

Contract Law Concentrate: Law Revision and Study Guide (6th edn) Adam Shaw-Mellors and James Devenney

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4. Privity and third party rights

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter discusses the doctrine of privity and third party rights. The doctrine of privity of contract provides that a person who is not a party to a contract (called a 'third party'), cannot acquire rights under or enforce the provisions of that contract or rely on its protections even if the provisions were intended to benefit that third party. At common law there are complex, and sometimes artificial, ways to avoid this conclusion. More significant nowadays is the attempt to reform this principle by legislation in the Contracts (Rights of Third Parties) Act 1999, allowing some third party beneficiaries to enforce the provisions of contracts.

Keywords: doctrine of privity, consideration, third parties, enforcement, benefit, agency, collateral contract, trust of a promise, Contracts Rights of Third Parties Act 1999, performance interest

Key facts

- The doctrine of **privity of contract**, which provides the general rule in England and Wales, states that a person who is not a party to a contract (called a 'third party') generally cannot enforce the provisions of that contract or rely on its protections even if the provisions were intended to benefit that third party. In addition, consideration must move from the promisee—and a third party may not have provided consideration.

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At common law there are complex, and sometimes artificial, ways to avoid this conclusion such as the use of agency to allow a third party to rely on an exemption clause seemingly in a contract to which the third party is not a party.

- More significant nowadays is the attempt to reform this principle by legislation in the **Contracts (Rights of Third Parties) Act 1999**, allowing those third party beneficiaries who satisfy the s. 1 test of enforceability to enforce the provisions of contracts. Where the s. 1 test is satisfied, it will not matter that the third party may not have provided consideration for the promise it is seeking to enforce, as long as the promise is supported by consideration supplied by another.
- If the third party has not been given an enforceable right under the 1999 Act, it may still be possible for the promisee to enforce the promise for the third party's benefit. However, there is a need to avoid the usual principle preventing the recovery of substantial **damages** if the promisee's loss is nominal (e.g. as it is the third party who was due to benefit under the contract). The courts have devised methods to avoid the 'black hole' problem (the party who suffers loss cannot sue due to privity and the contracting party is unable to recover more than nominal loss) since this would permit the party in breach to avoid having to pay substantial damages for that breach.

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4.1 Introduction

In this topic the key question is **who may enforce the contract?** In other words, who may rely on the terms in the contract (such as exemption clauses) and who may obtain remedies in the event of a breach?

4.1.1 Key things that you need to know and need to be able to explain

1. The doctrine of privity and its relationship with the doctrine of consideration (use correct terminology and understand the difference between contracting parties and a third party).
2. Reasons for reform in the context of intended third party beneficiaries.
3. The test of enforceability (s. 1 **Contracts (Rights of Third Parties) Act 1999**—accurately and in detail) and the scope and limitations of the Act.
4. Devices developed at common law to avoid the operation of privity in the context of an intended third party beneficiary—in particular the agency/*Eurymedon* device and the position in a similar scenario under the 1999 Act.
5. The ability of the promisee to secure specific performance in favour of the third party or to recover substantial damages to cover the third party's loss.

Think like an examiner

This topic tends to be set as an essay question; typically examining the scope of the **Contracts (Rights of Third Parties) Act 1999**, e.g.:

'The Contracts (Rights of Third Parties) Act 1999 does not abolish privity and fails to achieve its objective of enabling intended third party beneficiaries to enforce contractual provisions in their favour. This has meant that the courts have needed to be ever more ingenious in finding ways to allow a promisee to recover substantial damages to compensate for that third party's loss.'

Discuss.

The particular question may be so broad (like this one) that it can encompass consideration of most of the issues covered in this chapter.

Problem questions are not easy to draft—and tend to be predictable by focusing on whether a third party can rely on an exemption clause in a contract to which it is not a party where the clause purports to provide protection. There are some template scenarios throughout this chapter which examiners tend to use as the basis for a more complex question. A fuller example problem-style question appears towards the end of the chapter.

It would be folly to revise this topic without having a detailed knowledge and understanding of the provisions of the 1999 Act and some case law explaining its scope.

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4.2 Who may enforce the contract?

Who may rely on the terms in the contract (such as exemption clauses) and who may obtain remedies in the event of a breach?

Practical example

Alex makes a contract with Becky where, in exchange for Becky's promise to pay £150, Alex promises to deliver his bicycle to Charlie.

In relation to this contract, Alex and Becky are the contractual parties. Charlie is a beneficiary of the contract but he is not a party to it. He is a 'third party'. The terminology is admittedly quite confusing!

Traditionally, the doctrine of privity of contract provides a restrictive answer to the question of *who* may enforce a contract.

Key point

The doctrine of privity of contract provides that generally only the parties to a contract may enjoy the benefits of that contract: only the parties can enforce the contractual obligations or rely on its protections.

A related rule is that consideration must move from the promisee.

Practical example

Alex promises Becky to deliver his bicycle if she pays the price of £150. On exchange of these promises the parties are bound.

Who is the promisor and who is the promisee turns on which promise is being enforced. Students often find it difficult to grasp the concept that the same parties can have differing roles:

- (i) Alex fails to deliver the bicycle and Becky wishes to sue him for this non-delivery. She is therefore enforcing the promise to deliver. In relation to this promise Alex is promisor and Becky is promisee. To enforce the delivery promise Becky needs to have provided consideration to support Alex's promise. She has promised to pay £150 on delivery. As this is executory consideration it need not have taken place. A promise to pay is sufficient.
- (ii) Becky fails to pay the price and Alex wishes to sue her for non-payment. Alex is therefore enforcing the promise to pay. In relation to this promise Becky is the promisor and Alex is the promisee. To enforce the payment promise Alex needs to have provided consideration to support Becky's promise. He has promised to deliver the bicycle.

p. 75 The rule that consideration must move from the promisee was interpreted to mean that a plaintiff (claimant or person seeking to enforce the promise) had to have supplied the consideration to support it. Inevitably this excluded the vast majority of third parties, even where the contract was made for their benefit, since they have rarely provided any obvious consideration, e.g. in the practical example above: Becky provides the consideration (promising to pay £150) but it is Charlie who may wish to sue Alex in the event that Alex did not deliver the bicycle.

Tweddle v Atkinson (1861)

FACTS: The fathers of the intended bride and groom (F1—groom’s father, F2—bride’s father) promised each other that each would pay a sum of money to the plaintiff (the groom). The bride’s father (F2) failed to pay. Could the groom enforce it?

HELD: Although the promise was for the plaintiff groom’s benefit, he was unable to enforce it because (i) he was not a party to the contract containing the promise and (ii) he had not provided any consideration to enable him to enforce it. (The consideration for F2’s promise was provided by F1. See Figure 4.1.)

