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25. Third Parties

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Abstract

This chapter examines the impact of a contract on third parties. It addresses two main questions: whether or not a third party can acquire any rights under the contract, and whether or not the contract can impose upon him obligations or liabilities. The general rule adopted by English law is that the contract creates rights and imposes obligations only between the parties to the contract: the third party thus neither acquires rights under the contract nor is he subject to liabilities. This general rule is known as the doctrine of privity of contract. The Contracts (Rights of Third Parties) Act 1999, however, provides a relatively simple mechanism by which contracting parties can confer upon a third party a right to enforce a term of their contract. The dominant philosophy that underpins the 1999 Act is one of freedom of contract and, this being the case, the success of the Act in practice will depend upon contracting parties themselves. The chapter examines the individual sections of the 1999 Act, the exceptions to the doctrine of privity that existed at common law and under various statutes prior to the enactment of the 1999 Act. The chapter concludes by considering the extent to which a third party can be subject to an obligation by a contract to which he is not a party.

Keywords: English contract law, third party rights, privity of contract, Contracts Rights of Third Parties Act 1999, common law exceptions to privity, obligations imposed on third parties

Central Issues

1. The general rule at common law in England is that a third party cannot acquire rights under a contract to which he is not a party nor can he be subject to a burden by a contract to which he is not a party. These rules are known as the doctrine of privity of contract.
2. The rule that a third party cannot acquire rights under a contract to which he is not a party has proved to be a controversial one and the courts over time have created a number of exceptions to it. But the exceptions are of limited scope and they did not bring to an end the demands for reform of this rule.
3. Reform was eventually implemented in the form of the Contracts (Rights of Third Parties) Act 1999. The 1999 Act provides a relatively simple mechanism by which contracting parties can confer upon a third party a right to enforce a term of their contract. The dominant philosophy which underpins the 1999 Act is one of freedom of contract, so it is possible for the contracting parties to define for themselves the scope of the third party right of action.
4. The 1999 Act has not, however, escaped criticism. Some have questioned the justifications put forward in support of the proposition that a third party should be entitled to enforce a term of a contract to which he is not a party. The principal objections put forward are that the third party is not a promisee, nor has he provided any consideration for the promise, and so he ought not to be entitled to a remedy in his own right. The competing arguments for and against recognition of a third party right of action are considered in this chapter.
5. The 1999 Act does not abolish the exceptions to the doctrine of privity that pre-dated the Act. However, it is likely that the practical significance of these exceptions will diminish over time. Contracting parties who wish to confer an enforceable right of action upon a third party are more likely to use the 1999 Act than the pre-Act exceptions.
6. A contracting party who, in breach of contract, fails to confer a benefit on a third party will incur a liability towards the other party to the contract. The remedies available to the latter party are not affected by the 1999 Act and, in certain circumstances, he may be able to obtain a remedy, such as a specific performance order, which will be of benefit to the third party. The circumstances in which a contracting party can sue and recover damages on behalf of a third party are an issue of some controversy that is discussed in this chapter.

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7. As a general rule, parties to a contract cannot impose an obligation on a third party without the latter's consent. The existence of this general rule is widely accepted. While it is the subject of some exceptions, neither the general rule nor its exceptions are affected by the 1999 Act.

25.1 Introduction

A contract creates rights and obligations as between the parties to the contract. But what impact does it have on third parties, that is to say those who are not party to the contract? Broadly speaking, there are two questions to be answered here. The first is whether or not a third party can acquire any rights under the contract, and the second is whether or not the contract can impose upon him obligations or liabilities. The general rule which English law has adopted is that the contract creates rights and imposes obligations only between the parties to the contract: the third party thus neither acquires rights under the contract nor is he subject to liabilities. This general rule is known as the doctrine of privity of contract. The rule is the subject of a number of exceptions and the scope of these exceptions, particularly in relation to the acquisition of contractual rights by third parties, has been a source of considerable controversy. Indeed, Professor Treitel has stated (*Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002), p. 47) that the 'most significant doctrinal development in English contract law in the twentieth century was no doubt the outcome of what I shall call the battle over privity'. The outcome of that battle was the enactment of the Contracts (Rights of Third Parties) Act 1999 (generally referred to in this chapter as 'the 1999 Act'). This Act is now the most important source of the law relating to third party rights in that it provides a relatively simple means by which contracting parties can, if they so desire, confer upon a third party the right to enforce a term of the contract. It is, however, important to note that the Act does not purport to abolish the doctrine of privity with the consequence that, in a case that falls outside the scope of the Act, the doctrine of privity remains applicable. On the other hand, it can be said that the Act introduces into English law a limited third party right of action.

The bulk of this chapter will be devoted to the topic of the acquisition of contractual rights by third parties. The reason for this is that it has proved to be the most contentious aspect of the doctrine of privity. By contrast, the rule that the parties to a contract cannot impose a contractual liability upon a third party is generally accepted, although it too is a rule that is subject to some exceptions. The reason for the general acceptance of the latter rule is that it would be an 'unwarranted infringement of a third party's liberty if contracting parties were able, as a matter of course, to impose burdens on a third party without his or her consent' (Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, Law Com No 242 (1996), para 2.1). Before examining the dual aspects of the doctrine of privity, it is important to examine the relationship between third party rights of action and the contract structures that are commonly adopted in commercial practice.

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25.2 Contract Structures

An impression that is often gained from a reading of contract cases is that all contracts have two parties to them and that each contract is separate and distinct from every other contract. Any such impression is misleading. Contracts can and frequently do involve more than two parties. But that is not our present concern. Rather our concern is with the proposition that each contract is separate and distinct from every

other contract. This proposition is simply not true. Contracts are linked in many complex ways. Two hypotheticals will illustrate the point, one drawn from the commercial sphere and the other based on a more commonplace example involving a consumer.

The commercial example is based loosely on the facts of the case of *Junior Books Ltd* v. *Veitchi Co Ltd* [1983] 1 AC 520. A company (X) wishes to have a new factory built and, for this purpose, enters into a contract with another company (Y) which agrees to design and build the factory. Y cannot provide all of the necessary services itself and so, to the knowledge of X, it plans to sub-contract some of the work to company Z. X is content to allow Y to sub-contract the work in this way and is also generally satisfied with the quality of Z's work but it nevertheless harbours a concern that an employee of Z might, through his negligence, cause damage to the works and thereby inflict loss on X. How can X take steps to protect itself in this situation? One possibility is to resort to a claim in tort in the event of negligence on the part of an employee of Z. The problem with this strategy is that X is likely to encounter severe difficulties in bringing a claim in tort in the event that it suffers economic loss as a result of the negligence of Z (the courts being extremely reluctant to find liability in tort in the case of economic loss: see *D & F Estates Ltd* v. *Church Commissioners for England and Wales* [1989] AC 177).

What contractual routes of redress are open to X? The obvious claim is against Y, its contracting party. Here it is important for X to ensure that Y assumes a contractual responsibility for the quality of the works that includes the work to be carried out by Z. Then, in the event of a breach of duty by Z, X can sue Y for breach of contract and then leave Y to seek redress from Z. This is a commonly used structure, although the risk inherent in it is that Y will become insolvent before making payment in full to X, leaving X with no obvious means of redress against Z. An alternative strategy is for X to require that Z enter into a contract with it under which Z promises to exercise reasonable care and skill in the performance of its obligations. Such a warranty, commonly known as a collateral warranty, will generally be entered into in the form of a deed in order to avoid any argument about whether or not X has provided consideration for Z's promise to exercise reasonable care and skill.

We can look at the same transaction from the perspective of Z. Z may be concerned about its exposure to a claim by X. For example, it may have a very good working relationship with Y and prefer to assume responsibility only to Y. It may therefore be unwilling to provide a collateral warranty to X (although it may not in practice have the bargaining power to resist such a demand).

We can see that there are two principal structural options open to the parties in this case. The first is for Z to assume a contractual responsibility towards Y and for Y to assume contractual responsibility to X but Z does not assume such a responsibility towards X. In this example (subject to the possibility of a claim in tort) liability will be left to flow down the chain of contracts. Thus in the event of a breach by Z which results in loss to X, X will sue Y and Y will then sue Z but X cannot sue Z directly. The second is for Z to assume a direct
p. 948 contractual responsibility to X in addition to Y's contractual responsibilities to X. The point ↵ to grasp here is that the parties have a choice to make and (at least in the case of parties who are legally advised) they will have their reasons for choosing one type of contract structure in preference to another and, further, they will expect the courts to respect and give effect to the distribution of rights and obligations set out by the particular contract structure they have chosen.

Now let us feed into the equation the possibility of a third party right of action. The obvious advantage of a third party right of action is that it provides another means by which X can protect its position. X could insist that Y insert a clause into its contract with Z the effect of which would be to confer on X a right to enforce the term of the contract by which Z assumed an obligation to exercise reasonable care and skill in the performance of its duties. The ability to confer an enforceable right of action on the third party appears to perform a useful function (although not everyone accepts this, see 25.3.5) in that it provides a means by which contracting parties can give effect to their intention to confer an enforceable right of action upon a third party. But the parties will obviously not want the courts to imply the existence of a third party right of action in the case where the parties have chosen to structure their transaction in such a way that Z does not assume a direct contractual responsibility to X but only to Y. In such a case, recognition of a direct third party right of action in X would cut across the contract structure adopted by the parties and could result in a distribution of liability other than that intended by the parties. It must be stressed at this point that such a result is not an inevitable consequence of the introduction of a third party right of action. But this example does underline the need for any third party right of action to be sensitive to the contract structure that has been adopted by the parties.

Our second example is a consumer transaction and can be dealt with more quickly. Suppose that a consumer wishes to buy a car on credit but the car dealer cannot provide the credit facilities himself. A finance house is, however, prepared to provide the finance. How can these three parties structure their transaction? They have a range of possibilities open to them but these possibilities can be divided into two broad groups. The first and most commonly adopted structure is for the car dealer to sell the car to the finance house which will then supply the car to the consumer on credit terms. Very often consumers are unaware of the fact that this is the structure which they have agreed. As far as they are concerned they are purchasing a car from the dealer. But in law there are two transactions taking place, not one. The first is the sale by the car dealer to the finance house and the second is the transaction between the finance house and the consumer. One drawback to this structure is that, in the absence of a collateral contract (which the courts may be prepared to imply, see *Andrews* v. *Hopkinson* [1957] 1 QB 229), there is no direct contractual relationship between the dealer and the consumer. This may be a problem in the event that the car proves to be defective. The consumer wants a claim against the dealer, not the finance house and, for that matter, the finance house does not want to involve itself in the repair of the car. Its intention is to provide the finance, not the services of a mechanic. But in legal theory (at least as far as the common law is concerned) the consumer has a claim against the finance house and the finance house has a claim against the dealer, but the consumer does not have a direct claim against the dealer, albeit in practice the problem will be resolved by the consumer dealing directly with the dealer.

The second alternative is for the dealer to sell the car to the consumer and then either the consumer or the dealer to enter into a credit transaction with the finance house. Thus the dealer may agree to sell the car to the consumer and then assign its contractual rights against the consumer to the finance house in return for an immediate payment by the finance house. Suppose that the consumer has agreed to pay the dealer £5,500 for
p. 949 the car over a two-year ↵ period (this sum being known as a receivable). In return for assigning to the finance house its rights against the consumer the dealer may be able to obtain immediate payment from the finance house of a percentage of the sum due to it from the consumer, say £5,000. The dealer may even have an agreement with the finance house under which the dealer agrees to sell all its receivables to the finance house in return for immediate payment. Alternatively, the dealer may sell the car to the consumer and the consumer can then enter into a transaction with the finance house in order to obtain the credit necessary to

pay the dealer (such as a sale and lease-back). In both of these alternatives there is a direct contractual relationship between the dealer and the consumer so that this time the consumer will have a direct claim against the dealer in the event that the car proves to be defective. But, once again, the point to be made is that contracting parties (at least in the case of the dealer and the finance house) frequently give a great deal of thought to the contractual structures which they adopt and they take into account a broad range of factors in making a decision about the contract structure that is most beneficial to them (these factors include matters such as liability for defects and tax and accounting considerations). As was the case in the example drawn from the commercial sphere, any introduction of a third party right of action must be sensitive to this fact and not produce a right of action which cuts across, or undermines, the distribution of rights and obligations that has been agreed by the parties.

25.3 Third Parties and the Acquisition of Contractual Rights

The enactment of the 1999 Act constitutes a watershed in any discussion of the contractual rights of third parties. Given its importance today it should be the first item for discussion. Yet it is very difficult, if not impossible, to appreciate the significance of the Act without an understanding of the way in which the law has evolved. The Act must be placed in its context. In order to do this it is necessary to examine the cases which established the general rule at common law that a third party does not have a right to enforce a term of a contract to which he is not a party, the various exceptions to the general rule that were recognized prior to the enactment of the 1999 Act, and the arguments that were advanced both in support of, and in opposition to, the reform of the law that culminated in the 1999 Act.

The discussion of the acquisition of contractual rights by third parties will therefore be divided into six parts. The first part (25.3.1) will focus upon the two leading cases in which the doctrine of privity of contract was established at common law. The second part (25.3.2) shifts attention to the position of the contracting parties themselves. It may seem out of place to analyse the rights of the contracting parties in the context of a discussion of the rights of the third party. But this is not so. Take the case of a contract between A and B under which B promises to do some work for A and A promises, in return, to pay a sum of money to C. Assume that B does the work for A but that A refuses in breach of contract to pay any money to C. In this situation B (generally referred to as 'the promisee') has a claim against A for breach of contract and the question which falls for consideration is whether or not B can obtain a remedy from A the effect of which will be to give C the promised performance. The third part (25.3.3) returns to the position of the third party and considers the exceptions to the doctrine of privity that were recognized at common law and by statute prior to the enactment of the 1999 Act. The fourth part (25.3.4) is devoted to the subject of third parties, exclusion clauses, and exclusive jurisdiction clauses. In many ways this line of cases could ↵ have been accommodated within part three but they raise issues of some difficulty and so merit separate discussion. The fifth part (25.3.5) is concerned with the debate over the reform of the doctrine of privity that preceded the enactment of the 1999 Act. The final part (25.3.6) is devoted to the 1999 Act itself. The principal provisions of the Act are analysed and consideration will also be given to the impact of the Act on some of the cases that pre-dated the 1999 Act.

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25.3.1 The General Rule at Common Law: Third Parties Have No Right of Action

Professor Ibbetson states (*A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), p. 241) that the 'rule that a third party could not enforce rights arising under a contract has been a feature of English law since at least the thirteenth century'. English law was not alone in adopting this stance. According to classical Roman law a contract created rights and obligations only between the parties to it and did not have any effect, whether in terms of the acquisition of rights or the imposition of liabilities, upon third parties. Over time the influence of classical Roman law on the continent of Europe waned. The influence of natural lawyers, such as Grotius, and the emphasis which they placed on the importance of the will of the parties and upon consensus or agreement led to the gradual recognition of the contract in favour of a third party. Thus Professor Zimmermann concludes (*The Law of Obligations* (Oxford University Press, 1996), p. 42) that in 'the 17th century the great breakthrough towards the recognition of the contract in favour of the third party had taken place and the prevailing new attitude had already influenced many of the codes of that time'. For a time it appeared that English law might follow the lead taken on the continent of Europe. Cases can be found which appeared to support the existence of a third party right of action (see, for example, *Dutton* v. *Poole* (1678) 2 Lev 210, *Pigott* v. *Thompson* (1802) 3 Bos & Pul 98, and *Carnegie* v. *Waugh* (1823) 1 LJ (KB) 89). But, equally, there were cases which were hostile to the existence of such a third party right of action (see, for example, *Crow* v. *Rogers* (1724) 1 Str 591 and *Price* v. *Easton* (1833) 4 B & Ad 433). The cases thus appeared to be in some disarray. The case which is credited with resolving the conflict and committing English law to the rule that a third party cannot acquire contractual rights under a contract to which he is not a party is the decision of the Court of Queen's Bench in *Tweddle* v. *Atkinson* (1861) 1 B & S 393, as subsequently confirmed by the House of Lords in the leading case of *Dunlop Pneumatic Tyre Co Ltd* v. *Selfridge and Co Ltd* [1915] AC 847. These two cases established the doctrine of privity of contract as a 'fundamental' principle of English contract law and it is therefore necessary to examine them in more detail.

Tweddle v. Atkinson

(1861) 1 B & S 393, 121 ER 762, Court of Queen's Bench

William Tweddle married the daughter of William Guy. Prior to the wedding William Guy entered into a verbal agreement with John Tweddle, William Tweddle's father, under which both promised to give their children marriage portions. After the wedding had taken place, they entered into a written
p. 951 agreement which was intended to give effect to their verbal ↵ promises under which William Guy agreed to pay £200 to William Tweddle and John Tweddle agreed to pay him £100. The agreement contained the following sentence: 'it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified.' William Guy failed to pay the promised amount and so William Tweddle brought an action against the executor of William Guy's estate for the sum of £200. His claim failed.

Wightman J

Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne* v. *Mason* 1 Ventr 6, in which it was held that the daughter of a physician might maintain assumpsit upon a promise by her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

Crompton J

The modern cases have, in effect, overruled the old decisions; they shew that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued ...

Blackburn J

... Mr Mellish [counsel for the plaintiff] admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made. But he says that there is an exception; namely, that when the consideration moves from a father, and the contract is for the benefit of his son, the natural love and affection between the father and son gives the son the right to sue as if the consideration had proceeded from himself. And *Dutton and Wife* v. *Poole* was cited for this. We cannot overrule a decision of the Exchequer Chamber; but there is a distinct ground on which that case cannot be supported. The cases ... shew that natural love and affection are not a sufficient consideration whereon an action of assumpsit may be founded.

Commentary

Why did William Tweddle's claim fail? Two possible reasons can be given. The first is that he was not a party to the contract concluded between his father and his father-in-law. The second is that he did not provide any consideration for William Guy's promise to pay him £200. Which reason was invoked by the judges in *Tweddle*? It would appear that their focus was on the latter rule. Counsel for the defendant submitted that 'it is now settled that an action for breach of contract must be brought by the person from whom the consideration
p. 952 moved' and cited *Price* v. *Easton* (1833) 4 B & Ad 433 in support of his submission. Counsel for the plaintiff,
↵ Mr Mellish, accepted that there was such a general rule but submitted that there was an exception to it in the case of contracts made by parents for the purpose of providing for their children. Thus battle was joined on the issue whether or not William Tweddle was a 'stranger' to the consideration provided by his father. The acceptance by Mr Mellish of this general rule has been criticized (see R Flannigan, 'Privity—The End of an Era (Error)' (1987) 103 *LQR* 564, 571) on the basis that 'it seems entirely unsatisfactory that the general third party right of action should be lost on an unnecessary concession'. This criticism is not without foundation. As we have noted, the cases did not all point one way (although one would scarcely guess this from the tenor of the judgments in *Tweddle*) and in 1859 the New York Court of Appeals had taken a step in the opposite direction in *Lawrence* v. *Fox*, 20 NY 268 (1859) when it recognized the existence of a third party right of action (although the case did not even merit a mention either in argument or in the judgments in *Tweddle*). On the other hand, it could be said that the criticism misses the point in that the reason given by the judges for the failure of William Tweddle's claim was not that he was a third party but that he had not provided any consideration for the promise made by William Guy.

