which has suffered the loss.” ⁴⁴¹ That party, in the situation here under discussion, is C; and where A has suffered no loss himself, the result of allowing him to recover damages in respect of C’s loss would also have the advantage of ensuring that these damages (as opposed to damages in respect of loss suffered by A himself) were to be held for C, ⁴⁴² thus avoiding the “unattractive” result of allowing A to “put the money in his own pocket.” ⁴⁴³

18-065

It is submitted that the same approach is also appropriate to the case where the contract between A and B is one for services to be rendered by B to, or for the benefit of, C which B simply fails or refuses to perform, as opposed to performing them defectively, as in Lord Griffiths’ example, ⁴⁴⁴ in which it seems to be assumed that A has paid for the work. Lord Griffiths does not discuss the case of total non-performance by B, presumably assuming that in such a case B would not have been paid. ⁴⁴⁵ If A then gets another builder to do the same work and that other builder charges no more than B would have charged, no loss will be suffered by A or by C; if the other builder charges more than B would have done, A will (subject to questions of mitigation ⁴⁴⁶ and remoteness) be able to recover the difference as damages for his own loss. The position will be substantially the same where A has paid B in advance and B has done no part of the work: in that case A will be entitled to claim restitution of his payment ⁴⁴⁷ together with damages for his own loss in respect of any extra cost of employing a substitute builder. ⁴⁴⁸ So in none of these cases of total non-performance is there any “legal black hole” ⁴⁴⁹ and hence no need to generate a new remedy at the suit of A in respect of C’s loss. The more difficult case is that of an advance payment by A followed by *part* performance by B in circumstances in which A himself has suffered no loss, e.g. because A was under no obligation to C to secure completion of the performance that B was to render and has neither himself taken any steps to secure that completion nor was likely to do so. ⁴⁵⁰ In such a case of partial performance there is considerable difficulty in holding B liable for partial restitution ⁴⁵¹; and if, in addition, the remedy of specific performance were not available (e.g. because the contract was one for personal services to be rendered by B ⁴⁵²), then there would be at least a partial “legal black hole” and this fact should (it is again submitted) be a ground for allowing A to recover substantial damages from B in respect of C’s loss.

Use to which damages are put

18-066

It will be recalled that, in his statement of the “broader ground” in the *Linden Gardens* case, Lord Griffiths said that the court would wish to be “satisfied that the repairs have been or are likely to be carried out.” ⁴⁵³ In later cases, conflicting views have been expressed on the question whether this is an essential requirement for the operation of the “broader ground.”

18-067

One view is that it is not, since (at least as a general rule ⁴⁵⁴) a court in awarding damages is not concerned with the question what the claimant intends to do with these damages ⁴⁵⁵; that question is said to be relevant only to the issue of the “reasonableness” of the claimant’s conduct. This issue, however, arises, not for the purpose of determining the *existence* of a claim for substantial damages,

but its *extent*: it may be relevant in determining whether damages in a two-party case are to be assessed on a difference in value or on a cost of cure basis,⁴⁵⁶ or whether the claimant has failed to mitigate his loss⁴⁵⁷; but such questions arise only on the assumption that a claim for substantial damages does exist. A related argument in favour of the view that the claimant's intention with regard to the disposal of the damages is irrelevant is that he has been deprived by the defendant's breach of the benefit of his bargain, and this fact is, of itself, enough to support a claim for substantial damages.⁴⁵⁸ This line of reasoning is, however, with respect, hard to reconcile with the principle that the victim of a breach has no claim to substantial damages if the breach has no adverse effect on him.⁴⁵⁹ The assumption underlying this principle is that the mere failure to perform a contract does not suffice to sustain a claim for substantial damages: as Lord Clyde said in the *Panatown* case, "A breach of contract may cause a loss but is not in itself a loss in any meaningful sense."⁴⁶⁰ In the cases here under consideration, the breach will have no adverse effect on *the claimant* (the promisee⁴⁶¹) unless he has carried out, or intends to carry out, cure; and the argument that he has been deprived of his bargain cannot answer the question whether it must be shown that this deprivation has had an adverse effect on *him*: it merely pushes this question back one stage.

18-068

The alternative view is that damages in respect of the cost of curing the breach (and so of securing the intended benefit for the third party) can be recovered only if cure has been, or is likely to be, carried out. The main practical argument in favour of his view is that (as noted in para.18-063 above) it would be "unattractive" to allow the promisee to recover the cost of cure as damages in respect of his own loss and then to "put the money in his own pocket."⁴⁶² It is respectfully submitted that this is the preferable view. In a two-party case it is indeed generally⁴⁶³ no concern of the court's what the claimant intends to do with the damages; but the rationale of this rule does not necessarily apply in a threeparty case. That rationale in a two-party case is that the defendant has, by reason of the breach, inflicted injury, loss or damage on the person or property of *the claimant* (or has failed to improve, or to transfer, an asset belonging to, or to be vested in, the claimant) who should therefore be able to deal in whatever way he pleases with the damages awarded to him in substitution of the interest of *his own* of which he has been deprived by the breach. For example, in the case of a contract to repair the claimant's own house, he could, but for the breach, have sold the house at a price reflecting the value of the repairs, had they been properly carried out, and then have disposed of the proceeds of the sale in any way he pleased; and so he should be able to dispose in the same way of the damages due to him for failure to carry out the repairs. Obviously, this reasoning cannot apply where the house is owned, not by the claimant, but by a third party. There is also the further point that, although in Lord Griffiths' example the claimant as a matter of legal principle recovers damages in respect of his *own* loss, as a practical matter the purpose of the award in such a case is to protect the interests of the third party. Where damages are awarded in respect of a third party's loss (under one of the exceptions to the general rule stated in paragraph 18-051 above) the court requires the promisee to hold these damages for the third party.⁴⁶⁴ No such machinery is available where the damages are awarded in respect of the promisee's own loss; but a practical way of ensuring that the damages are in fact destined for the benefit of the third party is to require the promisee to show (as a condition of his entitlement to substantial damages) that they will be so used.

No contract between claimant and defendant

18-069

The principle established in the *Linden Gardens* case⁴⁶⁵ assumes that there is a contract between A and B, the breach of which causes loss to C. The principle therefore did not apply in *Smithkline Beecham plc v Apotex Europe Ltd*⁴⁶⁶ where, in legal proceedings between A and B, an interim injunction was granted to B to restrain A from dealing in England with a pharmaceutical product; and as a condition of the grant of the injunction, B was required to give an undertaking to the court to comply with any order which the court might, in later proceedings, make requiring B to compensate A for any loss which the injunction had caused to A. It was held that A could not invoke the *Linden Gardens* principle so as to recover damages in respect of loss suffered by A's supplier, C, in consequence of the injunction. One reason for this conclusion was that the cases in which that principle had been applied were "only about what damages [could] be recovered for a breach of contract"⁴⁶⁷ and that the principle did not apply in the *Smithkline* case since in that case "there [was] in fact no contract between the parties [i.e. A and B]. The undertaking [was] given to the court."⁴⁶⁸

This line of reasoning is, perhaps, not of itself conclusive since a principle akin to that of allowing a claimant to recover damages in respect of a third party's loss appears to be recognised in the law of tort. ⁴⁶⁹ The result in the *Smithkline* case was, however, also justified on the further ground that, even if there had been a contract between A and B on the terms of the undertaking, A's only interest in the performance of the hypothetical contract was in A's not being restrained from dealing with the product, so that there was "no 'legal black hole' of the sort contemplated in *Linden Gardens*." ⁴⁷⁰ B would be liable to A for breach of B's hypothetical promise and full effect would be given to that promise by an award of damages to A in respect of the loss suffered by A as a result of the hypothetical breach.

Relation to third party's right

18-070

Even where, in one of the exceptional situations discussed above, ⁴⁷¹ the promisee can recover damages in respect of the third party's loss, no right to enforce the contract is conferred directly on the third party, whose only claim will be to the fruits of any action which the promisee may decide to bring. ⁴⁷² The third party will have a direct right against the promisor only under one of the exceptions to the doctrine of privity. On the facts of some ⁴⁷³ (though not of all) ⁴⁷⁴ of the cases discussed above, the third party would probably, if those facts recurred now, have such a right under the Contracts (Rights of Third Parties) Act 1999. ⁴⁷⁵ If the third party has such a right, then this very fact may restrict the number of situations in which the promisee can recover damages in respect of the third party's loss ⁴⁷⁶; and it will probably reduce the pressure on the courts to extend the range of such situations. ⁴⁷⁷ But s.4 of the 1999 Act preserves the promisee's rights under the contract. ⁴⁷⁸ The question of his right to recover damages in respect of the third party's loss will therefore continue to arise and to be of practical importance: e.g. where the promisor has a defence against the third party which is not available against the promisee. ⁴⁷⁹

Negative promises

18-071

In paras 18-051 to 18-069 above it has been assumed that the promise is positive in nature, e.g. to pay money, to deliver goods or to render some service. Where the promise is negative in nature, the promisee's most obvious remedy is an injunction to restrain the promisor's breach. This would, for example, be the position where A validly promised B not to compete with C.

Promise not to sue a third party

18-072

A further type of negative promise which gives rise to special difficulty is a promise by A to B *not to sue* C. If, in breach of such a promise, A nevertheless does sue C, it would not be appropriate for B to start a second action for an injunction to restrain A from proceeding with the first action; for such a step would lead to undesirable multiplicity of legal proceedings. ⁴⁸⁰ B's remedy is to ask the court to exercise its discretion ⁴⁸¹ to stay A's action against C. In *Gore v Van der Lann* ⁴⁸² the Court of Appeal held that B could obtain a stay of A's action against C only if two conditions were satisfied: there must be a definite promise by A to B not to sue C, and B must have a sufficient interest ⁴⁸³ in the enforcement of A's promise. This last requirement would not be satisfied unless, as a result of A's breach, B was exposed to the risk of incurring legal liability to C: for example where B had contracted with C to procure his release from a debt or liability to A, and B would be put in breach of that contract by A's action against C.

18-073

Snelling v John G. Snelling Ltd ⁴⁸⁴ goes even further in giving effect to a promise of this kind. Three brothers had lent money to a family company of which they were directors. They agreed that if one of

them resigned he should “forfeit” any money due to him from the company. One of them did resign and sued the company for the amounts due to him. By way of defence the company relied on the agreement between the brothers, and if matters had rested there the defence would have failed as the company was not a party to the agreement.⁴⁸⁵ But the other two brothers applied to be joined as defendants to the action, adopted the company’s defence and counterclaimed for a declaration that the third brother’s loan was forfeited. It was held that they were entitled to such a declaration by virtue of the contract between them and the third brother.⁴⁸⁶ Ormrod J. further held that they could obtain a stay of that brother’s action against the company and that the most convenient way of disposing of the action against the company was to dismiss it. So far as the granting of the stay is concerned, the judgment is hard to reconcile with the requirement of a sufficient interest as explained in *Gore v Van der Lann*⁴⁸⁷; but it is submitted that Ormrod J.’s actual decision is consistent with the spirit of *Beswick v Beswick*.⁴⁸⁸ If the promisee takes steps specifically to enforce the contract, the court should wherever possible grant such remedy as is most appropriate for that purpose. Normally this will be an order of specific performance or an injunction. The fact that the latter remedy is not appropriate to enforce a promise not to sue should not deter the court from granting other remedies that serve substantially to enforce the promise. Such a remedy is, again, available only if it is sought by the promisee.⁴⁸⁹ If, in the *Snelling* case, the two brothers had not applied to be joined to the action, the company could not have relied on the agreement between them and the third brother by way of defence to that brother’s claim against it.

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1. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.
 - ²⁸⁷. [1968] A.C. 58; above, para.18-022.
 - ²⁸⁸. Below, paras 27-054-27-058.
 - ²⁸⁹. As there would be no “total failure of consideration”; and as “rescission” for breach could probably not be allowed unless the third party was willing to restore any performance received.
 - ²⁹⁰. e.g. where the person on whose death the policy moneys were payable had died after only a relatively small number of premiums, amounting to much less than the sum payable on that death by the promisor, had been paid by the promisee.
 - ²⁹¹. See *Coulls v Bagot’s Executor and Trustee Co Ltd* [1967] A.L.R. 385 at 409–411; cf. *Beswick v Beswick* [1968] A.C. at 88, 101 (dealing with the remedy of damages: see below, para.18-049).
 - ²⁹². See *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147; below, para.18-086.
 - ²⁹³. *Tradigrain SA v King Diamond Shipping SA (The Spiros C)* [2000] 2 Lloyd’s Rep. 319 at 331; below, para.18-075.
 - ²⁹⁴. *The Turiddu* [1999] 2 Lloyd’s Rep. 401 at 407.
 - ²⁹⁵. *ibid.*
 - ²⁹⁶. Lord Pearce thought that damages would be substantial: [1968] A.C. 58 at 88. It was not entirely clear whether he had in mind an action for *damages* or one for the *agreed sum*: see his reference at p.87 to “separate actions as each sum falls due”.
 - ²⁹⁷. [1968] A.C. 58 at 102 (italics supplied). See further para.18-064, below.
 - ²⁹⁸. e.g. under (at that time) the Inheritance (Family Provision) Act 1938, now Inheritance (Provision for Family and Dependents) Act 1975.
 - ²⁹⁹. *Admiralty Commissioners v SS. Amerika* [1917] A.C. 38, 61, where the actual decision was that

payments voluntarily made to the victim of an alleged tort could not be recovered; on this point, see also *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* [1989] A.C. 643 (where there was no causal link between the voluntary payment and the defendants' wrongdoing). For the possibility of recovering, as damages for breach of contract, voluntary payments to or benefits voluntarily conferred on, third parties see also *Banco de Portugal v Waterlow & Son Ltd* [1932] A.C. 452, where a bank recovered damages in respect of payments which it was not legally liable to make: below, para.26-082. And see the discussion in paras 18-055 and 18-060-18-068 below of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] A.C. 85 and of *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518.

300. *Chappell v Somers & Blake* [2003] EWHC 1644 (Ch), [2004] Ch. 19.

301. [2016] EWHC 293 (Comm), [2016] 1 Lloyd's Rep. 571.

302. [At [6]. There was no appeal against the arbitrator's decision that this "turpitude", being only "incidental", did not give rise to the "defence of illegality" : at [8].

303. [2016] EWHC 293 (Comm) at [12].

304. [2016] EWHC 293 (Comm) at [18], [25].

305. [2016] EWHC 293 (Comm) at [25].

306. [2016] EWHC 293 (Comm). Teare J. reached this conclusion "without enthusiasm" because of A's "dishonest concealment and turpitude" [2016] EWHC 293 (Comm) at [28] but (no doubt for the reason given in n.298b above) these matters "could not affect the court's consideration of the question of law raised by this appeal". For the formulation of this question, see [2016] EWHC 293 (Comm) at [3].

307. [2005] All E.R. (D) 331 (Jul); Q.B.D., 22 July 2005; for earlier proceedings in this case, see [2003] EWCA Civ 1058.

308. [2005] All E.R. (D) 331 (Jul), at [2], [25].

309. *ibid.*, at [30].

310. *ibid.*

311. *ibid.*, at [26].


312. *i.e.*, 29th ed., paras 18-044 to 18-049.

313. Below, para.26-046; cf. *White v Jones* [1995] 2 A.C. 207 (above, para.18-039), where the damages recoverable by the estate of the other contracting party would have been no more than nominal.

314. A fortiori, a promisee cannot recover damages in respect of loss suffered by a third party *other* than one for whose benefit the contract was made. Thus if A agrees to buy goods from B which B intends to acquire from C, and A repudiates the contract so that B does not in turn buy the goods from C, then B cannot recover damages in respect of any loss suffered by C: *And so to Bed Ltd v Dixon*, Transcript November 21, 2000 at 46-49, 54 (Ch. D.). Similarly, it has been said that B could not recover damages in respect of loss suffered by B's intended supplier C in a case falling within an exception to the general rule stated in the present paragraph: *Smithkline Beecham plc v Apotex Ltd* [2006] EWCA Civ 658, [2007] Ch. 71 at [94], where the main reason


for actual decision was that there was no contract between A and B (at [86], [88]). Of course if B had *contracted* to acquire the goods from C and was in consequence of A's repudiation liable in damages to C, then B could recover the amount for which he was so liable from A as damages in respect of his (B's) *own* loss.

- 315. *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* [1977] A.C. 774, 846; *Linden Gardens* case, above, n.297 at 114, and see below, para.18-060, at nn.372 and 373; Weir [1977] C.L.J. 24. See also *Ramco (UK) Ltd v International Insurance Co of Hanover* [2004] EWCA Civ 675, [2004] 2 All E.R. (Comm) 866 at [32]; the actual decision (that an insurance policy did not cover a third party's loss) turned on the wording of the policy.
- 316. [1975] 1 W.L.R. 1468; Yates (1975) 39 M.L.R. 202.
- 317. Contrast *Daly v General Steam Navigation Co Ltd (The Dragon)* [1979] 1 Lloyd's Rep. 257, 262; affirmed [1980] 2 Lloyd's Rep. 415, above, para.18-014.
- 318. [1975] 1 W.L.R. 1468 at 1472.
- 319. *ibid.*, at 1474.
- 320. *ibid.*; cf. *McCall v Abelesz* [1976] Q.B. 585, 594.
- 321. Lord Denning M.R. relied on a dictum of Lush L.J. in *Lloyd's v Harper* (1880) 16 Ch.D. 290, 331, said to have been quoted by Lord Pearce in *Beswick v Beswick* "with considerable approval": [1975] 1 W.L.R. 1468 at 1473. In fact, Lord Pearce said that the dictum "cannot be accepted without qualification and regardless of the context": [1968] A.C. 58, 88; cf. *ibid.* at 101; he agreed with the view expressed in *Coulls v Bagot's Executor & Trustee Co Ltd* [1967] A.L.R. 385, 411, that Lush L.J.'s dictum must be confined to cases in which the contract creates a trust in favour of the third party: below, paras 18-080-18-088. *Lloyd's v Harper*, above, was treated as a case of trust by Fry J. at first instance, and by James and Cotton L.JJ in the Court of Appeal. Cases of trust fall within the exceptions stated in para.18-054, below to the general rule that in an action for damages the claimant can recover damages only in respect of his *own* loss.
- 322. [1968] A.C. 58.
- 323. Above, para.18-049.
- 324. [1975] 1 W.L.R. 1468 at 1474.
- 325. cf. *Radford v de Froberville* [1977] 1 W.L.R. 1262 (damages for failure to perform a contract to build a wall not reduced merely because the promisee had entered into the contract not only for his own benefit, but also for that of his tenants).
- 326. [1980] 1 W.L.R. 277.
- 327. *ibid.*, at 283, 293, 297. Where a contract is made with a company and the breach causes loss to its subsidiary, damages can be recovered by the company since the value of its holding in the subsidiary will be reduced in consequence of the loss: *George Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 B.C.L.C. 260.
- 328. cf. *Lockett v A.M. Charles Ltd* [1938] 4 All E.R. 170, where agency reasoning was used in such a situation.
- 329. [1980] 1 W.L.R. 277, 283. cf. *Calabar Properties Ltd v Stitcher* [1984] 1 W.L.R. 287, 290 where it was not disputed that a tenant's damages for her landlord's breach of his covenant to repair should include compensation for ill-health suffered by her husband.
- 330. Below, para.24-018.
- 331. [1980] 1 W.L.R. 277 at 284.

- [332.](#) [1980] 1 W.L.R. 277, above, para.18-052.
- [333.](#) [1980] 1 W.L.R. 277 at 291; cf. 297-298; 300–301.
- [334.](#) cf. above, para.18-022 at nn.123-126.
- [335.](#) *Darlington B.C. Wiltshier (Northern) Ltd* [1995] 1 W.L.R. 68 at 79; for the origins of this metaphor, see *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at 529.
- [336.](#) See above, para.18-051 at n.306 for this requirement.
- [337.](#) e.g., by way of specific performance, as in *Beswick v Beswick* [1968] A.C. 58.
- [338.](#) (1981) 125 S.J. 397.
- [339.](#) [1968] A.C. 58.
- [340.](#) Above, para.18-049.
- [341.](#) Such a result could also, on the facts of the case, follow from the reasoning in para.18-056, below.
- [342.](#) Below, para.27-032.
- [343.](#) Above, paras 18-052 and 18-053.
- [344.](#) See, for example, below para.18-085. cf. *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1988] 2 Lloyd's Rep. 505; below para.18-133; *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] 1 Q.B. 86 (above, para.18-036) at [141], [144] can be explained on the ground either that the beneficial owner could itself sue (joining the legal owner to the action) for the loss it had suffered, or on the ground that "if formality is necessary ... [the legal owners] can recover the amount which [the beneficial owner (B)] has lost, but will hold the sums so recovered as trustees for" B (at [144]). According to *Rolls Royce Power Engineering plc v Ricardo Consulting Engineers Ltd* [2003] EWHC 2871 (TCC), [2004] 2 All E.R. (Comm) 129 a contracting party cannot recover damages in respect of the third party's loss where the other contracting party did not, when the contract was made, know or have reason to know that the former party was contracting as trustee.
- [345.](#) See *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 A.C. 199, 207.
- [346.](#) *St Albans C.C. v International Computers Ltd* [1996] 4 All E.R. 481.
- [347.](#)  *Dunlop v Lambert* (1839) 2 Cl. & F. 626, 627 (as to which see *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at 523 et seq.). cf. *Obestain Inc. v National Mineral Development Corp. Ltd (The Sanix Ace)* [1987] 1 Lloyd's Rep. 465; the reasoning of *Obestain Inc v National Mineral Development Corp Ltd (The Sanix Ace)* [1987] 1 Lloyd's Rep. 465 was followed in *Titan Europe 2006-3 Plc v Colliers International UK Plc* [2015] EWCA Civ 1083, [2016] 1 All E.R. (Comm) 999 at [30] to enable an owner of property to recover damages in tort in respect of negligent valuation of property (in this case, choses in action) by virtue of his ownership of that property, even though that owner was not a party to the contract with the valuer. *Wibau Maschinenfabric Hartman SA v Mackinnon Mackenzie & Co (The Chanda)* [1989] 2 Lloyd's Rep. 494 (overruled on another point in *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd (The Kapitan Petko Voivoda)* [2003] EWCA Civ 451; [2003] 1 All E.R. (Comm) 801). The rule was recognised by the House of Lords in *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* [1977] A.C. 774, but held inapplicable as the buyer had acquired his own contractual rights against the shipowner under Bills of Lading Act 1855, s.1 (now repealed and replaced by Carriage of Goods by Sea Act 1992); Weir [1977] C.L.J. 24. *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* [1977] A.C. 774 was distinguished in *Titan Europe 2006-3 Plc v Colliers International UK Plc* [2015] EWCA Civ 1083 at [32] on the ground that the loss in the latter case had been suffered by an owner in respect of property which he

had retained while the claimant in the former case had, at the relevant time, parted with the property in question. In the *Rolls Royce Power* case, above, n.336 the rule in *Dunlop v Lambert* (above) was said at [124] to apply only if, at the time of the contract, it was “in the actual contemplation of the parties that an identified third party or a third party who was a member of an identified class might suffer damage in the event of a breach of the contract.” In the case of goods carried under a transferable bill of lading, this requirement will generally be satisfied since the transfer of such a bill must be within the carrier’s contemplation. For discussion of another aspect of *Dunlop v Lambert*, above, see *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 55, [2008] 1 Lloyd’s Rep. 462 at [12], [39]–[40]. In the case of contracts to which the Carriage of Goods by Sea Act 1992 applies, a special statutory exception is created by s.2(4) of the Act to the general rule that a person can recover damages only in respect of his own loss; for a full discussion of this subsection, see Carver on Bills of Lading, 3rd ed. (2011), paras 5-077—5-088. For the possible effects of arts 57 and 58 of the Rotterdam Rules (above, para.18-036 n.218) on s.2 of the 1992 Act, see below, para.18-117 n.672. These Rules contain no provision resembling s.2(4) of the 1992 Act.

[348.](#) *The Albazero* [1977] A.C. 774, above, n.339.


[349.](#)  Exceptions to the general rule that a contracting party cannot recover damages in respect of loss suffered, not by himself, but by a third party (Main Work, Vol.I, para.18-051) are further discussed by the Supreme Court in *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2017] 2 W.L.R. 1161 (see further para.18-057, text after n.359a, below). Lord Neuberger in that case described some of these exceptions (in particular those discussed in Main Work, paras 18-052 to 18-069) as “anomalous” (a word that perhaps carries a note of disapproval); and it is interesting to note that neither he nor any other member of the Supreme Court in that case made any reference to the judicial criticisms of the general rule discussed in Main Work, para.18-053, perhaps because these criticisms were not drawn to the attention of the Supreme Court in the *Swynson* case.

[350.](#) *Hunt v Severs* [1994] 2 A.C. 350, 357.

[351.](#) *ibid.*, at 363.

[352.](#) *Hughes v Lloyd* [2007] EWHC 3133 (Ch), [2008] W.T.L.R. 473; and see below, para.18-078. No such damages can be recovered where the voluntary carer is the tortfeasor: *Hunt v Severs* [1994] 2 A.C. 350; below para.18-078, n.477.

[353.](#) See further para.18-057, text after n.359a, below.

[354.](#)  [1994] 1 A.C. 85. The discussion in paras 18-055 to 18-064 of the Main Work, Vol.I, is directly concerned only with the extension of the reasoning of the “*Albazero* exception” (Main Work, para.18-054) to *building* contract cases. The view that these cases have extended this exception to “contracts generally” (*Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2017] 2 W.L.R. 1161 per Lord Sumption at [15], and see Main Work para.18-057 line 24) does not mean that the (so extended) exceptions necessarily apply to all contracts whatsoever: it is, for example, still an open question whether their reasoning would apply to a contract by which A promised B to pay a sum of money to C, as in the *Woodar case* [1980] 1 W.L.R. 277 (Main Work, para.18-052). For the scope of the *Albazero* exception in bill of lading contracts, see also Carver on Bills of Lading, 4th ed. (2017) para.5-070.

[355.](#) Below, paras 18-058 to 18-069.

[356.](#) The case is reported on a preliminary issue of law, so that the alleged facts had not been proved.

[357.](#) cf. *IMI Cornelius (UK) v Alan J. Bluor* (1993) 57 B.L.R. 108.

[358.](#) See further para.18-057, text after n.359a, below.

[359.](#) *Linden Gardens case* [1994] A.C. 85 at 96-97; *Alfred McAlpine Construction Ltd v Panatown*

Ltd [2001] 1 A.C. 518, e.g. at 532; all the other members of the House of Lords accepted and used this terminology.

[360.](#) [1994] A.C. 85, 97. In fact the third party had reimbursed the employer in respect of this expenditure: see *ibid.*, at 97; but this did not affect the question of liability.


[361.](#) *ibid.* This requirement has been doubted on the ground that, in general, the court is “not concerned with what the plaintiff proposes to do with this damages:” *Darlington B.C. v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68, 80. But it seems, with respect, that Lord Griffiths’ requirement is concerned, not with the question what the plaintiff proposes to do with the damages, but with the question whether he has suffered any loss. In *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at 592 Lord Millett (dissenting) rejects the above reasoning, apparently on the ground that the promisee is “bound to mitigate his loss” and “cannot increase it by entering into other arrangements.” But, with respect, the mitigation rules only require the injured party to act reasonably (below, para.26-082) and in cases of the present kind this requirement would, it is submitted, normally be satisfied where he made alternative provision to secure for the third party the benefit which the promisor has, in breach of the contract, failed to provide.

[362.](#) [1968] A.C. 58.


[363.](#) *ibid.*, at 102; above para.18-049.

[364.](#) See further para.18-057, text after n.359a, below.

[365.](#) [1994] 1 A.C. 85, 95.

[366.](#)  *ibid.*, at 96. See also *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2017] 2 W.L.R. 1161 at [17], quoted below, para.18-057 at n.359l.

[367.](#) *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518, 575.

[368.](#)  Above, para.18-054. For the distinction between *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* [1977] A.C. 774 and *Titan Europe 2006-3 Plc v Colliers International UK Plc* [2015] EWCA Civ 1083, [2016] 1 All E.R. (Comm) 999 at [32] see above, para.18-054.


[369.](#) *The Albazero* [1977] A.C. 774 at 847; *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd* [2005] EWCA Civ 1437, [2006] 1 W.L.R. 643 at [23].