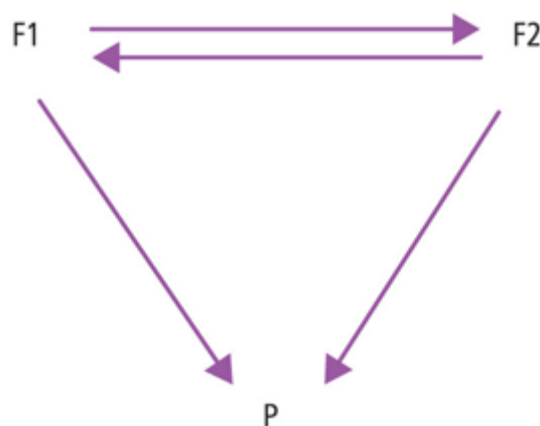


Figure 4.1 *Tweddle v Atkinson*

p. 76 These principles were applied to the same effect by the House of Lords (HL) in *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd*. ↵

Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd (1915) (HL)

FACTS: Dunlop sold tyres to Dew & Co. Under the terms of this contract (contract 1) Dew & Co. promised not to sell the tyres at less than list price and to obtain a similar undertaking from trade buyers. In return Dew & Co. received a discount from Dunlop. Dew & Co. sold some tyres to Selfridge (contract 2) and Selfridge promised Dew & Co. to abide by the list price. In breach of this undertaking in contract 2, Selfridge sold tyres to customers (e.g. contract 3). Dunlop sued Selfridge for breach of its undertaking not to sell at below list price.

HELD: Dunlop could not succeed because:

- (i) It was not a party to the contract containing that promise made by Selfridge (i.e. contract 2).

- (ii) Dunlop had also not provided any consideration to support Selfridge's promise. The discount applied only between Dunlop and Dew & Co. (See Figure 4.2.)



Figure 4.2 *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd*

Revision tip

It is clear that any reform of privity would also need to explain the relationship with the consideration requirement. (This is discussed later in the context of reform.)

4.2.1 The difficulty of refusing enforcement to third party intended beneficiaries

Whereas it has generally been accepted that a third party who is a total stranger should not be able to enforce a contract or contractual provision, it has been more difficult to justify why a third party intended beneficiary should not be able to enforce the contract, e.g. like the groom in *Tweddle v Atkinson* or Charlie in the practical example:

- **Intentions of the original contracting parties are arguably thwarted:** it is clear in the practical example that both Alex and Becky's original intentions are that the bicycle is to be transferred to Charlie.
- **Injustice to the third party:** Charlie (the third party) appears unable to secure the promised bicycle but may well have acted in reliance on the promise that the bicycle would be his.
- **The person who has suffered loss cannot sue, whereas the person who has suffered no loss can sue (the 'black hole' problem):** Becky is the promisee and has provided consideration. She could sue Alex on the basis of his breach of their contract but her loss would arguably be nominal if the breach is non-delivery. The person suffering loss is Charlie—but Charlie cannot sue.

These issues led to:

- **Case law-based devices to avoid the privity doctrine.** (These devices retain some relevance due to the limited scope of the legislative reform. They are, however, acknowledged to have introduced 'complexity, artificiality and uncertainty' into the law.)

- Recommendations for statutory reform of the third party rule in order to allow a third party beneficiary, in certain circumstances, to enforce a contractual provision. (See Law Commission Report: *Privity of Contract: Contracts for the Benefit of Third Parties*, Law Com. No. 242, Cm. 3329, 1996, and especially pp. 39–50 for the arguments in favour of reform.)

This statutory reform is contained in the **Contracts (Rights of Third Parties) Act 1999**.

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4.2.2 The Contracts (Rights of Third Parties) Act 1999

Revision tip

The Act, and its scope of application, is extremely popular with examiners and you must ensure that you are familiar with its provisions, particularly the ‘test of enforceability’. Remember it can apply to written and oral contracts: see *Broadcasting Investment Group Ltd v Smith* (2020) (this part was not challenged on appeal (2021)).

Third party enforcement

In principle

In its report the Law Commission recommended that the privity rule be reformed by legislation in order to ‘enable contracting parties to confer a right to enforce the contract on a third party’, that is:

- the right to enforce remedies for breach of contract that would have been available had the third party been a contracting party (s. 1(5));
- the right to enforce an exemption clause as if the third party was a party to the contract (s. 1(6)).

Contracts (Rights of Third Parties) Act 1999

Section 1(5): 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 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).

Section 1(6): Where a term of a contract excludes or limits liability in relation to any matters, references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.

When might a third party be able to enforce a contract? The test of enforceability

Section 1(1): Subject to the provisions of this Act, a person who is not a party to a contract (a ‘third party’) may in his own right enforce a term of the contract *if—*

- (a) the contract expressly provides that he may, or
- (b) subject to subsection (2), the term purports to confer a benefit on him.

Section 1(2): Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

p. 78 Summary of the test of enforceability

A third party will be able to enforce a contractual provision in its favour if:

either s. 1(1)(a)

- there is an express term in the contract stating that the third party may enforce the contractual term

or s. 1(1)(b) and s. 1(2)

- the contract must purport to confer a benefit on the third party *and* there must be nothing in the contract which indicates that the parties did *not* intend that the term should be enforceable by the third party.

Don't fall into the trap

It is not the case, despite what you may have read, that the s. 1(2) proviso applies to both parts of s. 1(1). It applies only to s. 1(1)(b) as can be clearly seen by examining the wording of that subsection.

The first alternative: s. 1(1)(a). Is this part of the test satisfied?

If this part of the test is satisfied, the contract between Alex and Becky would include a term which provided: ‘and Charlie shall have the right to enforce the terms of this contract for his benefit as against the contractual parties’ (or words to similar effect). This is the clearest way to ensure that the third party has direct enforcement rights and/or could rely on the protection of an exemption clause which sought to protect him.

The second alternative: s. 1(1)(b) and s. 1(2) proviso—is this part of the test satisfied?

Step 1: Determining if the contract ‘purports to confer a benefit’ on the third party

In *Dolphin & Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening, The Swedish Club* this argument failed.

Dolphin & Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening, The Swedish Club (2009)

FACTS: A contract between U (underwriters of vessel involved in collision) and the Club (C), with which that vessel was registered, provided for C to pay sums recovered to Dolphin (D), a recovery agent for those underwriters, who would pass these sums on to U. When C paid the sums direct to U, U had refused to pay D any commission. D had therefore sought to enforce the provision in the contract with C, arguing that the contract ‘purported to confer a benefit’ on D.

HELD: The contract was concerned with how payment was to be made to U and D was not a beneficiary of the agreement, albeit it was more convenient for D to receive the sums so that it could deduct its commission before passing on the balance.