Two further points should be noted about *Tweddle*. The first is that it underlines the fact that there is a close relationship between the rule that consideration must move from the promisee (on which see 5.2.4) and the doctrine of privity. In many cases the former rule renders discussion of the latter unnecessary. *Tweddle* itself illustrates this point. The judges found that William Tweddle had not provided any consideration. His claim was therefore doomed to fail and it was not necessary for them to consider whether or not his claim was also bound to fail on the ground that he was a third party. It is therefore only in the rare case where the third party has provided consideration but is not party to the agreement that the need for a distinct third party rule emerges. Such cases are likely to be very rare. Treitel gives the following example (*The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), para 14-014):

> A father might, for example, promise his daughter to pay £1,000 to anyone who married her. A man who married the daughter with knowledge of and in reliance on such a promise might provide consideration for it, but could not enforce it, as it was not addressed to him.

In this example the doctrines of consideration and privity do appear to be separate and distinct (unless one takes the view that only an offeree can give consideration to the offeror so as to make a contract in which case there would be no contract at all on the facts of Professor Treitel's hypothetical and so no contract for anyone to be privy to).

The second point to note about *Tweddle* relates to the position of William Tweddle's father, John Tweddle. Why did he not bring a claim against William Guy's executor? One reason might have been that he had not paid his son the promised £100. Lord Denning in *Beswick* v. *Beswick* [1966] Ch 538, 553–554 offered the

following analysis of *Tweddle*:

> The action failed for the very good reason that the husband's father had not done his part. He had not paid his promised £100. The son could not himself be sued for his father's failure to pay the £100: for he was no party to the contract. So he could not be allowed to sue his wife's father for the £200. … But if the husband's father had paid his £100 and thus wholly performed his part, then the husband's father in his lifetime, or his executor after his death, could have sued the wife's father or his executor for the £200. As Wightman J observed 1 B & S 393, 397:
>
> > 'If the father of the plaintiff had paid the £100 which he promised, might not he have sued the father of the plaintiff's wife on his express promise?'
>
> p. 953 ↵ To which the answer would undoubtedly be: 'Yes, he could sue and recover the £200', but he would recover it not for his own benefit, or for the benefit of the estate, but for the benefit of the son.

The difficulty with this view is that no reference is made in the judgments to the position of John Tweddle. Lord Denning's reference to the observation of Wightman J is to an observation made by him in the course of argument and it does not amount to a categorical statement that the promised £100 had not in fact been paid. The point is, however, one of some significance and we shall return to it when we come to apply the 1999 Act to the facts of *Tweddle* (25.3.6). Nevertheless, it is not possible to confine the rule laid down in *Tweddle* in such a narrow way. The reason for this is to be found in the next case, a decision of the House of Lords.

Dunlop Pneumatic Tyre Co Ltd v. Selfridge and Co Ltd
[1915] AC 847, House of Lords

In 1911, Messrs Dew, motor accessory agents, agreed to buy a quantity of tyres and other goods from Dunlop (the appellants) who carried on business as motor tyre manufacturers. Dunlop agreed to give Dew certain discounts off their list price and Dew in return agreed not to sell Dunlop's goods to any person at less than the list prices. However, it was also agreed that Dew could give genuine trade customers a limited discount off Dunlop's list prices if, as agents of Dunlop, Dew obtained from the trader a similar written undertaking that it would observe the list prices. On 2 January 1912, the respondents, Selfridge, large storekeepers who sold tyres by retail to the public, ordered Dunlop tyres from Dew. Dew agreed to give Selfridge certain discounts off Dunlop's list prices and Selfridge agreed not to sell any Dunlop tyres to private customers at less than the list prices. Dunlop sued Selfridge for breach of this undertaking when Selfridge sold Dunlop tyres to private customers for less than the list prices. The trial judge gave judgment for Dunlop. The Court of Appeal reversed this decision on the ground that the agreement of 2 January 1912 was not a contract between Dunlop and Selfridge but between Dew and Selfridge. The House of Lords dismissed Dunlop's appeal.

Viscount Haldane LC

My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio*[1] arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognized in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it.

p. 954 ↵ My Lords, in the case before us, I am of opinion that the consideration, the allowance of what was in reality part of the discount to which Messrs Dew, the promisees, were entitled as between themselves and the appellants, was to be given by Messrs Dew on their own account, and was not in substance, any more than in form, an allowance made by the appellants …

No doubt it was provided as part of these terms that the appellants should acquire certain rights, but these rights appear on the face of the contract as jura quaesita tertio, which the appellants could not enforce. Moreover, even if this difficulty can be got over by regarding the appellants as the principals of Messrs Dew in stipulating for the rights in question, the only consideration disclosed by the contract is one given by Messrs Dew, not as their agents, but as principals acting on their own account.

The conclusion to which I have come on the point as to consideration renders it unnecessary to decide the further question as to whether the appellants can claim that a bargain was made in this contract by Messrs Dew as their agents; a bargain which, apart from the point as to consideration, they could therefore enforce. If it were necessary to express an opinion on this further question, a difficulty as to the position of Messrs Dew would have to be considered. Two contracts—one by a man on his own account as principal, and another by the same man as agent—may be validly comprised in the same piece of paper. But they must be two contracts, and not one as here. I do not think that a man can treat one and the same contract as made by him in two capacities. He cannot be regarded as contracting for himself and for another uno flatu.

My Lords, the form of the contract which we have to interpret leaves the appellants in this dilemma, that, if they say that Messrs Dew contracted on their behalf, they gave no consideration, and if they say they gave consideration in the shape of a permission to the respondents to buy, they must set up further stipulations, which are neither to be found in the contract sued upon nor are germane to it, but are really inconsistent with its structure. That contract has been reduced to writing, and it is in the writing that we must look for the whole of the terms made between the parties. These terms cannot, in my opinion consistently with the settled principles of English law, be construed as giving to the appellants any enforceable rights as against the respondents.

I think that the judgment of the Court of Appeal was right, and I move that the appeal be dismissed with costs.

Lord Dunedin

My Lords, I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce. Notwithstanding these considerations I cannot say that I have ever had any doubt that the judgment of the Court of Appeal was right.

My Lords, I am content to adopt from a work of Sir Frederick Pollock, to which I have often been under obligation, the following words as to consideration: ‘An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable’. (Pollock on Contracts, 8th edn, p. 175.)

Now the agreement sued on is an agreement which on the face of it is an agreement between Dew and Selfridge. But speaking for myself, I should have no difficulty in the circumstances of this case in holding it proved that the agreement was truly made by Dew as agent for Dunlop, or in other words that Dunlop was the undisclosed principal, and as such can sue on the agreement. None the less, in order to enforce it he must show consideration, as above defined, moving from Dunlop to Selfridge.

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> ↵ In the circumstances, how can he do so? The agreement in question is not an agreement for sale. It is only collateral to an agreement for sale; but that agreement for sale is an agreement entirely between Dew and Selfridge. The tyres, the property in which upon the bargain is transferred to Selfridge, were the property of Dew, not of Dunlop, for Dew under his agreement with Dunlop held these tyres as proprietor, and not as agent. What then did Dunlop do, or forbear to do, in a question with Selfridge? The answer must be, nothing. He did not do anything, for Dew, having the right of property in the tyres, could give a good title to any one he liked, subject, it might be, to an action of damages at the instance of Dunlop for breach of contract, which action, however, could never create a vitium reale in the property of the tyres. He did not forbear in anything, for he had no action against Dew which he gave up, because Dew had fulfilled his contract with Dunlop in obtaining, on the occasion of the sale, a contract from Selfridge in the terms prescribed.
>
> To my mind, this ends the case. That there are methods of framing a contract which will cause persons in the position of Selfridge to become bound, I do not doubt. But that has not been done in this instance; and as Dunlop's advisers must have known of the law of consideration, it is their affair that they have not so drawn the contract.
>
> I think the appeal should be dismissed.
>
> ***Lords Atkinson***, ***Parker of Waddington***, ***Sumner***, and ***Parmoor*** delivered concurring judgments.

Commentary

Dunlop is a case of great significance largely because of Viscount Haldane's statement (in the first extracted paragraph of his judgment) to the effect that the rule that only a person who is a party to a contract can sue upon it is separate and distinct from the requirements of the doctrine of consideration (a point subsequently affirmed by the Privy Council in *Kepong Prospecting Ltd* v. *Schmidt* [1968] AC 810). But the fact that they have their separate existence does not remove the fact that they are closely related in the sense that the 'rule that only a party to the agreement can enforce it will often lead to the same result as the rule that consideration must move from the promisee' (Treitel, *The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), para 14-014). The close connection between the two doctrines can be seen in *Dunlop* itself in that the greater part of the judgments was taken up with the doctrine of consideration. Indeed, it was the doctrine of consideration that was the object of Lord Dunedin's wrath. However, Lord Dunedin may not have been correct in his assertion that the doctrine of consideration made it possible for Selfridge to snap their fingers at a bargain deliberately made. While the contract was not enforceable by Dunlop, it does not follow that it could not have been enforced by Dew. Had Dew sought an injunction to restrain further breaches of contract by Selfridge it probably would have been successful (although it would have been more difficult for Dew to have sued Selfridge for damages because it did not appear to have suffered any loss as a result of the breach and it is unlikely that, in the state of the law as it was then, it could have recovered damages for the loss suffered by Dunlop, a third party (on which see 25.3.2.3)).

Two further points should be noted about *Dunlop*. The first is that the aim of Dunlop in setting up this scheme was to fix the price of its products by setting minimum prices at which they could be sold. Such price maintenance agreements are now regulated by statute in the public interest (see generally the Competition

Act 1998). But it is important to note that no point was taken before their Lordships to the effect that the
p. 956 agreements were invalid on the ↵ ground that they were contrary to public policy. On the contrary, their Lordships assumed that price maintenance agreements were in principle valid and enforceable at common law. It is therefore not possible to confine *Dunlop* on the basis that the case was concerned with 'the maintenance of prices to the public disadvantage' (as Denning LJ appeared to suggest in *Smith and Snipes Hall Farm* v. *River Douglas Catchment Board* [1949] 2 KB 500, 519). As far as their Lordships were concerned, the failure of Dunlop's claim had nothing to do with the fact that the public might have been disadvantaged in any way by Dunlop's attempt to fix the prices of its products.

The second point is that Viscount Haldane recognizes that the principle that only a person who is a party to a contract can sue is not absolute. Two exceptions are apparent from his judgment (and from the judgment of Lord Dunedin). The first is that it is possible to confer a right of action upon a third party via a trust. This is an important point and the device of a trust of a promise has become a recognized exception to the doctrine of privity, albeit that it operates within narrow limits (on which see 25.3.3.2). The second exception is the doctrine of agency. Thus Viscount Haldane states that 'a principal not named in the contract may sue upon it if the promisee really contracted as his agent'. On the facts of the case, Dunlop was not able to avail itself of the agency exception because of the finding that the consideration had been supplied by Dew on its own account and not as agent for Dunlop. But, had Dew acted within the scope of its authority as an agent for Dunlop in concluding the contract with Selfridge, it would have resulted in the creation of a contract between Dunlop and Selfridge with the consequence that Dunlop would have been entitled to bring a claim against Selfridge.

25.3.2 The Rights of the Promisee

In both *Tweddle* and *Dunlop* the temptation is to focus attention exclusively on the position of the third party and the defendant and thereby ignore the position of the defendant's contracting party (John Tweddle and Messrs Dew respectively). The emphasis on the position of the third party and the defendant is understandable given that they were the parties to the litigation. Nevertheless, sight must not be lost of the position of the defendant's contracting party ('the promisee'). There are at least three reasons why attention must be paid to the position of the promisee. The first is that the promisee has paid for the defendant's promise of performance, whereas the third party is generally no more than a gratuitous beneficiary of that promise. On this basis it can be argued that the law's primary concern should be for the position of the promisee, not the third party. Secondly, the defendant may have a defence to any claim brought by the promisee and this defence should also be available to any claim brought by the third party. *Tweddle* itself may be an example in this category (on the assumption that Lord Denning was correct in stating that the promisee, John Tweddle, had not carried out his obligation to pay £100 to his son). Thirdly, there is a temptation to assume that a failure to provide the third party with a remedy will enable the defendant to break his contract with impunity. This is not necessarily the case. Proper consideration of the position of the promisee may lead us to the conclusion that the more appropriate way of providing redress in respect of the breach is via an action by the promisee rather than by conferring a right of action on the third party. This is not the place to debate the merits of conferring a right of action upon the third party (that will come later: 25.3.5). It suffices here to make the point that the rights of the promisee are important and could even be said to be of greater importance than the rights of the third party.

The rights of the promisee can be broken down into two broad categories. The first relates to the entitlement
p. 957 of the promisee to a 'specific remedy', namely a remedy which requires ↵ the defendant specifically to comply with its obligations under the contract. The form of the remedy will depend upon the nature of the obligation which has been assumed by the defendant. If the obligation is a positive one, namely to perform a particular act, the remedy is likely to take the form of a specific performance order (on which see Chapter 24), that is to say an order of the court that the defendant perform his obligations in accordance with the terms of the contract. Where, however, the obligation of the defendant is one not to do a particular thing (for example not to compete with the third party), the remedy is likely to take the form of an injunction, namely an order of the court that restrains the defendant from doing the act that he has contracted not to do (although it may also take the form of a stay of proceedings, discussed in more detail at 25.3.2.2). It is vital to note that the specific remedies are of importance to the third party as well as to the promisee. Where the promise made by the defendant is one to confer a benefit on a third party, the effect of the specific performance order will be to require the defendant to confer the benefit on the third party. In this way the position of both the promisee and the third party will be protected.

The second right of the promisee relates to its entitlement to recover damages in respect of the promisor's breach of contract. The damages remedy may or may not be of significance to the third party. Where damages are awarded to compensate the promisee for his own loss then the remedy will be of little significance to the third party. But where damages are awarded to compensate the promisee for the loss which has been suffered by the third party, then the remedy is of obvious significance for the third party. As we shall see, the question whether or not (and, if so, in what circumstances) English law entitles a contracting party to sue and recover damages in respect of a loss suffered by a third party is one of some controversy that remains largely unresolved.

Any consideration of the rights of the promisee must therefore distinguish between the various remedies that are potentially available to the promisee. We shall focus attention on three of the principal remedies, namely (i) specific performance, (ii) a stay of proceedings, and (iii) damages.

25.3.2.1 Specific Performance

The leading case on the entitlement of the promisee to the remedy of specific performance is the decision of the House of Lords in *Beswick* v. *Beswick* [1968] AC 58. However, the significance of *Beswick* transcends this particular issue. The case is of importance for a number of reasons. First, it evidences the judicial assault that Lord Denning launched on the doctrine of privity in the middle of the twentieth century. It is for this reason that an extract has been included from Lord Denning's judgment in the Court of Appeal. Secondly, the case illustrates the attitude of the House of Lords to the doctrine of privity during the same period. While they spoke of the doctrine in critical terms they did not attempt to abrogate it. Thirdly, Mrs Beswick brought her action in a dual capacity: first, as the personal representative of her husband (who was the promisee) and secondly in her own capacity (as third party). The case therefore neatly illustrates the difference between the legal position of the promisee and the legal position of the third party. Finally, the case evidences the range of doctrines and statutory provisions that have been used in the attempt to outflank the doctrine of privity. A significant part of the judgments in the House of Lords was taken up with an analysis of section 56(1) of the Law of Property Act 1925. The precise scope of this subsection has never been established. But the point which

was established by the House of Lords, and which can be seen in the extract from the speech of Lord Reid, is that the section cannot be used as the foundation for a full-scale assault on the doctrine of privity in the way that Lord Denning had envisaged in the Court of Appeal.

p. 958 ***Beswick v. Beswick***

[1966] Ch 538, Court of Appeal, [1968] AC 58, House of Lords

In March 1962 Peter Beswick, who was then aged 70 and in poor health, agreed to sell his coal delivery business to his nephew, John Beswick. On 14 March they visited a solicitor who drew up an agreement to give effect to their intentions. John Beswick agreed to employ Peter Beswick as a consultant to the business at £6 10s a week for the rest of his life and to pay his wife an annuity of £5 a week for her life, after his death. Peter Beswick's wife, Ruth, was not a party to the agreement. In November 1963 Peter Beswick died. John Beswick made one payment of £5 to Mrs Beswick but refused to make any further payments. Mrs Beswick brought an action against John Beswick for specific performance of the agreement of March 1962 in her capacity as administratrix of Peter Beswick's estate and in her personal capacity. The trial judge refused to make an order for specific performance. The Court of Appeal allowed her appeal and held that Mrs Beswick was entitled to enforce the March 1962 agreement by way of specific performance both in her capacity as administratrix of her husband's estate and also, by virtue of section 56(1) of the Law of Property Act 1925, in her personal capacity.

Lord Denning MR

We have here the standard pattern of a contract for the benefit of a third person. A man has a business or other assets. He transfers them to another and, instead of taking cash, takes a promise by that other that he will pay an annuity or other sum to his widow or children. Can the transferee take the assets and reject the promise? I think not. In my opinion a contract such as this, for the benefit of widow and children, is binding. The party who makes the promise must honour it, unless he has some good reason why he should not do so. He may, for instance, be able to say that the contract should be rescinded as being induced by fraud or misrepresentation, or that it was varied or rescinded by agreement between the parties, before the widow or children knew about it and adopted it. But unless he has some good reason, he is bound. The executor of the dead man can sue to enforce it on behalf of the widow and children. The widow and children can join with the executor as plaintiffs in the action. If he refuses to sue, they may sue in their own names joining him as a defendant. In this way they have a right which can be enforced. I will prove this by reference to the common law, reinforced by equity, and now by statute.

1. The common law

[He considered *Dutton* v. *Poole* (1678) 8 T Raym 302, 2 Lev 210, 1 Vent 318, 332, 3 Keb 786, T Jo 102 and *Tweddle* v. *Atkinson* (1861) 1 B & S 393 and continued]

Those two cases give the key at common law to the whole problem of contracts for the benefit of a third person. Although the third person cannot as a rule sue alone in his own name, nevertheless there is no difficulty whatever in the one contracting party suing the other party for breach of the promise. The third person should, therefore, bring the action in the name of the contracting party, just as an assignee used to do. Face to face with the contracting party, the defaulter has no defence.