[370.](#) *Linden Gardens case*, [1994] 1 A.C. 85, 114.


[371.](#) cf. above, para.18-054 at n.339.

[372.](#)  Discussed in Main Work, para.18-055.


[373.](#)  Discussed in Main Work, paras 18-056, 18-057.

[374.](#)  [2017] UKSC 32, [2017] 2 W.L.R. 1161.

[375.](#)  [2017] UKSC 32 at [4], [40], [92].

[376.](#)  [2017] UKSC 32 at [4].

[377.](#)  Many other issues were discussed by the Supreme Court: see below, paras 26-099B, 26-102.

[378.](#)  [2017] UKSC at [14]; for the destination of damages so recovered by A in respect of C’s loss,

see Main Work, para.18-078.

379.

!Above at n.359a.

380.

! [2017] UKSC 32 at [14], [16], [52], [54], [101]; for an earlier use of the phrase “transferred loss” see *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at 529. The same phrase was also used by Robert Goff L.J. in *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1985] Q.B. 350, 399, in a passage which, when that case reached the House of Lords, drew adverse comment from Lord Brandon: see [1986] A.C. 785 at 820. But in *The Aliakmon* that passage was used in a context different from that which arose in the *Swynson* case. In *The Aliakmon*, the question arose whether C was *bound* by a term of the contract between A and B, while in the *Swynson* case the question was whether C could, at least indirectly, *benefit* from a contract between A and B. These two questions raise different issues of policy; and this may well have been the reason why, in the *Swynson* case, *The Aliakmon* was not cited to the Supreme Court.

381.

! [2017] UKSC 32 at [17], [107].

382.

! [2017] UKSC 32 at [54], [107].

383.

! [2017] UKSC 32 at [17].

384.

! [2017] UKSC 32 at [17] and see at [108].

385.

! See the use by Lord Sumption in [2017] UKSC 32 at [17] of the phrase “in either form”. Lord Neuberger’s reasoning at [107]-[108] seems also to apply to both the “broader” and the “narrower” forms of the principle.

386.

[1995] 1 W.L.R. 68.

387.

See below, para.18-059.

388.

These difficulties are not, it is submitted, removed by Dillon L.J.’s alternative ground for decision, viz. that the bank was constructive trustee for the council of its contractual rights against the defendant: this reasoning merely pushes the enquiry back to the question what (if anything) the bank could have recovered from the defendant.

389.

[1995] 1 W.L.R. 68 at 79, per Steyn L.J. Dillon L.J. regarded the result in the *Darlington* case as a “direct application” of the *Linden Gardens* case: *ibid.*, at p.75. Waite L.J. expressed his agreement with both the other judgments, though his reasoning seems to be closer to that of Dillon L.J. than to that of Steyn L.J. See also *John Harris Partnership v Groveworld Ltd* [1999] P.N.L.R. 697 (developer entitled to recover from architect retained by him loss suffered in part by a third party who had financed the building project).


390.

! *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] A.C. 518 at 531, 566 per Lords Clyde and Jauncey; *ibid.*, pp.545, 584, per Lords Goff and Millett (dissenting). In *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2017] 2 W.L.R. 1161 Lord Sumption, in discussing the “*Albazero* exception” (see Main Work, Vol.I, para.18-054) and its extension to “contracts generally” ([2017] UKSC 32 at [15]) said at [14] that these exceptions applied where the third party was “the intended transferee of property affected by the breach”; and Lord Neuberger similarly referred at [102] to their application “where there is a contract between A and B relating to A’s property which is subsequently acquired by C ...”. These statements may, at first sight, seem to be inconsistent with *Darlington B.C. v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68 (discussed in Main Work para.18-058); but it is submitted that they should not be read in this way. They should be read rather as general statements of the scope of the “*Albazero* exception” and its extensions, and not as casting doubt on the *Darlington* case. That case was

cited without disapproval by Lord Mance in the *Swynson* case [2017] UKSC 32 at [52] and is not questioned in the other two judgments (i.e., those of Lord Sumption and of Lord Neuberger) in that case. The ground for the decision that the exceptions did not apply in the *Swynson* case is stated above, para.18-057, text after n.359a.

- 391. Quaere whether this extension will be applied in the carriage by sea context in which the exception originated: see Carver on Bills of Lading, 3rd ed. (2011) para.5-064.
- 392. [2006] EWCA Civ 1079, [2006] 1 W.L.R. 2926.
- 393. *ibid.*, at [33].
- 394. *ibid.*, at [43], per Mummery L.J., italics supplied; cf. *ibid.*, at 87, per Rix L.J.
- 395. *ibid.*, at [43].
- 396. *Landfast (Anglia) Ltd v Cameron Taylor One* [2006] EWHC 343 (TCC), 117 Con L.R. 553 at [29].
- 397. [2001] 1 A.C. 518, discussed by Coote (2001) 117 L.Q.R. 81; reversing (1998) 58 Const.L.R. 58, discussed by Treitel (1998) L.Q.R. 527; for further proceedings, see [2001] EWCA Civ 284; (2001) 76 Con.L.R. 222.
- 398. [2001] 1 A.C. 518, 522, 563, 575.
- 399. Lord Millet, *ibid.*, 580-581; Lord Goff is more skeptical: see *ibid.*, at 538-539.
- 400. [1994] 1 A.C. 85, above, para.18-055; referred to as the *St Martin* case throughout the speeches in the *Panatown* case.
- 401. *The Albazero* [1977] A.C. 774; above, para.18-054.
- 402. This was the position in *The Albazero*, above, itself, where the exception accordingly did not apply.
- 403. Above, para.18-054, n.339.
- 404. The restriction could also apply where the third party's contractual right against the carrier arose under an implied contract of the kind illustrated by *Brandt v Liverpool, etc., S.N. Co* [1924] 1 K.B. 575; see *The Albazero* [1977] A.C. 774, 847.
- 405. **!**As in *The Albazero* [1977] A.C. 774. For the distinction between *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* and *Titan Europe 2006-3 Plc v Colliers International UK Plc* [2015] EWCA Civ 1083, [2016] 1 All E.R. (Comm) 999 at [32], see above, para.18-054 note 339.
- 406. *Panatown* case [2001] 1 A.C. 518, 575; *The Albazero*, above, 846-848. The exception is similarly "not needed" where full effect can be given to the broken promise by an award of damages for the breach to the promisee: see *Smithkline Beecham plc v Apotex Europe Ltd* [2006] EWCA Civ 658, [2007] Ch. 71, below, para.18-061 at n.386 and para.18-069.
- 407. See above, para.18-053.
- 408. **!***Darlington B.C. v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68, 79; above, para.18-053 at n.327. The reasoning of the *Panatown* case has likewise been said not to apply where the third party has its own independent right against the promisor, not in contract, but in tort, *Riyad Bank v Ahli United Bank* [2005] EWHC 279 (Comm), [2005] 2 Lloyd's Rep. 409 at [173] (affd without reference to this point [2006] EWCA Civ 780, [2006] 2 Lloyd's Rep. 292). Cf. the statement in *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2017] 1 W.L.R. 1161 at [16] that the

“principle of transferred loss” (see above, para.18-057 at n.359i) is “not available if the third party has a direct right for the same loss, *on whatever basis*” (italics supplied). In that case, the third party had “abandoned the argument that a duty of care was owed [by the defendant] to him [the third party] personally” ([2017] UKSC 32 at [10]) but there were other reasons why the principle of transferred loss did not there apply: see above, para.18-057.

- 409. Above, para.18-056; *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518, 532.
- 410. *ibid.*, 574 and 577 (per Lords Jauncey and Browne-Wilkinson).
- 411.  See the references given in nn.380 and 382, above. For the view that the “principle of transferred loss” (see above, para.18-057 at n.359i) is “driven by legal necessity” (i.e., by the necessity of avoiding a “legal black hole” of the kind described in para.18-061 of the Main Work) see *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2017] 1 W.L.R. 1161 at [16].
- 412. *Panatown case* [2001] 1 A.C. 518, 574, per Lord Jauncey. There would likewise be no such “legal black hole” where A’s only interest in the performance of the contract was to avoid the prejudice which failure in its performance might cause to himself and he had a remedy in damages against B in respect of that prejudice: see *Smithkline Beecham plc v Apotex Europe Ltd* [2006] EWCA Civ 658, [2007] Ch. 71 at [94], and below, para.18-069.
- 413. *Panatown case* [2001] 1 A.C. at 577, per Lord Browne-Wilkinson; and see 76 Con. L.R. 224 at 38 (“made their contractual bed”) cf. *Henderson v Merrett Syndicates Ltd* [1992] 2 A.C. 145, 195, using the phrase “contractual structure” in the context of the faintly analogous question whether a contract between A and B can impose on A a duty of care to C: see above, para.18-025 n.153; cf. *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundation Ltd* [1989] Q.B. 71 (tort duty excluded by tripartite contractual structure); and *R.M. Turton & Co Ltd v Kerslake & Partners* [2000] Lloyd’s Rep. P.N. 967 (New Zealand Court of Appeal). Contrast *Riyad Bank v Ahli United Bank (UK) plc* [2006] EWCA Civ 780, [2006] 2 Lloyd’s Rep. 292 at [31], [32], [42] and [137], where the “contractual structure” did not exclude liability in tort to the third party.
- 414. *Panatown case* [2001] 1 A.C. 519, 536, per Lord Clyde.
- 415. *ibid.*
- 416. For the contrary view, see Lord Goff, dissenting, in *The Panatown case*, above, 556-557.
- 417. [2001] 1 A.C. 518, above para.18-060.
- 418. Above, para.18-056.
- 419. Of Lords Goff and Millett.
- 420. Lords Clyde, Jauncey and Browne-Wilkinson.
- 421. *Linden Gardens case* [1994] 1 A.C. 85, 97; see further paras 18-066 to 18-068 below.
- 422. No such separate contract was established in *Panatown case*: see 76 Con.L.R. 224 at 35.
- 423. *Panatown case* [2001] 1 A.C. 518, 571. This possible restriction on the scope of the broader ground is not considered in the discussion of that ground in the further proceedings in that case (76 Con.L.R. 224 at 20), being unnecessary to the decision at this stage.
- 424. Below, para.18-078.
- 425. Above, at nn.395 and 396.
- 426. Lord Millett’s dissent in the *Panatown case* is restricted to this situation: [2001] 1 A.C. 518, 591; Lord Goff’s dissent does not appear to be so restricted: see *ibid.* 545, 552–553.

- [427.](#) *Linden Gardens case* [1994] 1 A.C. 85, 97. In *Rolls Royce Power Engineering plc v Ricardo Consulting Engineers Ltd* [2003] EWHC 2871 (TCC), [2004] 2 All E.R. (Comm) 129 at [128] it was said that the “broader ground” for the decision in the *Linden Gardens* case was not easy to apply “where the alleged damage is damage to, or failure to repair, property and there is no suggestion of consequential loss.” It is, with respect, submitted that this restriction of the “broader ground” appears to be inconsistent with Lord Griffiths’ example stated in the text above.
- [428.](#) [1986] A.C. 58, above, para.18-022.
- [429.](#) [1986] A.C. 58, 102; above, para.18-049.
- [430.](#) [1980] 1 W.L.R. 277, above, para.18-052.
- [431.](#) i.e. unless A can show that B’s breach caused loss to A himself.
- [432.](#) See above, paras 18-049, 18-052 and 18-053.
- [433.](#) i.e. in the *Linden Gardens case* [1994] A.C. 85, the *Darlington case* [1995] 1 W.L.R. 68 and the *Panatown case* [2001] 1 A.C. 518.
- [434.](#) See above, para.18-053.
- [435.](#) Above, para.18-022.
- [436.](#) Above, para.18-059.
- [437.](#) See below, paras 18-066-18-069.
- [438.](#) [2006] EWCA Civ 1079, [2006] 1 W.L.R. 2926.
- [439.](#) At [44].
- [440.](#) At [84].
- [441.](#) At [85].
- [442.](#) Below, para.18-078.
- [443.](#) *Panatown case* [2001] 1 A.C. 518, 517.
- [444.](#) Above, para.18-064 at n.401.
- [445.](#) Performance of the work is in contracts of this kind prima facie a condition precedent of the right to be paid: *Morton v Lamb* (1797) 7 T.R. 125; *Miles v Wakefield MDC* [1987] A.C. 539, 561.
- [446.](#) e.g. damages on a “cost of cure” basis are not recoverable if the cost of cure is wholly disproportionate to the benefit to be derived from cure: below, para.26-038.
- [447.](#) There will be a “total failure of consideration:” below, para.29-058.
- [448.](#) See below, para.26-037.
- [449.](#) See above para.18-053 at n.327 for this expression.
- [450.](#) As in *Beswick v Beswick* [1968] A.C. 58, above, para.18-049.
- [451.](#) The “failure of consideration” would be only “partial:” see below, para.29-065.
- [452.](#) Below, para.27-024.

- [453.](#) [1994] 1 A.C. 85, 97; above, para.18-056 at n.350; for further discussion, see below at paras 18-067-18-068.
- [454.](#) For a possible exception, see the discussion at para.26-037 below of the question whether cost of cure is recoverable where cure is not undertaken.
- [455.](#) See the *Darlington* case [1995] 1 W.L.R. 68, 80; the *Panatown* case [2001] 1 A.C. 518, 556, 592 per Lords Goff and Millett, dissenting; *Ruxley Electronics and Construction Co v Forsyth* [1996] A.C. 344, 359 and 357; above, para.18-056, n.350.
- [456.](#) Below, para.26-037.
- [457.](#) Below, para.26-082.
- [458.](#) See the references to the *Darlington* and *Panatown* cases in n.429, above.
- [459.](#) e.g., where a seller of goods in breach of contract fails to deliver and the goods are at the time of the failure worth less than the buyer had agreed to pay (but had not paid) for them.
- [460.](#) [2001] 1 A.C. 518, 534.
- [461.](#) Our concern here is with adverse *financial* effect on the claimant. A claim for damages for “loss of amenity” (below, para.26-144) will generally be one for loss suffered by the claimant, though in the family holiday cases (above, paras 18-051, 18-052) this loss may be increased by the claimant's witnessing the sufferings of his family in comfortless hotels. Cf. also below, para.26-144.
- [462.](#) *Panatown* case [2001] 1 A.C. 518, 571.
- [463.](#) See at n.428, above.
- [464.](#) Below, para.18-078.
- [465.](#) [1994] 1 A.C. 85, above para.18-055.
- [466.](#) [2006] EWCA Civ 658, [2007] Ch. 71.
- [467.](#) *ibid.*, at [88].
- [468.](#) *ibid.*, at [86].
- [469.](#) See para.18-054 above.
- [470.](#) [2006] EWCA Civ 658 at [94].
- [471.](#) In paras 18-054 et seq.
- [472.](#) Below, para.18-078.
- [473.](#) e.g., the *Woodar* case [1980] 1 W.L.R. 277 (above, 18-050, and see Law Com. No.242, para.7-49); and probably the *Forster* case (1981) 125 S.J. 397 (above, para.18-053).
- [474.](#) e.g., probably, the *Linden Gardens* case [1994] 1 A.C. 85 (above, para.18-055): see below, para.18-096.
- [475.](#) Below, paras 18-090 et seq. Section 1(1)(a) and (3) will make it possible to draw up contracts on facts similar to those of the *Linden Gardens* case, above, so as to confer a right of enforcement directly on the third party: see below, paras 18-091, 18-097, 18-098.
- [476.](#) On the reasoning of *The Albazero* [1977] A.C. 774, and of *Alfred McAlpine Construction Ltd v*

- Panatown Ltd* [2001] 1 A.C. 518, above, paras 18-054, 18-060, 18-061. Cf. *Marquess of Aberdeen and Temair v Turcan Connell* [2008] CSOH 183, [2009] P.N.L.R. 18, where the fact that the third party had no claim, either under the Scots Law principle of *ius quaesitum tertio* (above, para.18-038) or in tort under *White v Jones* [1995] 2 A.C. 207 (above, para.18-039) was part of the reasoning which led to the conclusion that the pursuer had an arguable claim for damages against the solicitor whose breach of duty (in administering the trust in respect of which he had been employed by the pursuer) had caused loss partly incurred by the third party (a beneficiary under that trust); for the destination of such damages, see below, para.18-078.
- [477.](#) The “legal black hole” referred to in the *Darlington case* [1995] 1 W.L.R. 68 at 79, above, para.18-053, would be much reduced in significance.
- [478.](#) See below, para.18-124.
- [479.](#) 1999 Act, s.3(4), below, para.18-114.
- [480.](#) See Senior Courts Act 1981 (formerly Supreme Court Act, 1981), s.49(2), replacing Supreme Court of Judicature (Consolidation) Act 1925, s.41.
- [481.](#) Under Senior Courts Act 1981 (see above, n.454), s.49(3).
- [482.](#) [1967] 2 Q.B. 31; Davies (1980) 1 L.S. 287; cf. *The Elbe Maru* [1978] 1 Lloyd’s Rep. 206; *European Asian Bank AG v Punjab & Sind Bank* [1982] 2 Lloyd’s Rep. 356; *Neptune Orient Lines Ltd v J.V.C. (UK) Ltd (The Chevalier Roze)* [1983] 2 Lloyd’s Rep. 438.
- [483.](#) e.g. *Deepak Fertilisers & Chemical Corp. v ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd’s Rep. 387 at 401; *Whitesea Shipping and Trading Corp. v El Paso Rio Clara Ltda (The Marielle Bolten)* [2009] EWHC 2552 (Comm), [2010] 1 Lloyd’s Rep. 648 at [56]–[60].
- [484.](#) [1973] 1 Q.B. 87; Wilkie (1973) 36 M.L.R. 214.
- [485.](#) [1973] 1 Q.B. at 95.
- [486.](#) *ibid.*, at 96.
- [487.](#) [1967] 2 Q.B. 31, above, para.18-072.
- [488.](#) [1968] A.C. 58; above para.18-022.
- [489.](#) cf. *Heaton v Axa Equity and Law Life Assurance Society Ltd* [2002] UKHL 15; [2002] 2 A.C. 329, at [9] (“is enforceable by B”, i.e. the promisee). No such promise had been made in that case.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 6 - Joint Obligations, Third Parties and Assignment

Chapter 18 - Third Parties ¹

Section 4. - Contracts for the Benefit of Third Parties

(a) - Effects of a Contract for the Benefit of a Third Party

(ii) - Position between Promisee and Third Party

Introduction

18-074

The promisor may be willing to perform, or may actually perform, in favour of the third party, e.g. by paying him the agreed sum. These possibilities give rise to further problems between the third party and the promisee. In discussing these problems we shall in paras 18-075 to 18-078 assume that the case does not fall within any of the exceptions to the doctrine of privity which will be considered later in this Chapter. ⁴⁹⁰

Promisor pays or is willing to pay

18-075

The promisor may actually pay or be willing to pay the third party in accordance with the contract, and the promisee may then claim that the third party is not entitled to keep the money for his own benefit but that he must hold it on behalf of the promisee. Such a claim is not likely to be made by the promisee himself, as he generally wants to benefit the third party. But it might be made by the promisee's trustee in bankruptcy, or by his personal representative on death. In *Beswick v Beswick* the House of Lords held that the third party was entitled to keep the money which the promisor was ordered to pay her, simply because it appeared from the true construction of the contract that this was the intention of the contracting parties. ⁴⁹¹ It seems that this rule would apply equally to payments made willingly, i.e. without any order of the court. ⁴⁹² Payments actually received by the third party can be claimed by the promisee only if, on the true construction of the contract, they were made to the third party as nominee for the promisee. Where the money has not yet been paid, the promisor and the promisee can agree to rescind or vary the contract ⁴⁹³; and if they vary it so as to provide for payment to the promisee, the third party has no claim under the contract. But the question whether the promisee can unilaterally (i.e. without the consent of the promisor) demand that payment should be made to himself depends once again on the construction of the contract. If the contract can be construed as one to pay the third party "or as the promisee shall direct" then the promisee is entitled to demand payment to himself. ⁴⁹⁴ But the contract is not likely to be construed in this way where it is a matter of concern to the promisor that payment should be made to the third party, e.g. because the third party is a near relative of the promisor and it matters to the promisor that the third party should be provided for. ⁴⁹⁵

Revocable mandate

18-076

The rules stated in para.18-075 above apply only if there is indeed a promise to pay the third party. In *Coulls v Bagot's Executor and Trustee Co Ltd* ⁴⁹⁶ an agreement between A and B provided for payment of royalties by B to A and concluded: "I [A] authorise ... [B] to pay all money connected with this agreement to my wife ... and myself ... as joint tenants." The document was signed by A, B and A's wife. A majority of the High Court of Australia held that there was no *promise* by B to A to pay A's wife but only a *mandate* by A authorising B to pay A's wife (so that such payment would discharge B). This mandate was revocable ⁴⁹⁷ and had been revoked by A's death. Consequently, the money (which B was willing to pay) belonged to A's estate and not to his wife. The third party would, a fortiori, not be entitled to the money if he were mentioned in the contract as a mere nominee in such a way as to indicate that no beneficial interest was intended to pass to him and that payment to him without the request of the promisee should not discharge the promisor. ⁴⁹⁸

Promisee refuses to sue

18-077

A further problem arises where the promisee fails or refuses to take any action to enforce the promise. Lord Denning has suggested that, even at common law, the third party could in such a case circumvent the doctrine of privity by suing the promisor and joining the promisee as co-defendant. ⁴⁹⁹ But Diplock and Salmon L.JJ. have said that the action can (in cases not falling within any of the exceptions to the doctrine of privity) be brought only by the promisee ⁵⁰⁰; and it is submitted that this is the correct view. Lord Denning's view is fundamentally inconsistent with the common law doctrine of privity, which was recognised in *Beswick v Beswick* and in many later cases. ⁵⁰¹ It is also inconsistent with the reasoning of the cases on trusts of promises, to be discussed later in this Chapter ⁵⁰²; for if the third party could always enforce the promise against the promisor by joining the promisee to the action, it would be pointless to insist that he must in addition show the existence of a trust.

Promisee sues for damages or restitution

18-078

A final problem arises where the promisee sues but claims some form of relief other than specific performance in favour of the third party: e.g. where he claims damages, or recovery of the consideration provided by him. If such a claim succeeded, it would seem to lead to a judgment for payment to the promisee and not to the third party; and the question would arise whether the promisee could keep the payment for his own benefit or whether he would be bound to hold it for the third party. In tort, a person can sometimes recover damages for a loss suffered, not by himself, but by another; e.g. a husband may get damages for loss of earnings suffered by his wife in giving up her job so as to nurse him after an accident; and such damages must then be held on trust for the other person. ⁵⁰³ Similarly, where one person can recover damages for breach of contract in respect of loss suffered by another person in the exceptional cases mentioned in paras 18-054 to 18-058 above, those damages must be held for that other person. ⁵⁰⁴ This may also be the position in the cases "calling for special treatment," ⁵⁰⁵ such as the booking of family holidays or ordering of meals in restaurants. If, in such special cases, the promisee can recover damages in respect of the third party's loss, it may be that those damages, when recovered, would (as in the exceptional situations discussed in para.18-054 to 18-058 above) be held by the promisee as money had and received for the use of the third party. ⁵⁰⁶ But these exceptions apart, there does not appear (at least as a general rule) to be any similar possibility where the promisee claims damages for breach of a contract merely because the contract was made for the benefit of a third party. The general rule in such a case is that damages will be awarded only to compensate the promisee for his *own* loss, ⁵⁰⁷ and where the damages are awarded for such loss, it does not seem that the promisee can be under any obligation to pay over those damages (or any part of them) to the third party. ⁵⁰⁸

1. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19

M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.

490. Below, paras 18-079-18-138.

491. *Beswick v Beswick* [1968] A.C. 58, 71, 94, 96, on this point overruling *Re Engelbach's Estate* [1924] 2 Ch. 348 and doubting *Re Sinclair's Life Policy* [1938] Ch. 799. Earlier cases supporting the view stated in the text include *Ashby v Costin* (1888) 21 Q.B.D. 401; *Harris v United Kingdom, etc., Society* (1889) 87 L.T.J. 272; *Re Davies* [1892] 3 Ch. 63.

492. This appears from the treatment in *Beswick v Beswick* of *Re Engelbach's Estate*, above, n.465, where the money had in fact been paid to the third party: see 93 L.J.Ch. 616, 617.

493. The present discussion is (as stated in para.18-074 above) based on the assumption that the case does *not* fall within any of the exceptions (to be discussed in paras 18-079 et seq.) to the common law doctrine of privity of contract.

494. For an illustration of what is "probably" a contract to pay the third party or as the promisee shall direct, see *Tradigrain SA v King Diamond Shipping SA (The Spiros C)* [2002] 2 Lloyd's Rep. 319 at [56], [57] (bill of lading making freight payable to a person other than contracting carrier; actual decision based on other grounds: *ibid.*, at [58]). Para.18-073 of the 30th edition of this book (numbered 18-075 in the present edition) is cited with apparent approval in *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd (The Bulk Chile)* [2012] EWHC 2107 (Comm), [2012] 2 Lloyd's Rep. 594 at [35] in support of the proposition that "where a contract provides for payment to a third party, it is a matter of construction whether the promisee can unilaterally (i.e. without the consent of the promisor) demand that payment should be made to himself." When this decision was affirmed ([2013] EWCA Civ 184, [2013] 2 Lloyd's Rep 38), the same point was discussed and the same conclusion was reached as in the Court below: see especially [2013] EWCA Civ 184 at [23], quoting Rix L.J. in *The Spiros C*, above, who in that case at [56] referred with apparent approval to "Chitty" paras 19-044 and 19-060. This reference is to the 28th edition of this book, that being the most recent edition at the time of the decision in *The Spiros C*. The corresponding paragraphs in the present edition of this book are 18-048 and 18-075. Similar reasoning can apply where a contract provides for some performance other than a payment of money to be rendered to a third party: e.g. *Mitchell v Ede* (1840) 11 Ad. & El. 888; *Elder Dempster Lines v Zaki Ishag (The Lycaon)* [1983] 2 Lloyd's Rep. 548.

495. As in *Re Stapleton-Bretherton* [1941] Ch. 482.

496. [1967] A.L.R. 385.

497. Similar reasoning forms the ground of the Court of Appeal's decision in *The Bulk Chile* [2013] EWCA Civ 184, [2013] 2 Lloyd's Rep. 38 (above, n.468) at [25] where Tomlinson L.J. (with whom Toulson and Pill L.JJ. agreed) said that the third party was the promisee's agent to receive the payment and that there was nothing in the contract between promisor and promisee "to preclude the promisee from cancelling the nominated agent's authority to act on his behalf in receiving the [payment] ... and requiring it to be made to himself".

498. *Thavorn v Bank of Credit & Commerce SA* [1985] 1 Lloyd's Rep. 259; *The Turridu* [1999] 2 Lloyd's Rep. 401.

499. *Beswick v Beswick* [1966] Ch. at 557; *Gurtner v Circuit* [1968] 2 Q.B. 587, 596.

500. *Gurtner v Circuit* [1968] 2 Q.B. 587 at 599, 606.

501. Above, para.18-022.

502. Below, paras 18-080-18-088.

503. *Hunt v Severs* [1994] 2 A.C. 350, 363 following *Cunningham v Harrison* [1973] Q.B. 942, 952

and rejecting the contrary view in *Donnelly v Joyce* [1974] Q.B. 454, 461–462. cf. *Allen v Waters* [1935] 1 K.B. 200 and *Dennis v L.P.T.B.* [1948] 1 All E.R. 779 as explained in (1956) 72 L.Q.R. 187; *Lowe v Guise* [2002] EWCA Civ 197; [2002] 3 All E.R. 454 at [38]; *Robertson v Wait* (1853) 8 Exch. 299. For further problems which may arise where the person who provides the nursing or other services in respect of which damages are claimed is also the tortfeasor (e.g. where tortfeasor and victim are members of the same family involved in the same motor accident) see *Hayden v Hayden* [1992] 1 W.L.R. 986 and *Hunt v Severs* [1994] 2 A.C. 350, holding that in such circumstances the claimant cannot recover damages in respect of the value of services voluntarily rendered by the tortfeasor himself.