Christopher Clarke J referring to s. 1(1)(b) also stated:

74. A contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed. The reference in the section to the term purporting to ‘confer’ a benefit seems to me to connote that the language used by the parties shows that one of the purposes of their bargain (rather than one of its incidental effects if performed) was to benefit the third party.

In *Broadcasting Investment Group Ltd v Smith (2020)* Judge Andrew Simmons QC agreed that in *Dolphin & Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening, The Swedish Club (2009)* the relevant contract did not purport to confer a benefit on D. However, he did not accept the suggestion, arising from [74] of the judgment of Christopher Clarke J, that it was necessary to distinguish between major and minor benefits. This part of Judge Andrew Simmons QC’s judgment was not challenged on appeal (2021).

- p. 79 ↩ This case, as clarified in *Broadcasting Investment Group Ltd v Smith (2020)*, can be contrasted with the Alex, Becky, and Charlie scenario where it is clear that the contract purports to confer a benefit, namely delivery of the bicycle, on Charlie. Equally, a Himalaya clause which purports to confer the protection of an exemption clause on ‘servants, agents or independent contractors’ is clearly intended to confer this protection on these named third parties.

Step 2: Consider the effect of s. 1(2)

There must be nothing in the contract which denies the third party a right to enforce the term or rely on it for protection. This proviso has caused some difficulties because it appears to suggest having to prove a negative. This is not necessary.

Nisshin Shipping Co. Ltd v Cleaves & Co. Ltd (2003)

FACTS: C had negotiated charter contracts on behalf of the owners of the vessels (N) and each contract had provided for the payment of commission to C, although the contracts were made between N and the individual charterers. C sought the commission and argued that the 1999 Act applied. Clearly the commission clauses purported to confer a benefit on C (s. 1(1)(b)), but N argued that C could not show that the parties intended that the benefit of this term should be directly enforceable by C, which N argued was a requirement due to the s. 1(2) proviso.

HELD: This was not necessary. The test of enforceability was satisfied and C could enforce the commission clause directly.

Revision tip

Thus the s. 1(2) proviso will only operate to deny enforceability by a third party if the contracting party denying this is able to satisfy the court that the parties' contract indicates that the parties were denying any right of enforcement to the third party (i.e. this burden fell on N in *Nisshin Shipping*). Where the contract says nothing at all about this (as is usual), then s. 1(1)(b) applies. The burden of proof under s. 1(2) is often understood to be on the contracting party although in *Secretary of State for the Home Department v James Cox (2023)* Lewis and Underhill LJ adopted a more integrated approach to s. 1(1)(b) and (2): 'The likelihood is that courts will be in a position to determine whether, on the proper construction of the contract, the term was or was not intended to be enforceable by the third party.'

p. 80 **The primary limitation in the test of enforceability is the first part of s. 1(3)**

Section 1(3): The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

***Avraamides v Colwill* (2006) (CA)**

FACTS: A had employed C to refurbish A's bathroom. C's performance was defective and C was therefore liable to A. However, before enforcement, C sold its business to B on terms whereby B assumed C's liabilities 'to pay in the normal course of time **any liabilities properly incurred by C as at 31 March 2003**'.

Did this mean that A, as a third party beneficiary to the contract C/B, had the ability to enforce this agreement against B?

HELD: A did not have rights of direct enforcement. Since A, as third party, was not expressly identified in the contract C/B by name, it could not be said that the effect of the agreement was to give those with rights against C the ability to enforce those rights directly against B.

Revision tip

This is an important limitation on the ability of the Act to give third parties enforceable rights (although a broad approach was taken to this provision in *Starlight Shipping Co v Allianz Marine and Aviation Versicherungs AG* (2014) and this appears to have gained some support from the Court of Appeal (CA) in *Chudley v Clydesdale Bank plc (trading as Yorkshire Bank)* (2019)).

Looking for extra marks?

It is vital to stress the importance of the test of enforceability to the scope of the Act—and hence to the scope of reform. The privity doctrine remains the general rule. The reality is that although the proviso in s. 1(2) has been interpreted in a way which is helpful to intended third party beneficiaries, s. 1(3) may not be helpful. In addition, the fact that the Act is often excluded by party agreement is telling.

It is also helpful to be able to demonstrate to the examiner that you appreciate the scope of the test of enforceability by considering whether cases involving claims to third party enforceability before the 1999 Act would be covered by this test, e.g. *New Zealand Shipping v Satterthwaite* (see 'Agency' in 4.2.3).

If the third party has a direct right of enforcement, could the promisor argue against enforcement on the basis that the third party has not supplied any consideration for the promise?

Can Alex argue that even if Charlie can satisfy s. 1 of the 1999 Act and prima facie enforce the promise to deliver the bicycle, Charlie has not provided any consideration—only Becky has?

p. 81 ↵ Clearly the entire reform would fail in its purpose if the third party could be prevented from enforcing the contract on the basis that he or she had not provided consideration. Although there is no provision in the 1999 Act relating to consideration, it must be clear from s. 1(1) that the right of a third party to enforce a contractual term cannot be defeated by an argument that the third party (Charlie) did not provide consideration to support that promise (although there must be consideration provided by the promisee (Becky) in order to make the promise enforceable).

In other words, consideration to support Alex's promise would have to be provided (by the promisee, Becky) but need not be provided by Charlie, the third party.

Variation and cancellation of the third party's rights

Can the original contracting parties (Alex and Becky) maintain their right to vary or cancel the contract so as to deprive the third party (Charlie) of his benefit at a later stage? Could they, for example, decide that the bicycle should instead be delivered to Becky? This would seem onerous if Charlie (the third party) has relied on the fact that he will receive this bicycle on the delivery date.

Section 2(1) of the 1999 Act provides:

Subject to the provisions of this section, where a third party has a right under section 1 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if:

- (a) the third party has communicated his assent to the term to the promisor [s. 2(2) explains this assent and ousts the postal rule in the case of assent by post],
- (b) the promisor is aware that the third party has relied on the term, or
- (c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.

Therefore, the usual right of contracting parties to vary contract terms is maintained unless:

- (i) either the third party has communicated his assent to the term to the promisor (Charlie has informed Alex that he agrees to accept the bicycle, which is somewhat artificial); or
- (ii)

the third party has relied on his rights and the promisor knows this (or ought reasonably to have foreseen it). (It might be questioned whether a promisor should always assume some form of reliance as long as there is knowledge that the third party knows it is to benefit under the terms of the promise.)

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The overall effect of s. 2(1) in practical terms is to protect the third party. However, the balance is re-struck by the remainder of this section. Contracting parties are permitted to expressly opt out of this by stipulating for a different crystallization test (not reliance or acceptance) or by reserving the right to vary or cancel the third party's right irrespective of reliance or acceptance by the third party (s. 2(3) of the Act). Of course, in order to opt out the parties would need to be aware of their ability to do so (which may translate as taking legal advice when drafting a contract).