He is sued by one who has provided consideration and to whom he has given his promise to pay the third person. He has broken his promise and must pay damages. The defaulter sometimes seeks to say that the contracting party can only recover nominal damages because it is not he but the third person who has suffered the damage. The common law has never allowed the defaulter to escape by such a shifty means. It holds that the contracting party can recover the money ↵ which should have been paid to the third person. He can get judgment for the sum and issue a writ of fi. fa. or other machinery to enforce payment: but when he recovers it, he holds the proceeds for the benefit of the third person. He cannot retain the money himself because it belongs to the third person and not to him: see *In re Schebsman, Ex parte the Official Solicitor, the Trustee. Cargo Superintendents (London) Ltd* v. *Schebsman* [1944] Ch 83 CA. It is money had and received to the use of the third person. In *Robertson* v. *Wait* (1853) 8 Exch 299, 301 Martin B said: 'If a person makes a contract whereby another obtains a benefit, why may not the former sue for it?' And in *Lloyd's* v. *Harper* Lush LJ said (1880) 16 Ch D 290, 321, CA:

p. 959

> 'I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself.'

Such was the position at common law if the action was brought in the name of the contracting party by himself alone. But nowadays when joinder of parties is freely permissible, it is far better for the contracting party and the third person to join as co-plaintiffs. Judgment will be given for the plaintiffs for the amount: and on payment, it will go at once to the third person who is entitled to it.

2. Equity

Sometimes one of the contracting parties makes the contract on trust for the third person, in this sense, that from the very beginning the right to sue is vested in him as trustee for the third person as beneficiary. Such a contract is different from those we are considering. It cannot be rescinded or varied except with the consent of the third person beneficiary: see *In re Empress Engineering Co* (1880) 16 Ch D 125. In such a case it is clearly established that the third person himself can sue in equity to enforce the contract: see *Tomlinson* v. *Gill* (1756) Amb 330 and *Gregory* v. *Williams* (1817) 3 Mer 582; but even so, he ought as a rule to join the trustee as a party. Here we have a case where there is admittedly no trust of the contractual right. Peter Beswick and his nephew might by agreement before his death have rescinded or varied the agreement, if they so wished. Nevertheless, although there is no trust, I do not think equity is powerless. It has in its hands the potent remedy of ordering a party specifically to perform his contract. If a party makes a promise to pay money to a third person, I see no reason why a court of equity should not order him to perform his promise. The action must be brought, of course, in the name of the other contracting party; but, that being done, there is no bar to a decree for specific performance being made. True it is for the payment of money, but a court of equity often decrees specific performance of a promise to pay money. It can enforce it by the appointment of a receiver, or other appropriate machinery ...

These cases in equity fit in exactly with the common law. The contracting party is entitled by himself alone, or jointly with the third person, to have the contract performed according to its terms, and the court will decree specific performance of it.

3. Statute

Section 56(1) of the Law of Property Act, 1925, says that

> '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':

p. 960 ↵ and by section 205(1)(xx) '"Property" includes any thing in action, and any interest in real or personal property'. Apply that section to this case. The promise of the nephew to pay the widow £5 a week was a 'thing in action': for the simple reason that it could be enforced by action, namely, an action by the contracting party. This section says, as clearly as can be, that the widow can take the benefit of the agreement, although she is not named as a party to it. Seeing that she is to take the benefit of it, she must be able to sue for it, if not by herself alone, at least jointly with the contracting party. Otherwise the section is made of no effect. Ubi jus, ibi remedium.[2] If there was, therefore, any doubt as to her ability to sue at common law or equity, that doubt is removed by this section.

4. Conclusion

The general rule undoubtedly is that 'no third person can sue, or be sued, on a contract to which he is not a party': but at bottom that is only a rule of procedure. It goes to the form of remedy, not to the underlying right. Where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party or jointly with him or, if he refuses to join, by adding him as a defendant. In that sense, and it is a very real sense, the third person has a right arising by way of contract. He has an interest which will be protected by law. ... It is different when a third person has no legitimate interest, as when he is seeking to enforce the maintenance of prices to the public disadvantage, as in *Dunlop Pneumatic Tyre Co Ltd* v. *Selfridge & Co Ltd* [1915] AC 847, 853, HL(E): or when he is seeking to rely, not on any right given to him by the contract, but on an exemption clause seeking to exempt himself from his just liability. He cannot set up an exemption clause in a contract to which he was not a party: see *Midland Silicones Ltd* v. *Scruttons Ltd* [1962] AC 446, HL(E).

The widow here sues in her capacity as executrix of her husband's estate (and therefore as contracting party), and also in her personal capacity (and therefore as a third person). This joint claim is clearly good. She is entitled to an order for specific performance of the agreement, by ordering the defendant to pay the arrears of £175, and the instalments of £5 a week as they fall due ... When the money is recovered, it will go to the widow for her own benefit, and not to her husband's estate.

> ***Danckwerts LJ*** delivered a concurring judgment while ***Salmon LJ*** agreed that Mrs Beswick was entitled to a specific performance order in her capacity as administratrix of her husband's estate but left open the question of her entitlement to a remedy under section 56(1) of the 1925 Act.

John Beswick appealed to the House of Lords. The House of Lords affirmed the decision of the Court of Appeal in so far as it held that Mrs Beswick ('the respondent') was entitled to enforce the March 1962 agreement in her capacity as administratrix of her husband's estate. But their Lordships held that she was not entitled to enforce the agreement in her personal capacity under section 56(1) of the Law of Property Act 1925.

Lord Reid

[set out the facts and continued]

p. 961 For clarity I think it best to begin by considering a simple case where, in consideration of a sale by A to B, B agrees to pay the price of £1,000 to a third party X. Then the first question ↵ appears to me to be whether the parties intended that X should receive the money simply as A's nominee so that he would hold the money for behoof of A and be accountable to him for it, or whether the parties intended that X should receive the money for his own behoof and be entitled to keep it. That appears to me to be a question of construction of the agreement read in light of all the circumstances which were known to the parties. There have been several decisions involving this question. I am not sure that any conflicts with the view which I have expressed. … In the present case I think it clear that the parties to the agreement intended that the respondent should receive the weekly sums of £5 in her own behoof and should not be accountable to her deceased husband's estate for them. Indeed the contrary was not argued.

Reverting to my simple example the next question appears to me to be: Where the intention was that X should keep the £1,000 as his own, what is the nature of B's obligation and who is entitled to enforce it? It was not argued that the law of England regards B's obligation as a nullity, and I have not observed in any of the authorities any suggestion that it would be a nullity. There may have been a time when the existence of a right depended on whether there was any means of enforcing it, but today the law would be sadly deficient if one found that, although there is a right, the law provides no means for enforcing it. So this obligation of B must be enforceable either by X or by A. I shall leave aside for the moment the question whether section 56(1) of the Law of Property Act, 1925, has any application to such a case, and consider the position at common law.

Lord Denning's view, expressed in this case not for the first time, is that X could enforce this obligation. But the view more commonly held in recent times has been that such a contract confers no right on X and that X could not sue for the £1,000. Leading counsel for the respondent based his case on other grounds, and as I agree that the respondent succeeds on other grounds, this would not be an appropriate case in which to solve this question. It is true that a strong Law Revision Committee recommended so long ago as 1937 (Cmd 5449):

> 'That where a contract by its express terms purports to confer a benefit directly on a third party it shall be enforceable by the third party in his own name …' (p. 31).

And, if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter. But if legislation is probable at any early date I would not deal with it in a case where that is not essential. So for the purposes of this case I shall proceed on the footing that the commonly accepted view is right.

What then is A's position? I assume that A has not made himself a trustee for X, because it was not argued in this appeal that any trust had been created. So, if X has no right, A can at any time grant a discharge to B or make some new contract with B. If there were a trust the position would be different. X would have an equitable right and A would be entitled and, indeed, bound to recover the

money and account for it to X. And A would have no right to grant a discharge to B. If there is no trust and A wishes to enforce the obligation, how does he set about it? He cannot sue B for the £1,000 because under the contract the money is not payable to him, and, if the contract were performed according to its terms, he would never have any right to get the money. So he must seek to make B pay X.

The argument for the appellant is that A's only remedy is to sue B for damages for B's breach of contract in failing to pay the £1,000 to X. Then the appellant says that A can only recover nominal damages of 40s. because the fact that X has not received the money will generally cause no loss to A: he admits that there may be cases where A would suffer damage if X did not receive the money but says that the present is not such a case.

p. 962 Applying what I have said to the circumstances of the present case, the respondent in her personal capacity has no right to sue, but she has a right as administratrix of her husband's ↵ estate to require the appellant to perform his obligation under the agreement. He has refused to do so and he maintains that the respondent's only right is to sue him for damages for breach of his contract.

If that were so, I shall assume that he is right in maintaining that the administratrix could then only recover nominal damages because his breach of contract has caused no loss to the estate of her deceased husband.

If that were the only remedy available the result would be grossly unjust. It would mean that the appellant keeps the business which he bought and for which he has only paid a small part of the price which he agreed to pay. He would avoid paying the rest of the price, the annuity to the respondent, by paying a mere 40s. damages.

The respondent's first answer is that the common law has been radically altered by section 56(1) of the Law of Property Act, 1925, and that that section entitles her to sue in her personal capacity and recover the benefit provided for her in the agreement although she was not a party to it. Extensive alterations of the law were made at that time but it is necessary to examine with some care the way in which this was done. That Act was a consolidation Act and it is the invariable practice of Parliament to require from those who have prepared a consolidation Bill an assurance that it will make no substantial change in the law and to have that checked by a committee [he considered the legislative history of the section and continued] ... it is therefore quite certain that those responsible for the preparation of this legislation must have believed and intended that section 56 would make no substantial change in the earlier law, and equally certain that Parliament passed section 56 in reliance on an assurance that it did make no substantial change.

Section 56 was obviously intended to replace section 5 of the Real Property Act, 1845 (8 and 9 Vict. c. 106). That section provided:

> 'That, under an indenture, executed after October 1, 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 same indenture ... '

Section 56 (1) now provides:

> [He set out the subsection, in the extract from Lord Denning earlier in this subsection and continued]

If the matter stopped there it would not be difficult to hold that section 56 does not substantially extend or alter the provisions of section 5 of the Act of 1845. But more difficulty is introduced by the definition section of the Act of 1925 (section 205) which provides:

> '(1) In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:- ... (xx) "Property" includes any thing in action, and any interest in real or personal property.'

... If application of [the definition of 'property'] would result in giving to section 56 a meaning going beyond that of the old section, then, in my opinion, the context does require that the definition of 'property' shall not be applied to that word in section 56. The context in which this section occurs is a consolidation Act. If the definition is not applied the section is a proper one to appear in such an Act because it can properly be regarded as not substantially altering the pre-existing law. But if the definition is applied the result is to make section 56 go far beyond the pre-existing law. Holding that the section has such an effect would involve holding that the invariable practice of Parliament has been departed from *per incuriam* so that something has got into this consolidation Act which neither the draftsman nor Parliament can have intended to be there. ... For these reasons I am of opinion that section 56 has no application to the present case.

p. 963 ↵ The respondent's second argument is that she is entitled in her capacity of administratrix of her deceased husband's estate to enforce the provision of the agreement for the benefit of herself in her personal capacity, and that a proper way of enforcing that provision is to order specific performance. That would produce a just result, and, unless there is some technical objection, I am of opinion that specific performance ought to be ordered. For the reasons given by your Lordships I would reject the arguments submitted for the appellant that specific performance is not a possible remedy in this case.

Lord Pearce

My Lords, if the annuity had been payable to a third party in the lifetime of Beswick senior and there had been default, he could have sued in respect of the breach. His administratrix is now entitled to stand in his shoes and to sue in respect of the breach which has occurred since his death.

It is argued that the estate can only recover nominal damages and that no other remedy is open, either to the estate or to the personal plaintiff. Such a result would be wholly repugnant to justice and commonsense. And if the argument were right it would show a very serious defect in the law.

In the first place, I do not accept the view that damages must be nominal. Lush LJ in *Lloyd's* v. *Harper* (1880) 16 Ch D 290, 321 said:

> 'Then the next question which, no doubt, is a very important and substantial one, is, that Lloyd's, having sustained no damage themselves, could not recover for the losses sustained by third parties by reason of the default of Robert Henry Harper as an underwriter. That, to my mind, is a startling and alarming doctrine, and a novelty, because I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been made with B himself.'

... I agree with the comment of Windeyer J in the case of *Coulls* v. *Bagot's Executor* and *Trustee Co Ltd* (1967) 40 ALJR 471, 486 in the High Court of Australia that the words of Lush LJ cannot be accepted without qualification and regardless of context and also with his statement:

> 'I can see no reason why in such cases the damages which A would suffer upon B's breach of his contract to pay C $500 would be merely nominal: I think that in accordance with the ordinary rules for the assessment of damages for breach of contract they could be substantial. They would not necessarily be $500; they could I think be less or more.'

In the present case I think that the damages, if assessed, must be substantial. It is not necessary, however, to consider the amount of damages more closely since this is a case in which, as the Court of Appeal rightly decided, the more appropriate remedy is that of specific performance.

The administratrix is entitled, if she so prefers, to enforce the agreement rather than accept its repudiation, and specific performance is more convenient than an action for arrears of payment followed by separate actions as each sum falls due. Moreover, damages for breach would be a less appropriate remedy since the parties to the agreement were intending an annuity for a widow; and a lump sum of damages does not accord with this. And if (contrary to my view) the argument that a derisory sum of damages is all that can be obtained be right, the remedy of damages in this case is manifestly useless.

The present case presents all the features which led the equity courts to apply their remedy of specific performance. The contract was for the sale of a business. The defendant could on his part clearly have obtained specific performance of it if Beswick senior or his administratrix had defaulted. Mutuality is a ground in favour of specific performance.

p. 964 ↵ Moreover, the defendant on his side has received the whole benefit of the contract and it is a matter of conscience for the court to see that he now performs his part of it ...

In my opinion, the plaintiff as administratrix is entitled to a decree of specific performance.

[He then considered the widow's claim at common law and under section 56(1) of the Law of Property Act 1925 and concluded that the widow had a claim on neither basis].

> ***Lord Upjohn***, ***Lord Hodson***, and ***Lord Guest*** delivered concurring speeches in which they held that Mrs Beswick was entitled to a specific performance order in her capacity as administratrix of her husband's estate but not in her personal capacity.

Commentary

A number of points of significance emerge from the decision of the House of Lords in *Beswick*. The first group of points relates to the failure of Mrs Beswick's claim in her personal capacity. It should be noted that in the House of Lords counsel for Mrs Beswick did not attempt to support Lord Denning's view that Mrs Beswick was entitled to succeed in her claim at common law, apart from section 56 of the Law of Property Act 1925. Their Lordships were therefore not asked to engage in a re-examination of the doctrine of privity. In relation to section 56, their Lordships held that it did not have the effect which Lord Denning attributed to it. But its precise scope remains uncertain. Treitel comments (*The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), para 14-146):

> [T]here is support in *Beswick* v. *Beswick* for four limitations on its scope: namely, that it applies only (1) to real property, (2) to covenants running with the land; (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; and (4) to deeds strictly inter partes. But there is no clear majority in the speeches in favour of all, some or even one of these limitations, so that the scope of the subsection remains obscure.

The conclusion that Mrs Beswick was not entitled to a specific performance order in her own capacity gives rise to apparent anomalies. Had the executor of Peter Beswick's estate been someone other than Mrs Beswick, she would not have been entitled to a specific performance order, nor would she have been able to compel the executor to seek a specific performance order. It would have been for the executor himself to decide whether or not to seek a remedy and, if so, which remedy. On the other hand, it can be argued that there is no anomaly here. The remedy belonged to the estate (on the ground that Peter Beswick provided the consideration for the promise of his nephew), not Mrs Beswick, and the same remedies would have been available whoever happened to be the administrator of the estate.

The second group of points relates to the conclusion that Mrs Beswick was entitled to a specific performance order in her capacity as administratrix of her husband's estate. What factors were relied upon by Lord Pearce to support the conclusion that a specific performance order was the most appropriate remedy on the facts of the case? Lord Upjohn stated that damages were 'inadequate to meet the justice of the case'. Why was this so? Damages may have been an inadequate remedy to protect the interests of Mrs Beswick in her own capacity but she was not suing in that capacity. She was suing as the representative of the estate and on what basis could it be said that damages were an inadequate or inappropriate remedy for the estate?

p. 965 ↵ Finally, what would have been the position if the contract had not been specifically enforceable? It was not necessary for their Lordships to decide this particular point given that they concluded that the contract was specifically enforceable. But it is worth noting that Lord Pearce was of the view that the estate would have been entitled to substantial damages, while the rest of their Lordships were content to assume that damages would have been nominal. Which view is the correct one?

25.3.2.2 Stay of Proceedings

Where the promise made by the promisor is a promise not to sue a third party, the promisee may be able to seek a stay of the promisor's action against the third party under section 49(3) of the Senior Courts Act 1981 which states:

> Nothing in this Act shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings.

In order to obtain a stay the promisee must demonstrate that the promisor has promised not to sue the third party and that the promisee has a sufficient interest in the enforcement of the promisor's promise to justify the grant of a stay. A case in which these requirements were not satisfied is *Gore* v. *Van Der Lann* [1967] 2 QB 31. The plaintiff fell when attempting to board a bus operated by Liverpool Corporation. She brought an action in negligence against the bus conductor who was an employee of the corporation. The corporation applied to stay her action. The basis for their application was that the plaintiff had applied for a free bus pass from the corporation and in doing so had signed an application form which stated that the pass was issued 'subject to the conditions that neither the Liverpool Corporation nor any of their servants or agents responsible for the driving, management, control or working of their bus system, are to be liable to the holder … for … injury … however caused'. It was held that the corporation was not entitled to the stay. The Court of Appeal held that the condition relied upon by the corporation was caught by section 151 of the Road Traffic Act 1960 and was consequently invalid.[3] But in any event it was held that the corporation was not entitled to the stay because (i) the plaintiff had not promised not to sue the bus conductor (although one might wish to argue that the exemption clause in the bus pass ought to have been treated as a promise not to sue) and (ii) the corporation did not have a sufficient interest in the enforcement of any such promise (had it been made) because it was not under an obligation to indemnify its employee against his liability to the plaintiff in negligence.