[504.](#) See, e.g. *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* [1977] A.C. 774, 842 and other authorities cited in para.18-054, above; and cf. *Conservative Central Office v Burrell* [1980] 3 All E.R. 43, 63; affirmed (without any reference to *Beswick v Beswick* [1986] A.C. 58) [1982] 1 W.L.R. 522; *O'Sullivan v Williams* [1992] 3 All E.R. 385, 387, discussing *The Winkfield* [1902] P. 42; *Linden Gardens case* [1994] 1 A.C. 85, above, para.18-055; *John Harris Partnership v Groveworld Ltd* [1999] P.N.L.R. 697; *Marquess of Aberdeen and Temair v Turcan Connell* [2008] CSOH 183, [2009] P.N.L.R. 18 at [45]; *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] 1 Q.B. 86 at [144], quoted in para.18-054 n.336 above; Carriage of Goods by Sea Act 1924 s.2(4) (“for the benefit of the person who sustained the loss”).

[505.](#) *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277, 283.

[506.](#) This was the view of Lord Denning M.R. in *Jackson v Horizon Holidays Ltd* [1975] 1 W.L.R. 1468, 1473. The strange result would be that the claimant was under some quasi-contractual or restitutionary liability to his two small children in respect of part of the £500 recovered as damages for distress.

[507.](#) See above, paras 18-051-18-052, 18-056.

[508.](#) cf. *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] A.L.R. 385, 411.

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In general

18-079

The doctrine of privity of contract is subject to many exceptions. Some of these, such as assignment and agency, are discussed in other parts of this work. ⁵⁰⁹ Others, such as covenants relating to land, are beyond its scope. In the following paragraphs of this Chapter, we shall discuss a further group of situations in which a third party can acquire rights under a contract by virtue of a number of equitable and statutory exceptions to the doctrine of privity. The most important of these is the “general and wide-ranging” ⁵¹⁰ one which has been created by the Contracts (Rights of Third Parties) Act 1999. This Act preserves any right or remedy which the third party may have apart from its provisions. ⁵¹¹ The exceptions which were established before the Act came into force therefore still call for discussion, particularly because situations may arise in which it will be to the third parties’ advantage to rely on one of these exceptions, rather than on the new one which has been created by the Act. ⁵¹²

1. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.

⁵⁰⁹. See Ch.19 and Vol.II, Ch.31. See also paras 15-042-15-061, above.

⁵¹⁰. Law Com No.242, para.5.16.

⁵¹¹. s.7(1); this can apply not only to existing, but also to future, exceptions.

⁵¹². See above, para.18-002, below, paras 18-119 to 18-121.

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(i) - Equitable Exceptions

Trusts of promises ⁵¹³

18-080

Equity developed an exception to the doctrine of privity by making use of the concept of a trust of a chose in action. It accordingly held that where A made a promise to B for the benefit of C, the promise could be enforced by C against A if B had constituted himself trustee of A's promise for C. ⁵¹⁴ This exception to the doctrine of privity was approved by the House of Lords in *Walford's case* ⁵¹⁵ where C (a broker) negotiated a charterparty in which the shipowner (A) promised the charterer (B) to pay a commission to C. It was held that B was trustee of A's promise for C, who could accordingly enforce the promise against A.

Intention to create a trust

18-081

A promisee will not be regarded as a trustee for the third party unless he has the intention to create a trust. ⁵¹⁶ Such an intention can be made clear by using the word "trust" or "trustee," ⁵¹⁷ though even where this is done the further question ⁵¹⁸ may arise whether the trust, which no doubt exists, is one in favour of the particular third party who seeks to enforce the promise which is the subject-matter of that trust. ⁵¹⁹ A trust may, moreover, be created without using any particular form of words; and where the word "trust" or "trustee" has not been used, the question whether there is an intention to create a trust gives rise to very great difficulty. Thus in some cases ⁵²⁰ a promise to a person to provide for his dependants on his retirement or death has been held to create a trust in their favour, while in other cases ⁵²¹ such a promise has been held not to have this effect. ⁵²² Similarly, life insurance policies expressed to be for the benefit of third parties have in some cases been held to create trusts in their favour, ⁵²³ and in others to confer no enforceable rights on them. ⁵²⁴ And in some cases concerning other types of insurance ⁵²⁵ the courts have held that the third party could take advantage of the policy under the trust device, ⁵²⁶ while in others they have held that the third parties had no rights because of the doctrine of privity. ⁵²⁷ There is no point in trying to reconcile all these cases. They represent different stages in the development of the law. At one time, the courts were very ready to apply the trust device in order to protect the interests of the third party. ⁵²⁸ Later, they became more reluctant to apply the device because, once a contract was held to have created a trust in favour of the third party, the parties to that contract lost the right to vary it by mutual consent. ⁵²⁹ Although there are, therefore, no clear rules which determine the existence of a trust in cases of this kind, it is possible to extract from the cases a number of principles which will serve as some guide to the solution of future problems. These principles are discussed in paras 18-082 to 18-084 below.

Intention to benefit third party necessary

18-082

There must be an intention to benefit the third party.⁵³⁰ If the promisee took the promise for his own benefit there will be no trust in favour of the third party.⁵³¹ The same may be true if it is as consistent with the facts that the promisee took the promise for his own benefit as that he took it for the benefit of the third party.⁵³² Conversely, the fact that the promisee had *not* intended to take the promise for his own benefit can be relied on to support the conclusion that there was a trust in favour of the third party.⁵³³

Irrevocability of intention to benefit third party

18-083

As a general rule,⁵³⁴ the intention to benefit the third party must be irrevocable; so that a contract will not normally give rise to a trust in favour of the third party if, under the terms of the contract, the promisee is entitled to deprive the third party of the benefit by diverting it to himself or to other beneficiaries not mentioned in the contract.⁵³⁵ On the other hand, the existence of such a power to divert the benefit will not negative the intention to create a trust where the power is expressed to be exercisable only for a limited period and is not in fact exercised within that period.⁵³⁶ Nor will the existence of a trust necessarily be negated where a contract names a group of beneficiaries, but reserves to the promisee a power to redistribute the intended benefits among them in variation of the terms of the original contract.⁵³⁷ And where a contract *by statute* creates a trust,⁵³⁸ a general provision purporting to entitle the promisee to divert the benefit to whom he pleases will not defeat the trust: on the contrary, such a power can be used only for the benefit of the objects of the trust.⁵³⁹ The court may conclude that there was no intention irrevocably to benefit the third party even though the contract contains no express provision entitling the promisee to divert the benefit away from the third party. It may do so on the ground that the contract would, if it were held to give rise to a trust, unduly limit the freedom of action of the parties or of one of them: e.g. by restricting the promisee's freedom of movement⁵⁴⁰ or by depriving the parties to the contract of their right to vary it by mutual consent.⁵⁴¹

Intention to benefit third party not sufficient

18-084

The intention to benefit the third party is not, without more, sufficient, since an intention to make a gift must be distinguished from an intention to create a trust.⁵⁴² There are many cases in which the courts have refused to apply the trust device although the promisee clearly, irrevocably and without qualification intended to benefit the third party.⁵⁴³ There must be an intention to create a trust; and it seems that such an intention will readily be found where the contract in favour of the third party is made in pursuance of some contractual⁵⁴⁴ or fiduciary⁵⁴⁵ obligation owed by the promisee to the third party. But the trust device has not been wholly confined to such cases—probably because the courts did not formerly insist very strictly on proof of intention to create a trust. The fact that they later came to do so accounts for the present more restricted scope of the trust device.

The intention to create a trust may, finally, be negated on the ground that a trust is not necessary to give rights to the third party because that party is entitled to enforce the contract (even in the absence of a trust) under a statutory exception to the doctrine of privity.⁵⁴⁶

Effects of the trust

18-085

Two consequences generally flow from a finding that there is a trust in favour of a third party. First, the third party is entitled to sue the promisor for the money or property which the promisor had promised to pay or to transfer to him.⁵⁴⁷ He must join the promisee as a party to the action⁵⁴⁸ since if this were not done the promisor might be sued a second time by the promisee. As this rule as to

joinder of parties exists for the benefit of the promisor, it can be waived by him.⁵⁴⁹ Secondly, the third party is (as a general rule⁵⁵⁰) beneficially entitled to any money paid or payable under the contract; the promisee has no right to such money.⁵⁵¹ After *Beswick v Beswick*⁵⁵² the third party can generally keep money so paid to him even if there is no trust.⁵⁵³

Failure of the trust

18-086

There are exceptional cases in which the promisee may be entitled to the money even though there was a trust. In *Cleaver v Mutual Reserve Fund Life Association*⁵⁵⁴ a husband insured his life for the benefit of his wife by a policy which, by statute, created a trust in her favour.⁵⁵⁵ The wife was convicted of murdering the husband and was therefore disqualified from enforcing the trust. It was held that the executors of the husband were entitled to the policy moneys. The decision can be criticised on the ground that the promisor should not have been held liable to pay the promisee when its promise was one to pay the third party.⁵⁵⁶ But it seems that the destination of the payments was a matter of indifference to the insurance company and that there was nothing to show that the company would (even if there had been no conviction) have been in any way prejudiced by paying the husband's executors rather than the wife.⁵⁵⁷ The actual decision may also turn on the interpretation of the statute creating the trust.⁵⁵⁸

Kinds of promises which can be held on trust

18-087

The trust device has so far been applied only to promises to pay money or to transfer property. It is sometimes suggested that it might be applied to other kinds of promises, e.g. that an employer might hold the benefit of an exemption clause on trust for his employee.⁵⁵⁹ But the present judicial tendency is to confine the trust device within narrow limits⁵⁶⁰; and the suggestion has therefore been rejected on the ground that "the conception of a trust attaching to a benefit under an exclusion clause extends far beyond conventional limits."⁵⁶¹ A number of other techniques have, however, been developed for making the benefit of exemption clauses available to third parties.⁵⁶²

Relation of trust device to doctrine of privity

18-088

It has been argued⁵⁶³ that, where the trust device applied and so conferred rights on a third party, there was before the Judicature Act 1873 a conflict between the rules of equity and those of common law; that, by virtue of that Act, the rules of equity now prevail⁵⁶⁴; and that a third party should now generally be entitled to enforce a contract made for his benefit. But this argument has not been accepted⁵⁶⁵ and the trust device has been judicially described as "an *exception* to the rule of privity of contract."⁵⁶⁶ The exception is of limited, if uncertain, scope and so does not give rise to a direct conflict between common law and equity. Even in equity, a third party could not enforce a contract merely because it was expressed to have been made for his benefit⁵⁶⁷: he had to show, in addition, that a trust had been created in his favour.⁵⁶⁸ The argument that third parties were entitled to enforce contracts made for their benefit has been rejected in many cases since the 1873 Act; and although some of these decisions were based entirely on common law principles,⁵⁶⁹ in others the equitable argument was considered and rejected.⁵⁷⁰

Covenants in marriage settlements

18-089

In equity a covenant to settle after-acquired property contained in a marriage settlement can be enforced by persons "within the marriage consideration," that is, by the parties to, and the issue of,

the marriage. But the covenant confers no rights on mere volunteers such as the next-of-kin of those parties or children by a previous marriage.⁵⁷¹

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1. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.
 513. Corbin, 46 L.Q.R. 12 (1930); *Contracts*, Ch.46; Jaconelli [1998] Conv. 88.
 514. *Tomlinson v Gill* (1756) Amb. 330; cf. *Gregory v Williams* (1817) Mer. 582; *Lloyd's v Harper* (1880) 16 Ch.D. 290; for recognition of the device at common law (allowing B to recover more than he had lost on the ground that he was bound to hold the surplus for C) see *Lamb v Vice* (1840) 6 M. & W. 467; *Robertson v Wait* (1853) 8 Ex. 299; *Prudential Staff Union v Hall* [1947] K.B. 685. For the effectiveness of a direction (not of a contractual nature) to executors in favour of a third party, see *Crowden v Aldridge* [1993] 1 W.L.R. 433. Our concern here is with the situation in which B constitutes himself as trustee ab initio, i.e. at the time of contracting. B may also constitute himself as trustee for C after that time. For the relationship between the latter possibility and an assignment to C by B of contractual rights against A, see *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 1 Lloyd's Rep. 723, below para.19-047.
 515. *Les Affréteurs Réunis SA v Leopold Walford (London) Ltd* [1919] A.C. 801; for the application on similar facts of s.1(2)(b) of the Contracts (Rights of Third Parties) Act 1999 (below, paras 18-093, 18-094) see *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602, [2004] 1 All E.R. (Comm) 481; cf. *Howard Houlder & Partners Ltd v Marine General Transporters (The Panaghia P)* [1983] 2 Lloyd's Rep. 653, 655; *Atlas Shipping Agency (UK) Ltd v Suisse Atlantique Société d'Armement Maritime SA* [1995] 2 Lloyd's Rep. 188. Contrast *Marcan Shipping (London) Ltd v Polish SS. Co (The Manifest Lipkowsky)* [1989] 2 Lloyd's Rep. 138, where an agreement for the sale of a ship provided for deduction of the broker's commission from the price but seems to have contained no promise to pay the broker.
 516. *Swain v Law Society* [1983] 1 A.C. 598, 620; *Feltham* (1982) 98 L.Q.R. 17.
 517. *Fletcher v Fletcher* (1844) 4 Hare 67; *Bowskill v Dawson* [1954] 1 Q.B. 288.
 518. For the purpose of the present discussion, it is assumed that formal requirements, such as that imposed by Law of Property Act 1925, s.53(1)(b), have been satisfied. As to the effect on the rights of third parties of failure to satisfy such requirements, see *Feltham* (1987) Conv. 246.
 519. See *Gandy v Gandy* (1844) 34 Ch.D. 57.
 520. *Re Flavell* (1883) 25 Ch.D. 89; cf. *Page v Cox* (1852) 10 Hare 163; *Re Gordon* [1940] Ch. 851; *Drimmie v Davies* [1899] 1 I.R. 176.
 521. *Re Schebsman* [1944] Ch. 83; cf. *Re Stapleton-Bretherton* [1941] Ch. 482. In *Re Miller's Agreement* [1947] Ch. 615 and *Beswick v Beswick* [1968] A.C. 58 it was conceded that there was no trust.
 522. In *Re Schebsman*, above n.495, the argument that there was a trust was, paradoxically, advanced, not on behalf of the third parties, but on behalf of the promisee's trustee in bankruptcy. The point of the argument was to have the trust set aside under the Bankruptcy Act 1914, s.42 (now superseded by Insolvency Act 1986, s.339): see [1944] Ch. at 86. At 104 the argument is attributed to "Mr. Denning," who appeared for the third parties. But this must be a mistake; the corresponding passage in [1943] 2 All E.R. 768, 779 correctly attributes it to "counsel for the appellant," i.e. for the trustee in bankruptcy. As the company was willing to pay, the outcome of holding that there was *no* trust was that the third parties obtained the intended benefit (cf. above, para.18-075). In *Re Flavell*, above n.494, the same result followed from the

decision that there was a trust.

- [523.](#) *Re Richardson* (1882) 47 L.T. 514; *Royal Exchange Assurance v Hope* [1928] Ch. 179; *Re Webb* [1941] Ch. 225; *Re Foster's Policy* [1966] 1 W.L.R. 222.
- [524.](#) *Re Burgess' Policy* (1915) 113 L.T. 443; *Re Clay's Policy of Assurance* [1937] 2 All E.R. 548; *Re Foster* [1938] 3 All E.R. 357; cf. *Re Engelbach's Estate* [1924] 2 Ch. 248 and *Re Sinclair's Life Policy* [1938] Ch. 799; these two cases were disapproved or doubted on another ground in *Beswick v Beswick* [1968] A.C. 58: see above, para.18-075, n.465.
- [525.](#) For statutory exceptions to the doctrine of privity in cases of insurance, see below, paras 18-131 to 18-136.
- [526.](#) *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E. & B. 870; *Williams v Baltic Insurance Co* [1924] 2 K.B. 282; below, para.18-132; *Prudential Staff Union v Hall* [1947] K.B. 685; cf. Deane J. in *Trident General Ins. Co Ltd v McNiece Bros Pty Ltd* (1988) 165 C.L.R. 107 (above, para.18-022).
- [527.](#) *Vandepitte v Preferred Accident Insurance Corp.* [1933] A.C. 70; *Green v Russell* [1959] 2 Q.B. 226.
- [528.](#) See *Hill v Gomme* (1839) 5 My. & Cr. 250; *Page v Cox* (1852) 10 Hare 163.
- [529.](#) *Re Schebsman* [1944] Ch. 83, 104; *Re Sinclair's Life Policy* [1938] Ch. 799.
- [530.](#) In *Talbot Underwriting Ltd v Nausch Hogan & Murray Inc (The Jascon 5)* [2006] EWCA Civ 869, [2006] 2 Lloyd's Rep 195, it had been held that there could be no trust of a promise in favour of a third party if the contract did not contain any promise in favour of that party ([2005] EWHC 2395 at [70]–[71]). There is no reference to this unusually stringent requirement in the Court of Appeal.
- [531.](#) *West v Houghton* (1879) 4 C.P.D. 197; criticised in *Re Flavell* (1883) 25 Ch.D. 89, 98 and in *Lloyd's v Harper* (1880) 16 Ch.D. 290, 311.
- [532.](#) e.g. *Vandepitte v Preferred Accident Insurance Corp.* [1933] A.C. 70, where one relevant factor was that the insured was under the law governing the policy himself liable for the torts of the third party; contrast *Williams v Baltic Insurance* [1924] 2 K.B. 282. For the statutory position in such motor insurance cases, see below para.18-132.
- [533.](#) *Lyus v Prowsa Development Ltd* [1982] 1 W.L.R. 1044, as to which see below, para.18-141, n.790.
- [534.](#) For exceptions, see below at nn.510-513. For an earlier, contrary view, see below, n.509.
- [535.](#) *Re Sinclair's Life Policy* [1938] Ch. 799 (criticised on another ground in *Beswick v Beswick* [1968] A.C. 58, 96); and cf. *Re Schebsman* [1944] Ch. 83; some earlier authorities did not insist on this requirement: see *Hill v Gomme* (1839) 5 My. & Cr. 250; *Page v Cox* (1852) 10 Hare 163. A provision of the kind here under discussion would not fall within Contracts (Rights of Third Parties) Act 1999, s.2, since this applies only to rescission or variation *by agreement* between promisor and promisee: see below, paras 18-103, 18-104.
- [536.](#) *Re Foster's Policy* [1966] 1 W.L.R. 222.
- [537.](#) *Re Webb* [1941] Ch. 225.
- [538.](#) See below, para.18-131.
- [539.](#) *Re a Policy of the Equitable Life Assurance of the United States and Mitchell* (1911) 27 T.L.R. 213; *Re Fleetwood's Policy* [1926] 1 Ch. 48.

- [540.](#) e.g. *Re Burgess' Policy* (1915) 113 L.J. 43 (policy to become void if insured went "beyond the boundaries of Europe" without previously notifying insurers).
- [541.](#) e.g. *Re Schebsman* [1944] 83, 104 (parties "intended to keep alive their common law right consensually to vary the terms of the obligation"). The mere existence of such a right does not negative the statutory right of enforcement which third parties have under the Contracts (Rights of Third Parties) Act 1999: this is clear from s.2 of the Act (below, para.18-103).
- [542.](#) See *Richards v Delbridge* (1874) L.R. 18 Eq. 11; *Swain v Law Society* [1983] 1 A.C. 598, 620.
- [543.](#) *Re Clay's Policy of Assurance* [1937] 2 All E.R. 548; *Re Foster* [1938] 3 All E.R. 357; *Re Stapleton-Bretherton* [1941] Ch. 482; *Green v Russell* [1959] 1 Q.B. 28; *Re Cook's Settlement Trusts* [1965] Ch. 902. Under the Contracts (Rights of Third Parties) Act 1999, s.1(1)(b) and (2) it will suffice for the term to purport to confer a benefit on the third party, so long as it is not shown that the contracting parties did not intend the term to be enforceable by the third party. For the reasons given in para.18-002 above and para.18-121 below, however, it may be in the third party's interest to establish an intention to create a trust, so that he can rely on the trust exception rather than on the 1999 Act.
- [544.](#) See *Re Independent Air Travel Ltd*, *The Times*, May 20, 1961, where counsel, with the approval of the court, conceded this point.
- [545.](#) *Harmer v Armstrong* [1934] Ch. 65.
- [546.](#) *Swain v Law Society* [1983] 1 A.C. 598, esp. at 621.
- [547.](#) But where a trustee engages a professional adviser for the purpose of administering the trust, a claim for negligence against that adviser cannot be brought by the beneficiary since such a claim is not part of the trust property (though any damages recovered by the trustee would be): *Bradstock Trustee Services Ltd v Nabarro Nathanson* [1995] 1 W.L.R. 1405.
- [548.](#) cf. *Performing Right Society Ltd v London Theatre of Varieties* [1924] A.C. 1; *Howard Houlder & Partners v Marine General Transporters Co (The Panaghia P)* [1983] 2 Lloyd's Rep. 653, 655; *Atlas Shipping Agency (UK) Ltd v Suisse Atlantique Société d'Armement Maritime SA* [1995] 2 Lloyd's Rep. 188, 193; *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 1 Lloyd's Rep. 495 at [102].
- [549.](#) As in *Les Affréteurs Réunis v Leopold Walford (London) Ltd* [1919] A.C. 801; cf. *William Brandt's Sons & Co v Dunlop Rubber Co* [1905] A.C. 454.
- [550.](#) i.e. subject to the exceptions stated in para.18-086, below.
- [551.](#) *Re Flavell* (1883) 25 Ch.D. 89; *Re Gordon* [1940] Ch. 851; cf. *Paul v Constance* [1977] 1 W.L.R. 527.
- [552.](#) [1968] A.C. 58; above, para.18-022.
- [553.](#) Above, para.18-075.
- [554.](#) [1892] 1 Q.B. 147.
- [555.](#) Married Women's Property Act 1882, s.11; below, para.18-131.
- [556.](#) Ames, *Lectures*, 320; *Coulls v Bagot's Executor & Trustee Co Ltd* [1967] A.L.R. 385, 410–411, per Windeyer J. (dissenting); above para.18-048.
- [557.](#) cf. above, para.18-075.
- [558.](#) See [1892] 1 Q.B. 147, 157.

- [559.](#) See the Himalaya clause in *New Zealand Shipping Co Ltd v A. M. Satterthwaite & Co Ltd (The Eurymedon)* [1975] A.C. 154; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd (The New York Star)* [1980] 1 W.L.R. 138, above, para.15-051.
- [560.](#) Above, para.18-081.
- [561.](#) *Southern Water Authority v Carey* [1985] 2 All E.R. 1077, 1083.
- [562.](#) Above, paras 15-042 to 15-052.
- [563.](#) *Drimmie v Davies* [1899] 1 I.R. 176, 182; *Corbin* (1930) 46 L.Q.R. 12, 36; cf. Langbein, 105 Yale L.J. 625, 646–647 (1997).
- [564.](#) Judicature Act 1873, s.25(11); now Senior Courts Act 1981, s.49(1).
- [565.](#) *Re Schebsman* [1943] 1 Ch. at 370; approved [1944] Ch. at 104.
- [566.](#) *Barbados Trust Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 1 Lloyd's Rep. 495 at [99], per Rix L.J. (italics supplied).
- [567.](#) Above, para.18-084.
- [568.](#) *Colyear v Mulgrave* (1836) 2 Keen 81. The actual decision has been criticised but without impairing the principle stated in the text above: see *Page v Cox* (1852) 10 Hare 163; *Kekewich v Manning* (1851) 1 D.M. & G. 176.
- [569.](#) e.g., *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847.
- [570.](#) *Re Burgess' Policy* (1915) 113 L.T. 443; *Re Clay's Policy of Assurance* [1937] 2 All E.R. 548; *Re Sinclair's Life Policy* [1938] Ch. 799; *Re Schebsman* [1944] Ch. 83; *Green v Russell* [1959] Q.B. 28.
- [571.](#) *Hill v Gomme* (1839) 5 My. & Cr. 250, 254; *Re D'Angibau* (1880) 15 Ch.D. 228; *Green v Patterson* (1886) 32 Ch.D. 95, 107; *Re Plumptree's Marriage Settlement* [1910] 1 Ch. 609; *Re Cook's Settlement Trust* [1965] Ch. 902. These cases, apart from forming an exception to the doctrine of privity, are also hard to reconcile with the modern definition of consideration: cf. above, para.4-033; the statement in *Hill v Gomme*, above, that the children were “quasi-parties” is curiously reminiscent of the reasoning of *Dutton v Poole*, cited in para.18-021, above.

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Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 6 - Joint Obligations, Third Parties and Assignment
Chapter 18 - Third Parties ¹
Section 4. - Contracts for the Benefit of Third Parties
(b) - Exceptions to the Doctrine
(ii) - Contracts (Rights of Third Parties) Act 1999 ⁵⁷²

Third party's right of enforcement

18-090

"A general and wide-ranging exception to" the doctrine of privity is created by this Act, the central purpose of which ⁵⁷³ is to enable a third party to acquire rights under a contract if, and to the extent that, the parties to the contract so intend. Section 1(1) provides that a person who is not a party to the contract may in his own right enforce a term of the contract in the two situations to be described in paras 18-091 to 18-095 below. In discussing these situations and other provisions of the Act, it will be convenient to refer to the person who makes the promise which the third party is claiming to enforce (the promisor) as A, to the person to whom that promise is made (the promisee) as B ⁵⁷⁴ and to the third party as C.

Express provision

18-091

❗ Under s.1(1)(a) of the 1999 Act, C can enforce a term of the contract if "the contract expressly provides that he may": e.g. where a contract contains a promise by A to B to pay £1,000 to C and goes on to provide that C is to be entitled to enforce the term which contains this promise. If the contract contains such a provision, there is no further requirement (as there is under s.1(1)(b), to be discussed in paras 18-093 and 18-095 below) that the promise must have been made for C's own benefit: C can, for example, enforce the term even though the payment is to be made to him as trustee for D. ⁵⁷⁵ Express contractual provisions of the kind just described, to the effect that C is to be entitled to enforce the term containing the promise made by A to B, were, before the 1999 Act, rare, presumably because under the doctrine of privity they would at common law have been ineffective. The 1999 Act provides a new drafting device to enable the contracting parties to give effect to their intention that C is to acquire an enforceable right against A. Apart from the Act, a similar result can be achieved by creating a trust of A's promise in favour of C ⁵⁷⁶ or by making C a co-promisee with B. ⁵⁷⁷ There is a procedural advantage in making use of the machinery of s.1(1)(a) in that, if C sues under this provision, he will not (it seems) need to join B as a party to the action ⁵⁷⁸; though the court could order B to be so joined where claims against A were made by both B and C, or where A relied against C on a defence available to A against B, ⁵⁷⁹ since in such a case B's presence before the court is likely to be "desirable ... so that the court can resolve all the matters in dispute in the proceedings." ⁵⁸⁰

❗ If C does have a claim apart from the Act as the beneficiary of a trust of A's promise or as co-promisee, it may, in spite of the need to join B to the action, be in C's interest to pursue that claim since it would not be subject to other provisions of the Act which may restrict C's rights under it: e.g. to those relating to the rescission or variation of the contract between A and B, or to defences available to A against B. ⁵⁸¹

18-092

Section 1(1)(a) is also likely to apply to terms such as Himalaya clauses, ⁵⁸² contained in a contract between A and B by which A promises B that any exemptions from or limitations of liability available under that contract to B shall also be available for the benefit of C, who typically will be an employee, agent or subcontractor employed by B for the purpose of performing some or all of B's obligations under the contract. This follows from s.1(6) of the 1999 Act, by which references to C's "enforcing" a term which "excludes or limits liability" ⁵⁸³ are to be "construed as references to his availing himself of the exclusion or limitation." Words in the contract to the effect that C is to be protected by the exemption or limitation clause therefore amount in themselves to an express provision that C may enforce the clause ⁵⁸⁴; no further words will be necessary. C's protection under the Act will, however, be based on a theory different from that which accounts for the effectiveness of Himalaya clauses at common law. The common law theory is that such clauses, and the conduct of the relevant parties, can give rise to a separate or collateral contract between A and C. ⁵⁸⁵ Under the Act, by contrast, C enforces a term of a contract to which he is *not* a party. ⁵⁸⁶ It follows that the agency requirements imposed at common law for the "enforceability" of such clauses ⁵⁸⁷ are irrelevant for the purpose of the Act. On the other hand, under the Act C's right to "enforce" a Himalaya clause is subject to the provisions of the Act ⁵⁸⁸ while at common law the operation of such a clause is subject only to common law restrictions, and if C wishes to rely on his common law rights, in preference to those under the Act, it is open to him to do so. ⁵⁸⁹ For these (among other) ⁵⁹⁰ reasons, what may be called the old law relating to Himalaya clauses retains a considerable degree of practical importance, so that it would not be safe to rely exclusively on the simpler forms of words that can protect third parties under the 1999 Act.