Even if they were unaware of the right to opt out, there is a specific judicial discretion to vary or cancel irrespective of reliance or acceptance by the third party in certain circumstances (s. 2(4)–(7) of the Act).

Revision tip

The examiner will wish to know whether you appreciate the overall balance in terms of the parties' position and that of the third party which is achieved by s. 2. In commercial practice, contracting parties are likely to have expressly reserved their cancellation rights.

Overlapping claims and the question of priority of action

Can the promisee (Becky in the scenario) sue Alex on the promise to deliver in addition to Charlie seeking to enforce this promise by means of s. 1 of the 1999 Act?

Section 4: 'Section 1 does not affect any right of the promisee to enforce any term of the contract.' (Preserves the promisee's right to sue.)

Section 5: this expressly seeks to avoid double liability by explaining that where the promisee has recovered substantial damages (or agreed sum) for the third party's loss, the third party will not be entitled to a duplicate damages sum because 'the court ... shall reduce any award to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee'. (However, there is no provision to assist a third party in recovery of these sums from the promisee who had recovered damages on his behalf.)

4.2.3 Common law devices to avoid privity in the context of an intended third party beneficiary

The Act preserves the existing devices used to avoid privity in this context.

Section 7(1): Section 1 does not affect any right or remedy of a third party that exists or is available apart from this Act.

Revision tip

It is sufficient to focus attention on a few key examples or any answer to a question is likely to resemble a 'shopping list' of examples and this would favour description at the cost of analysis. Strong analysis is essential for a 2:1 (or a 60% plus) mark.

p. 83 Agency

Establishing an agency relationship is a possible means of avoiding the doctrine of privity since the true contracting party is revealed.

Practical example

If Becky was acting as Charlie's agent (i.e. on his behalf, and not on her own behalf) for the purposes of securing Alex's promise, then Charlie, as principal, may have a direct contract with Alex encompassing the promise to deliver (see Figure 4.3).



Figure 4.3 Agency

There are two contracts here:

- (i) the contract between Becky (agent) and Charlie (principal) which establishes Becky's authority to contract on behalf of Charlie; and

- (ii) the contract for the sale of the bicycle which may appear to present privity problems—Charlie as third party. However, due to the agency Charlie is actually the other contracting party because Becky contracted for him. Becky steps out of the picture.

In establishing the direct contract between Alex and Charlie, so that Charlie can enforce the delivery promise directly as a result of Becky's agency, it will also need to be shown that Charlie provided consideration for Alex's promise.

Looking for extra marks?

It helps to show your understanding of case law, e.g. in *Dunlop v Selfridge* (see Figure 4.2) the agency argument was attempted by Dunlop, i.e. they argued that Dew & Co. was acting as agent for Dunlop (as principal) in order to obtain the contractual undertaking from Selfridge. However, Dunlop could not establish that it had provided any consideration for Selfridge's promise made to Dew & Co. in contract 2.

The agency argument has been used to enable a third party to rely on an exemption clause in a contract to which it was not a party (on the basis that its agent contracted that it should have this protection).

Practical example

Adjusting our fact scenario, Alex is to sell a bicycle to Becky (contract 1: A/B). Alex employs Charlie as carrier to deliver it (contract 2: A/C). Contract 1 contains a clause which states that neither Alex, nor any carrier he employs, will be liable beyond £100 in the event that the bicycle is damaged by Alex or the carrier and Alex is contracting as agent on behalf of any such carrier for the purposes of securing the benefit of that clause. (This is a simple 'Himalaya clause'.)

Can Charlie rely on that clause against Becky, which is clearly intended to benefit Charlie (as a carrier employed by Alex) although Charlie is not a party to the contract A/B containing it?

p. 84 ↵ The courts have employed the agency argument to achieve this. Lord Reid set out the applicable criteria in *Scruttons Ltd v Midland Silicones Ltd* (1962).

- (1) The main contract (contract 1 in our scenario) must make it clear that the third party is intended to be protected by the clause in the contract between the shipper and the carrier.

- (2) The main contract must make it clear that the carrier is also acting as *agent* for the third party in contracting for the benefit of the clause.
- (3) The carrier must have authority from the third party to so contract.
- (4) The third party must have provided consideration for the main contract promise of protection.

The first requirement makes it clear that only a third party who was expressed to be an intended beneficiary of the clause can use this agency argument.

New Zealand Shipping Co. Ltd v AM Satterthwaite & Co. Ltd, The Eurymedon (1975)

(See earlier discussion in Chapter 3 regarding ‘Consideration’, especially at ‘3.6 Step 4: Was any consideration supplied by the promisee to support the promise made by the promisor?’, for the full facts and note the use of the ship’s name to abbreviate this case name.)

The Privy Council recognized contract 3 between the shippers and the stevedores based on the shippers’ promise of exemption made to the stevedores, via the carriers as agents for the stevedores. (The carriers and stevedores were companies in the same group so that the agency contract was established.) The stevedores could enforce this promise of exemption because they had provided consideration by unloading the goods. (See Figure 4.4.)

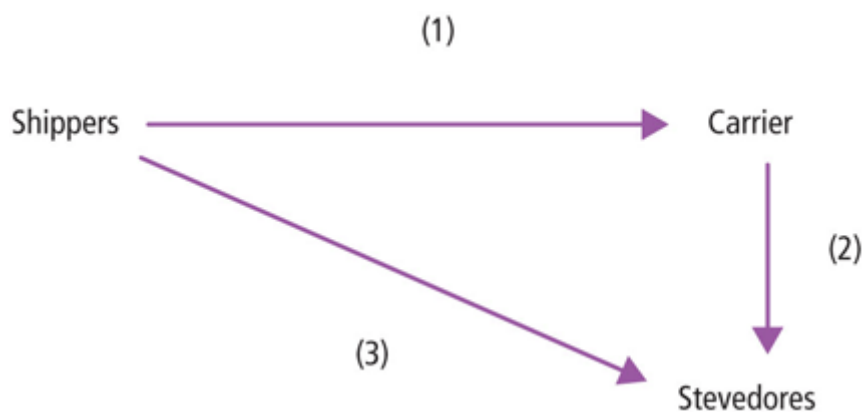


Figure 4.4 *The Eurymedon*

p. 85 **Would the s. 1 test of enforceability under the 1999 Act now enable the stevedores in *The Eurymedon* to rely directly on the Himalaya clause?**

The stevedores were expressly mentioned in the contract as the intended beneficiaries of the clause (i.e. they fall within a class which is expressly mentioned—namely ‘independent contractors’ of the carrier). The clause purports to confer a benefit on the stevedores (s. 1(1)(b)) and there is nothing in the contract to indicate that the parties did not intend the stevedores to be able to enforce the benefit of that protection (s. 1(2) proviso).