A different result was reached in *Snelling* v. *John G Snelling Ltd* [1973] 1 QB 87. Three brothers were directors of a family company and they were all owed substantial sums of money by the company. Differences arose between the brothers and, in an attempt to resolve them, they entered into an agreement under which they agreed that if one of them resigned his directorship he should 'forfeit' all monies due to him from the company. The plaintiff resigned his directorship and brought an action to recover the sums owed to him by
p. 966 the ↵ company. The company sought to rely on the terms of the agreement between the brothers as a defence to the claim. The plaintiff's two brothers then applied to be joined as defendants to the claim and they adopted the defence of the company and counterclaimed for a declaration that the sum due to the plaintiff by the company had been forfeited. Ormrod J dismissed the plaintiff's claim and gave judgment for the two brothers on their counterclaim. On what basis did he dismiss the plaintiff's claim? It is important to distinguish here between the position of the company and the position of the two brothers who were joined as defendants. The company was, as Ormrod J stated (at p. 96), 'not entitled to rely directly on the terms of the contract'. But the brothers were entitled to judgment on their counterclaim against the plaintiff. This being the case, Ormrod J continued (at pp. 96–97):

> [T]o give judgment for the plaintiff against the defendant company for the amount claimed in the statement of claim and judgment for the second and third defendants on the counterclaim would be absurd, unless, which is clearly not the case here, the second and third defendants could be adequately compensated in damages. So far as they are concerned a judgment against the company would frustrate the very purpose for which their agreement with the plaintiff was made. The next problem is to consider the relief to which they are entitled. They have claimed a declaration that the amount shown in the plaintiff's loan account has been forfeited to the defendant company and is now applicable in accordance with the resolution of the board of directors of the defendant company passed on May 22, 1969, but I feel some doubt whether this is the appropriate form of declaration. They are certainly entitled to a declaration that the provisions in the agreement of March 22, 1968, are binding on the plaintiff. Had these provisions been worded positively and not negatively, e.g., as a promise by the resigning director to release the company from its indebtedness to him, I think that, on the authority of *Beswick* v. *Beswick* [1968] AC 58, this would have been an appropriate case on the facts in which to order specific performance of that promise in whatever was the appropriate form. Similarly, had the second and third defendants themselves taken proceedings, before the plaintiff issued his writ, to restrain the anticipated breach they would have been entitled to an injunction restraining him from demanding payment by the company of his loan account. Had he subsequently started an action against the company it would, presumably, have been stayed as an abuse of the process of the court. But what is the appropriate form of order when the second and third defendants have been joined in the plaintiff's action, and succeeded on the counterclaim? ... In my judgment ... the second and third defendants have made out an unambiguous case and have shown that the interests of justice require that the plaintiff be not permitted to recover against the defendant company. It follows that this is a proper case in which to grant a stay of all further proceedings in the plaintiff's action against the company.
>
> [Counsel for the defendants], however, has submitted that he is entitled to go further and ask for the plaintiff's claim against the company to be dismissed ...
>
> [He considered the submission and concluded]
>
> ... I am inclined to the view that in a case such as this where the promisees under the agreement and the party to be benefited by the agreement are all before the court and the promisees have succeeded against the plaintiff on their counterclaim, the right view is that the plaintiff's claim should be dismissed. ... If the action was left with no more than an order staying further proceedings on the claim, the plaintiff could start another action only to have it also stayed and so on ad infinitum. The reality of the matter is that the plaintiff's claim fails and the order of the court ought, if possible, clearly to reflect that fact.
>
> p. 967 ↵ Accordingly, I think the plaintiff's claim should be dismissed and that there should be judgment for the second and third defendants on the counterclaim, together with a declaration in appropriate terms.

The approach of Ormrod J is less restrictive than that adopted by the Court of Appeal in *Gore* in that he dismissed the plaintiff's claim notwithstanding the fact the two brothers were not under any obligation to indemnify the company in respect of its liability to the plaintiff. Ormrod J took a broad view of the situation and concluded that the interest which the brothers had in the running of the family company was sufficient to give them an interest in obtaining a stay (and, indeed, the dismissal of the plaintiff's claim).

25.3.2.3 Damages

Finally, the promisee may seek a remedy in damages from the promisor. The promisee is clearly entitled to sue and recover damages in respect of the loss that he has suffered as a result of the breach. Take the case where the promisee is a debtor of the third party and the promisor has promised to pay a sum of money to the third party in order to discharge the promisee's liability to the third party. The promisor fails to make the promised payment to the third party. The consequence is that the promisee remains indebted to the third party and, to that extent, the promisee does suffer loss as a result of the failure of the promisor to make the payment to the third party. But in other cases the promisee is likely to find it difficult to prove that he has suffered loss as a result of the promisor's breach. *Beswick* v. *Beswick* [1968] AC 58 is a case in point. It was assumed by all of their Lordships, with the exception of Lord Pearce, that Mrs Beswick only had a claim for nominal damages in her capacity as administratrix of her husband's estate. The reason for this was that the estate did not appear to have suffered any loss as a result of John Beswick's breach of contract. Lord Pearce made no such assumption: in his opinion the estate was entitled to 'substantial' damages. It is not necessary for us to resolve this point here. It has already been discussed in the chapter on damages (see 23.3). It suffices to note that the ability of the promisee to recover damages for his own loss depends on whether or not he has suffered a loss as a result of the promisor's breach of contract.

The party who is more likely to have suffered loss as a result of the breach is the third party. Can the promisee sue and recover damages in respect of the third party's loss? The general rule is that he cannot. He can only recover damages in respect of his own loss. The existence of this general rule was affirmed by the House of Lords in *Alfred McAlpine Construction Ltd* v. *Panatown Ltd* [2001] 1 AC 518. The three judges in the majority all accepted the existence of the general rule (see Lord Clyde at p. 522, Lord Jauncey at p. 563, and Lord Browne-Wilkinson at p. 575), but it is in the speeches of the dissentients, Lord Goff and Lord Millett, that we find more extended analysis of both the basis for the general rule and the criticisms that have been levelled against it. Lord Millett (at p. 580) defended the general rule in the following terms:

> Compensation is compensation for loss; its object is to make good a loss. It is inherent in the concept of compensation that only the person who has suffered the loss is entitled to have it made good by compensation. Compensation for a third party's loss is a contradiction in terms. It is impossible on any logical basis to justify the recovery of compensatory damages by a person who has not suffered the loss in respect of which they are awarded unless he is accountable for them to the person who has.

p. 968 ↵ Lord Goff, on the other hand, was more sceptical. He doubted the existence of the general rule. He stated (at pp. 538–539 and p. 544):

> It would be an extraordinary defect in our law if, where (for example) A enters into a contract with B that B should carry out work for the benefit of a third party, C, A should have no remedy in damages against B if B should perform his contract in a defective manner. Contracts in this form are a commonplace of everyday life, very often in the context of the family; but, as the present case shows, they may also occur in a commercial context. It is not surprising therefore to discover that the authority for the supposed rule which excludes such a right to damages is very thin, and that its existence has been doubted by distinguished writers. … Plainly it is right that a contracting party should not use the remedy of damages to recover what has been described by Oliver J in a notable judgment in *Radford* v. *De Froberville* [1977] 1 WLR 1262, 1270 as 'an uncovenanted profit', or indeed to impose on the other contracting party an uncovenanted burden. But if the supposed rule exists, it could deprive a contracting party of any effective remedy in the case of a contract which is intended to confer a benefit on a third party but not to confer on the third party an enforceable right. It is not surprising therefore to discover increasing concern on the part of scholars specialising in the law of contract that the supposed rule, if rigidly applied, can have the effect of depriving parties of the fulfilment of their reasonable contractual expectations, and to read of doubts on their part whether any such rule exists.

Given that the majority in *Panatown* accepted the existence of the general rule, Lord Millett's view would appear to be the correct one as a matter of authority. Nevertheless, the concerns of Lord Goff are reflected in the exceptions to the general rule and in the case-law more generally. He points out that the general rule can cause problems both in the family and in the commercial context. Before giving brief consideration to the exceptions to the general rule it may be useful to examine two cases in which the general rule has given rise to difficulty. The first case, *Jackson* v. *Horizon Holidays Ltd* [1975] 1 WLR 1468, is drawn from the family context, while the second, *Woodar Investment Development Ltd* v. *Wimpey Construction UK Ltd* [1980] 1 WLR 277, is a commercial case.

Jackson v. Horizon Holidays Ltd
[1975] 1 WLR 1468, Court of Appeal

Julian Jackson booked a holiday for himself, his wife, and his three-year-old sons at the Pegasus Reef Hotel, Sri Lanka through Horizon Holidays Ltd, a travel company. Before making the booking Jackson set out his precise requirements regarding accommodation, food, amenities, and facilities in a letter to Horizon and was assured by Horizon that they would be met. The price payable was £1,432. Soon afterwards, Horizon informed Jackson that the Pegasus Reef Hotel would not be ready in time and offered him accommodation at the Brown's Beach Hotel for £1,200 instead. Jackson agreed after an assurance from Horizon that the hotel would be up to his expectations. The accommodation, food, amenities, and facilities at the Brown's Beach Hotel were unsatisfactory and the whole family suffered distress and inconvenience. Jackson brought an action against Horizon claiming damages for misrepresentation and breach of contract. Judge Edgar Fay QC awarded Jackson damages of £1,100. Horizon appealed on the ground that the damages awarded were excessive. The Court of Appeal refused to interfere with Judge Fay's award and dismissed the appeal.

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Lord Denning MR

[set out the facts and continued]

The judge did not divide up the £1,100. Counsel has made suggestions about it. Counsel for Horizon Holidays suggests that the judge gave £100 for diminution in value and £1,000 for the mental distress. But counsel for Mr Jackson suggested that the judge gave £600 for the diminution in value and £500 for the mental distress. If I were inclined myself to speculate, I think the suggestion of counsel for Mr Jackson may well be right. The judge took the cost of the holidays at £1,200. The family only had about half the value of it. Divide it by two and you get £600. Then add £500 for the mental distress.

On this question a point of law arises. The judge said that he could only consider the mental distress to Mr Jackson himself, and that he could not consider the distress to his wife and children. He said:

> 'The damages are the plaintiff's. … I can consider the effect upon his mind of the wife's discomfort, vexation, and the like, although I cannot award a sum which represents her own vexation.' …

We have had an interesting discussion as to the legal position when one person makes a contract for the benefit of a third party. In this case it was a husband making a contract for the benefit of himself, his wife and children. Other cases readily come to mind. A host makes a contract with a restaurant for a dinner for himself and his friends. The vicar makes a contract for a coach trip for the choir. In all these cases there is only one person who makes the contract. It is the husband, the host or the vicar, as the case may be. Sometimes he pays the whole price himself. Occasionally he may get a contribution from the others. But in any case it is he who makes the contract. It would be a fiction to say that the contract was made by all the family, or all the guests, or all the choir, and that he was

only an agent for them. Take this very case. It would be absurd to say that the twins of three years old were parties to the contract or that the father was making the contract on their behalf as if they were principals. It would equally be a mistake to say that in any of these instances there was a trust. The transaction bears no resemblance to a trust. There was no trust fund and no trust property. No, the real truth is that in each instance, the father, the host or the vicar, was making a contract himself for the benefit of the whole party. In short, a contract by one for the benefit of third persons.

What is the position when such a contract is broken? At present the law says that the only one who can sue is the one who made the contract. None of the rest of the party can sue, even though the contract was made for their benefit. But when that one does sue, what damages can he recover? Is he limited to his own loss? Or can he recover for the others? Suppose the holiday firm puts the family into a hotel which is only half built and the visitors have to sleep on the floor? Or suppose the restaurant is fully booked and the guests have to go away, hungry and angry, having spent so much on fares to get there? Or suppose the coach leaves the choir stranded halfway and they have to hire cars to get home? None of them individually can sue. Only the father, the host or the vicar can sue. He can, of course, recover his own damages. But can he not recover for the others? I think he can. The case comes within the principle stated by Lush LJ in *Lloyd's* v. *Harper* (1880) 16 Ch D 290, 321:

> 'I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been made with B himself.'

p. 970 ↵ It has been suggested that Lush LJ was thinking of a contract in which A was trustee for B. But I do not think so. He was a common lawyer speaking of common law. His words were quoted with considerable approval by Lord Pearce in *Beswick* v. *Beswick* [1968] AC 58, 88. I have myself often quoted them. I think they should be accepted as correct, at any rate so long as the law forbids the third persons themselves from suing for damages. It is the only way in which a just result can be achieved. Take the instance I have put. The guests ought to recover from the restaurant their wasted fares. The choir ought to recover the cost of hiring the taxis home. Then is no one to recover for them except the one who made the contract for their benefit? He should be able to recover the expense to which he has been put, and pay it over to them. Once recovered, it will be money had and received to their use. (They might even, if desired, be joined as plaintiffs.) If he can recover for the expense, he should also be able to recover for the discomfort, vexation and upset which the whole party have suffered by reason of the breach of contract, recompensing them accordingly out of what he recovers.

Applying the principles to this case, I think that the figure of £1,100 was about right. It would, I think, have been excessive if it had been awarded only for the damage suffered by Mr Jackson himself. But when extended to his wife and children, I do not think it is excessive. People look forward to a holiday. They expect the promises to be fulfilled. When it fails, they are greatly disappointed and upset. It is difficult to assess in terms of money; but it is the task of the judges to do the best they can. I see no reason to interfere with the total award of £1,100. I would therefore dismiss the appeal.

Orr LJ

I agree.

James LJ

In this case Mr Jackson, as found by the judge on the evidence, was in need of a holiday at the end of 1970. He was able to afford a holiday for himself and his family. According to the form he completed, which was the form of Horizon Holidays Ltd, he booked what was a family holiday. The wording of that form might in certain circumstances give rise to a contract in which the person signing the form is acting as his own principal and as agent for others. In the circumstances of this case, as indicated by Lord Denning MR, it would be wholly unrealistic to regard this contract as other than one made by Mr Jackson for a family holiday. The judge found that he did not get a family holiday. The costs were some £1,200. When he came back he felt no benefit. His evidence was to the effect that, without any exaggeration, he felt terrible. He said: 'The only thing, I was pleased to be back, very pleased, but I had nothing at all from that holiday'. For my part, on the issue of damages in this matter, I am quite content to say that £1,100 awarded was the right and proper figure in those circumstances. I would dismiss the appeal.

Commentary

The Court of Appeal held that Mr Jackson was entitled to £1,100 by way of damages. But on what basis? Lord Denning was clearly of the view that £1,100 was excessive if it was awarded solely in respect of the loss suffered by Mr Jackson but that it was nevertheless justifiable on the basis that Mr Jackson was entitled to recover damages on behalf of his family in respect of the loss which they had all suffered. Thus in his view Mr Jackson's claim was not one for his own loss but for the loss suffered by third parties (namely the members of
p. 971 his family). ↵ The judgment of James LJ is short but it would appear that he was content to uphold the award of the trial judge who awarded damages on the basis that the sum awarded was solely in respect of the loss suffered by Mr Jackson. So it would appear that James LJ was of the view that damages were awarded in respect of Mr Jackson's loss and not the loss suffered by members of his family. Given this apparent judicial division of opinion as to the basis on which damages were awarded to Mr Jackson, the judgment of Orr LJ assumes considerable significance. But what is the meaning to be ascribed to his two-word judgment? Did he agree with the substance of Lord Denning's judgment or did he simply agree with his conclusion that the appeal should be dismissed? It is impossible to give a definitive answer to this question and, this being the case, *Jackson* cannot be regarded as unequivocal authority for the proposition that a contracting party can sue and recover damages in respect of a loss suffered by a third party to the contract. Although the *ratio* of the case is unclear, the result is not and it was accepted by the House of Lords in *Woodar Investment Development Ltd* v. *Wimpey Construction UK Ltd* [1980] 1 WLR 277 and by Lord Goff and Lord Millett in *Panatown.*

One final point should be noted about *Jackson*. A common concern that emerges from the speeches of Lords Goff and Millett in *Panatown* (at p. 544) is that the contracting party should not be entitled to recover an 'uncovenanted profit'. In so far as damages are awarded to the claimant in respect of the loss suffered by the third party, the claimant should be required to account for them to the third party. Lord Denning was alive to

this problem. Thus he stated that the contracting party was accountable to the third parties by means of an action for ‘money had and received to their use’ (in other words, a personal restitutionary claim) for the damages received in respect of the loss suffered by the third parties.

Turning now to the commercial context, our illustrative case is:

Woodar Investment Development Ltd v. Wimpey Construction UK Ltd
[1980] 1 WLR 277, House of Lords

Wimpey agreed to buy land from Woodar. The contract stated that the purchase price was £850,000 but it further provided that upon completion of the purchase Wimpey should pay a further £150,000 to Transworld Trade Ltd ('Transworld'). Woodar alleged that Wimpey had committed a repudiatory breach of the contract and they claimed damages from Wimpey which included the £150,000 that Wimpey had agreed to pay to Transworld. The House of Lords held that Wimpey had not repudiated the contract and, this being the case, it was not necessary to decide whether or not Woodar were entitled to recover damages in respect of the money payable to Transworld. Nevertheless, their Lordships did consider the entitlement of Woodar to recover damages in the following terms.

Lord Wilberforce

[referred to the decision of the Court of Appeal in *Jackson* v. *Horizon Holidays Ltd* and continued]

I am not prepared to dissent from the actual decision in that case. It may be supported either as a broad decision on the measure of damages (per James LJ) or possibly as an example of a type of contract, examples of which are persons contracting for family holidays, ordering meals in restaurants for a party, hiring a taxi for a group, calling for special treatment. As I suggested in *New Zealand Shipping Co Ltd* v. *A M Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154, 167, there are
p. 972 many situations of daily life which do not fit neatly ↵ into conceptual analysis, but which require some flexibility in the law of contract. *Jackson*'s case may well be one.

I cannot however agree with the basis on which Lord Denning MR put his decision in that case. The extract on which he relied from the judgment of Lush LJ in *Lloyd's* v. *Harper* ... was part of a passage in which the Lord Justice was stating as an 'established rule of law' that an agent ... may sue on a contract made by him on behalf of the principal ... if the contract gives him such a right, and is no authority for the proposition required in *Jackson's* case, still less for the proposition, required here, that, if Woodar made a contract for a sum of money to be paid to Transworld, Woodar can, without showing that it has itself suffered loss or that Woodar was agent or trustee for Transworld, sue for damages for non-payment of that sum ...

Whether in a situation such as the present—viz, where it is not shown that Woodar was agent or trustee for Transworld, or that Woodar itself sustained any loss, Woodar can recover any damages at all, or any but nominal damages, against Wimpey, and on what principle, is, in my opinion, a question of great doubt and difficulty—no doubt open in this House—but one on which I prefer to reserve my opinion.

Lord Keith of Kinkel

[referred to the decision of the Court of Appeal in *Jackson* v. *Horizon Holidays Ltd* and continued]

That case is capable of being regarded as rightly decided upon a reasonable view of the measure of damages due to the plaintiff as the original contracting party, and not as laying down any rule of law regarding the recovery of damages for the benefit of third parties. There may be a certain class of cases where third parties stand to gain indirectly by virtue of a contract, and where their deprivation of that gain can properly be regarded as no more than a consequence of the loss suffered by one of the contracting parties. In that situation there may be no question of the third parties having any claim to damages in their own right, but yet it may be proper to take into account in assessing the damages recoverable by the contracting party an element in respect of expense incurred by him in replacing by other means benefits of which the third parties have been deprived or in mitigating the consequences of that deprivation. The decision in *Jackson* v. *Horizon Holidays Ltd* is not, however … capable of being supported upon the basis of the true ratio decidendi in *Lloyd's* v. *Harper* 16 Ch D 290, which rested entirely on the principles of agency.