Term purporting to confer benefit on third party

18-093

⚠ Under subs.1(1)(b) of the 1999 Act, C may enforce a term of the contract if "the term purports to confer a benefit on him" ⁵⁹¹ ⚠; but his right to do so in such a case is subject to s.1(2), by which C has no such right "if on a proper construction of the contract it appears that [A and B] did not intend the term to be enforceable by" C. ⁵⁹² ⚠ These will probably be the most significant provisions of the 1999 Act and their interpretation is likely to give rise to a number of difficulties. It seems that a "benefit" within s.1(1)(b) can include any performance due under the contract between A and B: thus it can include a payment of money, a transfer of property, or the rendering of a service; it can also (by virtue of s.1(6)) include the benefit of an exemption or limitation clause. The requirement that the term must "purport" to confer a benefit on C has been held to mean that it must have "the effect of conferring a benefit" ⁵⁹³ on him. If that is the position, there is no further requirement that benefiting the third party must be "the predominant purpose or intent behind the term." ⁵⁹⁴ But it is submitted that it must be a purpose of the parties, so that it would not suffice for C to show merely that he would happen to benefit from the performance of the term where A and B had no intention at all to confer that benefit on him. ⁵⁹⁵ The question whether A and B had any such intention would be one of construction. ⁵⁹⁶ ⚠ If, for example, A were employed by B "to cut my hedge adjoining C's land", performance by A might benefit C, but the term would not "purport to confer a benefit" on C. The question of construction could be particularly hard to answer where A was a subcontractor employed by B to render services in relation to property owned by C. ⁵⁹⁷ Assuming that the *term* does purport to confer a benefit on C, it is then necessary to construe the *contract* as a whole to determine the nature and extent of C's right to enforce the term. This follows from s.1(4), under which "this section does not confer a right on [C] to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract." This provision would, for example, apply if the term which C was seeking to enforce provided for the payment to him of £1,000, but another term of the contract provided that claims under the former term must be made within one year or that the claim must be made by arbitration (and not by litigation). On the other hand, it has been held that s.1(4) did not enable C to enforce an "adjudication" clause in the contract between A and B. ⁵⁹⁸ It was said that the "relevant rights" which C sought to enforce did not "engage the conditions within section 1(4) of the 1999 Act", though s.1(4) "would be engaged if there were an arbitration clause", ⁵⁹⁹ the reason for this distinction being that "[a]djudication, unlike arbitration, is not a mandatory alternative way in which a

party has to enforce its rights. Adjudication is a voluntary method of dispute resolution in the sense that a party may, but is not obliged to, have a dispute temporarily resolved ...".⁶⁰⁰ This reasoning gives rise to the problem that, while the phrase "conditions within section 1(4)" appears to reflect the Explanatory notes to the 1999 Act,⁶⁰¹ s.1(4) itself does not use the word "conditions": it uses the less restrictive phrase "any other relevant term of the contract"; and while it may, with respect, be accepted that an adjudication clause does not, like an arbitration clause, impose a restrictive condition on the enforceability by C of rights under the contract, it is less clear why a clause of the former kind is not one of the "relevant terms of the contract"⁶⁰² within s.1(4).

18-094

Yet a further and different question of construction arises (with regard to the intention of A and B) under s.1(2) (quoted above⁶⁰³) and it appears from the wording of this subsection that the burden of proof under it rests on A,⁶⁰⁴ or (in other words) that, if the term purports to confer a benefit on C, then there is a rebuttable presumption that the term is intended by A and B to be enforceable by C.⁶⁰⁵ To rebut the presumption, A must (in the words of s.1(2)) show that "the parties" did not intend the term to be enforceable by C. Thus it is not enough for A to show that he did not so intend; he must show that neither he nor B had this intention. Nor is the presumption rebutted merely because in the contract A and B had reserved the right to rescind or vary the contract: this follows from the provisions with regard to such rescission or variation made in s.2 of the Act and discussed in paras 18-103 to 18-111 below. As the question of intention put in s.1(2) is there described as one of "construction", it seems that the evidence which A will be allowed to adduce for this purpose will, in general, be limited by the rules which restrict the types of evidence admissible on other questions of construction.⁶⁰⁶ It follows from the structure of s.1 that the mere absence from the contract of any express statement that C is to have the right to enforce the term is not a bar to his entitlement under the section to do so⁶⁰⁷; but that effect will be given to an express contractual provision that C is not to have any such rights. It appears to be not uncommon for contracts to contain such express provisions.

18-095

The operation of ss.1(1)(b) and (2) of the 1992 Act is illustrated by *The Laemthong Glory*⁶⁰⁸ where, because the bill of lading relating to goods which had been carried in a chartered ship had not reached the prospective receiver (A) by the time of the ship's arrival at the contractual destination, the goods were delivered to A against a letter of indemnity (LOI) issued by A to the charterer (B) and amounting to a contract between A and B. The LOI contained a promise by A to indemnify "you [B] your servants or agents" in respect of liability which might be incurred by reason of delivery of the goods at A's request without production of the bill of lading. It was held that this promise on its true construction purported to confer a benefit on the shipowner (C) within s.1(1)(b) of the 1999 Act as C had acted as one of B's "agents" within the meaning of the LOI in delivering the goods to A, and that, by virtue of that Act, the promise was enforceable by C against A. A had not discharged the burden imposed on him by s.1(2) of proving that the LOI was not intended by A and B to be enforceable by C. Similar reasoning accounts for the outcome in *Far East Chartering Ltd v Binani Cement Ltd (The Jag Ravi)*⁶⁰⁹ where the LOI was addressed by the prospective receivers of the goods (A) to "The Owners/Disponent Owners/Charterers" of the carrying ship. The LOI was held to be "capable of acceptance by the charterers"⁶¹⁰ (B) and to have given rise to a contract between A and B; and it was further held that C, the owners of the carrying ship, who had made the goods available to A without production of the bill of lading and had so incurred a liability covered by the LOI, could enforce the LOI against A by virtue of the Contracts (Rights of Third Parties) Act 1999.⁶¹¹ The judgment does not make it clear either exactly how the offer contained in the LOI had been accepted by B (as opposed to being "capable of acceptance" by them); or why that offer had not been accepted by C when they did the acts (referred to above) which had given rise to their liability.⁶¹² The point to be stressed here is that C's right of enforcement under the 1999 Act can only have arisen on the assumption that C were not parties to the LOI contract between A and B.⁶¹³ By way of contrast to these cases, the operation of ss.1(1)(b) and 1(2) of the Contracts (Rights of Third Parties) Act 1999 is further illustrated by *Dolphin Maritime and Aviation Services Ltd v Sveriges Angfartygs Forening*.⁶¹⁴ In that case, cargo underwriters (B), having settled a cargo owner's claim against the carriers in respect of loss of goods at sea, and so become subrogated to the cargo owner's claim, employed recovery agents (C) to pursue that claim against the carriers. The carriers' P & I Club (A) issued a Letter of Undertaking addressed to B and the cargo owners by which they undertook to pay to C "on your [i.e., B's] behalf or to any solicitor you may appoint" any sums that might become due under a final judgment or by an

agreement with the carriers in respect of the loss. It was held that this term was not enforceable by C under the 1999 Act since the provision for payment to C was merely one as to the means or mode by which the payment due from A to B was to be made and so did not (within s.1(1)(b)) purport to confer a benefit on C.⁶¹⁵ It made no difference that the contract between B and C allowed C to deduct its commission from any recovery.⁶¹⁶ Alternatively, A and B did not intend the term to be enforceable by C, so that C's claim to enforce the term failed by virtue of s.1(2). The reason for this conclusion was, again, that the term related only to the mode of A's discharge of A's obligation to B. The case was "in the same category as that of A who agrees to pay B at B's bankers, C."⁶¹⁷

Application to previous decisions?

18-096

It is tempting to speculate how the provisions discussed in paras 18-091 to 18-095 above would apply to some of the leading cases in which the doctrine of privity was applied before the 1999 Act. To some extent, indeed, such an exercise is likely to be fruitless since the courts have not in the past directed their attention to the issues which will arise under the Act. In *Beswick v Beswick*,⁶¹⁸ for example, the contract no doubt purported to confer a benefit on C; but no finding of fact was made (because such a finding would have been irrelevant to the outcome) as to the intention of A and B on the issue of legal enforceability by C: it is conceivable that A could now succeed on this issue if, for example, he could show that A and B had, when the contract was made, instructed the solicitor who drafted it to do so in such a way as *not* to confer legally enforceable rights on C.⁶¹⁹ On the facts (if they now recurred), of a number of other cases, the position under the 1999 Act would, it is submitted be clearer. Thus in the "disappointed beneficiary" cases such as *White v Jones*⁶²⁰ C would not get a right under the Act against A, the negligent solicitor, since the terms of the solicitor's retainer (even if they identified C⁶²¹) would not purport to confer a benefit on C: the intended benefit was to come, not from A, but from B.⁶²² It is similarly unlikely that cases such as the *Junior Books* case,⁶²³ in which A is a subcontractor employed by B to enable B to perform his contract with C, would be covered, even if the subcontract named C, since the purpose of such a subcontract would, *prima facie*, be to regulate the relations between A and B rather than to confer a benefit on C.⁶²⁴ Cases such as the *Linden Garden* case⁶²⁵ would likewise not be affected by s.1 since the mere possibility that land on which work is done by a building contractor (A) might be transferred to purchasers (C) from the owners (B) would not be sufficient to show that the term relating to the quality of the work purported to "confer a benefit" on such purchasers; nor would the contract, without more, adequately "identify" ⁶²⁶ such purchasers as third parties for the purpose of s.1(1). Nor, in circumstances such as those of the *Panatown* case,⁶²⁷ would the mere fact that the building contractor (A) knew that the property on which he was working in pursuance of his contract with B belonged to someone other than B ⁶²⁸ suffice to show that the benefit was to be conferred on that other person (C): the answer to the question whether the work was being done for the benefit of C or B would depend on the contractual relations between B and C, of the details of which A might be wholly unaware. In the "family holiday" cases discussed in paras 18-051 to 18-052 above, the outcome under the Act would depend on the nature of the transaction. If the person making the booking supplied the names of other members of the family when the contract was made, those other members would probably acquire rights under s.1(1); but no such rights are likely to be acquired if a person simply rented a holiday cottage without giving the lessor any information as to the number or names of the persons with whom he proposed to share the accommodation. In many of the situations which have here been discussed, the question whether the contract purports to confer a benefit on C will be closely related to the question, to be discussed in paras 18-097 and 18-098 below, whether C is adequately "identified" in the contract between A and B.

Third party to be "expressly" identified

18-097

❗ Under s.1(3) of the 1999 Act, it is a requirement of C's right to enforce A's promise that C must have been "expressly identified in the contract [between A and B] by name, as a member of a class or as answering a particular description"⁶²⁹; and it follows from this requirement that C could not rely, for the purpose of s.1(1), on the argument that the contract referred to him by implication,⁶³⁰ though the

question whether the third party is “expressly” identified may itself raise a question of construction. If, for example, the contracting parties had adopted a “private dictionary”⁶³¹ by which all references in their contract to “Jack” were to mean “Jack and Jill” then a term conferring a benefit on “Jack” would (at least probably) amount to an “express” identification of Jill, no less than of Jack. In the absence of such special circumstances, the question whether the naming of one person as a party can also be construed as an “express” reference to another person or persons can give rise to more difficulty. The point is illustrated by *The Alexandros T*,⁶³² where an agreement between named insurers (A) and the owners of a ship which had sunk (B) provided for the settlement of all claims by B against the

“Underwriters”.⁶³³ This word was “construed an encompassing the servants or agents of insurers”⁶³⁴ so as to satisfy, with regard to these persons, the requirements of s.1(1)(b) and s.1(2) of the 1999 Act.⁶³⁵ It was further held (though with some hesitation⁶³⁶) that the servants or agents (C) were “expressly” identified within s.1(3) as “a class of third party intended to have a benefit conferred upon them by the settlement agreements,”⁶³⁷ so that they were, by virtue of s.1(1), entitled to enforce terms of the agreement⁶³⁸ between A and B by which claims against the “underwriters” had been “fully and finally settled.” A similar problem of the identification of third party beneficiaries had arisen in the

Canadian case of *London Drugs Ltd v Kuehne & Nagel International Ltd*⁶³⁹ where the claimants had delivered valuable machinery to a warehousing company under a contract which limited the liability of “the warehouseman” to \$40 per package. A majority of the Supreme Court of Canada held that the employees of the warehousing contractor were protected by this limitation of liability as “third party beneficiaries”⁶⁴⁰ under a new (though restricted) exception to the doctrine of privity.⁶⁴¹ The question whether such an exception would be recognised in England remains, at the level of the Supreme Court, an open one; but the point of interest here is how the majority in the Supreme Court of Canada identified the employees as third party beneficiaries who were entitled to the benefit of the exception. The process of identification seems to have been one of implication: this appears from the statements that “the intention to extend the benefit of the ... clause to employees may be express or implied”⁶⁴² and that although the employees were not “express third party beneficiaries”⁶⁴³ this fact did “not preclude a finding that they are implied third party beneficiaries.”⁶⁴⁴ It is clear from this reasoning that the employees were not expressly identified as third party beneficiaries, but that they were impliedly so identified; and if that reasoning were now followed in an English case arising from similar circumstances, then the question whether the employees had been “expressly” identified for the purpose of s.1(3) of the 1999 Act would have to be answered in the negative. That question does not, moreover, differ materially from the question whether, in *The Alexandros T* the servants or agents of the underwriters had, for the same purpose, been “expressly” identified by the word “underwriters”; and it is a matter of regret that, in *The Alexandros T*, the attention of Flaux J. was not drawn to the reasoning of the *London Drugs* case on the point here under discussion. Indeed, something resembling that reasoning appears to have been in Flaux J’s mind when he said that his “initial reaction” was that the mere use of the word “underwriters” was “not sufficient for express identification”:⁶⁴⁵ but his ultimate conclusion was that because that word “encompass[ed] servants or agents” it “expressly identifies a class of persons intended to have a benefit conferred on them by the settlement agreements.”⁶⁴⁶ This language seems to refer back to an earlier part of the judgment in which it was held that “the requirements of section 1(1)(b) and (2)⁶⁴⁷ are satisfied.”⁶⁴⁸ It is, however, with great respect, submitted that the learned judge’s “initial reaction” is more consistent than his ultimate conclusion with the language and structure of s.1 of the 1999 Act. In particular, s.1(1)(b) (intention to benefit the third party) and s.1(3) (express identification) are separate and cumulative requirements,⁶⁴⁹ so that reasoning which satisfies the first of these requirements cannot, of itself, satisfy the second.

18-098

Although it is a *necessary* condition for the creation of C’s rights under s.1(1) that he must be expressly identified in the contract between A and B, such identification is not a *sufficient* condition for this purpose, since a contract which identifies C does not necessarily purport to confer a benefit on him. If, for example, a portrait painter (A) were commissioned by a college (B) to paint a portrait of the head of the college (C) for display on its premises, the contract would not purport to confer a benefit on C, nor would A and B intend the contract to be enforceable by C. It would seem that C must be identified in such a way as to indicate that A and B intended to confer rights on C: thus the identification requirement would be satisfied where A promised B not to sue C for negligence but not where A promised B not to sue B for C’s negligence.⁶⁵⁰ The requirements of s.1(3) are, in other words, *additional* to those of s.1(2). Their operation may be illustrated by reference to the *Midland Silicones* case⁶⁵¹: on the facts of that case, C would not be able to enforce the limitation clause since

the contract between A and B contained no express reference to C (whether by name, by description or as a member of a class). In these circumstances, neither subsection would be satisfied: C would not be identified and this very fact would indicate that the contract did not purport to confer a benefit on him. Where a contract is (as it was in the *Midland Silicones* case) contained in or evidenced by a bill of lading, it is now likely to contain a Himalaya clause, which would be likely adequately to identify C within s.1(3) and also to satisfy the requirements of s.1(2), with the result that C would be entitled to “enforce”⁶⁵² the limitation clause. The question whether C is identified in such a way as to give him an enforceable right may itself raise a question of construction: e.g. where the words of the term are adequate to identify C but the term does not purport (or A and B do not intend) to confer a benefit on him.⁶⁵³

Third party not yet in existence

18-099

So long as C is identified in accordance with the requirements of s.1(3), there is no need for C to be in existence when the contract between A and B was made⁶⁵⁴: for example, a promise in favour of an unborn child, of a future spouse or of an unformed company could be enforced by⁶⁵⁵ such a third party when that person or entity came into existence.⁶⁵⁶

Remedies

18-100

Where C has a right to enforce a term of the contract by virtue of s.1(1) of the 1999 Act, he has this right in spite of the fact that he is not a party to the contract: the Act does not, in general, adopt the technique of transferring rights from B to C or of treating C as having acquired rights by means of the fiction that he has become a party to the contract.⁶⁵⁷ It does, however, make use of such a fiction so far as C's remedies are concerned.⁶⁵⁸ Section 1(5) provides that “For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of the contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).” It follows from this provision that C can invoke the same kinds of judicial remedies as would be available to B if no third party were involved, and that C can recover damages for loss of bargain (or “expectation” loss) even though the bargain was made, not with him, but with B. It also follows that the same principles which would limit B's remedies in a twoparty case also apply to an action brought by C: for example, the principles of remoteness and mitigation and those which restrict the availability of specific relief.⁶⁵⁹ The application of these principles may, however, lead to different practical results where the action is brought by C from those which would follow from them in an action brought by B. For example, in an action brought by C, the test of remoteness would be whether it was C's (not B's) loss which A ought reasonably have contemplated; the principles of mitigation would require the court to ask what steps C (not B) ought reasonably have taken to mitigate his loss; and the question whether specific relief should be refused on account of the conduct of the claimant could receive one answer where the action was brought by C and another if it were brought by B.

Arbitration provisions

18-101

The contract containing the term which C seeks to enforce against A may, in addition to that term, contain an arbitration clause amounting to a written arbitration agreement within the Arbitration Act 1996.⁶⁶⁰ The 1999 Act provides that, if C seeks to enforce the former term against A, then C is to be treated as a party to the arbitration agreement.⁶⁶¹ It follows that, if C attempted to enforce that term⁶⁶² by action, A could obtain a stay of that action under the 1996 Act and so secure compliance by C with the arbitration agreement.⁶⁶³ A contract between A and B may also provide that C is to be entitled to submit to arbitration some dispute between himself and A *other* than one concerning the enforcement by C against A of one of the other terms of that contract. Such an arbitration provision cannot compel

C to resort to arbitration of (for example) a tort claim between himself and A. But if the provision is a term which C is entitled to enforce under s.1 of the 1999 Act and is also a written arbitration agreement within the Arbitration Act 1996 and C chooses to submit the dispute with A to arbitration, then C is treated for the purpose of the 1996 Act as a party to the arbitration agreement so that the arbitration proceedings will be governed by the Act.

No requirement of consideration moving from third party

18-102

The 1999 Act does not impose any requirement that consideration for A's promise must move from C. It does not expressly provide that there is no such requirement⁶⁶⁴; the consequence follows from the fact that the Act gives C the right to enforce the term in question and is further supported by the general principle that C is not to be treated as a party to the contract between A and B.⁶⁶⁵ Since the promise in contracts of the kind in question is made to B, the fact that C need not provide any consideration for it is not strictly an exception to the rule that consideration must move *from the promisee*, but it can be regarded as a quasi exception to that rule in the sense that C is a person in whose favour a promise is made and who can enforce it even though he may be no more than a gratuitous beneficiary.

Right to rescind or vary the contract by agreement

18-103

Under the judge-made rules relating to contracts for the benefit of third parties, one objection to the creation of such rights has been that it would deprive the contracting parties of their right to rescind or vary the contract by mutual consent.⁶⁶⁶ The 1999 Act deals with this problem by means of a compromise: it specifies the circumstances in which A and B, *prima facie*, lose this right, while it at the same time enables them so to draw up their contract as to retain the right or to change the *prima facie* rules laid down in the Act which specify when that right is lost.

General rule: C's consent required

18-104

The general rule, stated in s.2(1) of the 1999 Act, is that, once C has acquired the right to enforce a term of the contract between A and B "under section 1", then, if one of the circumstances to be described in para.18-105 and 18-106 below has arisen, A and B may not, without C's consent, by agreement rescind or vary the contract so as to "extinguish or alter" C's "entitlement under that right". Rescission calls for no further comment here; but with regard to variation it should be noted that A and B are, under the general rule in s.2(1), precluded from varying the contract not only so as to extinguish but also so as to alter C's rights. An alteration may of course operate, not only to C's prejudice, but also to his advantage: e.g. where it purports to increase payments to be made to C under the term in question. Such a variation is unlikely to give rise to any problems between A and C, since C will presumably consent to it as soon as he hears of it. But the argument that C is entitled to enforce a term of a contract between A and B can also give rise to problems between one of these parties and outside interests: e.g. creditors of B in the event of B's insolvency.⁶⁶⁷ Such persons may seek to invoke s.2(1) where the variation increases C's rights but where, on the crucial date for the assertion of their rights, C has either not yet acquired any knowledge of the variation or has not yet made any communication to A or done any other act from which his assent to the variation⁶⁶⁸ can be inferred.

Third party's assent to the term

18-105

The first of the circumstances (referred to in para.18-104 above) in which A and B may not, without C's consent, agree to rescind the contract, or to vary it in the ways described in para.18-104 above arises where C has communicated his assent to the term to A ⁶⁶⁹; communication to B does not suffice for this purpose. ⁶⁷⁰ The assent may be by words or conduct ⁶⁷¹; and if it is "sent" to A by post or other means, it is not regarded as communicated to him "until received by him." ⁶⁷² In other words, the "posting" rule, as developed in cases of contract formation ⁶⁷³ does not apply in the present context. "Sent" here seems to refer to some act done by C in order to communicate words of assent to A. The rule relating to an assent "sent" to A by post or other means is negative in nature: it states that the assent is not communicated to A until received by him. It thus leaves open the question whether an assent which has been so sent can take effect before it has actually come to A's notice: e.g. where it has been delivered to his address but not yet been read by him. If the overriding requirement is one of communication, it may not be satisfied in such a case. The expression "sent" also does not seem to be appropriate to refer to an assent by conduct; but it seems that such an assent must come to A's notice: this seems to follow from the general requirement that C's assent must be "communicated" ⁶⁷⁴ to A. No formality (such as writing) is required even for an assent in words, ⁶⁷⁵ so that an oral communication suffices.

Third party's reliance

18-106

The right of A and B to rescind or vary the contract by agreement is also barred where A is aware of C's having relied on the term, ⁶⁷⁶ or where A could reasonably have foreseen such reliance and it has actually taken place. ⁶⁷⁷ It would seem that, in such cases, C may be entitled, not merely to the promised performance or its value in respect of his expectation loss, but also to damages in respect of his reliance loss: e.g. where he has travelled to the place specified in the contract for the receipt by him of the promised performance. This follows from the rule laid down by the 1999 Act with respect to C's remedies ⁶⁷⁸; it also follows from this rule that C could not claim under both heads to the extent to which such a combination of claims would result in double recovery or in his being placed in a better position than that in which he would have been if A had performed his promise in accordance with its original terms. ⁶⁷⁹

Consequences of attempted rescission or variation without C's consent

18-107

The general rule stated in s.2(1) is that A and B "may not" by agreement rescind the contract, or vary it in the ways described in para.18-104 above, without C's consent. The most obvious consequence of this provision is that a purported rescission or variation without C's consent is simply *ineffective*, so that C can, in spite of it, enforce the term in question *against* A. But such enforcement may, because of the rescission, become a practical impossibility (e.g. because A has in consequence of the rescission put it out of his power to perform); and it is arguable that the purported rescission is also *wrongful*, so as to give C a remedy in damages *against* B, perhaps on the analogy of liability in tort for causing loss by unlawful means. ⁶⁸⁰ This possibility could have practical significance in the event of A's insolvency.

Contract conferring choices on promisee

18-108

Section 2(1) of the 1999 Act deals with the situation in which C has become entitled to enforce a term of the contract "under section 1" and A and B then attempt by agreement to rescind or vary the contract. This situation must be distinguished from that in which A promises B to perform in favour of C *or as B shall direct*. If, in such a case, B directs A to perform in favour of D (or of B himself) the contract is not varied. On the contrary, it is to be performed in accordance with its original terms, under which B has a choice as to the person to whom performance is to be rendered. The case therefore does not fall within s.2(1), so that the requirement of C's consent, as there stated, does not

apply. ⁶⁸¹ Another way of explaining this conclusion is to say that, in the case put, the mere making of the promise was not intended to confer an indefeasible right on C; for the fact that the contract gave B the power to divert the benefit away from C would indicate that A and B did not, when the contract between them was made, intend ⁶⁸² the term to be enforceable by C if B exercised the power. A term of the present kind might, however, also *limit* B's power to divert the benefit away from C: e.g. by providing that the power was to be exercisable only for a specified period. After the end of that period, C could no longer be deprived of the benefit of A's promise by the unilateral act of B since the consent of A and B would then as a matter of common law be necessary to vary the contract; and any such variation would then be subject to the requirement of C's consent under s.2(1).

Contrary provision in the contract

18-109

The general requirement of C's consent to a rescission or variation of the contract, contained in s.2(1) and stated in para.18-104 above, may be displaced by an "express term" ⁶⁸³ of the contract. Section 2(3) envisages two possibilities. These are discussed in para.18-100 below.

(1) Term dispensing with need for C's consent

18-110

The first possibility, stated in s.2(3)(a), is for the express term to state that A and B may by agreement rescind or vary the contract, without the consent of C. Under such a term, it is open to A and B to rescind or vary the contract in spite of the fact that C has acquired a right by virtue of s.1(1) and in spite of the fact that one or more of the circumstances specified in s.2(1) have occurred: that is, even after communication of assent by C to A, or after reliance by C of which A is aware or which he could reasonably have been expected to foresee. It is not entirely clear whether it is enough for the express term to provide that A and B by agreement may rescind or vary the contract or whether it must go on to say in so many words that they may do so without the consent of C; but to be sure of achieving the desired result, A and B would be well advised to use the latter form of words.

(2) Term modifying requirement of C's consent

The second possibility, stated in s.2(3)(b), is for the express term to provide that the consent of C is required in circumstances other than those specified in s.2(1). For example, the term might provide that such consent was required only for a specified period or that it must be given in a specified form (e.g. by registered letter). Again, effect would be given to such provisions, so that in the first of the two examples just given, C's consent would no longer be needed (even after one of the circumstances described in s.2(1) had occurred) after the end of the specified period; while in the second it would be ineffective if not given in the specified form.

Judicial discretion to dispense with consent

18-111

Section 2(4) gives the court power, on the application of A and B, to dispense with the requirement of C's consent to a rescission or variation of the contract by agreement between A and B in two situations: (a) where C's consent cannot be obtained because "his whereabouts cannot reasonably be ascertained"; or (b) where he is mentally incapable of giving his consent. On a similar principle, the court has under s.2(5) the same power where it is alleged that C's consent is required because A could reasonably have foreseen that C would rely on the term ⁶⁸⁴ but it cannot reasonably be ascertained whether he has in fact relied on it. Where the court under these provisions dispenses with C's consent, it may order compensation to be paid to him ⁶⁸⁵; such an order may presumably be made against either A or B or both of them.

Promisor's defences against third party

18-112

Section 3 of the 1999 Act contains an elaborate set of provisions which specify matters on which A can rely by way of defence, set-off or counterclaim against C in an action by C for the enforcement, "in reliance on section 1," ⁶⁸⁶ of a term of the contract between A and B.