Exactly the same analysis can be applied to the Alex/Becky/Charlie scenario in order to enable Charlie to rely on the protection in the limitation clause.

By comparison, the protection clause in the Canadian case of *London Drugs Ltd v Kuehne and Nagel International Ltd* (1993) was expressly stated to apply to the ‘warehouseman’ and was only impliedly extended to other employees. Some have argued that the result would be different in English law on the basis that such a clause appears to fail to satisfy Lord Reid’s first requirement in *Scruttons*, that the main contract must expressly extend the protection of the clause to the third party beneficiary and, in relation to the Contracts (Rights of Third Parties) Act 1999, fails to satisfy s. 1(3). On the other hand, as we have noted, in *Starlight Shipping Co. v Allianz Marine and Aviation Versicherungs AG* (2014) a broad approach to s. 1(3) was taken (‘underwriters’ included servants and agents).

Collateral contracts

The collateral contract *avoids* privity by finding a separate collateral contract between the third party and the promisor relating to the contractual obligation. This is also the effect of the unilateral contract analysis in *The Eurymedon*, that is:

- contract between shipper and carrier containing the exemption clause;
- collateral contract (shipper and stevedores—offer by shipper as to the benefit of the exemption. This offer is accepted by stevedore’s act of unloading).

***Shanklin Pier v Detel Products Ltd* (1951)**

- (i) Contract whereby the Ps (owners of pier) employ the contractors to paint the pier and have the right to specify the paint to be used.
- (ii) Contract between contractors and the Ds (paint suppliers) for the purchase of the paint (sale of goods contract).
- (iii) Collateral contract between the Ds and the Ps based on the statement made by the Ds to the Ps that the Ds’ paint was suitable for painting the pier and that two coats would last seven years. The consideration for this contract was the instruction leading to the making of contract 2. (See Figure 4.5.)

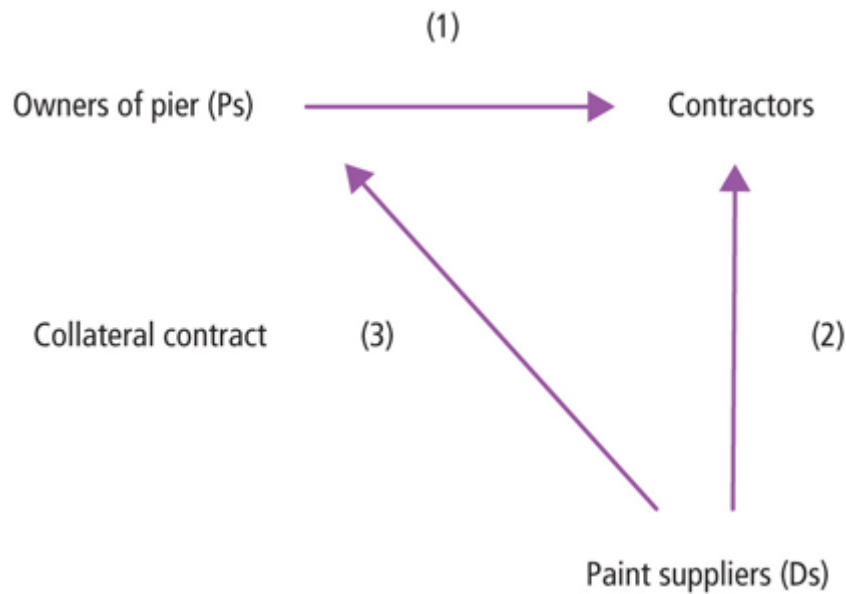


Figure 4.5 *Shanklin Pier v Detel Products Ltd*

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Trust of contractual obligations

It may be possible to argue that a contracting party holds the benefit of a contractual promise on trust for a third party (*Les Affréteurs Réunis SA v Leopold Walford (London) Ltd* (1919)). This would, for example, involve arguing that Becky held the benefit of the delivery promise on trust for Charlie. If a trust existed, then Becky may sue Alex as trustee for Charlie. However, there is no evidence to support the creation of such a trust since there must be an express intention to create a trust of the promise (*Re Schebsman* (1944): a trust will not be implied simply because there is a contract to benefit a third party).

The court recognized such an express trust of a promise in *Nisshin Shipping Co. Ltd v Cleaves & Co. Ltd* (2003), i.e. the shipowners promised the charterer that they would pay the broker a commission but then refused to pay this. The broker's action was treated as if the charterers (as trustees for the brokers) had been added as claimants and so could enforce the clause against the shipowners. The judge also confirmed that it did not follow from the recognition of a trust that there could therefore be no reliance on the direct enforceability rights contained in the 1999 Act.

4.2.4 Remedies available to the contracting party in respect of wrongs done to a third party (promisee remedies)

Revision tip

The Law Commission's Report recommended that the question of reform of the remedies available to a promisee (e.g. damages recovered by the promisee for the loss suffered by a third party) should be left to the courts. It follows that this is an area of interest and can feature in essay, and even in problem, questions.

Practical example

Alex has promised Becky that he will deliver the bicycle to Charlie. Could Becky bring an action against Alex in the event of non-delivery? Could she enforce the delivery obligation or recover damages for its breach on Charlie's behalf?

Of course, the real issue here is why she would wish to do this. She would have more incentive if she also benefited from the promise which Alex has failed to perform, e.g. if Becky was to receive Alex's bicycle helmet and Charlie was to receive the bicycle.

p. 87 Specific performance may be available in limited circumstances

An award of specific performance is an order of the court which compels the promisor to carry out their promise and the third party therefore gets the intended benefit under the contract resulting from this ordered performance. However, as we can see in Chapter 7, specific performance is a discretionary remedy and will only be awarded where damages would not be an adequate remedy.

Beswick v Beswick (1968) (HL)

FACTS: A nephew had acquired his uncle's coal business and in exchange had promised his uncle that he would pay a £5 a week annuity to the uncle's widow on the uncle's death.

The nephew failed to pay the widow and she brought an action seeking enforcement in two capacities: (i) in her personal capacity; and (ii) as administratrix of her late husband's estate. She faced the privity problem when suing in her personal capacity since she was not a party to the contract containing the nephew's promise, although she was the intended beneficiary of that promise.

HELD: The HL allowed specific performance in the widow's capacity of administratrix of her husband's estate—so ordering the nephew to perform his promise. This did not present a privity issue since the husband was a party to the agreement with his nephew and the HL held that it was an appropriate remedy because damages would be an inadequate remedy for her husband's estate. The estate had suffered no substantive loss due to the breach of this promise. On the facts, the only way to ensure that there would be an effective remedy for the nephew's breach was to order specific performance.