Lord Scarman

I believe it open to the House to declare that, in the absence of evidence to show that he has suffered no loss, A, who has contracted for a payment to be made to C, may rely on the fact that he required the payment to be made as prima facie evidence that the promise for which he contracted was a benefit to him and that the measure of his loss in the event of non-payment is the benefit which he intended for C but which has not been received. Whatever the reason, he must have desired the payment to be made to C and he must have been relying on B to make it. If B fails to make the payment, A must find the money from other funds if he is to confer the benefit which he sought by his contract to confer upon *C.* Without expressing a final opinion on a question, which is clearly difficult, I think the point is one which does require consideration by your Lordships' House.

Lord Salmon agreed with Lord Wilberforce, but added that, in his opinion, 'the law as it stands at present in relation to damages of this kind is most unsatisfactory: and I can only hope that your Lordships' House will soon have an opportunity of reconsidering it unless in the meantime it is altered by statute'. ***Lord Russell of Killowen*** was critical of the reasoning of Lord Denning in *Jackson's* case and pointed out 'that the order of the Court of Appeal as drawn up did not suggest that any part of the damages awarded to [Mr Jackson] were "for the use and benefit of" any member of his family'. He was therefore of the opinion that Woodar were only entitled to recover nominal damages in respect of the £150,000 payable to Transworld.

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Commentary

One point which does emerge with clarity from the judgments in *Woodar* is their Lordships' disapproval of the reasoning of Lord Denning in *Jackson*. Matters are more difficult in relation to the scope of the right of recovery recognized by their Lordships. The fact that their analysis was all *obiter*, and hence rather tentative, does not help. If Woodar had acted as agent or trustee for Transworld, it seems clear that Woodar would have been entitled to recover substantial damages. But in the absence of agency or trust, and assuming that Woodar had not itself suffered any loss as a result of the failure to make the payment to Transworld, it seems that Woodar's claim would have failed in the absence of judicial re-consideration of the underlying general

rule that a party can only recover in respect of his own loss. But, as we have noted (see earlier in this section), the general rule was re-affirmed by the House of Lords in *Alfred McAlpine Construction Ltd* v. *Panatown Ltd* [2001] 1 AC 518. Indeed, *Woodar* would appear to emerge unscathed from *Panatown*. Lord Clyde cited it (at p. 522) for its recognition of the agency and trustee exception to the general rule, although (at p. 535) he also cited with approval Lord Wilberforce's observation that 'there are many situations of daily life which do not fit neatly into conceptual analysis, but which require some flexibility in the law of contract'. Lord Jauncey summarized the judgments in *Woodar* (at pp. 572–573) and, while he noted the reservations of Lords Salmon and Scarman, did not suggest that Woodar should have been entitled to recover. Lord Browne-Wilkinson made no mention of the case. Of the dissentients, Lord Goff (at p. 553) was of the view that broader recognition of the plaintiff's performance interest would encompass some of the examples given by Lord Wilberforce in his judgment but he did not state expressly whether or not he would have held that Woodar was entitled to recover damages in respect of the £150,000 payable to Transworld. Lord Millett (at p. 589) cited the passage extracted earlier from the speech of Lord Scarman with apparent approval and his broad conception of the plaintiff's performance interest would appear to lead him to the conclusion that Woodar should have been entitled to recover substantial damages in respect of Wimpey's failure to pay Transworld but, again, he did not say so expressly.

Why should Woodar not be entitled to recover damages in respect of the £150,000 payable to Transworld? Even assuming that there is a general rule to the effect that a contracting party cannot recover damages in respect of a loss suffered by a third party, should the parties not be able to contract out of it? If A and B enter into a contract and they agree that any breach by A will have a detrimental effect on C and that B should be entitled to sue and recover damages on behalf of C, why should the law refuse to give effect to that agreement? This hypothetical example is not very far away from the fact situation in *Woodar*. Wimpey agreed to pay £150,000 to Transworld and it is unlikely that the parties intended that Wimpey should be able to break its promise with impunity. Is it not more likely that the parties intended that Woodar should be entitled to sue for damages subject to its duty to account for the sum so received to Transworld? It may be that the parties did
p. 974 not make their intention in this regard ↵ sufficiently explicit (and they also failed to make use of agency or the trust which would have protected Woodar's claim in relation to the £150,000) but, assuming that such was their intention, should the courts not have given effect to it? In other words, the law should recognize that the parties are entitled to contract out of the rule that a party to a contract cannot sue and recover damages in respect of a loss suffered by a third party.

As it is, the law recognizes various exceptions to the general rule that a party can only recover damages in respect of its own loss, albeit that the exceptions do not appear to go as far as to suggest that it is open to the parties to contract out of the general rule. The principal exceptions which have been recognized are as follows. First, a trustee can sue and recover damages even though the loss is suffered by the beneficiary. Secondly, an agent can recover damages notwithstanding the fact that the loss has been suffered by his principal. A further exception was recognized by Lord Diplock in *The Albazero* [1977] AC 774, 847 when he stated:

> [I]n a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into.

The scope of this exception is a matter of some doubt. This principle originated in the context of contracts for the carriage of goods but it is clear that it is no longer so confined (*Swynson Ltd* v. *Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313, [15]). It has been applied by the House of Lords to building contracts (see *Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd* [1994] 1 AC 85). It is clear that the exception cannot be invoked where the third party is given its own right of action against the party in breach (*Alfred McAlpine Construction Ltd* v. *Panatown Ltd* [2001] 1 AC 518). One particularly troublesome issue is whether or not it is confined to the case where it was in the contemplation of the parties that the ownership of the property would or might in the ordinary course of business be transferred by the contracting party to a successor in title during the currency of the contract. Lord Diplock clearly thought it was so confined and his view was endorsed by Lord Millett in *Panatown* (at p. 583). On the other hand, Lord Clyde stated in *Panatown* (at p. 531) that a change of ownership was not a necessary ingredient of the exception and the Court of Appeal so decided in *Darlington Borough Council* v. *Wiltshier Northern Ltd* [1995] 1 WLR 68. The most that can be said is that the exception clearly applies in the context of a contemplated transfer of property and leading summaries of the principle frequently make express reference to the transfer of property when formulating the principle (see, for example, *Swynson Ltd* v. *Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313, [104]) but it may be that, in an exceptional case, the principle could be extended to a case where the transfer of property is not in contemplation. But one would expect the court to proceed cautiously before so extending the exception.

25.3.3 The Exceptions to Privity

p. 975 The rule that a third party cannot sue on a contract to which he is not party was never absolute. The law always recognized some exceptions to, or qualifications of, the rule. The source ↵ of these exceptions is to be found both at common law and in various statutes. The principal exceptions, prior to the enactment of the 1999 Act, are as follows:

25.3.3.1 Collateral Contracts

The first is to find that the third party is not in fact a third party but is a party to a contract with the party who has failed to carry out his promise. The device that the courts can employ to this effect is the collateral contract. It can be seen at work in the case of *Shanklin Pier Ltd* v. *Detel Products Ltd* [1951] 2 KB 854. The defendant paint manufacturers represented to the plaintiffs, the owners of a pier, that the paint which they manufactured was suitable for use in the re-painting of the pier and would have a life of seven to ten years. In reliance upon the defendant's representation the plaintiffs instructed the contractors they had employed to re-paint the pier that they should use the defendant's paint. The paint proved to be unsuitable for use on the

pier and its lifespan was considerably less than the promised seven to ten years. The plaintiffs brought an action against the defendants. The defendants denied that they had provided any warranty but the trial judge, McNair J, held that such a warranty had been given. He then turned to the defendants' second line of defence which was that the warranty did not give to the plaintiffs a cause of action. McNair J stated (at p. 856):

> Counsel for the defendants submitted that in law a warranty can give rise to no enforceable cause of action except between the same parties as the parties to the main contract in relation to which the warranty is given. In principle, this submission seems to me to be unsound. If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some act for the benefit of A.

He therefore held that the plaintiffs were entitled to recover damages from the defendant.

The principal problem likely to confront any claimant who wishes to rely upon the existence of a collateral contract is that it must adduce evidence to support the existence of such a contract (in terms of offer, acceptance, intention to create legal relations, and consideration). In some cases the courts have found that there was no intention to create a collateral contract (see, for example, *Independent Broadcasting Authority* v. *EMI Electronics* (1980) 14 Build LR 1). However examples can be found of cases in which the courts have adopted a very flexible approach to the identification of offer, acceptance, and consideration (see, in particular, *New Zealand Shipping Co Ltd* v. *AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154, at 25.3.4). A court may be slow to imply the existence of a collateral contract where the parties are experienced in commerce and could have created a direct contractual relationship but chose not to do so (*Fuji Seal Europe Ltd* v. *Catalytic Combustion Corporation* [2005] EWHC 1659 (TCC), 102 Con LR 47).

The status of the collateral contract device as an exception to the doctrine of privity is open to question on the basis that it is not in fact an exception because it rests on a finding by the court that the third party is not a third party but is a party to a contract. Nevertheless, it is customary to treat the collateral contract device as an exception to the doctrine of privity on the basis that some of the cases adopt a rather strained analysis of the relationship between the parties in order to find that the claimant and the defendant were in fact contracting parties (see, in particular, *The Eurymedon*).

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25.3.3.2 Trust of a Contractual Right

In *Dunlop Pneumatic Tyre Company Ltd* v. *Selfridge and Company Ltd* [1915] AC 847 (25.3.1) Viscount Haldane LC stated that, while English law does not recognize a third party right of action arising by way of contract, such a 'right may be conferred by way of property, as, for example, under a trust'. In other words, a promisee may agree to hold his contractual right to sue the promisor on trust for the third party and, as a beneficiary under a trust, the third party acquires a property right which he can assert against someone, such as the promisor, who interferes with it. Cases can be found in which the courts have found the existence of a trust of a contractual right (see, for example, *Les Affréteurs Réunis* v. *Walford* [1919] AC 801) and, for a time, it appeared that the trust might prove to be a suitable vehicle for out-flanking privity and conferring enforceable rights of

action on third parties. But it was not to be. By the time we get to *Beswick* v. *Beswick* in 1967 (25.3.2.1) we find that it was 'common ground' between the parties that Peter Beswick did not enter into the agreement with his nephew as trustee for his wife in relation to the annuity to be paid to her.

With the benefit of hindsight we can see that the turning point was the decision of the Court of Appeal in *Re Schebsman* [1944] Ch 83. John Schebsman (referred to as 'the debtor') worked for a Swiss company and its subsidiary, an English company, until his contract was terminated in 1940. On 20 September 1940 Schebsman entered into an agreement with the two companies under which, in consideration of the termination of his employment, the companies agreed to pay him £5,500 in six instalments. The agreement provided that, in the event that Schebsman died before all six payments had been made to him, the money was to be paid to his wife and, if she died, his daughter. Schebsman was adjudicated bankrupt on 5 March 1942 and died on 12 May 1942. His trustee in bankruptcy sought a declaration that the sums payable to Schebsman's widow and, possibly, his daughter formed part of Schebsman's estate with the result that they should be gathered in by the trustee in bankruptcy and distributed among Schebsman's creditors rather than paid to his widow or daughter. The basis on which the trustee in bankruptcy sought this declaration was the submission that Schebsman had a right to intercept the money payable to his widow and that that right now resided in the trustee in bankruptcy. The Court of Appeal held that Schebsman had no such right of interception and that the trustee in bankruptcy was not entitled to the declaration sought. Our interest in the case lies in the submission advanced by counsel for the defendant, Mr Denning KC, that the contract between the companies and Schebsman created a trust in favour of Schebsman's widow and daughter. Uthwatt J and the Court of Appeal held that no such trust had been created. In the Court of Appeal Lord Greene MR stated (at p. 89) that:

> [t]he first question which arises is whether or not the debtor was a trustee for his wife and daughter of the benefit of the undertaking given by the English company in their favour. An examination of the decided cases does, it is true, show that the courts have on occasions adopted what may be called a liberal view on questions of this character, but in the present case I cannot find in the contract anything to justify the conclusion that a trust was intended. It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention. To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third. That dividing line exists, although it may not always be easy to determine where it is to be drawn. In the present case I find no difficulty.

p. 977 ↵ To similar effect is the judgment of du Parcq LJ. He stated (at p. 104):

> It was argued by Mr Denning that one effect of the agreement of September 20, 1940, was that a trust was thereby created, and that the debtor constituted himself trustee for Mrs Schebsman of the benefit of the covenant under which payments were to be made to her. Uthwatt J rejected this contention, and the argument has not satisfied me that he was wrong. It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jourdain talked prose, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention. I have little doubt that in the present case both parties (and certainly the debtor) intended to keep alive their common law right to vary consensually the terms of the obligation undertaken by the company, and if circumstances had changed in the debtor's life-time injustice might have been done by holding that a trust had been created and that those terms were accordingly unalterable. On this point, therefore, I agree with Uthwatt J.

The demise of the trust in this context can be attributed to two related factors. The first is that the courts now take seriously the requirement that the parties must have had an intention to create a trust. At first instance in *Re Schebsman* [1943] Ch 366, 368 Mr Denning KC referred Uthwatt J to a famous article by Professor Corbin ('Contracts for the Benefit of Third Parties' (1930) 46 *LQR* 12) in support of his submission that a trust had been created on the facts of the case. Uthwatt J referred to the article by Corbin, considered the cases referred to in the article, and continued (at p. 370):

> I am unable to see that they justify the conclusion at which he arrived that in some cases of the class now under consideration a fiction has been resorted to in order to raise a trust. The cases, no doubt, are hard to reconcile, but, to my mind, the explanation of them is that different minds may reach differing conclusions on the question whether the circumstances sufficiently show an intention to create a trust. Inferences as to intent may vary. … In the present case there can be no question of any estoppel, and there is nothing, except the terms of the contract itself, on which to ground an inference that there was an intention to create a trust and that the intent was duly put into effect … I do not think any such inference can properly be drawn. The only inference I draw is the obvious one, that the parties thought the contract would be carried out.

In most cases (*Schebsman* being an example) the intention of the parties is simply to enter into a contract and they will have given no thought to the creation of a trust. This being the case, there will be no intention to create a trust and so no trust. The second, and related factor is that a trust, once recognized, is irrevocable. This protects the position of the third party, in that he acquires an irrevocable right, but it deprives the parties to the contract of the freedom to change their minds. As du Parcq LJ noted in *Schebsman*, the contracting parties are likely to be slow to give up their freedom in this respect and, this being the case, the courts can be expected to be slow to infer the existence of a trust.

It would, however, be a mistake to dismiss the trust as a modern day irrelevance in this context. Parties who wish to create a trust of a contractual right are free to do so and it is not a difficult task for a lawyer to draw up a document that makes clear the parties' intention to create a trust. The principal drawback is that the trust,

p. 978 once constituted, is irrevocable. ↵ This being the case, it is necessary to think carefully before setting up a trust. But contracting parties who are certain that they want to confer an irrevocable right of action upon the third party can make use of the trust device in order to give effect to their intention.

25.3.3.3 Assignment

The doctrine of privity prevents A and B from conferring upon C, a third party, a right to enforce a term of their contract. But the law does allow a contracting party to transfer, or assign, his rights under a contract to a third party. This process, known as assignment, is an important feature of commercial practice. Assignment is particularly common in relation to debts (although it is not confined to debts). Suppose that A owes a sum of money to B and that the debt is repayable over a three-year period. B decides that he does not want to wait for three years for repayment in full and so he sells to C his rights against A in return for a cash payment from C. B, the creditor, will sell his rights against A by assigning them to C. The amount paid by C will generally be a percentage of the debt. In this way B gets access to instant cash and C makes his profit by paying to B a percentage (say 85 per cent) of the debt owed by A and by recovering the debt from A over the three-year period. The law relating to assignment is complex but it suffices for our purposes to note five points.

The first is that a distinction must be drawn between the assignment of contractual rights and the assignment of liabilities. As a general rule liabilities cannot be assigned without the consent of the party to whom the liability is owed. Contractual rights are more freely assignable and the extent to which they can be assigned is discussed in points two, three, and four.

The second point relates to the legal basis of an assignment. Assignments are either equitable or statutory in nature (the common law having largely set its face against the assignment of contractual rights). A statutory assignment generally takes effect under section 136 of the Law of Property Act 1925 provided that the requirements of the section have been satisfied. There are a number of requirements: (i) the assignment must be absolute and not by way of charge; (ii) the assignment must be unconditional so that it cannot, for example, take effect upon the occurrence of a future, uncertain event; (iii) the assignment must be in writing and signed by the assignor; (iv) express notice in writing must be given to the debtor; and (v) the assignment must be of 'any debt or other legal thing in action'. A statutory assignee is entitled to sue the debtor without having to join the assignor as a party to the action. Equity generally takes a more flexible approach to the validity of assignments so that an assignment that fails to comply with the requirements of section 136 may nevertheless take effect as an equitable assignment. Thus an equitable assignment may be valid notwithstanding the fact that it is not in writing (unless statute, such as section 53(1)(c) of the Law of Property Act 1925, provides otherwise) and notice has not been given to the debtor (although good practice usually dictates that notice is given to the debtor). An equitable assignee must generally join the assignor as a party to the action. In the case of a statutory assignment the assignee need not have provided consideration, although, in the case of an equitable assignment, the point is more doubtful (the safest course being to ensure that consideration is provided).

The third point relates to the extent to which contractual rights are assignable. Not all contractual rights are assignable. In the first place the contract may prohibit assignment or place limits on the extent to which rights under the contract can be assigned. A purported assignment which breaches a prohibition upon assignment will not be effective to confer rights upon the assignee, at least as between the assignee and the

debtor (see *Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd* [1994] 1 AC 85). Secondly, a mere right to sue
p. 979 for ↵ damages (or, as it is sometimes put, a bare right to litigate) is not assignable unless the assignee has a genuine commercial or financial interest in taking the assignment (*Trendtex Trading Corporation* v. *Credit Suisse* [1982] AC 679) and, for this purpose, the assignment of a cause of action to enable the assignee or a third party to make a profit out of the litigation will generally be void as savouring of champerty (*Simpson* v. *Norfolk NHS Trust* [2011] EWCA Civ 1149, [2012] 1 All ER 1423). Thirdly, where the relationship between the parties to the original contract is a personal one, the law may not give effect to an assignment of the rights under that contract (so, for example, the benefit of a car insurance policy is not assignable nor is any contractual right involving personal skill on the part of the creditor). In *Tolhurst* v. *Associated Portland Cement Manufacturers Ltd* [1902] 2 KB 660, 668 Collins MR summed up the position when he stated that the benefit of a contract is only assignable in cases 'where it can make no objective difference to the person on whom the obligation lies to which of two persons he is to discharge it'.

The fourth point is that an assignment takes effect 'subject to equities', that is to say the assignee acquires the contractual rights of the assignor subject to all the defences that would have prevailed against the assignor. A related rule is that an assignee cannot generally recover more by way of damages than the assignor would have recovered had there been no assignment (see *Dawson* v. *Great Northern & City Railway Co* [1905] 1 KB 260). This rule is 'not designed to allow a defendant to escape liability for breach' but rather to 'ensure that he does not have to meet a bigger liability than he would have been under to the assignor' (*Offer-Hoar* v. *Larkstore Ltd (Technotrade Ltd*, Part 20 *defendant)* [2006] EWCA Civ 1079, [2006] 1 WLR 2926, [42] and [87]). The liability to the assignor can, however, be substantial, particularly given the fact that the assignor's claim for damages is not, in principle, limited to the loss suffered as at the date of the accrual of the cause of action (*Offer-Hoar*).