(1) General principle

The starting principle, stated in s.3(2), is that A can rely by way of defence, or set-off on any matter that "arises from or in connection with the contract [between A and B] and is relevant to the term" and would have been available to A if the proceedings (to enforce the term) had been brought by B. Under this principle, A could, for example, rely against C on a valid exemption clause in the contract between A and B ⁶⁸⁷; and on the fact that the contract was void for mistake or voidable for misrepresentation, ⁶⁸⁸ or that it had been frustrated or that A was justified in refusing to perform it on account of B's repudiatory breach.

(2) Contrary provision

18-113

The above general principle can be excluded by a contrary provision in the contract: i.e. by a term in the contract between A and B that A is not to be entitled to rely on such matters against C ⁶⁸⁹; though where the contract between A and B was wholly void such a term would appear to be of no more effect than the rest of the purported contract. The general principle can, conversely, be extended by an express term in the contract. Section 3(3) provides that A can (in addition to the matters referred to in s.3(2)) rely by way of defence or set-off against C on any matter if "an express term of the contract provides for it to be available to him [A] in proceedings brought by" C and it would have been so available to A in proceedings brought by B. Under this provision, A could rely against C on debts owed by B to A even though the debts arose out of other transactions, if the contract containing the term which C was seeking to enforce contained an express term that A was to be entitled to rely on those debts also against C.

(3) Defence against C only

18-114

There is a further possibility that A may have defences or counterclaims against C which he would not have against B: e.g. where A had been induced to enter into the contract with B by C's misrepresentation, or where C was indebted to A under another transaction. Section 3(4) enables A to rely on such matters against C if they could have been so relied on if C had been a party to the contract between A and B; though this rule, like the general principle stated in s.3(2), can be modified or excluded by an express term of that contract. ⁶⁹⁰

(4) Reliance on exemption clauses

18-115

A rule analogous to the general principle stated in s.3(2) ⁶⁹¹ applies where the "enforcement" of the term by C takes the form of his availing himself of an exemption or limitation clause in his favour in the contract between A and B. ⁶⁹² Section 3(6) provides that C cannot in this way "enforce" the term if he could not have done so, had he been a party to the contract. This restriction on C's right to enforce the term would, for example, apply if, by reason of the Unfair Contract Terms Act 1977 ⁶⁹³ the clause had been invalid or if it had not satisfied the requirement of reasonableness as imposed by that Act;

or if the clause was invalid under other legislation ⁶⁹⁴; or if C was guilty of a fraud on A and so could not have relied on the term (even though B might have been able to do so) by reason of the common law rule that an exemption clause does not protect a party from liability for his own fraud. ⁶⁹⁵

Exceptions to third party's entitlement

18-116

A number of situations which *prima facie* fall within s.1 of the 1999 Act are excepted from the operation of that section by s.6. These exceptions fall into two groups. In cases which fall within the first group, C has, or can acquire, rights under the contract between A and B by virtue of some other rule of law; and the purpose of excepting these cases from the operation of s.1 is to preserve, not only C's rights, but also the conditions under which those rights arise under those other rules of law. In cases which fall within the second group, by contrast, C has, *prima facie*, no rights under other rules of law; and the purpose of excepting these cases from the operation of s.1 is to preserve in them the general rule of common law by which C acquires no rights under the contract between A and B. Such cases, in other words, continue to be governed by the common law doctrine of privity, subject to any limitations on its scope and to any exceptions to it that may exist at common law.

The first group of exceptions


18-117

The first of the above group of exceptions includes contracts on bills of exchange, promissory notes and other negotiable instruments ⁶⁹⁶; third parties can acquire rights under such contracts under the rules relating to negotiability, discussed elsewhere in this book. ⁶⁹⁷; and it is not the purpose of the Act to extend those rights. ⁶⁹⁸ It also includes contracts for the carriage of goods by sea which are governed by the Carriage of Goods by Sea Act 1924, and corresponding electronic transactions to which that Act may be applied by Order. ⁶⁹⁹ The carefully regulated scheme of the 1924 Act ⁷⁰⁰ for the acquisition of rights under such contracts by third parties (such as transferees of bills of lading) would be seriously disrupted if such third parties could acquire rights under the 1999 Act in circumstances in which no such rights would be acquired under the 1924 Act. The same is (*mutatis mutandis*) true of contracts for the international carriage of goods by rail, road and air, which are governed by international conventions having the force of law in the United Kingdom, ⁷⁰¹ so that these contracts are likewise excepted from the operation of s.1 of the 1999 Act. ⁷⁰² The present exception is, however, in turn, subject to an exception ⁷⁰³: C is not precluded from taking the benefit of an exemption or limitation clause in a contract for the carriage of goods governed by the 1924 Act or by the international conventions referred to above merely because such legislation applies to the contract. Before the 1999 Act, C could in many cases, take the benefit of an exemption or limitation clause in the contract of carriage (e.g. where the contract contained a Himalaya clause). The legal reasoning on which this result was based was that a separate or collateral contract arose, by virtue of such a clause and the conduct of the parties, between A and C. ⁷⁰⁴ Since C is a party to this contract, his right to "enforce" it does not depend (in the words of the present exception) on any "reliance on ... section" 1. ⁷⁰⁵ The effectiveness of Himalaya clauses would therefore not be directly affected by the present exception ⁷⁰⁶ to a third party's entitlement under s.1 to "enforce" an exemption or limitation clause. But one of the objects of the 1999 Act appears to have been to simplify the drafting of Himalaya clauses and to remove obstacles to their efficacy which might be encountered in establishing the separate contract between A and C, ⁷⁰⁷ and it is for this reason that the present exception to the operation of s.1 does not apply to exemption and limitation clauses in contracts of carriage which, for other purposes, fall within that exception.

The second group of exceptions

18-118

⚠ The second group of exceptions described in paragraph 18-116 above includes the contract which binds the company and its members by the terms of the company's constitution by virtue of s.33(1) of

the Companies Act 2006.⁷⁰⁸ The purpose of this exception is presumably to preserve the established limitations on the scope of this “statutory contract.”⁷⁰⁹ e.g. the rule that this contract confers no rights on a director of the company as such.⁷¹⁰ The second group also includes contracts of employment and certain analogous contracts to the extent that such a contract will not give the employer’s customer any right under s.1 of the 1999 Act to enforce any term of such a contract against the employee.⁷¹¹ 

Third party’s other rights unaffected

18-119

Section 7(1) of the 1999 Act provides that “Section 1 does not affect any right or remedy of a third party that exists or is available apart from this Act.” It follows that C continues, after the coming into force of the Act, to be able to enforce rights and to rely on defences arising under a contract between A and B, if before then he could have done so under exceptions to the doctrine of privity established at common law, in equity or under other legislation, or if he could have done so because the case fell outside the scope of the doctrine of privity of contract: these possibilities are discussed elsewhere in this Chapter.⁷¹² C will, for example, continue to be able to enforce a promise made by A to B if there is a trust of the promise in his favour⁷¹³; he will also continue to be able to enforce collateral contracts between himself and A⁷¹⁴ and, in particular to be able to rely on Himalaya clauses by virtue of which an exemption or limitation clause in a contract between A and B becomes available to him.⁷¹⁵ Indeed, in some such cases the person seeking to enforce the term is not truly a “third party” within the 1999 Act.⁷¹⁶ The whole point of the collateral contract device is to establish a direct contractual relationship between the parties that have here been called A and C; and the legal basis for the efficacy of Himalaya clauses at common law is similarly that they make it possible for a contract of some kind to come into existence between A and C,⁷¹⁷ though this is not the same as “the contract” (i.e. that between A and B) containing the term on which C seeks to rely. Subsection 7(1) also preserves any rights which C may have to sue A in tort in respect of loss suffered by C in consequence of A’s breach of his contract with B; we have seen that in such cases C will often have no rights under the 1999 Act.⁷¹⁸ C could also rely on the subsection to enforce rights arising under legislation coming into force after the 1999 Act or under new exceptions to the doctrine of privity of contract which might, after that Act, be developed by the courts.⁷¹⁹

18-120

Although s.7(1) in terms states only that “Section 1” does not affect other rights and remedies available to C, it follows from the structure of the 1999 Act that many of its other provisions will likewise not apply where C’s rights against A arise apart from the Act. Of particular significance are the points that the rules as to rescission and variation, contained in s.2, and the rules as to defences and related matters, contained in s.3, will not so apply, since s.2 applies only “where a third party has a right under section 1 to enforce a term of the contract”⁷²⁰ and s.3 applies only “where, in reliance on section 1, proceedings for the enforcement of a term of a contract are brought by a third party.”⁷²¹

18-121

The structure resulting from the distinctions drawn in paragraphs 18-119 to 18-120 above is therefore a complex one. Four types of cases call for consideration. The first is that in which C has rights under the 1999 Act but none apart from it because the case falls within the scope of the doctrine of privity of contract but not within any of the judge-made or other legislative exceptions to it. Here C’s rights and remedies are clearly subject to the provisions of the Act. The second is the case in which C has no rights under the Act (either because the requirements of its s.1 are not satisfied or because one of the exceptions listed in its s.6 applies) but in which he does have rights apart from the Act, because the case falls either outside the scope of the doctrine of privity of contract or within one of the judge-made or other legislative exceptions to it. Here the rights and remedies to which C is entitled are clearly not subject to the provisions of the Act.⁷²² The third is the case in which C has rights both under the Act and apart from it⁷²³ (because the case falls outside the scope of the doctrine of privity of contract or within one of the judge-made or other legislative exceptions to it). It would seem that in such a case C can choose between making his claim under the Act (and so subject to its provisions) and apart from the Act (and so not subject to its provisions). If, for example, C has a cause of action against A in tort

at common law, it may be to C's advantage to pursue that claim (rather than one which may also be, *prima facie*, available to him under s.1) since in making such a common law claim he would not, in general, be bound by an exemption clause in the contract between A and B, while he would be so bound if he made a claim under the Act.⁷²⁴ The fourth is the case in which C has no rights under the Act and none under the existing rules of common law or equity, or under other legislative exceptions to the doctrine of privity of contract. Here, C's only hope is to induce the court to create a new exception to the doctrine of privity⁷²⁵ or (in the Supreme Court) to reject that doctrine altogether. If C's claim were upheld on one of these grounds, it would plainly not be subject to the provisions of the 1999 Act.

Nature of the third party's rights under the 1999 Act

18-122

Although the 1999 Act for certain specified purposes⁷²⁶ makes use of the fiction of treating C as if he were a party to the contract, it in general treats C's rights and defences as being *sui generis*.⁷²⁷ It does not, in other words, except for those specified purposes, treat C as if he were deemed to be, or to have become, a party to the contract. In particular, the Act provides that C is not to be treated as a party to the contract between A and B for the purposes of other legislation.⁷²⁸ For example, the references to a party or to the parties to a contract in the Law Reform (Frustrated Contracts) Act 1943 and in the Misrepresentation Act 1967 do not, under the 1999 Act include references to C. The same is true of the Unfair Contract Terms Act 1977. The point can be illustrated by supposing that a contract was made between A and B on A's standard terms of business, that a term of this contract conferred a benefit on C, that this term was enforceable by C by virtue of s.1 of the Act, and that the contract contained a term excluding or restricting A's liability for defects in the performance rendered to C. The requirement of reasonableness under s.3 of the 1977 Act⁷²⁹ would not apply in favour of C since he was not one of the parties to the contract between A and B or a party who had dealt on A's standard terms: the requirement would apply only in favour of B.⁷³⁰ The justification given by the Law Commission for this position is that to apply the 1977 Act in a three-party case would raise complex policy issues going beyond those involved in reforming the doctrine of privity.⁷³¹

Effect on Unfair Contract Terms Act 1977, section 2⁷³²

18-123

The relationship between the 1999 Act and the Unfair Contract Terms Act 1977 gives rise to the further difficulty that under s.2(1) of the 1977 Act⁷³³ contract terms are void if they purport to exclude or restrict liability for death or personal injury resulting from negligence and that under s.2(2)⁷³⁴ contract terms are subject to the requirement of reasonableness if they purport to exclude or restrict liability for negligence in respect of other loss. Negligence can here include breach of a contractual duty of care,⁷³⁵ so that a claim by C affected by s.2 of the 1977 Act could be brought either under the 1999 Act or in tort, apart from the latter Act. Where it is brought under the 1999 Act, a compromise solution⁷³⁶ is adopted for cases of the kind here under discussion, i.e. for those in which C sues A for breach of a duty of care arising out of the contract between A and B, and A seeks to rely on a term of that contract excluding or restricting his liability for negligence. Where C in consequence of the breach suffers death or personal injury, the strong policy considerations against contract terms excluding or restricting A's liability for such harm prevail, so that nothing in the 1999 Act will affect C's right under s.2(1) of the 1977 Act to impugn the validity of a term excluding or restricting A's liability for such harm. But where C suffers other loss, the case is regarded as more closely analogous to the situation (described in para.18-122 above) that can arise under s.3 of the 1977 Act. Section 7(2) of the 1999 Act therefore provides that s.2(2) of the 1977 Act is not to apply where A's alleged negligence consists of the breach of an obligation arising from a term of a contract (between A and B) and the claim by C is brought under s.1 of the 1999 Act. In an action so brought by C, therefore, a term in that contract excluding or restricting A's liability for loss other than death or personal injury is not subject to the requirement of reasonableness under the 1977 Act.

Promisee's rights

18-124

At common law, the doctrine of privity of contract does not preclude the promisee from enforcing the contract⁷³⁷ and this position is preserved by s.4 of the 1999 Act, by which “Section 1 does not affect any right of the promisee to enforce any term of the contract.” The contract between A and B can thus be enforced by B even where the 1999 Act also gives C the right to enforce one of its terms against A. On A’s failure to perform that term in favour of C, B can therefore make any claims for the agreed sum, for other specific relief or for damages that would have been available to him at common law apart from the 1999 Act. There is also nothing in the 1999 Act that affects B’s right to restitution⁷³⁸ against A in the event of the latter’s non-performance of the term in favour of C, even though B’s right to restitution would not normally be a “right of [B] to enforce a term of the contract” within s.4. It would have this character only where the contract provided for the return by A of the consideration provided by B to A in the event of A’s failure to perform in favour of C. The 1999 Act also contains nothing to affect the common law rules which govern the relative rights of B and C where A has performed, or is willing to perform, in favour of C.⁷³⁹

Provision against double liability

18-125




At common law, A’s failure to perform in favour of C may, in circumstances discussed earlier in this Chapter,⁷⁴⁰ give B a right to recover damages in respect of C’s loss or in respect of expenses incurred by B in making good A’s default: e.g. in completing A’s unfinished, or in repairing A’s defective, work. If, after B had recovered such damages, C were to make a claim against A under s.1 of the 1999 Act, there would be a risk of A’s being made liable twice over for the same loss. Section 5 of the Act therefore directs the court in such circumstances “to reduce any award to [C] to such extent as it thinks appropriate to take account of the sum recovered by” B. Such a reduction would not prejudice C since, where damages had been recovered by B in respect of C’s loss, these would have to be held by B for C⁷⁴¹; and where B had incurred expense in curing A’s breach, C’s loss would be reduced in fact by his receipt of the intended benefit, though by a route other than that envisaged by the contract between A and B. Section 5 of the 1999 Act applies only where B has recovered “a sum” (i.e. of money) in respect of C’s loss or B’s expense in making good A’s default. Thus it will normally apply where B has recovered damages, though the possibilities of its also applying where B has recovered the agreed sum or where he has made a successful claim for restitution do not appear to be excluded. It will not, however, apply where B has obtained an order for the specific performance of an obligation by A to render some performance to C other than the payment of money, or where B has obtained an injunction to enforce a negative promise made by A for the benefit of C. In such cases, C will obtain the performance due to him under the term made enforceable by him by virtue of s.1 and so will not have any right to damages for its non-performance. But C might, in addition to the receipt of the performance, claim damages from A, e.g. in respect of delay in rendering the performance. Such a claim is not, and should not be, affected by s.5 of the 1999 Act since its success would not make A liable twice over for the same loss.

1. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.

572. See above, para.18-001; Stevens (2004) 120 L.Q.R. 292.

573. Law Commission Report on Privity of Contract: Contracts for the Benefit of Third Parties, Law Com. No.242, (1996), hereafter “Report”; (ed.) Merkin & Faber, *Privity: the Impact of the Contracts (Rights of Third Parties) Act 1999*.

574. cf. the definitions of “promisor” and “promisee” in s.1(7) of the 1999 Act.


- [575.](#) Report, para.7.5.
- [576.](#) Above, para.18-080.
- [577.](#) See *McEvoy v Belfast Banking Co* [1935] A.C. 24, above, para.4-045.
- [578.](#) This appears to follow from the words “in his own right” in s.1(1); cf. Report, para.14.3; *Mulchrone v Swiss Life (UK) Ltd plc* [2005] EWHC 1808, [2006] Lloyd’s Rep. I.R. 339 at [14] (“exclusively in her [C’s] own name”).
- [579.](#) Under s.3 of the 1999 Act: see below, para.18-112.
- [580.](#)  CPR, r.19.2(2)(a); but this provision does not apply where there is no “dispute” between the relevant parties : see *Milton Keynes BC v Viridor (Community Recycling MK) Ltd* [2016] EWHC 2764 (TCC), [2017] B.L.R. 47.
- [581.](#) See ss.2 and 3 (below, paras 18-103 to 18-111 to 18-113) and s.7(1) of the Act below, para.18-119).
- [582.](#) Above, para.15-052. For the effect of the 1999 Act on such clauses, see also Carver on Bills of Lading, 3rd ed. (2011), paras 7-075 to 7-080.
- [583.](#) This phrase would not include other terms in the contract on which C might wish to rely: e.g. not choice of forum clauses: see Report, para.14.9; cf., at common law, *The Mahkutai* [1996] A.C. 650, where such a clause was held as a matter of construction not to have been covered by the Himalaya clause in that case. If, in a future case, a Himalaya clause were so drafted as to cover the choice of forum clause, the case would not fall within s.1(6) of the 1999 Act.
- [584.](#) Report, para.7.10.
- [585.](#) Above, para.15-050 to 15-052; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 A.C. 715 at [34], [93], [152], [153] and [196]; see also *Whitesea Shipping and Trading Corp. v El Paso Rio Clara Ltda (The Marielle Bolten)* [2009] EWHC 2552 (Comm), [2010] 1 Lloyd’s Rep. 648 at [34]; enforcement of the promise was there sought by the promisee, not by the third party, so that there was no need to consider the 1999 Act.
- [586.](#) s.1(1) (“a person who is not a party ...”).
- [587.](#) Above, para.15-050.
- [588.](#) s.1(1); see especially ss.2 and 3, below paras 18-103-18-115.
- [589.](#) 1999 Act, s.7(1).
- [590.](#) See n.557, above; and see para.18-117 below.
- [591.](#)  A term may purport to confer a benefit on C even though it is also for the benefit of B. This was held to be the position in *Cavanagh v Secretary of State for Work and Pensions* [2016] EWHC 1136 (QB), where a contract of employment contained a term by which the employer promised the employee to make specified deductions from the employee’s pay and to pay these deductions to the employee’s trade union. It was held that this term was enforceable against the employer by the union: the term purported to confer a benefit on the union even though it could also be said to benefit the employee.
- [592.](#)  See *Royal Bank of Scotland Plc v McCarthy* [2015] EWHC 3626 (QB), where an alternative ground for the decision (i.e., alternative to that stated in note 569 below) was that the fact that the third party had other remedies than enforcement of the term in the contract between A and B indicated that A and B did not intend the term in the contract between them to be enforceable

by C (at [143]), so that C's claim under the Contracts (Rights of Third Parties) Act failed by virtue of s. 1(2) of that Act. For an apparent doubt whether this provision had been satisfied, see *Avraamides v Colwill* [2006] EWCA Civ 1553, [2007] B.L.R. 76 at [20]; the actual decision turned on s.1(3) of the 1999 Act (see below, paras 18-097, 18-098).

593. *Prudential Assurance Co Ltd v Ayres* [2007] EWHC 775 (Ch), [2007] 3 All E.R. 946 at [28], reversed [2008] EWCA Civ 52, [2008] 1 All E.R. 1266 on the different ground that the contract, on its true construction, purported, not to *benefit* C, but to *restrict* C's rights.

594. [2007] EWHC 775 at [28].

595. *Dolphin Maritime and Aviation Services Ltd v Sveriges Angfartygs Forening* [2009] EWHC 716 (Comm), [2009] 2 Lloyd's Rep. 123 (below, para.18-095) at [74] ("A contract does not purport to confer a benefit on a third party simply because the position of the third party will be improved if the contract is performed"); cf. *Petrologic Capital SA v Banque Cantonale de Geneve* [2012] EWHC 453 (Comm), where a letter of credit issued by A (a bank) to B (a seller of goods) contained a Swiss law and jurisdiction clause and it was held that this clause was not enforceable by C (the applicant for the letter of credit) as the clause was intended to govern the relation between A and B (at [53]) and as that contract did not purport to confer the benefit of the clause on C (at [54]).

596.  *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602, [2004] 1 All E.R. (Comm) 481. Even if, on its true construction, the term was intended by A and B to confer *some* benefit on C, a further question of construction could arise whether that benefit was the one claimed by C: see *Hurley Palmer Flatt Ltd v Barclays Bank plc* [2014] EWHC 3042 (TCC), [2015] Bus. L.R. 106, where a contract between A and B for the provision of services by B was expressed to confer rights on C (a so-called "affiliate" of A) and also contained "adjudication provisions" which C sought to invoke. The actual decision was that the rights conferred on C were certain substantive rights or defences available to A, and not "procedure rights" such as those under the "adjudication provisions" (at [22]). See also *Royal Bank of Scotland Plc v McCarthy* [2015] EWHC 3626 (QB), where the mere fact that a benefit to the third party was an "incidental effect" (at [137]) of the performance of the contract was held not to satisfy the requirement set out in s.1(1)(b) of the 1999 Act. The question whether the contract purported to confer a benefit on the third party was one of the "construction" of the contract (at [123], [129]), and this requirement had not been satisfied. In support of this conclusion, the Court who relied on the *Dolphin Maritime* case [2009] EWHC 716 (Comm), [2009] 2 Lloyd's Rep. 123, cited in Vol.I, para.18-093 note 568.

597. An analogous problem arose, apparently under Brazilian law, in *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2004] EWHC 1180 (Comm), [2005] 1 Lloyd's Rep. 219 where A, a subbareboat charterer of an oil production platform, took out a policy of insurance with B relating to the platform. It was held that no claim on the policy could be brought in his own right by C, a subcontractor engaged to do upgrading work on the platform, as A had not purported to insure for the benefit of C. In English law, similar reasoning could on such facts be applied to a claim brought under s.1(1)(b) of the 1999 Act. On appeal, the decision was affirmed without reference to the point of Brazilian law here discussed: [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121 (above, para.2-123 n.611).

598. *Hurley Palmer Flatt Ltd v Barclays Bank plc* [2014] EWHC 3042 (TCC), [2015] Bus. L.R. 106.

599. *ibid.*, at [26].

600. *ibid.*, at [28].

601. See *ibid.*, at [25].

602. There are other legal contexts in which "terms" has a wider import than "conditions": for example where the issue is whether certain charterparty terms have been incorporated into a bill of lading by a clause in the latter document: see Carver on Bills of Lading, 3rd ed. (2011), para.3-020.

- [603.](#) At n.565.
- [604.](#) See *The Laemthong Glory*, below, para.18-095.
- [605.](#) Report, paras 7.5, 7.17.
- [606.](#) See above, para.13-099; but the rule that evidence is not admissible to ascertain the “parties’ intention” (*Prenn v Simmonds* [1971] 1 W.L.R. 1381, 1385) can scarcely apply in the present context since the very purpose of the enquiry under s.1(2) is to determine what the parties intended.
- [607.](#) *Nisshin Shipping* case, above n.569.
- [608.](#) *Laemthong International Lines Co Ltd v Artis (The Laemthong Glory (No.2))* [2005] EWCA Civ 519, [2005] 1 Lloyd’s Rep. 632.
- [609.](#) [2012] EWCA Civ 180, [2012] 2 Lloyd’s Rep. 637, affirming [2011] EWHC 1372 (Comm), [2011] 2 Lloyd’s Rep. 309.
- [610.](#) [2012] EWCA Civ 180 at [42].
- [611.](#) *ibid.*, at [36].
- [612.](#) See above, para.2-040.
- [613.](#) See Contracts (Rights of Third Parties) Act 1999, s.1(1), conferring rights of enforcement under the Act only on a person who “is *not* a party to” the contract in question (*italics supplied*).
- [614.](#) [2009] EWHC 716 (Comm), [2009] 2 Lloyd’s Rep. 123; followed in *San Evans Maritime Inc v Aigaion Insurance Co SA (The St Efrem)* [2014] EWHC 163 (Comm), [2014] 2 Lloyd’s Rep. 265 where the requirement of s.1(1)(b) that the term must be one that “purports to confer a benefit” on C was again not satisfied: see at [39]–[41], [44].
- [615.](#) At [75], [76].
- [616.](#) At [76].
- [617.](#) At [84].
- [618.](#) [1968] A.C. 58; above, para.18-022.
- [619.](#) It would have been easy, even before the 1999 Act, for the solicitor to have drafted the contract so as to make it enforceable by C, e.g. by expressly making B trustee for C (above, para.18-081) or by making C a joint promisee with B (see above, para.4-043). We do not know whether the solicitor explained these possibilities to A and B or whether he received any instructions from them on the point.
- [620.](#) [1995] 2 A.C. 207; above, para.18-039.
- [621.](#) Within s.1(3): see below, paras 18-097, 18-098.
- [622.](#) Report, para.7.25.
- [623.](#) *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520; above, para.18-025.
- [624.](#) The case was a Scottish case and no claim was made in contract even though Scots law recognises a *jus quaesitum tertio* arising by way of contract. For a summary of the requirements of this doctrine, see above, para.18-038 n.225.
- [625.](#) *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85; above,

para.18-055.

[626.](#) Within s.1(3), below paras 18-097, 18-098.

[627.](#) *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518, above, para.18-060.

[628.](#) As appears to have been the position in *Darlington B.C. v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68.

[629.](#) Italics supplied.

[630.](#) See *Avraamides v Colwill* [2006] EWCA Civ 1533, [2007] B.L.R. 76 at [19], where on the transfer of B's business to A, A promised B to pay "any liabilities properly incurred by B." This was held not to amount to an express identification of one of B's former customers (even though A had also promised "to complete outstanding customer orders") since the "liabilities" to which it referred "would benefit third parties but of a large number of *unidentified* classes" (at [19], italics supplied). For identification of a third party "as a member of a class or as answering a particular description" within s.1(3), see *Crowson v HSBC Insurance Brokers Ltd* [2010] 1 Lloyd's Rep. I.R. 441 at [12] (directors of the company with which the contract had been made).

[631.](#) See para.13-124 above.

[632.](#) *Starlight Shipping Co v Allianz Versicherungs AG (The Alexandros T)* [2014] EWHC 3068 (Comm), [2014] 2 Lloyd's Rep. 579.

[633.](#) For the text of the relevant parts of the agreements, see [2014] EWHC 3068 (Comm) at [7] (Clause 3) and [8] (Clause 2).

[634.](#) [¶](#) *ibid.*, at [62], [88]. The process here is one of *construction* of the word "Underwriters", not one of *implication* since the latter would not suffice for the purpose of s.1(3): above, at n.603. It is true that in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 Lord Hoffmann described the process of implication as one of "the construction of the instrument as a whole" (at [19]). But it does not follow that construction is necessarily a process of implication. In *The Alexandros T* Flaux J. refers at [59] to the *Belize* case, where that case is cited in connection with a different part of the reasoning of *The Alexandros T* from that discussed in the text above; and he evidently saw no conflict between his discussion at [59] of implication and his later discussion of construction at [62] and [88]. Lord Hoffmann's description in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 of the process of implication as one of "the construction of the instrument as a whole" was extensively discussed by the Supreme Court in *Marks & Spencer Plc v BNP Paribas Security Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742. Lord Neuberger (with whose judgment Lord Sumption and Lord Hodge agreed) there said (at [26]) that Lord Hoffmann's observation (quoted above) "could obscure the fact that construing the words used and implying additional words are different processes governed by different rules" and (at [31]) that they (i.e. those observations) should "henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms." For the same view, see also *Globe Motors Inc v TRW Varity Electric Steering Ltd* [2016] EWCA Civ 396 at [58], following the *Marks & Spencer* case. The majority view in the *Marks & Spencer* case was not there shared by Lord Carnwath (see [2015] UKSC 72 at [74]); while Lord Clarke said at [76] that both processes (i.e. construction and implication) could "properly be said" to be "part of the construction of the contract in a broad sense." The judgments in the *Marks & Spencer* case on the present point are more fully discussed in, para.14-007 above. Even before that case the scope of Lord Hoffmann's views in the *Belize* case had been narrowed by judicial statements to the effect that those views applied only to the implication of terms in fact, and not to the implication of terms in law: see *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 A.C. 523 at [55] per Baroness Hale and *Yam Seng Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526 at [131], [132], per Leggatt J.; for the difference between these two types of implied terms, see Vol.I, para.14-004.