Promisee may be able to recover substantial damages in respect of loss suffered by the third party

Generally, it will not be possible for the promisee to recover substantial damages for the loss suffered by a third party because a party is limited to recovering for losses *it has suffered* and the promisee's loss may be purely nominal, e.g. Becky's loss if Alex's only promise relates to delivering the bicycle to Charlie will be purely nominal.

There are, however, two clearly recognized exceptions where substantial damages for a third party's loss can be recovered:

Exception 1

Where, for reasons of convenience, a contract is made by one person (party) for the benefit of a group of people, that person can recover substantial damages for the losses suffered by members of that group (e.g. holidays, meals in restaurants—see Lord Wilberforce in *Woodar v Wimpey*).

p. 88 ↪ Lord Denning had attempted a broader recovery in *Jackson v Horizon Holidays Ltd* (1975). The case concerned a family holiday booked by a husband on behalf of his wife and children where the holiday failed to meet contractual promises. The husband was able to recover for his own loss and that of his wife and family, although they were not parties to the contract, simply on the basis that the contract was made for their benefit. The HL, while not disagreeing with the result in *Jackson v Horizon Holidays Ltd* (1975), in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* considered that such a broad principle was unsupported by authority and limited recovery to 'party convenience' contracts.

Woodar Investment Development Ltd v Wimpey Construction UK Ltd (1980) (HL)

FACTS: Wimpey had contracted to purchase development land from Woodar. The purchase price was £850,000, and £150,000 of this was payable to a third party. The property market fell and it was argued that Wimpey had wrongfully repudiated the contract.

HELD: There had been no breach of contract (so there was no need to decide whether Woodar could recover for the third party's loss in addition to its own). Nevertheless, the HL held that there was no general principle permitting substantial recovery in such circumstances. Lord Wilberforce recognized the contracts 'calling for special treatment', i.e. 'party convenience' contracts, where substantial damages could be recovered.

Revision tip

Even in 'party convenience' cases it may be necessary for the contracting party (promisee) to have suffered loss before he or she can also recover for third party loss. Both Mr Jackson and Woodar had also suffered loss as a result of the breach.

Exception 2

The *St Martins Property* exception ('black hole' problems): the narrow ground principle in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1994) (the *St Martins* appeal—*St Martins Property Corp. Ltd v Sir Robert McAlpine & Sons Ltd*) sometimes allows for recovery of substantial damages suffered by another by a party who has not suffered any loss. In recent times this exception has been developed in the context of property development. For example, A is a land-owning developer who has contracted with B (building contractor) for B to carry out work on the property. A sells the building (so transfers property rights) to C so that C is the person suffering loss in the event that B defectively performs the building contract (see Figure 4.6). However, A is not successful in its attempt to transfer the benefit of the building contract to C (or there is a prohibition on assignment/transfer) which would have transferred the contractual rights enabling C to sue B in his own right.



Figure 4.6 'Black hole' problems

p. 89 C, as the new building owner, is the person who suffers the loss resulting from defective performance of the building contract by B but is unable to enforce the contract. By contrast, A has the right to enforce the contract but *prima facie* does not suffer any loss. There is, therefore, a risk that any claim against B will fall down a 'legal black hole'. Accordingly, the *St Martins Property* exception provides that in such circumstances A may nevertheless retain its right to sue B in respect of the defective performance of the building contract and can recover substantial damages, despite not having personally suffered a financial loss as a result of the breach. Originally this exception was considered to rest on the fact that B would contemplate that A might transfer the property to another so that the other, and not A, would suffer loss in the event of B's breach of that contract. However, it has subsequently been held to arise by operation of law rather than party contemplation. In *Lowick Rose LLP (in liquidation) v Swynson Ltd* (2017) Lord Sumption was of the opinion that this exception could apply to other types of contract (indeed it was originally developed in the context of contracts of carriage) but it was still an exception to the general rule that a party to a contract can only claim in respect of its own loss. On the facts of *Lowick Rose LLP (in liquidation) v Swynson Ltd* (a case which involved a negligent report by accountants) Lord Sumption held that the exception did not apply as it was not part of the object of the contract to benefit the third party.

Limitation

It follows that where **the new building owner or person suffering loss has a direct right of action against the contractor**, the original developer/contracting party cannot rely on the narrow ground to argue that it can also recover substantial damages. It is instead limited to recovering nominal loss.

Alfred McAlpine Construction Ltd v Panatown Ltd (2001)

A majority of the HL held that since UIPL (owners of land and suffering loss) had a direct remedy against the contractor under the duty of care deed, there were no grounds to allow Panatown (the employer) anything more than nominal damages. (See Figures 4.7 and 4.8.)

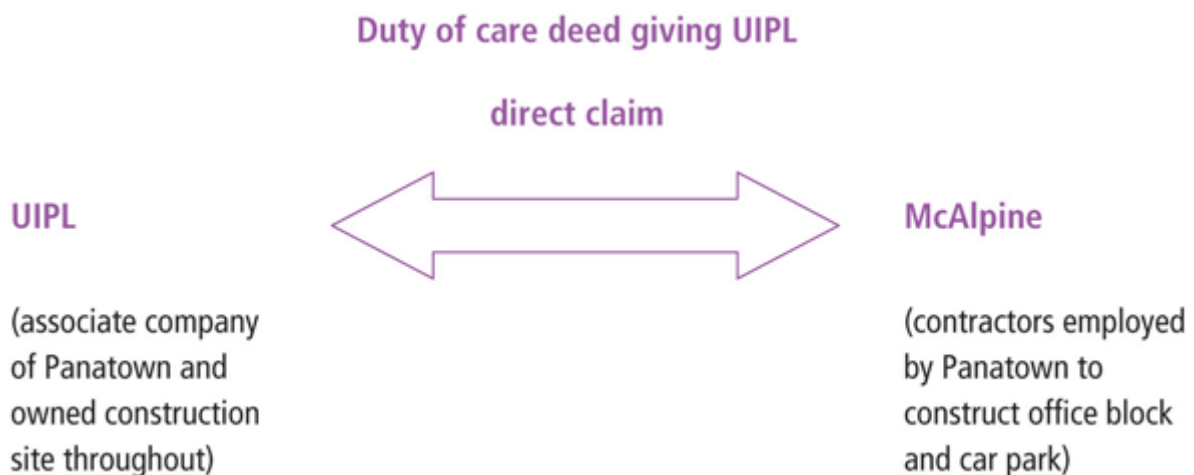


Figure 4.7 Duty of care deed: *Alfred McAlpine Construction Ltd v Panatown Ltd*



Figure 4.8 Contract: *Alfred McAlpine Construction Ltd v Panatown Ltd*

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↪ The narrow ground (the *St Martins Property* exception) was applied by the CA in *Darlington Borough Council v Wiltshier Northern Ltd* to a situation where the contractual rights had been assigned. However, an assignee (the person to whom the contractual rights have been transferred) cannot acquire greater rights than those possessed by the transferor. It was therefore essential to establish that the transferor could recover substantial damages in the event of the contractor's breach.