The final point is that the burden of a contract cannot be assigned without the consent of the other party to the contract. The requirement that consent be obtained to the transfer of liabilities is necessary to protect the right of contracting parties to choose their contracting parties. Were the law otherwise a party could enter into a contract with one party, only to find that performance is provided by another party and that he has no right to object and no means of redress. It is, however, important to note that the law does allow liabilities to be transferred provided that consent is obtained. This process is known as novation. The law relating to novation was summarized by David Steel J in *The Tychy (No 2)* [2001] 1 Lloyd's Rep 10, 24 in the following terms:

> (a) Novation involves the creation of a new contract where an existing party is replaced by a new party. (b) Thus, novation requires the consent of all parties, including in particular the party which is thereby accepting a new person as his debtor or as his counterpart under an executory contract. (c) The consent may be apparent from express words or inferred from conduct. (d) The consent must be clearly established on the evidence as being only consistent with the intent of achieving a novation.

Novation provides a means by which one contracting party can drop out of the contract and be replaced by another party who will acquire the rights and obligations of the party who drops out of the contract. So, for example, novation provides the means by which a third party can be substituted as a lender under a loan

agreement. Novation thus assumes an important role in commercial practice in that it enables the parties to restructure transactions and it also facilitates the transfer of financial assets.

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25.3.3.4 Agency

The relationship between the law of agency and the doctrine of privity is an uneasy one. Parts of the law of agency can be explained in terms which are consistent with privity, but other parts, particularly the rules relating to undisclosed principals, are very difficult to reconcile with privity. As we have noted (25.3.1), Viscount Haldane in *Dunlop Pneumatic Tyre Company Ltd* v. *Selfridge and Company Ltd* [1915] AC 847 stated that a principal not named in a contract may sue upon it if the promisee really contracted as his agent provided that the principal has given consideration either personally or through the promisee acting as his agent.

An agent is a person who has authority from another party, his principal, to act on the principal's behalf in such a way as to affect the principal's legal relations with third parties. Suppose that company X appoints a number of independent brokers to act on its behalf in selling the company's products. Company X limits the authority of its brokers in various ways (for example, no broker can offer a customer a discount greater than 10 per cent without first obtaining approval from head office). One of the brokers, after disclosing that he is acting as an agent for X, concludes a contract with a third party under which the third party agrees to buy products from company X. Who are the parties to the contract for the purchase of these products? The answer is that it is company X and the third party. The general rule is that once an agent, acting within the scope of his authority, has concluded a contract with a third party, the agent 'drops out of the picture' so that he can neither sue nor be sued upon the contract (*Wakefield* v. *Duckworth* [1915] 1 KB 218). More difficult is the case where the agent acts in excess of his authority in concluding the contract. Suppose that the broker offers the third party a discount of 15 per cent without first obtaining approval from head office. Is X bound by this contract? The answer depends on whether or not the agent was acting within the scope of his authority in entering into the contract on these terms. Obviously the broker did not have actual authority to conclude the contract but the prohibition or limitation placed on his authority by X does not necessarily bind the third party. In order to protect the position of third parties the law adopts a more extensive conception of authority that extends beyond actual authority to implied authority, apparent authority, and usual authority. It is not necessary to analyse these concepts in any detail here. It suffices to state that, where the principal holds out the agent as having certain authority or a party in the position of the agent would customarily have a certain amount of authority, the third party is not generally bound by any narrower limit on the authority of the agent unless the third party has notice of such a limitation. This branch of the law of agency can generally be explained in terms that are consistent with the doctrine of privity. In these cases the principal is not a third party intervening on a contract which he did not make. The agent disclosed to the third party that he was acting on behalf of the principal and the agent's function was to bring about a contractual relationship between the principal and the third party. In these circumstances the proposition that the principal is a party to, or privy to, the contract is an acceptable one.

Much more difficult to explain is the doctrine of the undisclosed principal. The law relating to the undisclosed principal was summarized by Lord Lloyd in *Siu Yin Kwan* v. *Eastern Insurance Co Ltd* [1994] 2 AC 199, 207 in the following terms:

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> (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.

In this instance the third party is unaware of the existence of the principal but the principal is nevertheless entitled to sue, and can be sued, on the contract. As has been pointed out (*Bowstead and Reynolds on Agency* (22nd edn, Sweet & Maxwell, 2021), para 8-069), 'it is difficult to deny that the undisclosed principal is really a third party intervening on a contract which the principal did not make'. This point was conceded by Lord Lloyd in *Siu Yin Kwan* when he stated that 'it seems to be generally accepted that, while the development of this branch of the law may have been anomalous, since it runs counter to fundamental principles of privity of contract, it is justified on grounds of commercial convenience'. The 'commercial convenience' of the doctrine has been disputed on the ground that it can cause hardship to a third party who finds himself bound by a contract with a party of whose existence he was unaware and to whose presence he may object (although it should be noted that, where the benefit of the contract is assignable, the third party does not have the right to choose his contracting party). True, the law has imposed limits on the entitlement of the principal to intervene on the contract (see, for example, *Said* v. *Butt* [1920] 3 KB 497) but these limits are of uncertain scope and may leave the third party bound by a contract with a principal with whom the third party would never knowingly have contracted (*Dyster* v. *Randall & Sons* [1926] Ch 932). Some of the cases in this area of the law are extremely difficult, if not impossible to reconcile with the doctrine of privity (see, for example, *Watteau* v. *Fenwick* [1893] 1 QB 346). It seems odd that a principal can intervene on a contract when he is not named and one of the parties objects to his participation in the contract while the doctrine of privity prevents a third party from intervening on a contract when the two parties to the contract have expressly stated that the third party is to have the right to intervene and enforce the contract (as was the case in *Tweddle* v. *Atkinson*, 25.3.1). Given its anomalous status, it is unlikely that the undisclosed principal doctrine will be extended in any way (*VTB Capital plc* v. *Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337, [141]).

25.3.3.5 Negotiable Instruments

A negotiable instrument has been defined (*Goode and McKendrick on Commercial Law* (6th edn, Penguin, 2020), para 19.04) as an instrument 'which, by statute or mercantile usage, may be transferred by delivery and indorsement to a bona fide purchaser for value in such circumstances that he takes free from defects in the title of prior parties'. It is important to note that this 'bona fide purchaser', known as a holder in due course, takes 'free from defects' and so is in a better position than an assignee because an assignment takes effect 'subject to equities'. A cheque is a negotiable instrument. A person who writes a cheque is known as 'the drawer'. The cheque is essentially an instruction by the drawer to his bank, the drawee, to pay a third party a given sum of money. The third party recipient of the cheque can then present the cheque and demand payment from the drawer's bank. Cheques, together with other negotiable instruments (such as bills of exchange and promissory notes) have for many years played an important role in the economy and their

p. 982 commercial success has depended, ↵ in large part, upon the third party being given a secure right to demand payment from the bank. While the significance of cheques will diminish in the future, with the development of new electronic methods of payment, it is important not to lose sight of the benefits that can be obtained by the use of a negotiable instrument.

25.3.3.6 Tort

A claimant who suffers loss as a result of the negligence of the defendant in the performance of a contract with another party may have a claim against the defendant in the tort of negligence. This proposition does not excite much controversy where the loss which the claimant suffers is physical injury or property damage. In the great case of *Donoghue* v. *Stevenson* [1932] AC 562 the pursuer (the term used to describe the claimant in Scotland) alleged that she became ill after drinking ginger beer out of a bottle which contained the remains of a decomposed snail. The ginger beer was purchased at a café by the pursuer's friend and so she did not have a claim in contract against the café proprietor. So she brought an action in delict (tort) against the manufacturer of the ginger beer. The manufacturer defended the claim and submitted that the duty which it owed was to its contracting party and that it could not owe a duty to a third party with whom it was not in a contractual relationship. The House of Lords rejected the defender's submission and held that it could be liable to the pursuer (provided that she could establish the factual basis of her claim). Lord Atkin stated that:

> [a] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

More difficult is the case where the claimant suffers economic loss as a result of the negligence of the defendant in the performance of his contract with a third party. Cases can be found in which the courts have imposed a duty of care in favour of the claimant in this situation, although the cases themselves have proved to be extremely controversial. The most controversial is the decision of the House of Lords in *Junior Books Ltd* v. *Veitchi Co Ltd* [1983] 1 AC 520 (see 25.2). The pursuers entered into a contract with main contractors for the construction of a factory and the defenders were employed as sub-contractors by the main contractors (although they were nominated by the pursuers). The pursuers alleged that the floor had been laid defectively and they brought an action in delict (tort) against the defenders. Their claim succeeded in the House of Lords. Normally such claims would be brought in contract: the pursuer would sue the main contractor and the main contractor would then sue the sub-contractor and so liability would flow down the chain of contracts. But the effect of *Junior Books* was to enable the pursuers to jump down the chain of contracts and bring an action directly against the sub-contractors. The case is open to criticism in so far as it rests on a finding that the defenders had assumed a responsibility towards the pursuers. Indeed, in *Linklaters Business Services* v. *Sir Robert McAlpine Ltd* [2010] EWHC 1145 (TCC), [2010] BLR 537 Akenhead J went so far as to state (at [27]) that it was now 'in practice inconceivable' that a duty of care would be found to exist on the facts of *Junior Books*. The normal construction (and the one adopted in cases such as *Simaan General Contracting Co* v. *Pilkington Glass Ltd*

p. 983 *(No 2)* [1988] QB 758) is that the responsibility assumed by the party in the position of ↵ the defender is a contractual one owed to its immediate contracting party and not in tort to a remoter party down the chain of contracts.

The second case is *White* v. *Jones* [1995] 2 AC 207, a case which the Law Commission in their Report on *Privity of Contract* (at para 2.14) state is best analysed as 'allowing a third party to enforce a contract by pursuing an action in tort'. The defendant solicitor was instructed by a testator to draw up a new will. The defendant failed to do so before the testator's death. The intended beneficiaries under the new will brought an action in negligence against the defendant on the basis that his negligent failure to draw up the will had caused them to lose their bequests. By a majority of 3–2 the House of Lords held that the claimants were entitled to bring an action in negligence against the defendants. One factor which weighed heavily with their Lordships was that the beneficiaries were the parties who had suffered the loss and, if they did not have a claim against the solicitor, there would be a lacuna in the law because, although the estate (as the contracting party) had a claim against the solicitor, it had suffered no loss and so had no effective claim. The remedy which their Lordships fashioned in order to avoid such a lacuna was tortious in form but has the features of a contractual claim in that, as Lord Goff acknowledged, the solicitor is entitled to rely on any term of the contract with his client in order to limit or exclude his liability to the beneficiaries in tort. It is therefore a claim in tort that is subject to the terms of the contract between the solicitor and his client.

While a claim in tort thus has the potential to outflank the doctrine of privity in this way it is subject to the obvious limitation that the claimant, in order to succeed, must prove that the defendant was negligent.

25.3.3.7 Statutory Exceptions

Prior to the enactment of the Contracts (Rights of Third Parties) Act 1999 there were a number of statutory exceptions to the doctrine of privity. We have already seen, in *Beswick* v. *Beswick* (25.3.2.1) the use that was made by Lord Denning of section 56(1) of the Law of Property Act 1925 in an attempt to outflank the doctrine of privity of contract. The attempt failed because the House of Lords could not discern any intention in section 56 to effect such a radical change to common law doctrine (see 25.3.2.1). But in other contexts Parliament has intervened with the express purpose of recognizing third party rights. The significance of these legislative interventions should not be underestimated. The contracts regulated are important commercial transactions where tri-partite relationships are common (particularly insurance and shipping contracts). Thus section 11 of the Married Women's Property Act 1882 provides:

> A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts.

And section 14(2) of the Marine Insurance Act 1906 provides:

> A mortgagee, consignee, or other person having an interest in the subject matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.

p. 984 ↵ Section 148(7) of the Road Traffic Act 1988 provides:

> Notwithstanding anything in any enactment, a person issuing a policy of insurance under section 145 of this Act shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

Finally, section 2 of the Carriage of Goods by Sea Act 1992 provides that a person who becomes the lawful holder of a bill of lading shall, by virtue of becoming the holder of the bill, have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract from the outset.

25.3.4 Third Parties, Exclusion Clauses, and Exclusive Jurisdiction Clauses

An issue which has given rise to great difficulty in the case-law is the question whether, and if so to what extent, a third party may take the benefit of an exclusion or limitation clause in a contract to which it is not a party. A related issue is whether or not a claimant can be bound by an exclusion or limitation clause in a contract to which the defendant is a party but the claimant is not. As we shall see, this issue is not confined to exclusion or limitation clauses: it can arise in the context of other clauses, notably exclusive jurisdiction clauses. The cases are both long and complex. Yet their practical significance has diminished as a result of the enactment of the Contracts (Rights of Third Parties) Act 1999 which provides a much simpler mechanism by which contracting parties can extend the sphere of application of these clauses. Nevertheless, the Act will not catch all cases and, in such cases, the courts will have to fall back on the common law rules as set out in these cases.

The approach that will be adopted in this section is to use one case, *The Mahkutai* [1996] AC 650, as the vehicle for discussion of these issues. At the outset it must be acknowledged that there is one drawback in this approach which is that the case involves an exclusive jurisdiction clause (that is, a clause which requires that legal proceedings be brought in a particular jurisdiction) rather than an exclusion clause, and exclusive jurisdiction clauses raise one or two additional complexities in comparison with exclusion clauses. But this disadvantage is more than outweighed by the clarity and the elegance of Lord Goff's analysis of the leading cases (such as *Elder Dempster & Co* v. *Paterson Zochonis & Co* [1924] AC 522, *Scruttons Ltd* v. *Midland Silicones Ltd* [1962] AC 446, *New Zealand Shipping Co Ltd* v. *A M Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154, *Port Jackson Stevedoring Pty Ltd* v. *Salmond & Spraggon (Australia) Pty Ltd (The New York Star)* [1981] 1 WLR 138, and *The Pioneer Container* [1994] 2 AC 324). Before turning to Lord Goff's judgment three preliminary comments must be made.

The first relates to the technicality of the language that is used in the judgments. Three phrases merit further discussion at this point: (i) bill of lading, (ii) bailment on terms, and (iii) vicarious immunity. A bill of lading and its functions have been described in M Bridge (ed), *Benjamin's Sale of Goods* (11th edn, Sweet & Maxwell, 2021), para 18-019 in the following terms:

> p. 985 A bill of lading is traditionally a document issued by a sea carrier and which has three functions, not all of which are fulfilled by other documents. First, it is a receipt: i.e. it is an ↵ acknowledgment by the person issuing it that he has received goods into his possession and generally that he will continue to do so and to deliver them in accordance with his bailor's instructions (either back to the bailor or to an authorised third party consignee). Secondly, it is generally evidence of the terms of a contract between the shipper (and/or subsequent holder) and the carrier. Thirdly, it is a 'document of title', which broadly means that the carrier, who has possession of the goods, will deliver them to the person lawfully holding the bill and that the holder may transfer the right to receive possession to another. However, by itself a document does not reveal the origin or the content of legal rights and obligations relating to the goods; they do not arise merely from possession of, or with reference to, the document.

Bailment on terms is a little more difficult to describe and indeed the precise meaning of this phrase is the subject of some debate. Bailment is the term used to describe the situation where one person (the bailee) is voluntarily in possession of goods that belong to another (the bailor). Bailment on terms arises where the bailor entrusts goods to the bailee and, either expressly or impliedly, authorizes the bailee to entrust the goods to a third party. In such a case the bailor will be bound by the terms of the sub-bailment to which he has consented or has authorized. Vicarious immunity, on the other hand, means that an employee or agent who performs a contract is entitled to rely on any immunity from liability which the contract confers on his employer or principal.

The second point is that it is vital to distinguish the case in which the clause at issue between the parties is to be found in the main contract from the case in which the clause at issue is to be found in the sub-contract. These two situations raise different issues, although it is possible to have a case in which there are two relevant clauses in issue between the parties, one in the main contract and one in the sub-contract but the claimant and the defendant are not in a direct contractual relationship (*Scruttons Ltd* v. *Midland Silicones Ltd* [1962] AC 446 being such a case).

The third point relates to the policy issues at stake. The policy issues in the exclusion clause cases differ from those that arise in the context of exclusive jurisdiction clauses. The policy issues in relation to exclusive jurisdiction clauses are raised in Lord Goff's judgment in *The Mahkutai* and so here it suffices to mention the conflicting policy issues that arise in the exclusion clause cases. On the one hand, the courts have, as we have seen (Chapter 13), generally adopted a restrictive approach towards exclusion clauses. This suggests that they are likely to apply privity strictly and refuse to extend the benefit of an exclusion clause to a third party. On the other hand, in some of the cases it seems clear that the intention of all the parties was that the benefit of the exclusion clause should be enjoyed by the third party (such as an employee) and, in such cases, the judges are generally unwilling to frustrate the intention of the parties, particularly in commercial transactions which have been negotiated at arm's length. This conflict of policies has been reflected in the different approaches taken by the judiciary over the years, a point noted by Lord Goff in *The Mahkutai.*

The Mahkutai
[1996] AC 650, Privy Council

Indonesian shipowners chartered their vessel to an Indonesian corporation ('the carrier') who in turn sub-chartered it to Indonesian timber merchants ('the shippers') for the carriage of a cargo of
p. 986 plywood from Jakarta to Shantou in the People's Republic of China. The master ↵ of the vessel authorized the carrier's agent to sign a bill of lading which provided, in condition 4, that, every servant, agent, or subcontractor of the carrier was to have the benefit of all 'exceptions, limitations, provision, conditions and liberties herein benefiting the carrier as if such provisions were expressly made for their benefit'. Condition 19 of the bill of lading further provided that:

> the contract evidenced by the bill of lading shall be governed by the law of Indonesia and any dispute arising hereunder shall be determined by the Indonesian courts according to that law to the exclusion of the jurisdiction of the courts of any other country.