[635.](#) Above paras 18-093-18-095, following (at [86], [87]) *Laemthong International Lines Co Ltd v*

Artis (The Laemthong Glory) (No.2) [2005] EWCA Civ 519, [2005] 1 Lloyd's Rep. 632.

[636.](#) See *[2014] EWHC 3068 (Comm)* at [88], and below at n.618.

[637.](#) *[2014] EWHC 3068 (Comm)* at [88].

[638.](#) *ibid.*

[639.](#)  *[1992] 3 S.C.R. 299*; more fully discussed in Carver on Bills of Lading, 4th ed. (2017), paras 7-019—7-021.

[640.](#) *[1992] 3 S.C.R. 299* at 451.

[641.](#) See above, para.18-022 n.124.

[642.](#) *[1992] 3 S.C.R. 299* at 449.

[643.](#) *ibid.*, at 451.

[644.](#) *ibid.*

[645.](#) *[2014] EWHC 3068 (Comm)* at [88].

[646.](#) *ibid.*

[647.](#) For these requirements, see above, paras 18-093-18-095.

[648.](#) *[2014] EWHC 3068 (Comm)* at [87].

[649.](#) See the Explanatory notes to Clause 1 of the Bill appended to Law Com. No.242 (“*In addition ... clause 1(3) requires that the third party be expressly identified ...*”; italics supplied).

[650.](#) As, for example, in *Adler v Dickson [1955] 1 QB 158*.

[651.](#) *Midland Silicones Ltd v Scruttons Ltd [1962] A.C. 446*; above, para.15-045.

[652.](#) See s.1(6), above, para.18-092.

[653.](#) Such a question could arise on facts such as those in *Elder Dempster & Co Ltd v Paterson Zochonis & Co Ltd [1924] A.C. 522*, where the form of bill of lading used seems to have been based on the assumption that the goods would be carried by B but they were in fact carried by C and the words of the exemption clause in the bill happened to be apt to refer also to C. In the *Avraamides* case, above n.603, A’s promise to B to “complete outstanding customer orders” seems to have been intended for the benefit of B rather than of any of B’s customers.

[654.](#) Report, para.8.8; and see n.628 below.

[655.](#) A company which did not at the time of the contract exist could, on coming into existence, by virtue of s.1(3) *enforce* a term made for its benefit (within s.1(1)); but the rules relating to contracts made on behalf of such a company would continue to govern the extent to which such a company could be *bound* by a contract made on its behalf: Report, paras 8.9 to 8.16; Companies Act 1985, s.36C (referred to in Report, para.8.9) has been replaced by Companies Act 2006, s.51.

[656.](#) For examples, see Report, para.8.5.

[657.](#) 1999 Act, s.7(4), below, para.18-122. Section 7(4) refers only to other legislation, but the principle that C is not to be treated as a party to the contract appears also to apply for the purpose of rules of common law: see below, para.18-102.

- [658.](#) It also makes use of the above fiction for a number of other purposes relating to defences available to A against C: see s.3(4) and (6), below, para.18-114; and to arbitration provisions: see s.8, below, para.18-101.
- [659.](#) Report, paras 3.32, 3.33.
- [660.](#) Below, Vol.II, para.32-044.
- [661.](#) 1999 Act, s.8(1); e.g. *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602, [2004] 1 All E.R. (Comm) 481. Section 8(1) has been said to illustrate the principle of “conditional benefit” (reflected in s.1(4) of the 1999 Act and described in para.18-139 n.779 below): *Fortress Value Recovery Fund I LLC v Blue Sky Special Opportunities Fund LP* [2013] EWCA Civ 367, [2013] 1 Lloyd’s Rep. 606 at [42] per Toulson L.J. (“a substantive benefit subject to a procedural condition”); *Hurley Palmer Flatt Ltd v Barclays Bank plc* [2014] EWHC 3042 (TCC), [2015] Bus. L.R. 106 at [35]. But, as an arbitration clause could carry with it a “duty on the third party to submit to arbitration”, s.1(4) would not suffice to make the arbitration agreement binding on the third party: this is the reason why it was “necessary to incorporate sections 8(1) and 8(2) in the 1999 Act”: *ibid.*, at [34].
- [662.](#) By virtue of s.8(1), the third party is to be treated as a party to the arbitration agreement only as regards disputes between himself and the promisor relating to the “substantive term” (s.8(1)(a)), i.e. the term conferring a right of enforcement on the third party under s.1 of the Act: see *Fortress Value Recovery Fund I LLC v Blue Sky Special Opportunities Fund LP* [2013] EWCA Civ 367, [2013] 1 Lloyd’s Rep. 606 at [30], [43]. Other disputes arising out of the contract are not within s.8(1).
- [663.](#) 1999 Act, s.8(2). See *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust Kamenogorsk Hydropower Plant JSC* [2010] EWHC 772 (Comm), [2010] 2 Lloyd’s Rep. 493, where a contract between A and B governed by a foreign law contained an arbitration clause, to the benefit of which C was entitled under that law (at [28]). It was held that C was also entitled in English law to enforce that clause “pursuant to section 1 and, in due course, section 8” (at [32]) of the 1999 Act. The decision was affirmed ([2011] EWCA Civ 647, [2011] 2 Lloyd’s Rep. 233) without reference to this point; and further affirmed *sub nom. UST-Kamenogorsk Hydropower Plant JSC v AES UST-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1 W.L.R. 1889, again without any reference to the Contracts (Rights of Third Parties) Act 1999.
- [664.](#) Report, para.6.8 n.8.
- [665.](#) See above, para.18-100, at n.630.
- [666.](#) This has been one reason for the restrictions on the scope of the equitable exception to the doctrine of privity by way of trusts of promises: above, para.18-081.
- [667.](#) As, for example, in *Re Schebsman* [1944] Ch. 83, above, para.18-081.
- [668.](#) See s.2(1)(a), below, para.18-105.
- [669.](#) s.2(1)(a).
- [670.](#) This follows from the words “to the promisor” in s.2(1)(a).
- [671.](#) s.2(2)(a).
- [672.](#) s.2(2)(b).
- [673.](#) Above, para.2-047.
- [674.](#) s.2(1)(a).
- [675.](#) Contrast the requirement of Law of Property Act, 1925, s.136(1), requiring written notice of an

assignment.

[676.](#) s.2(1)(b).

[677.](#) s.2(1)(c).

[678.](#) s.1(5); above, para.18-100.

[679.](#) e.g. where it would have been necessary for C to incur the reliance expenditure in order to secure the benefit—perhaps by travelling to the place where it was to be conferred.

[680.](#) Below, para.18-141; the analogy is far from exact and its application would involve a significant extension of the tort.

[681.](#) cf. Report, para.10.3.

[682.](#) Within s.1(2).

[683.](#) s.2(3).

[684.](#) See s.2(1)(c).

[685.](#) s.2(6).

[686.](#) s.3(1).

[687.](#) cf. Report, para.10.31.

[688.](#) See *Moody v Condor Insurance Ltd* [2006] EWHC 100 (Ch), [2006] 1 W.L.R. 1847 at [30].

[689.](#) s.3(5).

[690.](#) s.3(5) applies to s.3(4) as well as to s.3(2).

[691.](#) Above, para.18-112, sub-para.(1).

[692.](#) See s.1(6), above para.18-092.

[693.](#) Above, paras 15-066 et seq.

[694.](#) See *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 where a Himalaya clause (above, para.15-051) was held not to protect a third party at common law by reason of its being void under Art.III. 8 of the Hague Rules. An attempt by the third party to “enforce” such a clause in reliance on s.1(6) of the 1999 Act would fail for the same reason by virtue of s.3(6) of that Act. The Starsin was distinguished in *Whitesea Shipping and Trading Corp. v El Paso Rio Clara Ltda (The Marielle Bolten)* [2009] EWHC 2552 (Comm), [2010] 1 Lloyd’s Rep. 648 where, for the reason given in para.18-023 n.132 above, the validity of the exemption clause was not affected by Art.III.8 of the Hague Rules.


[695.](#) Above, para.15-039.

[696.](#) s.6(1).

[697.](#) Below, Vol.II Ch.34.

[698.](#) Report, para.12.6.

[699.](#) s.6(5)(a); Carriage of Goods by Sea Act 1992, s.1(5), as amended by Communications Act 2003, s.406(1), Sch.17 para.17. If the Rotterdam Rules (above, para.18-036) are given the force of law in the United Kingdom, then (1) s.6 of the 1999 Act will have to be amended and (2)

- s.1(5) of the 1992 Act will be in part superseded by the provisions of the Rules relating to electronic communications (Art.1.17) and electronic transport records (Art.1.18): see, in particular, Ch.3 of the Rules.
- [700.](#) For details of this scheme, see Carver on Bills of Lading, 3rd ed. (2011) paras 5–012—5–110, 8–002—8–016, 8–036—8–060; the 1992 Act (unlike the 1999 Act) provides not only for the acquisition of rights by, but also for the imposition of liabilities on, third parties.
- [701.](#) See below, Vol.II Chs 35 and 36.
- [702.](#) s.6(5)(b).
- [703.](#) s.6(5), “tailpiece”.
- [704.](#) Above, paras 18-023, 18-092, 15-050—15-051; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [34], [93], [152], [153] and [196].
- [705.](#) s.1(1) confers a right of enforcement only on a “person who is *not* a party” to the contract.
- [706.](#) i.e., that contained in s.6(5) of the 1999 Act.
- [707.](#) See Report, paras 2.35, 12.10; for the complexity of the drafting of Himalaya clauses and the difficulties which arise, or are thought to arise, in satisfying the common law requirement of a separate contract between A and C, see above, paras 15-050—15-052.
- [708.](#) Replacing, with modifications, the effect of s.14 of the Companies Act 1985, which is repealed by s.1295 and Sch.16 of Companies Act s.2006. Section 33(1) of the latter Act is quoted in para.18-012 above.
- [709.](#) *Soden v British & Commonwealth Holdings plc (in Administration)* [1998] A.C. 298, 323, where the above quoted phrase is used with reference to the earlier legislation which has been replaced by s.33(1) of the 2006 Act (see above, n.681).
- [710.](#) *Beattie v E. & F. Beattie Ltd* [1938] Ch. 708; *Rayfield v Hands* [1960] Ch. 1 is hard to reconcile with this principle: L.C.B.G., 21 M.L.R. 401. The limitations on the scope of the “statutory contract” referred to above seem not to be affected by the fact that this contract, which formerly arose by virtue of Companies Act 1985, s.14, now arises (after the repeal of that section by s.1295 and Sch.16 of Companies Act 2006) by virtue of 33(1) of the 2006 Act: see above, paras 18-012 and 18-118, n.681. Para.108 of the Explanatory Notes to the 2006 Act states that “Like s.14(1) [of the Companies Act 1985] the provisions of this section [i.e., s.33 of Companies Act 2006] are excepted from the general principle set out in s.1 of the Contracts (Rights of Third Parties) Act 1999 ...” There is no express provision to this effect in the 2006 Act; but the effect of s.1297(5) of the 2006 Act appears to be that, when s.33(1) of the 2006 Act came into force, the reference in s.6(2) of the 1999 Act to s.14 of the 1985 Act took effect as being a reference to s.33 of the 2006 Act.
- [711.](#)  ss.6(3), (4). In *Cavanagh v Secretary of State for Work and Pensions* [2016] EWHC 1136 (QB), see above, para.18-093 note 564a, enforcement of the term by the union was held not to amount to enforcement of it “against the employee” within s.6(3) of the Contracts (Rights of Third Parties) Act 1999 (see at [75]).
- [712.](#) Above, paras 18-005, 18-006, 18-023, 18-079 et seq.; below, paras 18-126 et seq.
- [713.](#) Above, paras 18-080 et seq.
- [714.](#) Above, paras 18-005 et seq.
- [715.](#) Above, paras 15-052, 15-053, 18-023, 18-092, 18-117.
- [716.](#) s.1(1), (“not a party ...”).

- [717.](#) See above, at n.688.
- [718.](#) Above, para.18-096.
- [719.](#) See below at n.698.
- [720.](#) s.2(1).
- [721.](#) s.3(1).
- [722.](#) *White v Jones* [1995] 2 A.C. 207 (above, paras 18-039, 18-096) illustrates this possibility.
- [723.](#) e.g. *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602, [2004] 1 All E.R. 481.
- [724.](#) s.3(2), above para.18-112.
- [725.](#) e.g. perhaps, to follow the Supreme Court of Canada's decision in *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 S.C.R. 299 in recognising, at least to a limited extent, the principle of vicarious immunity: cf. above, para.18-023, n.131 and para.18-097.
- [726.](#) See s.1(5), relating to C's remedies: above, para.18-100; s.3(4), relating to certain defences; s.3(6), relating to restrictions on the availability of exemption clauses: above, para.18-115; for a different technique, see s.7(3), relating to limitation of actions and s.8, relating to arbitration agreements (above, para.18-101; below Vol.II, para.32-044).
- [727.](#) A claim by C under the Contracts (Rights of Third Parties) Act 1999 is, however, a "matter relating to contract" within Art.5.1 of the Judgments Regulation (EC 44/2001; OJ 2001 L 12 p 1): *WPP Holdings Italy SRL v Benatti* [2007] EWCA Civ 263, [2007] 2 All E.R. (Comm) 525 at [53]–[55].
- [728.](#) 1999 Act, s.7(4). This provides that C is not to be so treated "by virtue of section 1(5) or 3(4) or 3(6)", above, n.699. No reference is made in s.7(4) to s.8, above, n.699, by virtue of which C is treated as a party to an arbitration agreement for the purpose of the Arbitration Act 1996.
- [729.](#) Above, para.15-084. Under the Consumer Rights Act 2015, s.3 of the Unfair Contract Terms Act 1977 will not apply to terms in a "consumer contract" made on or after October 1, 2015 and the fairness of such terms will be regulated under Part 2 of the 2015 Act. The Act is fully discussed in Vol.II Ch.38; for its Part 2, see paras 38-351 et seq. The 2015 Act contains no reference to the Contracts (Rights of Third Parties) Act 1999.
- [730.](#) Report, para.13.10; for B's right of enforcement, see below, para.18-124.
- [731.](#) Report, para.13.10 (vii) and (viii).
- [732.](#) Under the Consumer Rights Act 2015, s.2 of the Unfair Contract Terms Act 1977 will cease to apply to a "consumer contract" and to a "consumer notice" as defined by s.61(4) and (7) of the 2015 Act (see s.75 and Sch.4, para.4) if the contract is made, or the event to which the notice applies takes place, on or after October 1, 2015, but the fairness of such contracts or notices will be regulated under Part 2 (s.62) of the 2015 Act. Part 2 (s.65) of that Act also restricts the power of a trader to exclude or restrict negligence liability by a term of such a contract or by such a notice. The 2015 Act is fully discussed in Vol.II, Ch.38; for its Sch.4 para.4, see para.38-341; for its s.65, see para.38-377. Section 2 of the 1977 Act will continue to apply to terms in contracts other than "consumer contracts" and to notices other than "consumer notices". The 2015 Act makes no reference to the Contracts (Rights of Third Parties) Act 1999.
- [733.](#) Above, para.15-081.
- [734.](#) Above, para.15-081.
- [735.](#) Unfair Contract Terms Act 1977, s.1(1)(a).

- [736.](#) See Report, 13.12.
- [737.](#) Above, para.18-045.
- [738.](#) Above, para.18-047.
- [739.](#) Above, para.18-053.
- [740.](#) Above, para.18-054—18-069.
- [741.](#) Above, para.18-078.

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Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 6 - Joint Obligations, Third Parties and Assignment
Chapter 18 - Third Parties ¹
Section 4. - Contracts for the Benefit of Third Parties
(b) - Exceptions to the Doctrine
(iii) - Other Statutory Exceptions

18-126

A number of other exceptions to the doctrine of privity of contract were created by statute before the 1999 Act and continue to be available to the third party after the coming into force of that Act. ⁷⁴² The most important of these exceptions are discussed in the paragraphs that follow.

Law of Property Act, section 56(1) ⁷⁴³

18-127

At common law a person could not take an immediate interest in property, or the benefit of any covenant, under an indenture purporting to be *inter partes*, unless he was named as a party to the indenture. ⁷⁴⁴ The rule did not apply to deeds poll ⁷⁴⁵ or to indentures not *inter partes*. ⁷⁴⁶ In the case of such deeds, the grantee or covenantee never had to be named as a party, and it was eventually settled that he need not be named at all, so long as he was sufficiently designated. ⁷⁴⁷ Deeds no longer have to be indented for any purpose ⁷⁴⁸, but the law still distinguishes between deeds *inter partes* and other deeds. That distinction has recently been restated as being one between a deed by which (i) "one or more of [the parties] makes a promise to the other" and (ii) one by which the parties executing it "seek to use the document as a means for each of them to make unilateral promises to a person not a party to it." ⁷⁴⁹ In the former case, the document is in the traditional terminology a deed *inter partes*, not enforceable at common law by a person who is not a party to it; in the latter case it is enforceable by such a person. ⁷⁵⁰ The old rule relating to indentures *inter partes* ⁷⁵¹ still appears to apply to deeds *inter partes* which do not fall within the provisions (to be discussed below) of s.56(1) of the Law of Property Act 1925.

18-128

The common law rule with regard to indentures *inter partes* was modified by s.5 of the Real Property Act 1845, ⁷⁵² which provided that "under an indenture executed after the first day of October 1845 an immediate estate or interest in any tenements or hereditaments and the benefit of a condition or covenant respecting any tenements or hereditaments may be taken although the taker thereof be not named a party to the said indenture." This enactment was limited to estates or interests in, and to conditions or covenants respecting, tenements or hereditaments, i.e. to real property. ⁷⁵³ It was later held that the enactment was further limited, in the case of covenants, to those which ran with the land. ⁷⁵⁴

18-129

Section 5 of the 1845 Act was replaced by s.56 of the Law of Property Act 1925, subs.(1) of which provides: "A person may take an immediate or other interest in land or other property, or the benefit of

any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.” The 1925 Act further defines “property” to include “any thing in action.” s.205(1)(xx) In *Beswick v Beswick* Lord Denning M.R. and Danckwerts L.J. held that a promise in writing by A to B to pay a sum of money to C would, by virtue of this definition of “property,” be within s.56(1) and so give C a right to enforce the promise against A. ⁷⁵⁵ But in the House of Lords this view was rejected, principally on the ground that the definition of “property” in the Act was stated to apply “unless the context otherwise requires.” The context in s.56(1) did otherwise require, since s.56(1) was part of a consolidating Act and was designed to reproduce s.5 of the 1845 Act, which admittedly did not have the wide effect suggested for s.56(1). ⁷⁵⁶ There was, moreover, nothing in the legislative history of s.56(1) to support the view that the subsection was intended to abolish the doctrine of privity in relation to written contracts ⁷⁵⁷; indeed, that legislative history gives some support to the view that no such change was intended. ⁷⁵⁸ The enacting words ⁷⁵⁹ of s.56(1) also give some support to this view. They refer to the case in which a person is not *named* as a party: not to the case in which he *is not* a party. ⁷⁶⁰

18-130

Section 56(1) therefore does not apply to a bare promise in writing by A to B to pay a sum of money to C; and the correctness of a number of previous decisions to this effect ⁷⁶¹ is reaffirmed by the House of Lords in *Beswick v Beswick*. But the question, to what other cases the subsection does apply, remains one of great difficulty. There is support in the speeches in *Beswick v Beswick* for the following limitations on the scope of s.56(1): namely, that it applies only (1) to real property ⁷⁶² (2) to covenants running with the land ⁷⁶³; (3) to cases where the instrument is not merely for the benefit of the third party but purports to contain a grant to or covenant with him ⁷⁶⁴; and (4) to deeds strictly *inter partes*. ⁷⁶⁵ But there is no clear majority in the speeches in favour of the imposition of all, some or even one of these restrictions, so that the precise scope of the subsection has not been clarified. There appear to be only three reported cases in which s.56(1) has actually been applied. The first case ⁷⁶⁶ is consistent with all four of the above limitations, the second ⁷⁶⁷ case is consistent only with the last two and it is not clear whether the third is consistent with any of them. ⁷⁶⁸ The third limitation ⁷⁶⁹ was regarded as the operative one in the first two of the above three cases and in a number of other cases in which the courts have refused to apply the subsection ⁷⁷⁰; and as it was, at any rate, not decisively rejected in *Beswick v Beswick*, it is probable that the subsection will be applied only where the requirements of this limitation are satisfied. There is also much to be said on historical grounds for the fourth limitation, which is consistent with all the cases, though it does not form a ground of decision in any of them. The scope of s.56(1) is further limited by a rule which it was not necessary to consider in *Beswick v Beswick*, namely, that a person cannot take the benefit of a covenant under the subsection unless he, or his predecessor in title, was in existence ⁷⁷¹ and identifiable in accordance with the terms of the instrument at the time when it was made. ⁷⁷²

Life insurance ⁷⁷³

18-131

Section 11 of the Married Women’s Property Act 1882 provides that where a man insures his life for the benefit of his wife or children, or where a woman insures her life for the benefit of her husband or children, ⁷⁷⁴ the policy “shall create a trust in favour of the objects therein named”; any reference to “husband” and “wife” in this section is now to be “read as including a reference to a person who is married to a person of the same sex”. ⁷⁷⁵ By virtue of s.70 of the Civil Partnership Act 2004, ⁷⁷⁶ section 11 of the 1882 Act also applies to “a policy of assurance (a) effected by a civil partner on his own life, and (b) expressed to be for the benefit of his civil partner, or of his children, or of his civil partner and children, or any of them.” Section 11 (as so extended) applies only where a person insures his or her own life and not where the policy is on the life of the beneficiary ⁷⁷⁷; and it is restricted to policies for the benefit of spouses, civil partners and children and so does not apply in favour of other dependants. ⁷⁷⁸ These restrictions on the scope of s.11 are not affected by the Contracts (Rights of Third Parties) Act, 1999 ⁷⁷⁹; but persons who have no rights under s.11 of the 1882 Act (as extended by s.70 of the 2004 Act) may, if the requirements of the 1999 Act are satisfied, acquire the more restricted ⁷⁸⁰ rights conferred on third parties by that Act. They may also have enforceable rights under the trust device discussed in para.18-080 above. ⁷⁸¹

Motor insurance

18-132

A person driving a motor vehicle with the consent of the owner can, by statute, take the benefit of a provision in his favour in the owner's insurance policy without having to prove that the owner intended to constitute himself trustee. ⁷⁸²

Insurance by persons with limited interests

18-133

If a person insures for its full value property in which he has only a limited interest, he may be able to recover in full from the insurer but be liable to pay over to the other person interested any sum exceeding his own loss. ⁷⁸³ A number of real or supposed common law limitations on this principle have been removed by statute. For example, s.14(2) of the Marine Insurance Act 1906 provides that any person who has an interest in the subject-matter of a policy of marine insurance can insure "on behalf of and for the benefit of other persons interested as well as for his own benefit." On a somewhat similar principle, where property is sold and suffers damage before the sale is completed, any insurance money to which the vendor is entitled in respect of the damage must be held by him for the purchaser, and be paid over to the purchaser on completion. ⁷⁸⁴

Fire insurance

18-134

Where an insured house is destroyed by fire, "any person ... interested" may require the insurance money to be laid out towards reinstating the house. ⁷⁸⁵ Thus a tenant may claim under his landlord's insurance; and vice versa. ⁷⁸⁶

Solicitors' indemnity insurance

18-135

Under s.37 of the Solicitors Act 1974, a scheme has been established by the Law Society for the compulsory insurance of solicitors against liability for professional negligence or breach of duty. The scheme takes the form of a contract between the Society and insurers, whereby the insurers undertake, on being paid the appropriate premiums, to provide indemnity insurance to solicitors. It has been held that the scheme gives rise to reciprocal rights and duties between the insurers and solicitors. ⁷⁸⁷ This result follows "by virtue of public law, not the ordinary English private law of contract" ⁷⁸⁸ for in operating the scheme the Society acts, not in its private capacity as a professional association, but in its public capacity, as a body one of whose functions is to protect members of the public against loss which they may suffer from dealings with solicitors.

Third parties' rights against insurers

18-136

⚠ Our concern here is not with insurance contracts which purport to confer benefits on third parties, but with those which insure the promisee against liability to third parties. Under the Third Parties (Rights against Insurers) Act 1930, a third party may in certain circumstances enforce the rights of the insured under the policy ⁷⁸⁹ by proceeding against the insurance company. ⁷⁹⁰ The 1930 Act is to be repealed and replaced by the Third Parties (Rights against Insurers) Act 2010, which gives effect to proposals for reform made by the Law Commissions. ⁷⁹¹ The principal provisions of the 2010 Act are

outlined in the footnote below to this sentence. ⁷⁹² **!** At the time of writing, none of these provisions has been brought into force.

The Motor Insurers' Bureau

18-137

! In the case of victims of motor accidents, the statutory rights described in para.18-136 above are supplemented by an agreement originally made between the Motor Insurers' Bureau and the Minister of Transport. ⁷⁹³ **!** This provides that, in the circumstances specified in the agreement, the Bureau will pay any judgment (to the extent to which it remains unsatisfied) in respect of any liability which is required to be covered by a policy of insurance under the statutory scheme of compulsory motor insurance. At common law, a person who is injured in a road accident cannot technically sue on the agreement as he is not a party to it. ⁷⁹⁴ But the agreement may be specifically enforced by the appropriate Minister ⁷⁹⁵; and although "the foundations in jurisprudence" of the agreement "are better not questioned," ⁷⁹⁶ **!** the Bureau's policy is not to rely on the doctrine of privity as a defence to claims by the injured parties themselves. ⁷⁹⁷ **!** It is also now possible to draft the relevant agreements between the Bureau and the Secretary of State in such a way as to enable the victim to enforce them in his own right under s.1 of the Contracts (Rights of Third Parties) Act 1999. ⁷⁹⁸

Defective premises

18-138

Under the Occupiers' Liability Act 1957, an occupier of premises who is bound by contract to permit persons who are strangers to the contract to enter or use the premises owes them (subject to any contrary provision in the contract) not only the common duty of care but also any stricter obligation he may undertake towards the other contracting party. ⁷⁹⁹ The Defective Premises Act 1972 imposes certain duties on a person who takes on work for or in connection with the provision of a dwelling. These duties are owed not only to the person to whose order ⁸⁰⁰ the dwelling is provided but also to any person who acquires an interest (whether legal or equitable) in the dwelling. ⁸⁰¹ The Act also deals with the case where premises are let under a tenancy which puts on the landlord an obligation ⁸⁰² to the tenant for the maintenance or repair of the premises. The landlord in such a case owes a duty to all persons, who might reasonably be expected to be affected by defects in the state of the premises, to take reasonable care to see that such persons are reasonably safe from personal injury or damage to their property caused by a relevant defect. ⁸⁰³

1. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.

⁷⁴². See s.7(1) of the 1999 Act.

⁷⁴³. Elliott (1956) 20 Conv. 43, 114; Andrews (1959) 23 Conv. 179; Wade [1964] C.L.J. 66; Furmston (1960) 23 M.L.R. 380–385; Ellinger (1963) 26 M.L.R. 396; all these comments on s.56(1) must now be read in the light of the decision of the House of Lords in *Beswick v Beswick* [1968] A.C. 58, below para.18-130.

⁷⁴⁴. *Scudamore v Vanderstene* (1587) 2 Co.Inst. 673; *Storer v Gordon* (1814) 3 M. & S. 308; *Berkeley v Hardy* (1826) 5 B. & C. 355; *Southampton v Brown* (1827) 6 B. & C. 718; *Gardner v Lachlan* (1836) 8 Sim. 123. The rule was also applied to composition deeds; the cases on this subject are impossible to reconcile (see *Isaacs v Green* (1867) L.R. 2 Ex. 352, 355) but have

become obsolete in view of the Deeds of Arrangement Act 1914, repealed in part by Insolvency Act 1985, s.235 and Sch.10, Pt III and amended by Insolvency Act 1986, s.439(2).