Darlington Borough Council v Wiltshier Northern Ltd (1995) (CA)

FACTS: The council owned land on which it wished to construct a leisure centre. However, the council was unable to enter into a construction contract at this time due to restrictions on such local authority expenditure. MG was engaged to enter into the construction contract. The contractor was fully aware that the centre was for the council and was being built on council land and the contractual rights were assigned (transferred) from MG to the council. The council sought to bring a claim against the contractor for defective work but needed to establish that MG could have recovered substantial losses despite not owning the land and therefore could transfer that right to the council via assignment.

HELD: Applying the *St Martins Property* exception and concluding that the assignor (MG) had the right to recover substantial damages (which it had validly assigned). It was clearly contemplated by the contractor that the centre was being constructed for the council on council land. (See Figure 4.9.)

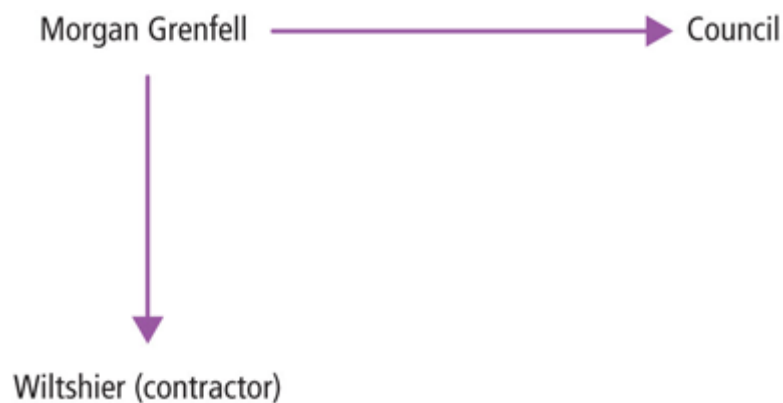


Figure 4.9 *Darlington Borough Council v Wiltshier Northern Ltd*

p. 91 The broad ground and ‘performance interest’

In the *St Martins Property* appeal Lord Griffiths had used the ‘broad ground’ to support his conclusion that the landowner/developer could recover substantial damages in this scenario. The ‘broad ground’ provides that in a contract for the supply of work and materials, the promisee will suffer a loss (even if she has no property interest) because she did not receive the performance for which she contracted. She can therefore recover substantial damages on the basis of her own loss of bargain.

Practical example

Suppose I contract with a kitchen company to supply and install a kitchen in my daughter’s home as a special gift. My daughter is not a party to that contract but she owns the property in which the kitchen is being fitted and, in the event that either the installation or the kitchen is defective, my daughter will suffer loss. I can sue for breach of contract but my loss seems purely nominal. The broad ground, on the other hand, recognizes that if the kitchen or workmanship is defective then I have not received what I bargained for and should be able to recover for the loss incurred (irrespective of ownership rights) simply on the basis of failure to fulfil my interest in performance.

There is some support for this ground from the dissenting members of the HL (Lords Goff and Millett) in *Alfred McAlpine Construction Ltd v Panatown Ltd* and more recently Lord Sumption in *Lowick Rose LLP (in liquidation) v Swynson Ltd* (2017). However, this ground has such far-reaching implications for contractual damages that the academic debate is continuing (see ‘Key debates’ and Lord Mance in *Lowick Rose LLP (in liquidation) v Swynson Ltd* (2017)) and, more recently, in *Dr Jones Yeovil Ltd v The Stepping Stone Group Ltd* (2020) HHJ Russen QC, whilst accepting the broad ground, doubted whether it applied to cases of pure economic loss.

Template problem question

In April 2017 Carlton International plc, a property developer, entered into a contract with Ace Construction Ltd for the construction of an office complex on a site owned by Carlton International. The contractual completion date was 1 September 2018 and the contract also contained a clause prohibiting assignment without the express approval of Ace Construction Ltd.

↩ In addition, clause 4.1 of the contract stated that the liability of Ace Construction Ltd, as main contractor, for loss or damage attributable to defects or delay was limited to £300,000 and the clause also stated that this protection extended to 'servants or agents of Ace Construction Ltd and every independent contractor from time to time employed by Ace Construction Ltd acting in the course of, or in connection with, his employment or contractual obligations'.

Clause 4.2 stated that, for the purposes of clause 4.1, Ace Construction was deemed to be acting as agent on behalf of and for the benefit of all such persons mentioned in clause 4.1 as being entitled to the protection of the limitation of liability.

In October 2017 Ace Construction Ltd employed Blitz Plumbing to undertake all plumbing work for the main construction contract. This work was to be completed by August 2018.

Blitz Plumbing had arranged for their plumbing materials for performance of this contract to be stored in a warehouse owned and operated by Easi-Store Ltd. The contract for storage contained a limitation clause limiting the liability of the company's 'warehouse staff' to £150. Fred, a clerical assistant, damaged sensitive plumbing valves while he was completing an inventory of the storage warehouse. Fred claims that he is protected by the limitation clause in the contract between Blitz Plumbing and Easi-Store.

Blitz Plumbing was unable to acquire replacement valves of the same quality and therefore used another type of valve in the plumbing for the office complex. The valve was defective and caused a flood.

Blitz Plumbing also delayed completion of the plumbing works, which had knock-on effects for other subcontractors and meant that Ace Construction Ltd was unable to formally complete the works until March 2019.

Carlton International Ltd wishes to claim £2m from Ace Construction Ltd in respect of the delay and £800,000 from Blitz Plumbing in respect of the defective plumbing.

Advise all of the parties.

Some general pointers: this question concerns the limitation of liability clause, its enforceability (see Chapter 6), and whether the plumbing subcontractor (B), which is not a party to the contract (C/A) containing the limitation, can rely on the clause:

- First, it is necessary to consider the enforceability of the clause in general terms. Consider incorporation, construction (especially construction of limitation clauses as opposed to total exclusion clauses), and the application of the **Unfair Contract Terms Act (UCTA) 1977** (breaches of delay and defective goods in a work and materials contract—ss. 3 and 7(3) UCTA 1977) to a limitation clause in a commercial contract. (Note that this contract predates the **CRA 2015** but see s. 7(1A) UCTA 1977 for contracts after the coming into force of the **CRA 2015**.)
- In relation to whether the plumbing subcontractor (B) can rely on the clause, the question is whether the s. 1 test of enforceability in the **Contracts (Rights of Third Parties) Act 1999** is satisfied. B is identified as a member of the named class of independent contractors who are intended to be protected by the clause.
- Easi-Store and Fred—can Fred rely on a clause in a contract to which he is not a party? He is probably outside the s. 1 test of enforceability as he is not covered by the wording of protection (similarities with *London Drugs* and also same problem as in *Scruttons*).