When the vessel arrived in Shantou it was discovered that the plywood in one of the holds had been damaged by sea water. The vessel then proceeded to Hong Kong for the purpose of discharging other cargo. On arrival of the vessel in Hong Kong the cargo owners issued a writ against the shipowners claiming damages for breach of contract, breach of duty, or negligence. The shipowners sought to stay the proceedings in Hong Kong on the ground that the proceedings had been brought in breach of condition 19, the exclusive jurisdiction clause. Sears J held that the shipowners were entitled to invoke the exclusive jurisdiction clause and he ordered that the proceedings in Hong Kong be stayed. The cargo owners appealed to the Court of Appeal who allowed the appeal. The shipowners then appealed to the Privy Council. They submitted that they were entitled to rely on the exclusive jurisdiction clause on the basis of two principles: (i) that established by the Privy Council in *New Zealand Shipping Co Ltd* v. *A M Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154 and *Port Jackson Stevedoring Pty Ltd* v. *Salmond & Spraggon (Australia) Pty Ltd (The New York Star)* [1981] 1 WLR 138 and (ii), in the alternative, on the basis of the principle of bailment on terms, the origins of which are to be found in the speech of Lord Sumner in *Elder Dempster & Co* v. *Paterson Zochonis & Co* [1924] AC 522. The Privy Council held that the shipowners were not entitled to invoke the exclusive jurisdiction clause against the cargo owners, that the cargo owners were entitled to bring the action in Hong Kong against the shipowners, and that the stay had been properly set aside.

Lord Goff of Chieveley

[giving the judgment of the Privy Council set out the facts and continued]

The pendulum of judicial opinion

The two principles which the shipowners invoke are the product of developments in English law during the present century. During that period, opinion has fluctuated about the desirability of recognising some form of modification of, or exception to, the strict doctrine of privity of contract to accommodate situations which arise in the context of carriage of goods by sea, in which it appears to

be in accordance with commercial expectations that the benefit of certain terms of the contract of carriage should be made available to parties involved in the adventure who are not parties to the contract. These cases have been concerned primarily with stevedores claiming the benefit of exceptions and limitations in bills of lading, but also with shipowners claiming the protection of such terms contained in charterers' bills. At first there appears to have been a readiness on the part of judges to recognise such claims, especially in *Elder Dempster & Co* v. *Paterson, Zochonis & Co Ltd*, [1924] AC 522, concerned with the principle of bailment on terms. Opinion however hardened against them in the middle of the century as the pendulum swung back in the direction of orthodoxy in
p. 987 *Midland Silicones Ltd* v. *Scruttons Ltd* [1962] AC 446; but in more recent ↵ years it has swung back again to recognition of their commercial desirability, notably in the two leading cases concerned with claims by stevedores to the protection of a Himalaya clause—*New Zealand Shipping Co Ltd* v. *A M Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154 and *Port Jackson Stevedoring Pty Ltd* v. *Salmond & Spraggon (Australia) Pty Ltd (The New York Star)* [1981] 1 WLR 138.

In the present case shipowners carrying cargo shipped under charterers' bills of lading are seeking to claim the benefit of a Himalaya clause in the time charterers' bills of lading, or in the alternative to invoke the principle of bailment on terms. However they are seeking by these means to invoke not an exception or limitation in the ordinary sense of those words, but the benefit of an exclusive jurisdiction clause. This would involve a significantly wider application of the relevant principles; and, to judge whether this extension is justified, their Lordships consider it desirable first to trace the development of the principles through the cases.

The Elder Dempster case [1924] AC 522

The principle of bailment on terms finds its origin in the *Elder Dempster* case. That case was concerned with a damage to cargo claim in respect of a number of casks of palm oil which had been crushed by heavy bags of palm kernels stowed above them in a ship with deep holds but no 'tween decks to take the weight of the cargo stowed above. The main question in the case was whether such damage was to be classified as damage arising from unseaworthiness of the ship due to absence of 'tween decks, or as damage arising from bad stowage; in the latter event, no claim lay under the bills of lading, which contained an exception excluding claims for bad stowage. The bills of lading were time charterers' bills, the vessel having been chartered in by the time charterers as an additional vessel for their West African line. The House of Lords (on this point differing from a majority of the Court of Appeal) held that the damage was to be attributed to bad stowage, and as a result the time charterers were protected by the bill of lading exception; but the cargo owners had also sued the shipowners in tort, and the question arose whether the shipowners too were protected by the exception contained in the bill of lading, to which they were not parties. In the Court of Appeal [1923] 1 KB 420, 441–442, Scrutton LJ (who alone considered that the damage was to be attributed to bad stowage rather than unseaworthiness) rejected the claim against the shipowners on a suggested principle of vicarious immunity. This principle was relied on by the shipowners in argument before the House of Lords [1924] AC 522 and was accepted, at p. 534, by Viscount Cave (with whom Lord

Carson, at p. 565, agreed), and apparently also by Viscount Finlay, at p. 548. But the preferred reason given by Lord Sumner, at p. 564 (with whom Lord Dunedin, at p. 548, and Lord Carson, at p. 565, agreed) was that:

> 'in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading.'

The *Midland Silicones* case [1962] AC 446

This was a test case in which it was sought to establish a basis upon which stevedores could claim the protection of exceptions and limitations contained in the bill of lading contract. Here the stevedores had negligently damaged a drum of chemicals after discharge at London, to which the
p. 988 goods had been shipped from New York under a bill of lading ↵ incorporating the United States Carriage of Goods by Sea Act 1936, which contained the Hague Rules limitation of liability to £500 per package or unit. The stevedores sought to claim the benefit of this limit as against the receivers. They claimed to rely on the principle of bailment on terms derived from the *Elder Dempster* case [1924] AC 522. But they also sought a contractual basis for their contention on various grounds—that they had contracted with the receivers through the agency of the shipowners; that they could rely on an implied contract independent of the bill of lading; or that they could as an interested third party take the benefit of the limit in the bill of lading contract. All these arguments failed. The principle of bailment on terms was given a restrictive treatment; and the various contractual arguments foundered on the doctrine of privity of contract, Viscount Simonds in particular reasserting that doctrine in its orthodox form: [1962] AC 446, 467–468. For present purposes, however, three features can be selected as important.

First, the case revealed, at least on the part of Viscount Simonds … a remarkable shift from the philosophy which informed the decision in the *Elder Dempster* case [1924] AC 522. There the point in question was treated very briefly by the members of the Appellate Committee, apparently because it seemed obvious to them that the cargo owners' alternative claim against the shipowners should fail. It was perceived, expressly by Viscount Finlay, at p. 548, and, it seems, implicitly by the remainder, that:

> '[i]t would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort.'

By contrast Fullagar J, in the *Darling Island* case, 95 CLR 43, 71, condemned 'a curious, and seemingly irresistible, anxiety to save grossly negligent people from the normal consequences of their negligence', a sentiment to be echoed by Viscount Simonds in the concluding sentence of his speech in the *Midland Silicones* case [1962] AC 446, 472.

Second, the *Elder Dempster* case [1924] AC 522 was kept within strict bounds. Viscount Simonds [1962] AC 446, 470 quoted with approval the interpretation adopted by Fullagar J (with whom Dixon CJ agreed) in the High Court of Australia in the *Darling Island* case, 95 CLR 43, 78 where he said:

> 'In my opinion, what the *Elder Dempster* case decided, and all that it decided, is that in such a case, the master having signed the bill of lading, the proper inference is that the shipowner, when he receives the goods into his possession, receives them on the terms of the bill of lading. The same inference might perhaps be drawn in some cases even if the charterer himself signed the bill of lading, but it is unnecessary to consider any such question.'

This approach is consistent with that of Lord Sumner in the *Elder Dempster* case [1924] AC 522. In the *Midland Silicones* case [1962] AC 446, Lord Keith of Avonholm, at p. 481, and Lord Morris of Borth-y-Gest, at p. 494, spoke in similar terms. Lord Reid, at p. 479, treated the decision on the point as: 'an anomalous and unexplained exception to the general principle that a stranger cannot rely for his protection on provisions in a contract to which he is not a party'. Lord Denning dissented, at pp. 481–492.

It has to be recognised that this reception did not enhance the reputation of the *Elder Dempster* case [1924] AC 522, as witness certain derogatory descriptions later attached to it, for example by Donaldson J in *Johnson Matthey & Co Ltd* v. *Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215, 219—'something of a judicial nightmare'—and by Ackner LJ in *The Forum Craftsman* [1985] 1 Lloyd's Rep 291, 295—'heavily comatosed, if not long-interred'.

Third, however, and most important, Lord Reid in the *Midland Silicones* case [1962] AC 446, while rejecting the agency argument on the facts of the case before him, nevertheless indicated how it might prove successful in a future case. He said, at p. 474:

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> ↵ 'I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.'

It was essentially on this passage that the Himalaya clause (called after the name of the ship involved in *Adler* v. *Dickson* [1955] 1 QB 158) was later to be founded.

The pendulum swings back again

In more recent years the pendulum of judicial opinion has swung back again, as recognition has been given to the undesirability, especially in a commercial context, of allowing plaintiffs to circumvent contractual exception clauses by suing in particular the servant or agent of the contracting party who caused the relevant damage, thereby undermining the purpose of the exception, and so redistributing the contractual allocation of risk which is reflected in the freight rate and in the parties' respective insurance arrangements. Nowadays, therefore, there is a greater readiness, not only to accept something like Scrutton LJ's doctrine of vicarious immunity (as to which see, e.g., article 4 bis of the Hague-Visby Rules scheduled to the Carriage of Goods by Sea Act 1971) but also to rehabilitate the *Elder Dempster* case [1924] AC 522 itself, which has been described by Bingham LJ, in *Dresser UK Ltd* v. *Falcongate Freight Management Ltd* [1992] QB 502, 511F as 'a pragmatic legal recognition of commercial reality'. Even so, the problem remains how to discover, in circumstances such as those of the *Elder Dempster* case [1924] AC 522, the factual basis from which the rendering of the bailment subject to such a provision can properly be inferred. At all events the present understanding, based on Lord Sumner's speech, is that in the circumstances of that case the shippers may be taken to have impliedly agreed that the goods were received by the shipowners, as bailees, subject to the exceptions and limitations contained in the known and contemplated form of bill of lading: see *The Pioneer Container* [1994] 2 AC 324, 339–340. Their Lordships will however put on one side for later consideration the question how far the principle of bailment on terms may be applicable in the present case, and will turn first to consider the principle developed from Lord Reid's observations in the *Midland Silicones* case [1962] AC 446, 474, in *The Eurymedon* [1975] AC 154 and *The New York Star* [1981] 1 WLR 138.

The Eurymedon and The New York Star

Their Lordships have already quoted the terms of clause 4 (the Himalaya clause) of the bill of lading in the present case. For the purposes of this aspect of the case, the essential passage reads as follows:

> 'Without prejudice to the foregoing, every such servant, agent and subcontractor shall have the benefit of all exceptions, limitations, provision, conditions and liberties herein benefiting the carrier as if such provisions were expressly made for their benefit, and, in entering into this contract, the carrier, to the extent of these provisions, does so not only on [his] own behalf, but also as agent and trustee for such servants, agents and subcontractors.'

The effectiveness of a Himalaya clause to provide protection against claims in tort by consignees was recognised by the Privy Council in *The Eurymedon* [1975] AC 154 and *The New York Star* [1981] 1 WLR 138. In both cases, stevedores were sued by the consignees for damages in tort, in the first case on the ground that the stevedores had negligently damaged ↵ a drilling machine in the course of unloading, and in the second on the ground that they had negligently allowed a parcel of goods, after unloading onto the wharf, to be removed by thieves without production of the bill of lading. In both cases, the bill of lading contract incorporated a one year time bar, and a Himalaya clause which

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extended the benefit of defences and immunities to independent contractors employed by the carrier. The stevedores relied upon the Himalaya clause to claim the benefit of the time bar as against the consignees.

In *The Eurymedon* [1975] AC 154 the Privy Council held, by a majority of three to two, that the stevedores were entitled to rely on the time bar. The leading judgment was delivered by Lord Wilberforce. … Referring to Lord Reid's four criteria in the *Midland Silicones* case [1962] AC 446, 474, he considered it plain that the first three were satisfied, the only question being whether the requirement of consideration was fulfilled. He was satisfied that it was. He observed, at p. 167B, that 'If the choice, and the antithesis, is between a gratuitous promise, and a promise for consideration … there can be little doubt which, in commercial reality, this is'. He then proceeded to analyse the transaction in a way which showed a preference by him for what is usually called a unilateral contract, though he recognised that there might be more than one way of analysing the transaction.

In *The New York Star* [1981] 1 WLR 138, the Privy Council again upheld (on this occasion unanimously) the efficacy of a Himalaya clause to confer upon the stevedores the benefit of defences and immunities contained in the bill of lading, including a one year time bar. The judgment of the Judicial Committee was again given by Lord Wilberforce. In the course of his judgment, he stressed, at p. 143:

> 'It may indeed be said that the significance of Satterthwaite's case lay not so much in the establishment of any new legal principle, as in the finding that in the normal situation involving the employment of stevedores by carriers, accepted principles enable and require the stevedore to enjoy the benefit of contractual provisions in the bill of lading.'

He continued, at p. 144:

> 'Although, in each case, there will be room for evidence as to the precise relationship of carrier and stevedore and as to the practice at the relevant port, the decision does not support, and their Lordships would not encourage, a search for fine distinctions which would diminish the general applicability, in the light of established commercial practice, of the principle.'

Lord Wilberforce in particular expressed the Board's approval of the reasoned analysis of the relevant legal principles in the judgment of Barwick CJ, which in his opinion substantially agreed with, and indeed constituted a powerful reinforcement of, one of the two possible bases put forward in the Board's judgment in *The Eurymedon* [1975] AC 154. In his judgment in the court below (the High Court of Australia), Barwick CJ saw no difficulty in finding that the carrier acted as the authorised agent of the stevedores in making an arrangement with the consignor for the protection of the stevedores: see [1979] 1 Lloyd's Rep 298, 304–305. By later accepting the bill of lading the consignee became party to that arrangement. He could not read the clauses in the bill of lading as an unaccepted but acceptable offer by the consignor to the stevedores. However the consignor and the

stevedores were ad idem through the carrier's agency, upon the acceptance by the consignor of the bill of lading, as to the protection the stevedores should have in the event that they caused loss of or damage to the consignment. But that consensus lacked consideration. He continued, at p. 305:

> 'To agree with another that, in the event that the other acts in a particular way, that other
> p. 991 shall be entitled to stated protective provisions only needs performance by the doing of the
> ↵ specified act or acts to become a binding contract. ... The performance of the act or acts at the one moment satisfied the test for consideration and enacted the agreed terms.'

Such a contract Barwick CJ was prepared, with some hesitation, to describe as a bilateral contract.

Critique of *The Eurymedon* principle

In *The New York Star* [1981] 1 WLR 138, 144, Lord Wilberforce discouraged 'a search for fine distinctions which would diminish the general applicability, in the light of established commercial practice, of the principle'. He was there, of course, speaking of the application of the principle in the case of stevedores. It has however to be recognised that, so long as the principle continues to be understood to rest upon an enforceable contract as between the cargo owners and the stevedores entered into through the agency of the shipowner, it is inevitable that technical points of contract and agency law will continue to be invoked by cargo owners seeking to enforce tortious remedies against stevedores and others uninhibited by the exceptions and limitations in the relevant bill of lading contract. Indeed, in the present case their Lordships have seen such an exercise being legitimately undertaken by Mr Aikens on behalf of the cargo owners. In this connection their Lordships wish to refer to the very helpful consideration of the principle in *Palmer on Bailment*, 2nd ed. (1991), at pp. 1610–1625, which reveals many of the problems which may arise, and refers to a number of cases, both in England and in Commonwealth countries, in which the courts have grappled with those problems. In some cases, notably but by no means exclusively in England, courts have felt impelled by the established principles of the law of contract or of agency to reject the application of the principle in the particular case before them. In others, courts have felt free to follow the lead of Lord Wilberforce in *The Eurymedon* [1975] AC 154, and of Lord Wilberforce and Barwick CJ in *The New York Star* [1981] 1 WLR 138; [1979] 1 Lloyd's Rep 298, and so to discover the existence of a contract (nowadays a bilateral contract of the kind identified by Barwick CJ) in circumstances in which lawyers of a previous generation would have been unwilling to do so.

Nevertheless there can be no doubt of the commercial need of some such principle as this, and not only in cases concerned with stevedores; and the bold step taken by the Privy Council in *The Eurymedon* [1975] AC 154, and later developed in *The New York Star* [1981] 1 WLR 138, has been widely welcomed. But it is legitimate to wonder whether that development is yet complete. Here their Lordships have in mind not only Lord Wilberforce's discouragement of fine distinctions, but also the fact that the law is now approaching the position where, provided that the bill of lading contract clearly provides that (for example) independent contractors such as stevedores are to have the benefit of exceptions and limitations contained in that contract, they will be able to enjoy the protection of those terms as against the cargo owners. This is because (1) the problem of consideration in these

cases is regarded as having been solved on the basis that a bilateral agreement between the stevedores and the cargo owners, entered into through the agency of the shipowners, may, though itself unsupported by consideration, be rendered enforceable by consideration subsequently furnished by the stevedores in the form of performance of their duties as stevedores for the shipowners; (2) the problem of authority from the stevedores to the shipowners to contract on their behalf can, in the majority of cases, be solved by recourse to the principle of ratification;[4] and (3) consignees of the cargo may be held to be bound on the principle in ↵ *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575. Though these solutions are now perceived to be generally effective for their purpose, their technical nature is all too apparent; and the time may well come when, in an appropriate case, it will fall to be considered whether the courts should take what may legitimately be perceived to be the final, and perhaps inevitable, step in this development, and recognise in these cases a fully-fledged exception to the doctrine of privity of contract, thus escaping from all the technicalities with which courts are now faced in English law. It is not far from their Lordships' minds that, if the English courts were minded to take that step, they would be following in the footsteps of the Supreme Court of Canada: see *London Drugs Ltd* v. *Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261 and, in a different context, the High Court of Australia: see *Trident General Insurance Co Ltd* v. *McNiece Bros Pty Ltd* (1988) 165 CLR 107. Their Lordships have given consideration to the question whether they should face up to this question in the present appeal. However, they have come to the conclusion that it would not be appropriate for them to do so, first, because they have not heard argument specifically directed towards this fundamental question, and second because, as will become clear in due course, they are satisfied that the appeal must in any event be dismissed.

p. 992

Application of *The Eurymedon* principle in the present case

Their Lordships now turn to the application of the principle in *The Eurymedon* [1975] AC 154 to the facts of the present case. Two questions arose in the course of argument which are specific to this case. The first is whether the shipowners qualify as 'subcontractors' within the meaning of the Himalaya clause (clause 4 of the bill of lading). The second is whether, if so, they are entitled to take advantage of the exclusive jurisdiction clause (clause 19). Their Lordships have come to the conclusion that the latter question must be answered in the negative. It is therefore unnecessary for them to answer the first question ...