- [745.](#) cf. above para.1–137.
- [746.](#) *Cooker v Child* (1763) 2 Lev. 74; *Chelsea & Waldham Green Building Soc. v Armstrong* [1951] Ch. 853, discussed in *Moody v Condor Insurance Ltd* [2006] EWHC 100 (Ch), [2006] 1 W.L.R. 1847 at [24]–[27].
- [747.](#) *Sunderland Marine Insurance Co v Kearney* (1851) 16 Q.B. 925, qualifying *Green v Horn* (1694) 1 Salk. 197.
- [748.](#) Law of Property Act 1925, s.56(2).
- [749.](#) *Moody v Condor Insurance Ltd* [2006] EWHC 100 (Ch), [2006] 1 W.L.R. 1847 at [16].
- [750.](#) *ibid.*, at [18], where a deed of guarantee of instalments due under a contract for the sale of a company was held to fall into the second of the two categories distinguished in the text above.
- [751.](#) *Beswick v Beswick* [1968] A.C. 58, 104B.
- [752.](#) Replacing s.11 of the Transfer of Property Act 1844, which was not restricted to real property. For the history of this change see Davidson's, *Concise Precedents in Conveyancing* (2nd ed., 1845), pp.10 et seq. cf. Treitel (1967) 30 M.L.R. 687, 688–689.
- [753.](#) It is generally agreed that s.5 of the 1845 Act was confined to real property: see *Beswick v Beswick* [1968] A.C. 58, 87D, 104E.
- [754.](#) *Forster v Elvett Colliery Co Ltd* [1908] 1 K.B. 629 (in the House of Lords, Lord Macnaghten reserved the point: *Dyson v Forster* [1909] A.C. 98, 102); *Grant v Edmonson* [1931] 1 Ch. 1. 728.
- [755.](#) [1966] Ch. 538 (above, para.18-022), and see *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 Q.B. 250; criticised on this point by Wade [1954] C.L.J. 66.
- [756.](#) [1968] A.C. 58, 77C, 81C, 87C.
- [757.](#) [1968] A.C. 58, 73F, 84G, 104F; cf. Treitel (1966) 29 M.L.R. 657, 661.
- [758.](#) Before the passing of the 1925 Act, a number of reforming measures had been enacted. None of these contained any provisions from which the present s.56(1) is derived. In introducing one of the reforming Bills, which were consolidated, together with earlier Acts, in the 1925 property legislation, Lord Haldane L.C. said that no Parliamentary time would be needed for the consolidating bills “because they do not change what will then be the law”: (1924) 59 H.L. Deb. 125. In view of his speech in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847, Lord Haldane could hardly have taken this view of the 1925 legislation if the effect of s.56(1) had been to reverse, for written contracts, the “fundamental principle” stated by him in that case at p.853, that “only a person who is a party to a contract can sue on it.”
- [759.](#) But not the side-note, which reads in part “persons taking who are not parties ...”.
- [760.](#) cf. below at nn.735 and 743.
- [761.](#) *Re Sinclair's Life Policy* [1938] Ch. 799; *Re Foster* [1938] 3 All E.R. 357; *Re Miller's Agreement* [1947] Ch. 615. A dictum in the last-mentioned case is doubted in *Beswick v Beswick* [1968] A.C. at 75F, but the actual decision is several times referred to with approval or at least without disapproval: at 76A, 80B, 86C, 106E.
- [762.](#) This view is stated by Lord Guest (at 87F) and perhaps shared by Lord Reid (at 76B) but doubted by Lord Upjohn (at 105F) with whom Lord Pearce agreed (at 94D). Lord Hodson says

that “property” must be given “a limited meaning” (at 81C), but he does not say what that meaning is. cf. also *Southern Water Authority v Carey* [1985] 2 All E.R. 1077, 1083.


- [763.](#) This follows from Lord Guest’s view in *Beswick v Beswick* [1968] A.C. 58 at 87A that s.56(1) has made no change at all in the law. Contrast Lord Reid’s view that s.56(1) has not “substantially” (at 77C) altered the law; and cf. Lord Pearce’s view of s.56(1) as an “enlargement” of its predecessor (at 93B) making no “substantial innovation”; and cf. Lord Upjohn at 105F.
- [764.](#) This view is regarded as a possible (though unsatisfactory) one by Lord Pearce (at 94D) and approved by Lord Upjohn (at 106D–F). It is rejected by Lord Guest (at 87B) and mentioned without comment by Lords Reid (at 74-75) and Hodson (at 81A).
- [765.](#) This view is stated by Lord Upjohn (at 107A), with whom Lord Pearce agreed (at 94D). It is also mentioned without comment by Lord Reid (at 76-77).
- [766.](#) *Re Ecclesiastical Commissioners’ Conveyance* [1936] Ch. 430; cf. a dictum in *Re Windle* [1975] 1 W.L.R. 1628, 1631 (not affected on this point by the doubts expressed in *Re Kumar* [1993] 1 W.L.R. 224, 235).
- [767.](#) *Stromdale and Ball Ltd v Burden* [1952] Ch. 223.
- [768.](#) *OTV Birwelco Ltd v Technical & General Guarantee Co Ltd* [2002] EWHC 2240; [2002] 4 All E.R. 686, at [12]; the statement of the facts of the case leaves the point in doubt.
- [769.](#) This “third limitation” imposes a more strict requirement than those imposed by s.1(1) and 1(2) of the Contracts (Rights of Third Parties) Act 1999.
- [770.](#) See *White v Bijou Mansions* [1937] Ch. 610; affirmed [1938] Ch. 351; *Lys v Prowsa Developments* [1982] 1 W.L.R. 1044, 1049; *Amsprop Trading Ltd v. Harris Distribution Ltd* [1997] 1 W.L.R. 1025.
- [771.](#) There is no such requirement under the Contracts (Rights of Third Parties) Act 1999: see s.1(3); above, paras 18-097, 18-098.
- [772.](#) *Kelsey v Dodd* (1883) 52 L.J.Ch. 34; *Westhoughton U.D.C. v Wigan Coal Co* [1919] 1 Ch. 159 (both these cases were decided under s.5 of the Real Property Act 1845, but the position under s.56(1) of the 1925 Act seems to be the same: *White v Bijou Mansions*, above n.744).
- [773.](#) For details of the exceptions discussed in this and the next five paragraphs below, see Vol.II, Ch.42.
- [774.](#) Including illegitimate children: Family Law Reform Act 1969, s.19(1).
- [775.](#) Marriage (Same Sex Couples) Act 2013, s.11 and Sch.3, Pt 1, para.1(1)(c) and 1(3).
- [776.](#) The legislative provisions referred to in n.749 above appear to apply also to the meaning of “husband” and “wife” in s.70 of the Civil Partnership Act 2004.
- [777.](#) See *Re Engelbach’s Estate* [1924] 2 Ch. 348 which is still good law on this point, although it has, on another point, been overruled (see above, para.18-075, n.465).
- [778.](#) *Re Clay’s Policy of Assurance* [1937] 2 All E.R. 548.
- [779.](#) Law Com. No.242, para.12-27.
- [780.](#) e.g. powers of cancellation or variation under s.2 of the 1999 Act do not apply where a trust has arisen under s.11 of the 1882 Act; cf. above, para.18-121.
- [781.](#) *Re Foster’s Policy* [1966] 1 W.L.R. 222.


- [782.](#) Road Traffic Act 1988, s.148(7), replacing Road Traffic Act 1930, s.36(4); discussed in *Tattersall v Drysdale* [1935] 2 K.B. 174 and *Austin v Zurich, etc.*, *Insurance* [1944] 2 All E.R. 243, 248. cf. also Transport Act 1980, s.61.
- [783.](#) *Waters v Monarch Insurance Co* (1856) 5 E. & B. 870; *Hepburn v A. Tomlinson (Hauliers) Ltd* [1966] A.C. 451; cf. *Petrofina (UK) Ltd v Magnaload Ltd* [1984] Q.B. 127 (head contractor insuring for benefit of himself and sub-contractors); *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1988] 2 Lloyd's Rep. 505 (same principle applied to reinsurance); *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep. 487, 495; *Glengate Properties Ltd v Norwich Union Fire Insurance Society* [1996] 2 All E.R. 487, 497. Contrast *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1992] 2 Lloyd's Rep. 578, where the main contractors' insurance did not cover the subcontractors since the main contractors had no authority or intention to contract on behalf of the subcontractors; for similar reasoning, see *Colonia Versicherung AG v Amoco Oil Co* [1997] 1 Lloyd's Rep. 261, 270–272. The principle of *Waters v Monarch Insurance Co*, above, may also be excluded or limited by the terms of the policy: see *Ramco (UK) Ltd v International Insurance Co of Hanover* [2004] EWCA Civ 675, [2004] 2 All E.R. (Comm) 866 at [32]; *Ramco Ltd v Weller Russell & Laws Insurance Brokers Ltd* [2008] EWHC 2202 (QB), [2009] Lloyd's Rep. I.R. 27 at [12]. The loss of the insured may exceed the value of his interest, and even be suffered in spite of his having parted with that interest, by reason of his having undertaken a contractual obligation with respect to the property: e.g. an obligation to reinstate it in the event of damage by a peril covered by the insurance: *Lonsdale & Thompson Ltd v Black Arrow Group plc* [1993] Ch. 361. See also, *Simon Container Machinery v Emba Machinery* [1998] 2 Lloyd's Rep. 429 at 437.
- [784.](#) Law of Property Act 1925, s.47; for the definition of "property" see *ibid.* s.205(1)(xx). Cf. also Law of Property Act 1925, s.108 as to the application of insurance money where property is mortgaged. In contracts for the sale of land s.47 of the 1925 Act is commonly excluded by contract: see Law Com. 191 (1990) para.3.2; Standard Conditions of Sale, 5th edition, Condition 5.1.6.
- [785.](#) Fires Prevention (Metropolis) Act 1774, s.83.
- [786.](#) *Portavon Cinema Co v Price & Century Insurance Co* [1939] 4 All E.R. 601; *Mark Rowlands Ltd v Berni Inns Ltd* [1986] Q.B. 211; *Lonsdale & Thompson Ltd v Black Arrow Group plc* [1993] Ch. 361.
- [787.](#) *Swain v Law Society* [1983] 1 A.C. 598.
- [788.](#) *ibid.*, at 611.
- [789.](#) See *Socony Mobil Oil Co Inc. v West of England Shipowners' Mutual Insurance Association (The Padre Island)* [1984] 2 Lloyd's Rep. 408; *Normid Housing Association Ltd v R. John Ralphs* [1989] 1 Lloyd's Rep. 265; *Bradley v Eagle Star Insurance Co Ltd* [1989] A.C. 957 (third party unable to sue insurer where insured had gone into liquidation before liability was established); *Duncan Stevenson MacMillan v A.W. Knott Becker Scott Ltd* [1990] 1 Lloyd's Rep. 98; *Lefevre v White* [1990] 1 Lloyd's Rep. 569, 577; *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti and The Padre Island)* [1991] 2 A.C. 1; *Cox v Bankside* [1995] 2 Lloyd's Rep. 437, 457, 466–467; *Schiffahrtsgesellschaft Detlev von Appen v Voest Alpine Intertrading G.m.b.H.* [1997] 1 Lloyd's Rep. 179, 187; *Total Graphics Ltd v A.G.F. Insurance Ltd* [1997] 1 Lloyd's Rep. 599; *William McIlroy (Swindon) Ltd v Quinn* [2011] EWCA Civ 825, [2012] 1 All E.R. (Comm) 12 at [6], [24] (where the issue was not whether the insured's rights had accrued, but whether they had been barred by lapse of time). cf. *Eagle Star Insurance Co Ltd v Provincial Insurance plc* [1994] A.C. 130, where the issue of contribution between insurers arose under legislation in force in the Bahamas giving third parties direct rights against insurers; *Charlton v Fisher* [2001] EWCA Civ 112; [2002] Q.B. 578 at [96] (third party has no claim under the 1930 Act where the insured's claim against the insurer would fail on grounds of public policy since "as statutory assignee under the 1930 Act the third party simply stands in the shoes of the insured"); *Matadeen v Caribbean Insurance Co Ltd* [2002] UKPC 69, *The Times* January 20, 2003 (third party subject to same period of limitation as insured). For conflicting views on the question whether the third party had any right under s.1(3) before the insured's liability to the third party had been established, contrast *Nigel Upchurch*

Associates v Aldridge Estates Investment Co Ltd [1993] 1 Lloyd's Rep. 533 (no such right) with *Centre Reinsurance International Co v Curzon International Ltd* [2004] EWHC 200 (Ch), [2004] 2 All E.R. (Comm) 28 (such a right can rise "notwithstanding that the insured's liability to the third party has yet to be established" (at [29])). The *Centre Reinsurance* case was varied on appeal, but not on the point here under discussion: [2005] EWCA Civ 115, [2005] 2 All E.R. (Comm) 28, where it was also held that s.1(3) was not intended to strike down provisions in the insurance contract itself which were designed to put the third party into a better position than that in which the insured would have been immediately before the statutory transfer of the insured's rights to the third party (at [83]). On further appeal, the decision of the Court of Appeal was reversed ([2006] UKHL 45, [2006] 1 W.L.R. 2863), but not on the points here under discussion. See also *Re T & N Ltd (No.3)* [2003] EWHC 1447 (Ch), [2007] 1 All E.R. (Comm) 851 at [30]–[33], distinguishing between (a) the rule that only those rights which the insured has against the insurer can be vested in the third party transferee and (b) the stage at which the transfer takes place, which may be "an earlier stage" than that at which the rights of the insured against the insurer are established. The present topic is not covered by the Contracts (Rights of Third Parties) Act 1999: see Law Com. No.242 para.12-21.

[790.](#) Third Parties (Rights against Insurers) Act 1930; *Bradley v Eagle Star Insurance Co Ltd* [1989] A.C. 957; Road Traffic Act 1988 ss.151–153 as amended by Road Traffic Act 1991 s.48 and Sch.4, para.66, s.83 and Sch.8 and by Insurance Act 2015 s.21(4) when the latter Act comes into force; Michel [1987] L.M.C.L.Q. 228; and see Policyholders Protection Act 1975, s.7 for the rights of such persons where the company is in liquidation.

[791.](#) See their Report on Third Parties—Rights against Insurers, Law Com. 272, Scot. Law Com. 184, Cm 5217.

[792.](#)  It suffices here to make a number of general points about the 2010 Act. First, that Act maintains the principle, originally contained in the 1930 Act, that (in the circumstances specified in the 2010 Act) the rights of an insured person against the insurer under the policy can be transferred to a third party to whom the insured incurred the liability against which the latter was insured by the policy (s.1(2)). Secondly, the principle is extended to situations in which the insured, though not insolvent, has invoked one of a number of specified "alternatives to insolvency" now available to an "insured [who] is facing financial difficulties" ("Explanatory Notes" to the 2010 Act prepared by the Ministry of Justice, para.11; 2010 Act, ss.4 and 6). Thirdly, a new procedure is introduced which will make it possible for the third party to establish the liability of the insured to the third party in the same proceedings as those brought by the third party against the insurer (ss.1(3), 2). Fourthly, the rule in *The Fanti and the Padre Island* [1991] 2 A.C. 1 (cited in n.763 above), by which no rights are transferred by virtue of the 1930 Act where the policy contained a provision requiring the insured first to pay the third party before the insured acquired any rights under the policy, will no longer apply (2010 Act, s.9(5)); but this change in the law will not apply to contracts of marine insurance, except in relation to personal injury claims (ibid., s.9(6)). Further amendments of the 2010 Act have been made by the Third Parties (Rights against Insurers) Regulations 2016 (SI 2016/570) which came into force immediately after the coming into force of the 2010 Act and of Insurance Act 2015 s.20 and Sch.2. Section 19 of the Insurance Act 2015 (which replaces s.19 of the Third Parties (Rights against Insurers) Act 2010) came into force on April 12, 2015: see s.23(3)(a) of the 2015 Act. The rest of the 2010 Act is brought into force by the Third Parties (Rights against Insurers) Act 2010 (Commencement) Order 2016 (SI 2016/550) with effect from August 1, 2016.

[793.](#)  See *Hardy v M.I.B.* [1964] 2 Q.B. 745, 770 and *White v London Transport Executive* [1971] 2 QB 721, 729; *White v White* [2001] UKHL 9; [2001] 1 W.L.R. 481 and see ibid., at [7]; for a brief history of the Uninsured Drivers' Agreement and the Untraced Drivers' Agreement, see *Jacobs v Motor Insurers' Bureau* [2010] EWCA Civ 1208, [2011] 1 All E.R. 844 at [7]; Vol.II, para.42-125.

[794.](#) See *Gurtner v Circuit* [1968] 2 Q.B. 587.

[795.](#) ibid.

796.

! *Gardner v Moore* [1984] A.C. 548, 556. Where the injured third party has no rights by virtue of the Uninsured Driver's Agreement referred to in n.767 above, that party may, precisely for that reason, have rights to compensation against the Secretary of State for Transport under EU law: see *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB), [2014] R.T.R. 25; *Wigley-Foster v Wilson* [2016] EWCA Civ 454, [2017] 1 All E.R. (Comm) 715, citing *Jacobs v Motor Insurers' Bureau* [2010] EWCA Civ 1208, [2011] 1 W.L.R. 2609. Since these rights are not contractual, their "foundations in jurisprudence" do not call for discussion here.

797.

! *Hardy v M.I.B.*, above, at 757; *Randall v M.I.B.* [1968] 1 W.L.R. 1900; *Persson v London County Buses* [1974] 1 W.L.R. 569; *Porter v Addo* [1975] R.T.R. 503. As the Bureau is interested in the outcome of the litigation between the injured party and the driver it may, at the court's discretion, be added as a party to such litigation: see *Gurtner v Circuit*, above, and contrast *White v London Transport Executive*, above n.767. Notice of proceedings against the driver must be served on the Bureau: *Cambridge v Callaghan*, *The Times*, March 21, 1997; Uninsured Drivers Agreement 2015 (in force August 1, 2015). For the enforceability of the agreement by third parties, see also *Charlton v Fisher* [2001] EWCA Civ 122; [2002] Q.B. 578, at [25], [82] and below at n.772.

798.

Above, para.18-091: see *Evans v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 32, [2002] Lloyd's Rep. I.R. 1 at [4].

799.

Occupiers' Liability Act 1957, s.3(1).

800.

This order will generally give rise to a contract but the duty is imposed even where this is not the case.

801.

Defective Premises Act 1972, s.1.

802.

This will generally be contractual but might also be imposed (for example) by statute.

803.

Defective Premises Act 1972, s.4.

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 6 - Joint Obligations, Third Parties and Assignment
Chapter 18 - Third Parties ¹
Section 5. - Enforcement Against Third Parties

General rule: third party not bound

18-139

The general rule is that a contract binds only the parties to it. This rule is regarded as an aspect of the doctrine of privity ⁸⁰⁴; and in so far as A and B cannot by a contract between them impose an obligation to perform duties arising under that contract on C, ⁸⁰⁵ the rule may seem to be so obvious that it scarcely needs to be stated: if a contract between A and B provided that C was to pay £100 to A, no-one would suppose that this contract could oblige C to make the payment. The point is further illustrated by a case in which the Supreme Court held that a contract entered into by a company did not bind a third party merely because that person was the company's controlling shareholder. ⁸⁰⁶ Similar policy considerations account for the rule that C is not liable to A in restitution merely because A has, in the performance of a contract between A and B (to which C was not a party), conferred a benefit on C. ⁸⁰⁷ But the rule equally applies where the contract between A and B merely purports to deprive C of some right or to restrict his freedom of action, without imposing any obligation to perform on him: for example, a person is not bound by an exclusion clause contained in a contract to which he is not a party, ⁸⁰⁸ unless one of the exceptions to the doctrine of privity can be invoked against him ⁸⁰⁹ or unless he can be held to be so bound by virtue of some relationship (such as a bailment or sub-bailment on terms to which he had consented, incorporating the clause) between himself and the wrongdoer. ⁸¹⁰ Another illustration of the same point is provided by a case ⁸¹¹ in which A (the Crown) had granted a licence to B to "search, bore for and get" petroleum owned by A and lying partly under C's land. It was held that there was no "common law principle that [B] can invoke ... to regulate their position in relation to a landowner (C) who was not a party to that arrangement." ⁸¹² Accordingly, B was liable to C for trespass to land in drilling and laying pipelines under C's land (pursuant to the licence) in order to extract the petroleum.

Exceptions to the doctrine of privity

18-140

The discussion of the exceptions to the doctrine of privity in paras 18-079 to 18-138 above concerns situations in which a person can acquire *rights* under a contract to which he is not a party. It does not deal with the converse problem, whether *duties* or liabilities can be imposed by such a contract on a third party. This possibility can, however, arise, under some of the exceptions to the doctrine which have been referred to in para.18-079, but which (for reasons there stated) are not discussed in this chapter; e.g. under the law of agency and under the law as to covenants relating to land. It can also arise where liabilities arising under a contract are imposed by legislation on a person who is not an original party to the contract. ⁸¹³

Scope of the rule

18-141

In cases governed by the general rule stated in para.18-139 above, a contract between A and B cannot impose a positive duty on C to render the performance specified in the contract; but the contract can impose legal restrictions on C's freedom of action in various other ways. For example, it may create a lien, ⁸¹⁴ or a lease, ⁸¹⁵ or an equitable interest, or give rise to a constructive trust affecting property, ⁸¹⁶ and such interests can affect the rights of third parties who later acquire the property. Moreover, although a contract primarily creates rights and duties enforceable by the contracting parties against each other, it also incidentally imposes on third parties a duty not to induce one of the contracting parties to commit a breach of the contract. In the leading case of *Lumley v Gye* ⁸¹⁷ it was held that a person who, knowing of a contract between two others, "maliciously", i.e. intentionally ⁸¹⁸ induces one of them to commit a breach of it (e.g. by wrongfully refusing to perform it) is liable to the other for the tort of inducing a breach of the contract. ⁸¹⁹ In some later cases, this tort was described as one of "interference" by C with contractual rights which A had under a contract between A and B. This terminology was based on authorities ⁸²⁰ which had supported the "unified theory" ⁸²¹ that tort liability for inducing a breach of contract was "a species of a more general tort of actionable interference with contractual rights," ⁸²² But this "unified theory" was rejected ⁸²³ by the House of Lords in *OBG Ltd v Allan*. ⁸²⁴ A sharp distinction was there drawn between two torts: that of inducing a breach of contract ⁸²⁵ and that of causing loss by unlawful means. ⁸²⁶ The details of this distinction are beyond the scope of a book on the law of contract. It suffices here to say that the former tort depends on C's having induced a breach by B, while the latter does not ⁸²⁷; that the former tort does not, while the latter does, depend on C's having used means (to induce the breach) which are "independently unlawful" ⁸²⁸; and that the mental elements of the two torts differ in that the former requires no more than an intention to induce the breach by B while the latter requires an intention to cause loss to A. ⁸²⁹ If, for example, A's claim is based on the allegation that C has *prevented* B from performing his contract with A, but without B's having committed any *breach* of it, then C's liability (if any) is for the "unlawful means" tort and will arise only if the requirements of *that* tort are satisfied. ⁸³⁰ Our concern in this Chapter is with the first of the two torts distinguished in the decision of the House of Lords in *OBG Ltd v Allen*, ⁸³¹ i.e., with that of inducing a breach of contract.

Scope of the tort

18-142

The effect of the tort of inducing a breach of contract may be, not only to restrict the activities of the person guilty of the wrongful interference, but also adversely to affect other third parties. For example, where a former employee disclosed the employer's trade secrets to a company which the employee controlled, and which used those trade secrets to secure an order from one of the employer's old customers, an injunction was granted not only to restrain the employee from using the trade secrets, but also to restrain the company from fulfilling its contract with the customer, whose remedy would have been in damages against the company. ⁸³²

Contracts affecting chattels ⁸³³

18-143

The rule in *Lumley v Gye* ⁸³⁴ may help to solve the problem which can arise where a person acquires a chattel which is the subject-matter of a contract previously made between two other persons. The problem is to what extent the acquirer may, although he is a stranger to that contract, be affected by it in his use of or dealing with the chattel. Such contracts may take a variety of forms. One possibility is that they may impose restrictions on the use or disposition of goods, e.g. by providing that the goods shall be used only along with others made by the same manufacturer, or that they shall be sold only in packets sealed by the manufacturer, or at fixed prices, or within specified limits of time or territory. Or they may require the use of some *particular* chattel for their performance, without creating any proprietary or possessory interest in the chattel: for example, in the case of a contract to carry cargo in a particular ship. Or they may provide for the hire of a chattel, or confer an option to purchase it, or do both these things, as in the case of hire-purchase agreements.

Protection in special cases

18-144

In a number of special cases the law protects such contractual rights against strangers who acquire the chattel in question with notice of the contractual rights. Thus where an option to purchase a chattel is *specifically* enforceable, it may be enforced against third parties who acquire the chattel with notice of the option.⁸³⁵ The same would be true where a debtor gave an undertaking to his creditor that he would repay a loan of money out of specific property, and later created a charge over the property in favour of a third party. Since such an undertaking to repay is specifically enforceable, it would create a charge in equity over the property in favour of the creditor, and this would prevail against the third party unless he was a bona fide purchaser for value without notice.⁸³⁶ This principle can, however, apply only where the contract is one which relates to specific property. It therefore did not apply where a property developer undertook in its contract with a builder to set up a retention fund and then charged its assets to a bank. Although the bank had express notice of the terms of the building contract, its charge was held not to be subject to the promise to create the retention fund since there was no specific property to which that promise could be said to relate.⁸³⁷

More general principle rejected

18-145

An attempt to establish a more general principle of protection of contractual rights affecting chattels against strangers acquiring them with notice of those rights was made in the charterparty case of *De Mattos v Gibson*, where Knight Bruce L.J. said:

“Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.”⁸³⁸

This principle came to be associated with the rule in *Tulk v Moxhay*,⁸³⁹ relating to restrictive covenants affecting land. That rule was later confined to cases in which the claimant's interest in enforcing the covenant consisted in the ownership of land capable of being benefited.⁸⁴⁰ This usually meant adjacent land, and since adjacency cannot be a satisfactory criterion of interest in the case of things that can be moved, the tendency of this development of the rule in *Tulk v Moxhay*, was to undermine the view that the general principle stated by Knight Bruce L.J. in *De Mattos v Gibson* could be applied to contracts affecting all kinds of property.⁸⁴¹ Nevertheless, in *Lord Strathcona SS. Co v Dominion Coal Co*⁸⁴² the Privy Council relied on that principle to hold that a time charterer of a ship had an interest⁸⁴³ in the ship which he could enforce against a purchaser of the ship with notice of the charterparty: that purchaser was said to be “plainly in the position of a constructive trustee, with obligations which a court of equity will not allow him to violate.”⁸⁴⁴ The decision provoked adverse judicial criticism,⁸⁴⁵ particularly because the land law analogies and the constructive trust reasoning on which the decision was based might lead to the third party's being made liable where he had only constructive notice of the earlier contract. Where that contract concerned the use or disposition of a chattel, such a conclusion was open to the objection that it might have the undesirable effect⁸⁴⁶ of introducing the doctrine of constructive notice into commercial affairs. When a similar problem arose in *Port Line Ltd v Ben Line Steamers Ltd*,⁸⁴⁷ Diplock J. therefore refused to follow the Privy Council's decision. Alternatively, he was prepared to distinguish that decision on the ground that the purchaser of the ship in the *Port Line* case merely knew the ship was subject to a time charter to the claimant, but did not have actual notice of the relevant terms of the charterparty specifying the precise extent of the claimants' rights under it.⁸⁴⁸ Thus while the *Port Line* case rejects the general principle stated by Knight Bruce L.J. so far as it relates to contracts concerning chattels, it does not decide that a third party can always disregard such a contract when he acquires the chattel in question. Possible limitations on his freedom to do so are considered in the next eight paragraphs.