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Could Carlton International plc succeed in its claim if, in July 2017, Carlton International plc had sold the office complex and site to Devenport Developments plc, without obtaining the necessary approval from Ace Construction Ltd for the assignment of the contractual rights under the construction contract?

Carlton International plc appears to suffer no loss because it does not own the property at the relevant time.

- Loss is suffered by Devenport Developments plc but, because of the prohibition on assignment, Devenport Developments is not a party to the contract and cannot sue to enforce that contract.
- Is s. 1(3) satisfied?
- Can Carlton International obtain remedy for Devenport Developments? Discussion of *St Martins Property* exception (*Darlington, McAlpine v Panatown*)—narrow ground—but also mention possibilities if the broad ground of Lord Griffiths in the *St Martins* appeal is accepted and applied.

Key debates

Since this topic is more likely to feature as an essay than as a problem, these debates have already been touched upon but further reading is suggested below.

1. The need for reform

The arguments are rehearsed in the Law Commission's 1996 Report and the previous judicial dissatisfaction can be seen in the speeches of members of the HL in, for example, *Beswick v Beswick* and *Woodar v Wimpey*, and Steyn LJ in *Darlington BC v Wiltshier Northern*. However, in defence of privity see Kincaid, 'Third Parties: Rationalising a Right to Sue' (1989) 48 CLJ 243 and Smith 'Contracts for the Benefit of Third Parties: In Defence of the Third Party Rule' (1997) 17 OJLS 643.

Detailed critique of the Act, its provisions and scope, and the fact that it does not 'abolish' privity:

- Burrows, 'The Contracts (Rights of Third Parties) Act 1999 and its Implications for Commercial Contracts' [2000] LMCLQ 540.
- Andrews, 'Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999' (2001) 60 CLJ 353.
- Beale, 'A Review of the [1999 Act]' in Burrows and Peel (eds), *Contract Formation and Parties* (Oxford University Press, 2010).

2. The broad ground/performance-interest debate

- Coote, 'The Performance Interest: *Panatown* and the Problem of Loss' (2001) 117 LQR 81.

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Key cases

Case	Facts	Principle
<i>Tweddle v Atkinson</i>	Groom was named intended beneficiary of promise made in contract between groom's father and bride's father. Held that the groom could not enforce the bride's father's promise.	Privity meant that the groom was not party to that contract and he had not provided any consideration to support the promise.
<i>Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd (HL)</i>	Dunlop sold tyres to Dew & Co. and Dew & Co. promised (in return for a discount) not to sell the tyres at less than list price and to obtain a similar undertaking from trade buyers. Dew & Co. sold some tyres to Selfridge (contract 2) and Selfridge promised Dew & Co. to abide by the list price but broke it. Dunlop sued Selfridge for breach of its undertaking but failed because it was not a party to contract 2 containing Selfridge's promise.	Privity means that only a party to a contract can enforce its promises. Dunlop had also not provided any consideration to support Selfridge's promise (and an argument that Dew & Co. were acting as its agents also failed).
<i>Nisshin Shipping Co. Ltd v Cleaves & Co. Ltd</i>	Contracts between owners and charterers contained commission clause providing for payment to named broker. The 1999 Act applied and clause purported to confer a benefit on broker so the broker could enforce it directly.	Section 1(2) proviso to s. 1(1)(b) of the 1999 Act will only operate to deny enforceability by a third party if the contracting party denying this is able to satisfy the court that the parties' contract indicates that the parties were denying any right of enforcement or protection to the third party. The third party does not need to prove a negative.

4. Privity and third party rights

Case	Facts	Principle
<i>New Zealand Shipping Co. Ltd v AM Satterthwaite & Co. Ltd, The Eurymedon</i> (PC)	Stevedores could rely on exemption clause in contract between shipowners and carriers since carriers contracted as their agents for that clause and contract was clear that they were intended to be protected and they had provided consideration for the shipowners' exemption promise by unloading the goods (performance of contractual duty owed to third party).	Agency device to establish a binding promise of exemption between a contracting party and third party to the clause.
<i>Beswick v Beswick</i> (HL)	Nephew had promised uncle that he would pay weekly sum to uncle's widow on uncle's death. The widow could not enforce this in her personal capacity because of privity but acting as her late husband's representative she could. Since the estate had not suffered loss and could not recover substantial damages, specific performance was awarded.	Promisee remedies and the difficulties of the promisee seeking to enforce a promise in favour of a third party beneficiary. Specific performance was available because the promisee could not recover substantial damages if it had no loss.
<i>Alfred McAlpine Construction Ltd v Panatown Ltd</i> (HL)	McAlpine had been employed by Panatown to construct an office building on land belonging to UIPL, an associate company of Panatown. Defects arose with the building and Panatown sought damages. McAlpine claimed that Panatown had suffered no loss as a result of its breaches of contract because Panatown neither owned the land nor occupied the building. HL refused the recovery but the decision was based on the fact that McAlpine had entered into a separate duty of care deed directly with UIPL, giving UIPL remedies for defective work and that deed had to prevail.	HL held that normally (absent the duty of care deed) the narrow ground in the <i>St Martins Property</i> appeal would have enabled a party in the position of Panatown to recover substantial damages. Where a contract between a builder and an employer was for the construction of a building on the land of a third party who would own that building, the employer could seek substantial damages from the builder for defects where the third party had no direct remedy against that builder.

Exam questions

Problem question

Cliona Ltd is a property developer who is developing a piece of land on the outskirts of Reading. She enters into a building contract with Mary Ltd under which Mary Ltd is to construct a cinema on the land. This contract contains a prohibition on the assignment of rights under the contract and also states that the **Contracts (Rights of Third Parties) Act 1999** is excluded. Cliona Ltd then sells the land and cinema to Suzanne Ltd but does not attempt to assign the rights under the building contract to Suzanne Ltd. To celebrate the sale of the cinema Cliona, the managing

4. Privity and third party rights

director of Cliona Ltd, books a holiday to Malta for herself and her family. Unfortunately, the holiday is a complete disaster and does not conform to the contract terms. Various issues have now also arisen with the construction of the cinema.

Advise the parties. Cliona Ltd and Suzanne Ltd particularly want your advice on whether Cliona Ltd can recover damages under the building contract with Mary Ltd. Would your advice differ if Suzanne Ltd had a direct contractual right against Mary Ltd?

Head to the Outline Answers <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-4-outline-answers-to-essay-questions?options=showName> **section of the online resources for help with this question.**

Essay question

Critically discuss the impact of the **Contracts (Rights of Third Parties) Act 1999**.

Online Resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-4-outline-answers-to-essay-questions?options=showName>
- Interactive key cases <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-4-interactive-key-cases?options=showName>
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