Remedy

18-146

Later authorities have restricted the principle stated in *De Mattos v Gibson* ⁸⁴⁹ by emphasising that the remedy there sought was simply an injunction to restrain the acquirer, C, from using the property inconsistently with the terms of the contract between A and B, known to C. ⁸⁵⁰ The principle therefore cannot impose any positive obligation on C to perform the terms of the contract between A and B. Thus where B acquired shares from A, promising to make payments to A on the occurrence of specified events, which later happened, it was held that that promise could not be enforced against C who later acquired the shares from B with knowledge of the contract between A and B, nor against D who acquired them from C with such knowledge. ⁸⁵¹ An injunction on the principle of *De Mattos v Gibson* was not available against C or D as they were not proposing to act inconsistently with the contract between A and B: "they are merely proposing ... to do nothing whatever." ⁸⁵²

Third party's liability in tort ⁸⁵³

18-147

Where a person acquires a chattel with actual knowledge ⁸⁵⁴ of the terms of a contract affecting it, he may, if his acquisition or use of the chattel is inconsistent with that contract, be liable in tort for inducing a breach of contract. ⁸⁵⁵ Thus in *British Motor Trade Association v Salvadori* ⁸⁵⁶ B bought a car and covenanted with A that he would not resell it for one year without first offering it to A. C bought the car from B within the year with notice of the covenant and was held liable to A for wrongfully inducing B to break his contract with A. It has been suggested that the decision of the Privy Council in the *Lord Strathcona* case ⁸⁵⁷ can be explained on the ground that the purchaser of the ship had committed this tort against the charterer. ⁸⁵⁸ The tort may be committed even though B was quite willing to break his contract with A. Thus in a case like *Salvadori's* it would be immaterial whether B or C began the negotiations for the sale of the car. ⁸⁵⁹ Indeed, C's tort liability may arise precisely where he and B collude in order to get rid (if they can) of a restriction imposed by the contract between B and A. ⁸⁶⁰

Factors limiting tort liability

18-148

The merit of approaching the problem here under discussion through the law of tort is that it avoids the danger of importing the doctrine of constructive notice into this branch of the law. Such an approach is, on the other hand, subject to two limitations: these are discussed in paras 18-149 and 18-150, below.

Lack of causal connection

18-149

First, the tort is not committed if the defendant's interference was not the cause of the claimant's loss. Thus in the *Lord Strathcona* case the shipowners, who were the defendants in the Privy Council proceedings, ⁸⁶¹ had mortgaged the ship, after the conclusion of the charterparty. The mortgage gave the mortgagees a power to sell the ship, and it was held in other proceedings ⁸⁶² that they were entitled to sell her free from the charterers' rights even though they knew of those rights. ⁸⁶³ The reason for this decision was that the shipowners could not have performed the charterparty, even if the ship had not been sold, because they were too poor to put her to sea. It was the poverty of the shipowners, and not the mortgagees' sale of the ship, which was the cause of the charterers' loss. Similarly, where breach of the contract has already been induced by C's acquisition of the property from B, there will be no tort liability for inducing breach of contract on D, who subsequently buys the property from C, even with knowledge of the contract between A and B, for D's conduct will not have played any part in inducing the original breach. ⁸⁶⁴ Nor will D in such a case be liable for interference

with the remedies arising out of the broken contract⁸⁶⁵ between A and B.

Requirement of intentional wrongdoing

18-150

Secondly, liability for interference with contractual rights is based on intentional wrongdoing.⁸⁶⁶ It follows that, if a defendant negligently damaged a ship that was subject to a time charterparty, he would not commit this tort against the charterer; nor would he be liable to the charterer in negligence for purely economic loss, such as hire wasted or profits lost while the ship was, by reason of the damage, out of service.⁸⁶⁷

Third party's knowledge: the time factor

18-151

❗ So far, in discussing the third party liability in tort for inducing a breach of contract,⁸⁶⁸ it has been assumed that C either knew or did not know of the contract between A and B. In the former situation, he could, but in the latter he could not, be liable for this tort.⁸⁶⁹ There is also an intermediate situation, in which C at the time of his contract with B had no more than constructive notice of B's earlier contract with A, but then acquired actual knowledge of that contract before calling for (or receiving) performance of his own contract with B.⁸⁷⁰ The question then arises whether, on such facts, C is liable to A for the tort of inducing a breach of the contract between A and B. That tort is subject to the

defence of "justification,"⁸⁷¹ ❗ which is certainly available to C where he had contracted with B *before* A had done so.⁸⁷² But the defence is a flexible one,⁸⁷³ and the principle on which it is based appears to be equally applicable where C's contract with B was made *after* A's but in ignorance of it. The exercise by C of rights thus acquired in good faith against B should not, it is submitted, make C liable in tort to A.⁸⁷⁴ Even in such a situation, however, C may be liable to A under the rules stated in para.18-144 above if the contract between A and B is *specifically* enforceable by A. Where the specific enforceability of this contract gives rise to an equitable interest, this interest can be asserted against C even though he had, when he contracted with B, only constructive notice of the contract. In such a case, the tort claim would be "of no value"⁸⁷⁵ if, as has been submitted above, it arises only where C, when he contracted with B, had actual knowledge of A's rights; but it would equally be unnecessary,⁸⁷⁶ since A could succeed against C on the different ground that the contract between A and B was specifically enforceable by A and therefore conferred an equitable interest on A.

Protection of "possessory rights"

18-152

The further possibility here to be discussed relates to contracts under which possession of a chattel is, or is to be, transferred. The contracts in the *Strathcona* and *Port Line* cases were not of this kind: they were time charters, i.e. contracts under which a shipowner undertakes to render services by the use of a particular ship which remains in his possession.⁸⁷⁷ Such charters must be contrasted with demise charters, which are contracts for the hire of a ship under which the shipowner does transfer, or undertake to transfer, possession of the ship to the charterer.⁸⁷⁸ The nearest analogy in the land law to contracts for the hire of a chattel is a lease, and not a restrictive covenant. Hence the development of the doctrine of *Tulk v Moxhay*, discussed in para.18-145 above, need not affect cases concerning such contracts. One reason given by Diplock J. for his decision in the *Port Line* case was that a time charterer had "no proprietary or possessory rights in the ship."⁸⁷⁹ It can be inferred that a "possessory right" might have been protected. Where the hirer of a chattel is in actual possession of it, he should certainly be protected against a third party who acquires the chattel with notice of the hirer's interest.

Rights to future possession

18-153

It is less clear whether, in this context, the words “possessory rights”⁸⁸⁰ refer only to the right of possession or extend also to a right to possession, i.e. whether a person who has a contractual right to the future possession of a chattel would similarly be protected against the third party. In *The Stena Nautica* (No.2)⁸⁸¹ B had demise-chartered his ship to A under a contract which also gave A an option to purchase her. Later, while B was in possession of the ship, he granted a second demise charter of her to C who had no knowledge of the earlier contract. A exercised his option to purchase and it was held that his only remedy was by way of damages against B: since A’s option to purchase was not specifically enforceable,⁸⁸² A could not assert rights to the ship against C. The question whether A could assert his *right to possession as demise charterer* against C did not, strictly speaking, arise since A was suing, not to enforce that right, but rather his right as a person who had exercised an option to purchase. But it seems from the reasoning of the Court of Appeal that A’s right to possession as demise charterer would have been protected only if the contract under which the right arose was one in respect of which the court would be willing to make an order of specific performance.⁸⁸³ The argument of commercial convenience (which justified the decision in the *Port Line* case⁸⁸⁴) would seem to apply as much where a contract creates a right to the future possession of a chattel as it does where the contract creates the right to have some particular use made of the chattel. In each case the right is hard to discover and should not be enforced against a third party without actual knowledge of it; and adequate protection against a third party with such knowledge is provided by the rules relating to the tort of inducing a breach of contract.⁸⁸⁵

1. Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.

804. This aspect of the doctrine is not affected by the Contracts (Rights of Third Parties) Act 1999: see above para.18-002. Hence where a contract between A and B was held, on its true construction, to purport, not to confer a *benefit* on C, but to *restrict* C’s rights, it was said that “no question arises under the Contracts (Rights of Third Parties) Act 1999”: *Prudential Assurance Co Ltd v Ayres* [2008] EWCA Civ 52 at [42].

805. An apparent exception to the rule stated in the text above at first sight arises under the so-called principle of “conditional benefit” by which, where a term in a contract between A and B confers a benefit to C but gives C a right to enforce the term only if a specified condition occurs and where that condition is the performance of some act or abstention by C. But such a term does not impose an obligation on C to render that performance since it does not (and could not effectively) compel C to claim the benefit: it merely requires him to render the stipulated performance if he chooses to claim the benefit: see Report, paras 10-024 to 10-032; and, for a recent judicial discussion *Hurley Palmer Flatt Ltd v Barclays Bank plc* [2014] EWHC 3042 (TCC), [2015] Bus. L.R. 106 at [18], [35], where, for the reasons given at [36], [37] the principle of “conditional benefit” did not apply.

806. *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 A.C. 337, where Lord Neuberger P. said at [140] that it “would be wrong that [the third party] should be treated as if he was a party to the agreement in circumstances where (i) at the time the agreement was entered into, none of the actual parties to the agreement intended to contract with him and he did not intend to contract with them, and (ii) thereafter, [the third party] never conducted himself as if, or led any other party to believe, he was liable under the agreement.” No unfairness to the party who had contracted with the company resulted since if that party had been induced to contract by a misrepresentation made by the third party then the law would provide “redress for [that party] against [the third party] in the form of a cause of action in negligent or fraudulent misrepresentation” (at [139]); for such liability, cf. above para.18-024 at n.149. The letters used in Lord Neuberger’s judgment to designate the three parties are not the same as used in the text above for this purpose.

807. *Macdonald v Costello* [2011] EWCA Civ 930, [2012] 1 All E.R. (Comm) 357 (the claim was

rejected because, to uphold it “would undermine the contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations ...” (at [23]).

- [808.](#) *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785. Cf. *British American Tobacco Switzerland SA* [2012] EWHC 694 (Comm), [2012] 2 Lloyd’s Rep. 1 at [10] (defendant not bound by a jurisdiction clause in a contract to which defendant was not a party: see above, para.18-006); *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, above n.780, where the underlying assumption was that an English Court jurisdiction clause would not bind a person who was not a party to the contract in which that clause was contained (see especially at [140]).
- [809.](#) Above, para.15-043; cf. *Herd v Clyde Helicopters Ltd* [1997] A.C. 473, where legislation limiting the liability of a party to the contract was held to be effective as against a third party.
- [810.](#) Above, para.15-057; e.g. *East West Corporation v DKBS 1912* [2003] EWCA Civ 83; [2003] Q.B. 1509, at [69] (where the exemption clauses were held on other grounds not to protect the defendants); *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11, [2008] 1 Lloyd’s Rep. 462 at [46], [47].
- [811.](#) *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35, [2011] 1 A.C. 380.
- [812.](#) *ibid.*, at [32].
- [813.](#) As under Carriage of Goods by Sea Act 1992, s.3, discussed in Carver on Bills of Lading, 3rd ed. (2011), paras 5–086 to 5–105.
- [814.](#) See *Faith v E.I.C. (1821)* 4 B. & Ald. 630; *Tappenden v Artus* [1964] 2 Q.B. 185; *Jare Trä AB v Convoys Ltd* [2003] EWHC 1488 (Comm); [2003] 2 Lloyd’s Rep. 459. See also *T. Comedy (UK) Ltd v Easy Managed Transport Ltd* [2007] EWHC 611 (Comm), [2007] 2 All E.R. (Comm) 282 at [64] (third party bound by lien arising under contract of carriage by virtue of the doctrine of bailment on terms, referred to at n.784 above). Contrast *Chellaram & Sons Ltd v Butler’s Warehousing and Distributing Ltd* [1978] 2 Lloyd’s Rep. 142 (third party not bound by agreement purporting to confer on sub-bailee a lien more extensive than that which would, but for such agreement, arise at common law).
- [815.](#) As in *Ashburn Anstalt v Arnold* [1989] Ch. 1 (overruled on another ground in *Prudential Assurance Co Ltd v London Residuary Body* [1992] A.C. 386).
- [816.](#) See *Ashburn Anstalt v Arnold*, above n.789, where the mere fact that C had notice of an earlier contract between A and B was said at 25–26 to be insufficient to give rise to a constructive trust on C’s acquisition of the land affected by that contract; and where Fox L.J. (delivering the judgment of the court) at 17 disapproved dicta in *Errington v Errington* [1952] 1 K.B. 290, to the effect that a contractual licence to occupy land granted by A to B gave rise to an equitable interest binding third parties; Hill (1988) 51 M.L.R. 226; Oakley [1988] C.L.J. 353. cf. also *Binions v Evans* [1972] Ch. 359; Smith [1973] C.L.J. 81; *Re Sharpe* [1980] 1 W.L.R. 219; *Pritchard v Briggs* [1980] Ch. 338 (option to purchase); *Lys v Prowsa Developments* [1982] 1 W.L.R. 1044; *Lloyd v Dugdale* [2001] EWCA Civ 1754; [2001] 48 E.G.C.S. 129; contrast *Chaudhary v Yavus* [2011] EWCA Civ 1314, [2012] 2 All E.R. 418, where *Lys v Prowsa Development* was described as a “very unusual” (at [61]) or “exceptional” (at [64]) case and distinguished on the ground that, in the *Chaudhary* case, there was “nothing in the contract to draw specific attention to [the third party’s right]” (at [58]); and *Lloyd v Dugdale* was also distinguished on the ground that there was nothing in the contract in the *Chaudhary* case “to allow the court to conclude that by [that] contract the purchaser had undertaken to give effect to “the third party’s interest” (at [59]).
- [817.](#) (1853) 2 E.&B. 216; for further proceedings, see 23 L.T. 66, 18 Jur. & 68 n., 23 L.J.Q.B. 116n.; Waddams (2001) 117 L.Q.R. 431.
- [818.](#) “Maliciously” in *Lumley v Gye* (above, n.791) meant no more than that “the defendant intended to procure a breach of contract”: *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 A.C. 1 at [8]; cf. at [189], [191]. It follows that C must have actual knowledge, not only of the existence of the

contract between A and B, but also of the term in it alleged to have been broken by B: *ibid.*, at [39], [40]; though for this purpose C may be taken to have knowledge of a fact if he deliberately shuts his eyes to it: *ibid.*, at [41]. For the requirement of knowledge of the contract and intention to procure its breach, see also *Unique Pub Properties Ltd v Beer Barrels Mineral Waters Ltd* [2004] EWCA Civ 586, [2005] 1 All E.R. (Comm) 181. The relevant intention will be negated where C honestly and genuinely believed that B's relevant conduct would not amount to a breach: *OBG* case, above, at [68]–[70], [200]–[202]; this is true even where C's belief is based on a mistake of law: *ibid.*, at [202]; *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303 at [114], [119], [124], [180]. It follows from the requirement of an intention to induce a breach that C is not liable for the tort if he acts carelessly: "Negligent interference is not actionable": *OBG* case above at [191]; *Miller v Bassey* [1994] EMLR 44 (where the defendant had been held liable without intending to induce the breach) is disapproved in the *OBG* case at [43], [166], [264]; and see *ibid.* at [202], citing *British Industrial Plastics Ltd v Ferguson* [1940] 1 All E.R. 479 in favour of the view that the requisite intention may be negated by C's honest, if eccentric, belief that the conduct induced was not a breach. C is also not liable for this tort if he believed that he was entitled to act in a way that would prevent B from performing B's contract with A: *Meretz* case, above, at [124], [179]. Where the intention to induce B to break his contract with A is established, there is no further requirement that C must intend to cause loss: see below, at n.803. To the extent that the contrary may be suggested in the *Meretz* case at [2], [127], the suggestions are, with respect, made per incuriam, and are inconsistent with *ibid.*, at [124], [179].

[819.](#) See below at nn.799, 803.

[820.](#) e.g., *D.C. Thompson & Co v Deakin* [1952] Ch. 646: see *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 A.C. 1 at [26].

[821.](#) *ibid.*, before [26], at [27], [28], [264]; cf. [306], [320].

[822.](#) *ibid.*, at [27].

[823.](#) See *ibid.*, at [32]; cf. at [172], [173], [264].

[824.](#) [2007] UKHL 21, above, n.792.

[825.](#) At [3]–[5], [39]–[44], [168]–[172].

[826.](#) At [6]–[8], [45]–[60], [141]–[163].

[827.](#) At [8].

[828.](#) At [8]; cf. [32], [49], [51], [145], [148], [164].

[829.](#) At [8], [47], [62], [141], [192]; for the mental element of the tort of inducing breach of contract, see further n.792 above.

[830.](#) See the *OBG* case, above n.798 at [180], [189] ("there is no in-between hybrid tort of 'interfering with contractual relations'").

[831.](#) At nn.799, 800. For the further distinction between the requirements of the tort of *causing loss* by unlawful means and that of *conspiracy* to cause loss by unlawful means, see the discussion of the *OBG* case in *Revenue and Customs Commissioners v Total Networks SL* [2008] UKHL 19, [2008] 2 All E.R. 143.

[832.](#) *PSM International v Whitehouse* [1992] I.R.L.R. 279.

[833.](#) Chafee (1928) 41 Harv.L.Rev. 945; Wade (1928) 44 L.Q.R. 51.

[834.](#) (1853) 2 E. & B. 216; above, para.18-141.

- [835.](#) *Falcke v Gray* (1859) 4 Drew. 651, as explained in *Erskine Macdonald Ltd v Eyles* [1921] 1 Ch. 631, 641.
- [836.](#) *Swiss Bank Corp. v Lloyd's Bank Ltd* [1982] A.C. 584, 598, 613, below, para.27-008; the actual decision was that the contract of loan did *not* create an obligation to repay out of specific property and hence was not specifically enforceable. cf. also *C.N. Marine Inc. v Stena Line A/B (The Stena Nautica)* (No.2) [1982] 2 Lloyd's Rep. 336 (where specific performance was denied). For the special position of mortgages of ships, see *The Shizelle* [1992] 2 Lloyd's Rep. 444.
- [837.](#) *MacJordan Construction Ltd v Brookmount Erostin Ltd* [1992] B.C.L.C. 350.
- [838.](#) (1858) 4 D. & J. 276, 282.
- [839.](#) (1848) 2 Ph. 774.
- [840.](#) *L.C.C. v Allen* [1914] 3 K.B. 642; the actual decision has been reversed by statute (see now Housing Act 1985, s.609) but the principle stated in the text remains unimpaired.
- [841.](#) See *Greenhalgh v Mallard* [1943] 2 All E.R. 234, 249.
- [842.](#) [1926] A.C. 108.
- [843.](#) *ibid.*, at 123.
- [844.](#) *ibid.*, at 125.
- [845.](#) *Clore v Theatrical Properties* [1936] 2 All E.R. 483, 490; *Greenhalgh v Mallard* [1943] 2 All E.R. 234; cf. the earlier criticisms of Knight Bruce L.J.'s principle in *Barker v Stickney* [1919] 1 K.B. 121, 132 (as to which see *Tito v Waddell* (No.2) [1977] Ch. 106, 300).
- [846.](#) See *Manchester Trust Ltd v Furness* [1895] 2 Q.B. 539, 545; *Westdeutsche Landesbank Girozentrale v Islington B.C.* [1996] A.C. 669, 704.
- [847.](#) [1958] Q.B. 146. The cases cited in para.18-141, n.790 all apply the constructive trust reasoning to contracts concerning land and do not, it is submitted, undermine the rejection of that reasoning in the *Port Line* case so far as contracts affecting the use or disposition of chattels are concerned. The use of the expression "constructive trustee" in the passage quoted at n.818 above also now gives rise to a further question because of the overlap (discussed in para.4-142 above) between constructive trust and proprietary estoppel. That question is whether such an estoppel might operate in a context such as that of the charterparty cases discussed in the present paragraph (18-145). The question is prompted by *Stallion v Albert Stallion (Great Britain) Ltd* [2009] EWHC 1950 (Ch), [2010] F.L.R. 78 where an agreement between A and B gave rise to a proprietary estoppel between these parties and such an estoppel also arose in favour of B against C, a company controlled by A, which was not a party to the agreement between A and B. The latter estoppel was, however, based, not on that agreement, but on a representation made by or on behalf of C to B (see at [120], [122]). No such estoppel would arise against C merely because C had acquired from A a ship which, to C's knowledge, had been time-chartered by A to B; for in such a case the crucial requirement of an assurance given or representation made by C to B (see above, para.4-146) would not be satisfied.
- [848.](#) Hence the purchaser could not be held liable in tort: see above, para.18-141, below para. 18-147, n.828.
- [849.](#) Above, para.18-145, n.812.
- [850.](#) *Swiss Bank Corp. v Lloyds Bank Ltd* [1979] Ch. 574, 581 (as to which see also below, n.832).
- [851.](#) *Law Debenture Trust Corp. v Ural Caspian Oil Corp. Ltd* [1993] 1 W.L.R. 138; reversed, on

another point, [1995] Ch. 152.

[852.](#) [1993] 1 W.L.R. 138, 146.

[853.](#) Wade (1926) 42 L.Q.R. 139.

[854.](#) For the state of mind required to make a defendant liable for the tort of inducing a breach of contract, see *OBG Ltd v Allen* [2007] UKHL 21, [2008] 1 A.C. 1, above para.18-141 n.792 and at n.803. Discussions of the requisite mental element of the tort in earlier cases must now be read subject to the *OBG* case, above. In the *Port Line* case (above, para.18-145) the third party assumed that the charterparty with which he was alleged to have interfered contained certain crucial terms to the same effect as those of another charterparty which he had made with one of the parties to the original contract. He therefore honestly and genuinely believed that his conduct would not induce a breach of the charterparty; and such a belief would exonerate him from liability for the tort: see the *OBG* case, above, at [68]–[70], [200]–[202] and the *Meretz* case, above para.18-141 n.792 at [124], [180].

[855.](#) Above, para.18-141.

[856.](#) [1949] Ch. 556; *semble*, that in such circumstances the agreement would now be likely to be exempted under Competition Act 1998, s.4 from potential invalidity under s.2 of that Act; *Rickless v United Artists Corp.* [1988] Q.B. 40, 58–59; cf. *Law Debenture Corp. v Ural Caspian Oil Corp. Ltd* [1993] 1 W.L.R. 138 (where the fifth defendant admitted liability on this ground); reversed on another point [1995] Ch. 152.

[857.](#) [1926] A.C. 108, above, para.18-145.

[858.](#) *Swiss Bank Corp. v Lloyds Bank Ltd* [1979] Ch. 581, 574; in the Court of Appeal it was conceded that there was “no substance” in the point: see [1982] A.C. 584, 598 and para.18-151, below, at n.849.

[859.](#) *Sefton v Tophams* [1965] Ch. 1140, 1161, 1187; reversed without reference to this point [1967] A.C. 50. And see *Lictor Anstalt v MIR Steel UK Ltd* [2011] EWHC 3310 (Ch), [2012] 1 All E.R. (Comm) 592 at [53] (“persuasion [by C of B] is not required” in order to make C liable to A for inducing B to break his contract with A). For further proceedings in this case, in which C were held liable to A for knowingly procuring a breach of A’s contract with B, see [2014] EWHC 3316 (Ch) at [260].

[860.](#) *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd* [1974] Q.B. 142.


[861.](#) [1926] A.C. 108; above, para.18-145.

[862.](#) *The Lord Strathcona* [1925] P. 143; judgment in these proceedings was given four months earlier than that in the Privy Council proceedings. cf. also *De Mattos v Gibson* (1858) 4 D. & J. 276 where the charterer’s claim eventually failed on a similar ground; and *The Myrto* [1977] 2 Lloyd’s Rep. 243 (followed in *Anton Durbeck GmbH v Den Norske Bank ASA* [2005] EWHC 2497 (Comm), [2006] 1 Lloyd’s Rep. 93 at [50]–[64], though in a part of the judgment said at [50] to be “obiter”); *Lysus v Prowsa Developments Ltd* [1982] 1 W.L.R. 1044, 1049 (as to which see also above paras 18-082 and 18-141, n.790).

[863.](#) cf. *Den Norske Bank ASA v Acemex Management Co* [2003] EWCA Civ 1559, [2004] 1 All E.R. (Comm) 904 (mortgagee of ship not obliged to defer the exercise of power of sale under the mortgage by reason of the fact that such exercise interferes with contracts for the carriage of goods in the ship made between the mortgagor and shippers of the goods).

[864.](#) *Law Debenture Trust Corp. v Ural Caspian Oil Corp. Ltd* [1993] 1 W.L.R. 138, and see next note.

[865.](#) *Law Debenture Trust Corp. v Ural Caspian Oil Corp.*, [1995] Ch. 152, reversing the decision at first instance (above, n.838) on this point.

- [866.](#) See above, para.18-141 n.792.
- [867.](#) *Candlewood Navigation Corp. v Mitsui O.S.K. Lines (The Mineral Transporter)* [1986] A.C. 1.
- [868.](#) Above, paras 18-141 et seq.
- [869.](#) Above, paras 18-141; 18-147.
- [870.](#) This was the position in *Swiss Bank Corp. v Lloyds Bank Ltd* [1982] A.C. 854; see [1979] Ch. 548, 568–596 and below, n.848.
- [871.](#)  See *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 A.C. 1 at [193]. For the defence of “justification” to the tort of inducing a breach of contract, see also *Royal Bank of Scotland Plc v McCarthy* [2015] EWHC 3626 (QB) at [107], [114], [115]. The tort claim was also rejected on the ground that there had been no “inducement” of any breach (at [105]).
- [872.](#) *Smithies v National Association of Operative Plasterers* [1909] 1 K.B. 310, 337; *Edwin Hill & Partners v First National Finance Corp. plc* [1989] 1 W.L.R. 225, 230; *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303 at [42], [142], [179]. For terms which may be imposed on C as a condition of obtaining relief against B, see *Guinness Peat Aviation (Belgium) N.V. v Hispania Lineas Aereas SA* [1992] 1 Lloyd’s Rep. 190.
- [873.](#) *Glamorgan Coal Co v South Wales Miners’ Federation* [1903] 2 K.B. 545, 574–575; cf. *Anton Durbeck GmbH v Den Norske Bank* [2005] EWHC 2497 (Comm), [2006] 1 Lloyd’s Rep. 93, esp. at [68], [71]. In that case, A (a cargo-owner) contracted with B (a shipowner) for the carriage of goods which deteriorated and were lost when C (a bank) arrested and detained A’s ship as security for a loan made by C to B before the contract of carriage between A and B had been made. It was held that C was not liable to A for the tort here under discussion.
- [874.](#) This was admitted in *Swiss Bank Corp. v Lloyds Bank Ltd*, above, n.844: see [1979] Ch. 548, 569–573.
- [875.](#) *Swiss Bank Corp. v Lloyds Bank Ltd* [1982] A.C. 584, 598, where it was held, on construction, that the contract did *not* impose an obligation to use the specific property for its performance and was *not* specifically enforceable: see below, para.27-008, n.37.
- [876.](#) [1982] A.C. 584, 598.
- [877.](#) *Ellerman Lines v Lancaster Maritime Co (The Lancaster)* [1980] 2 Lloyd’s Rep. 497, 500; *Scandinavian Trading Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] A.C. 694, 702; *Hyundai Merchant Marine Co Ltd v Karander Maritime Co Ltd (The Niizura)* [1996] 2 Lloyd’s Rep. 66, 72; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715 at [119].
- [878.](#) *Baumwoll Manufacturer v Furness* [1893] A.C. 8; *The Guiseppe di Vittorio* [1998] 1 Lloyd’s Rep. 136, 156; *BP Operating Co Ltd v Chevron Transport (Scotland) Ltd* [2001] UKHL 50; [2003] 1 A.C. 197 at [78], [79].
- [879.](#) [1958] 2 Q.B. 146, 166 (italics supplied).
- [880.](#) Above, para.18-152 at n.853.
- [881.](#) *C.N. Marine Inc. v Stena Line A/B (The Stena Nautica) (No.2)* [1982] 2 Lloyd’s Rep. 336.
- [882.](#) Below, para.27-012, n.61. A licence to occupy *land* can be enforced against a trespasser even by a licensee not yet in possession: *Dutton v Manchester Airport plc* [1999] 2 All E.R. 675.
- [883.](#) Above, para.18-144.

[884.](#) Above, para.18-145.

[885.](#) Above, paras 18-147 to 18-150.

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