[He then set out the reasoning that led to the conclusion that the exclusive jurisdiction clause did not fall within the scope of the phrase 'all exceptions, limitations, provision, conditions, and liberties herein benefiting the carrier as if such provisions were expressly made for their benefit' in the Himalaya clause]

Application of the principle of bailment on terms in the present case

In the light of the principle stated by Lord Sumner in the *Elder Dempster* case [1924] AC 522, 564, as interpreted by Fullagar J in the *Darling Island* case, 95 CLR 43, 78, the next question for consideration is whether the shipowners can establish that they received the goods into their possession on the

> terms of the bill of lading, including the exclusive jurisdiction clause (clause 19)—i.e., whether the shipowners' obligations as bailees were effectively subjected to the clause as a term upon which the shipowners implicitly received the goods into their possession: see *The Pioneer Container* [1994] 2 AC 324, 340, per Lord Goff of Chieveley. …
>
> Their Lordships feel able to deal with this point very briefly, because they consider that in the present case there is an insuperable objection to the argument of the shipowners. This is that the bill of lading under which the goods were shipped on board contained a Himalaya clause under which the shipowners as subcontractors were expressed to be entitled to the benefit of certain terms in the bill of lading but, as their Lordships have held, those terms did not include the exclusive jurisdiction clause. In these circumstances their Lordships find it impossible to hold that, by receiving the goods into their possession pursuant to the bill of lading, the shipowners' obligations as bailees were effectively subjected to the exclusive jurisdiction clause as a term upon which they implicitly received the goods into their possession. Any such implication must, in their opinion, be rejected as inconsistent with the express terms of the bill of lading.

p. 993

Commentary

When describing the fluctuations in judicial opinion that have taken place Lord Goff makes reference to four leading cases, namely *Elder Dempster*, *Midland Silicones*, *The Eurymedon*, and *The New York Star*. One or two additional points can be made in relation to each case.

Elder Dempster was always a troublesome case and, as Lord Goff notes, it received a distinctly frosty judicial reception in the latter half of the twentieth century. Lord Goff points out that the case could be explained either on the basis of vicarious immunity or as an example of bailment on terms. The former doctrine was rejected by the House of Lords in *Midland Silicones* with the consequence that the case must now be regarded as an example of bailment on terms.

Midland Silicones is a case in which the defendant stevedores sought to rely both on a limitation clause in the contract between themselves and the carriers and on a limitation clause in the contract between the cargo owners and the carriers. Two further aspects of *Midland Silicones* are worthy of note. The first is Lord Denning's dissent. He held that the cargo owners were bound by the terms of the contract between the carriers and the stevedores on the basis that they impliedly authorized the carrier to employ the stevedores on the terms that their liability would be limited. The second is Lord Reid's four-stage test (set out earlier in this section) which in many ways formed the basis for future developments in *The Eurymedon.*

The Eurymedon is an important case because the Privy Council there held, albeit by a 3–2 majority, that the stevedores were entitled to rely on the time bar in order to defeat the claim brought by the consignors. In both *The Eurymedon* and *The New York Star* the leading judgment was given by Lord Wilberforce and in both cases he adopted a rather broad brush approach in finding the existence of a contract between the stevedores and the consignors which entitled the stevedores to rely on the time bar. The dissentients in *The Eurymedon*, while not denying that 'a suitably drawn document could bring a consignor and a stevedore into a relationship of obligation' (p. 183) were not prepared to paint with such a broad brush. Thus Viscount Dilhorne stated (at p. 175) that:

> clause 1 of the bill of lading was obviously not drafted by a layman but by a highly qualified lawyer. It is a commercial document but the fact that it is of that description does not mean that to give it efficacy, one is at liberty to disregard its language and read into it that which it does not say and could have said or construe the English words it contains as having a meaning which is not expressed and which is not implied.
>
> The clause does not in my opinion either expressly or impliedly contain an offer by the shipper to the carrier to enter into an agreement whereby if the appellant performed services in relation to the goods the shipper would give it the benefit of every exemption from and limitation of liability contained in the bill of lading.

So on what basis did Lord Wilberforce conclude that the stevedores and consignors/shippers were contracting parties? As Lord Goff notes there are two possible analyses: a unilateral contract or a bilateral contract. Lord Wilberforce himself adopted a unilateral contract analysis in the following terms (at pp. 167–168):

> [The present contract] is one of carriage from Liverpool to Wellington. The carrier assumes an obligation to transport the goods and to discharge at the port of arrival. The goods are to be carried
> p. 994 and discharged, so the transaction is inherently contractual. It is contemplated that a ↵ part of this contract, viz. discharge, may be performed by independent contractors—viz. the appellant. By clause 1 of the bill of lading the shipper agrees to exempt from liability the carrier, his servants and independent contractors in respect of the performance of this contract of carriage. Thus, if the carriage, including the discharge, is wholly carried out by the carrier, he is exempt. If part is carried out by him, and part by his servants, he and they are exempt. If part is carried out by him and part by an independent contractor, he and the independent contractor are exempt. The exemption is designed to cover the whole carriage from loading to discharge, by whomsoever it is performed: the performance attracts the exemption or immunity in favour of whoever the performer turns out to be. There is possibly more than one way of analysing this business transaction into the necessary components; that which their Lordships would accept is to say that the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shipper and the appellant, made through the carrier as agent. This became a full contract when the appellant performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading. The conception of a 'unilateral' contract of this kind was recognised in *Great Northern Railway Co* v. *Witham* (1873) LR 9 CP 16 and is well established. This way of regarding the matter is very close to if not identical to that accepted by Beattie J in the Supreme Court: he analysed the transaction as one of an offer open to acceptance by action such as was found in *Carlill* v. *Carbolic Smoke Ball Co* [1893] 1 QB 256. But whether one describes the shipper's promise to exempt as an offer to be accepted by performance or as a promise in exchange for an act seems in the present context to be a matter of semantics. The words of Bowen LJ in *Carlill* v. *Carbolic Smoke Ball Co* [1893] 1 QB 256, 268: 'why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition?' seem to bridge both conceptions: he certainly seems to draw no distinction between an offer which matures into a contract when accepted and a promise which matures into a contract after performance, and, though in some special contexts (such as in connection with the right to withdraw) some further refinement may be needed, either analysis may be equally valid.

The bilateral contract analysis adopted by Barwick CJ in *The New York Star* [1979] 1 Lloyd's Rep 298, 304–305 was in the following terms:

> For my part, I find no difficulty in interpreting the arrangement made by the bill of lading and its acceptance by the consignor as providing that if, in fact, the appellant stevedored the cargo, leaving aside for the moment what the stevedoring involved, the appellant should have the benefit of the clauses of the bill including the benefit of the time limitation expressed in cl. 17 of the bill of lading. I am unable to treat the clauses of the bill of lading as in any respect an unaccepted but acceptable offer by consignor to stevedore. Indeed, I do not think the bill can be interpreted as containing an offer at large by the consignor. The consignor and the appellant as stevedore were ad idem through the carrier's agency upon the acceptance by the consignor of the bill of lading as to the protection the stevedore should have in the event that it stevedored the consignment. But this consensus lacked the essential of consideration. The appellant through the bill of lading made no promise to stevedore the cargo. Thus, while I would not analyse the situation obtaining on the acceptance of the bill of lading as an exchange of promises, I would not analyse it as merely the making of an offer susceptible of acceptance by an act of the stevedore done in purported acceptance of the offer. For this reason I have
> p. 995 described the bill of lading in so far as the carrier there purports to ↵ act for the appellant as an arrangement. To agree with another that, in the event that the other acts in a particular way, that other shall be entitled to stated protective provisions only needs performance by the doing of the specified act or acts to become a binding contract. Whether or not the arrangement is susceptible of unilateral disavowal before the stated act is done need not be discussed. Here the act was done. The performance of the act or acts at the one moment satisfied the test for consideration and enacted the agreed terms. For myself and with due respect to those who find comfort in them, I find the descriptions 'unilateral and bilateral' or 'mutual' unhelpful in the resolution of this case. Indeed, the use of them seems to assume that they are mutually exclusive terms and together cover all possibilities. But I do not think they do. Indeed, this bill of lading, as I read it, indicates in my opinion that they do not. As I see it, we have here an arrangement, a compact with agreed conditions to attend the performance of certain acts, which are not promised to be done. True enough that, until such performance, the consensus has nothing upon which to operate. But that is its essential characteristic, to provide an agreed consequence to future action should that action take place: to attach conditions to a relationship arising from conduct. If one desires to use the terms, it could be said that the arrangement is mutual: it is bilateral: to it there are two parties both agreeing to the terms of the intended consequence, on the one hand the consignor and on the other the stevedore acting through its authorised agent, the carrier. The performance of the contemplated act both supplies the occasion for those conditions to operate and the consideration which makes the arrangement contractual.

Neither solution is free from technical difficulties and, notwithstanding Lord Wilberforce's attempt in *The New York Star* to discourage parties from taking technical points, Lord Goff was surely correct in *The Mahkutai* to state that it is 'inevitable that technical points of contract law and agency will continue to be taken' while this line of authority remains binding. The unilateral contract analysis is problematic for the following reasons: (i) it may not be easy to identify the existence of the offer of immunity by the consignor (the stumbling block for the minority in *The Eurymedon* and for Barwick CJ in *The New York Star*); (ii) the third party may not be aware of the existence of the offer at the time that it performs the act that constitutes the acceptance (an acceptance performed in ignorance of the offer is not generally valid: see 3.3.7); and (iii) the third party does not enjoy the immunity when it damages the goods when preparing to undertake the task set

out in the main contract (*Raymond Burke Motors Ltd* v. *Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep 155). The latter problem also arises in the context of the bilateral contract analysis. A further difficulty with the bilateral contract analysis lies in ascertaining the precise moment in time at which the contract is concluded. Finally, Professor Treitel states (*Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002), p. 67) that he prefers Lord Wilberforce's analysis 'since it avoids the consequence of the stevedore's being in breach of a separate contract with the cargo-owner if he has justifiably terminated his contract with the carrier on account of the latter's breach and consequently refused to unload the goods'.

Given these (and other) technical problems with the solutions adopted in *The Eurymedon* and *The New York Star*, Lord Goff states in *The Mahkutai* that the time may come when the courts will develop 'a fully-fledged exception to the doctrine of privity of contract, thus escaping from all the technicalities with which courts are now faced in English law' (see further *Homburg Houtimport BV* v. *Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715, where the House of Lords once again discussed these issues in some detail but stopped short of creating a fully fledged exception to the doctrine of privity). One of the cases to which Lord Goff
p. 996 makes reference in this context is the decision of the Supreme ↵ Court of Canada in *London Drugs Ltd* v. *Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261. London Drugs delivered an electrical transformer to Kuehne & Nagel for storage in a warehouse. The contract between them contained a limitation clause which stated that 'the warehouseman's liability on any one package is limited to $40 unless the holder has declared in writing a valuation in excess of $40 and paid the additional charge specified to cover warehouse liability'. The transformer was damaged as a result of the negligence of two of Kuehne & Nagel's employees. London Drugs brought a claim against Kuehne & Nagel and their two employees. In relation to the claim against the employees, the issue before the Supreme Court was whether or not the employees were entitled to rely on the limitation clause, notwithstanding the fact the clause made no express mention of them. It was held that they were entitled to invoke the benefit of the limitation clause. The basis for this conclusion was later summarized by Iacobucci J, giving the judgment of the Supreme Court of Canada in *Fraser River Pile & Dredge Ltd* v. *Can-Dive Services Ltd* [2000] 1 Lloyd's Rep 199, 205–206 in the following terms:

> In order to distinguish mere strangers to a contract from those in the position of third-party beneficiaries, the Court first established a threshold requirement whereby the parties to the contract must have intended the relevant provision to confer a benefit on the third party. In other words, an employer and its customer may agree to extend, either expressly or by implication, the benefit of any limitation of liability clause to the employees. In the circumstances of *London Drugs*, the customer had full knowledge that the storage services contemplated by the contract would be provided not only by the employer, but by the employees as well. In the absence of any clear indication to the contrary, the Court held that the necessary intention to include coverage for the employees was implied in the terms of the agreement. The employees, therefore, as third-party beneficiaries, could seek to rely on the limitation clause to avoid liability for the loss to the customer's property.
>
> The Court further held, however, that the intention to extend the benefit of a contractual provision to the actions of a third-party beneficiary was irrelevant unless the actions in question came within the scope of agreement between the initial parties. Accordingly, the second aspect of the functional inquiry was whether the employees were acting in the course of their employment when the loss occurred, and whether in so acting they were performing the very services specified in the contract between their employer and its customer. Based on uncontested findings of fact, it was clear that the damage to the customer's transformer occurred when the employees were acting in the course of their employment to provide the very storage services specified in the contract.
>
> Taking all of these circumstances into account, the Court interpreted the term 'warehouseman' in the limitation of liability clause to include coverage for the employees, thereby absolving them of any liability in excess of Can$40 for the loss that occurred. The Court concluded that the departure from the traditional doctrine of privity was well within its jurisdiction representing, as it did, an incremental change to the common law rather than a wholesale abdication of existing principles. Given that the exception was dependent on the intention stipulated in the contract, relaxing the doctrine of privity in the given circumstances did not frustrate the expectations of the parties.

The effect of *London Drugs* is, essentially, to introduce into Canadian law a form of vicarious immunity, a principle rejected, as far as English law is concerned, by the House of Lords in *Midland Silicones*. Nevertheless, English cases can be found which reach a similar result to that reached in *London Drugs*, albeit by a different
p. 997 route. One such case ↵ is *Norwich City Council* v. *Harvey* [1989] 1 WLR 828. Norwich City Council employed contractors to construct an extension to a swimming pool. Clause 20(c) of the contract provided that the building was at the sole risk of the employer as regards loss or damage by fire and that the employer would maintain adequate insurance against those risks. The contractors sub-contracted the roofing work to the defendants on the same terms as those contained in the main contract. The property suffered extensive damage as a result of a fire caused by the negligence of one of the defendants' employees. Norwich City Council sued the defendants in tort. The Court of Appeal held, having regard to the contract structure adopted by the parties, that the defendants did not owe a duty of care to the council. May LJ stated (at p. 837):

> [A]pproaching the question on the basis of what is just and reasonable I do not think that the mere fact that there is no strict privity between the employer and the subcontractor should prevent the latter from relying upon the clear basis upon which all of the parties contracted in relation to damage to the employer's building caused by fire, even when due to the negligence of the contractors or subcontractors.

Earlier in his judgment May LJ stated (at p. 834) that 'if in principle the subcontractor owed no specific duty to the building owner in respect of damage by fire, then neither in my opinion can any of its employees have done so'. It therefore followed that both the defendants and their employees were absolved from responsibility for the consequences of their negligence. The case differs from *The Eurymedon* in that reliance was placed on the contract structure, not for the purpose of finding the existence of a contract between the defendants and the council, but for the purpose of negating the duty of care that otherwise would have been owed by the defendants to the council. The difficulty with *Norwich City Council* is that in substance, but not in form, it appears to undermine the House of Lords' rejection of vicarious immunity in *Midland Silicones*. It is therefore difficult to ascertain the limits of the case. On the one hand it could be confined to its own facts. On the other hand, it is possible that it could, in combination with cases such as *London Drugs*, form the building blocks for the construction of a broader exception to the doctrine of privity. The merits of such a development are open to question. The difficult case is one such as *Adler* v. *Dickson* [1955] 1 QB 158 where the plaintiff suffered severe injuries when the gangway of a ship which she was boarding moved and she fell from a height of sixteen feet. She brought an action in negligence against the members of the crew. They sought to rely on the terms of an exclusion clause contained in the ticket issued by the carrier. The Court of Appeal held that they were not entitled to do so. The company had excluded its own liability and had not acted as an agent for its employees. Further, the contract did not expressly exempt the employees from the consequences of their negligence and the Court of Appeal refused to imply such an exemption. But how would a case such as *Adler* be decided on the basis of the principle laid down in *London Drugs*? The difference between the two cases may lie in the position of the two plaintiffs. In *London Drugs* the plaintiffs were found to have accepted that the employees were entitled to rely on the limitation clause, whereas the Court of Appeal in *Adler* formed the view that the plaintiff had no such intention. If this is the case, the ability of the employees to take the benefit of the exclusion or limitation clause will hinge upon the state of knowledge of their employer's customer, which seems, at least from their perspective, to be a less than satisfactory conclusion. But it is preferable to the alternative which is
p. 998 to deprive claimants of their rights of action without their knowledge or assent. This being the case,
↵ *Adler* would probably be decided the same way even if *London Drugs* were subsequently to be imported into English law.

Two other points remain to be made in relation to the judgment of Lord Goff in *The Mahkutai*. The first relates to his reference to *The Pioneer Container*. The latter case is distinguishable from *The Mahkutai* because there the exclusive jurisdiction clause was to be found in the sub-contract not the main contract. Thus the issue before the court in *The Pioneer Container* was not whether the sub-bailee could take the benefit of a clause in a contract to which he was not a party (as it was in *The Mahkutai*), but whether the head bailor was bound by the terms of a clause in a contract to which he was not a party. As Lord Goff points out, the latter question must be answered by reference to the authority given by the head bailor to the intermediate bailor to act on his behalf when agreeing to the term in the sub-bailment (on which see further Treitel, *The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), para 14-081).

The final point relates to Lord Goff's conclusion that the shipowners could not invoke the exclusive jurisdiction clause on the facts of *The Mahkutai*. His reason for reaching this conclusion was, essentially, that the exclusive jurisdiction clause, unlike an exclusion clause, was not a term that operated only for the benefit of the shipowner. It was a term which created mutual rights and obligations and, while the shipowners, being Indonesian, were content to be bound by it on the facts of the case, this would not be so in every case. This being the case, the exclusive jurisdiction clause did not fall within the scope of the Himalaya clause (whether the case would be decided differently under the 1999 Act is discussed at 25.3.6.6).

25.3.5 The Case for Reform

Having considered the doctrine of privity of contract and the various exceptions to it, we are now in a position to weigh up the arguments advanced both for and against reform of the common law rule. The case for reform was put forward by the Law Commission and their report formed the basis of the 1999 Act. They concluded as follows:

Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*

(Law Com No 242, 1996), paras 3.1–3.28

1. The Intention of the Original Contracting Parties are Thwarted

3.1 A first argument in favour of reform ... is that the third party rule prevents effect being given to the intention of the contracting parties. If the theoretical justification for the enforcement of contracts is seen as the realisation of the promises or the will or the bargain of the contracting parties, the failure of the law to afford a remedy to the third party where the contracting parties intended that it should have one frustrates their intentions, and undermines the general justifying theory of contract.

2. The Injustice to the Third Party

3.2 A second argument focuses on the injustice to the third party where a valid contract, albeit between two other parties, has engendered in the third party reasonable expectations of having the legal right to enforce the contract particularly where the third party has relied on
p. 999 that contract to regulate his or her affairs. In most circumstances this argument complements the above argument based on the intentions of the contracting parties. For in most circumstances the intentions of the contracting parties and the reasonable expectations of the third party are consistent with each other. However, one of the most difficult issues that we face is the extent to which the contracting parties can vary or discharge the contract. That issue can be presented as raising the conflict between these two fundamental arguments for reform. In other words, should the injustice to the third party trump the intentions of the parties where those intentions change? As will become clear, we believe that where the injustice to the third party is sufficiently 'strong' (that is, where the third party has not merely had expectations engendered by knowledge of the contract but has relied on the contract or has accepted it by communicating its assent to the promisor) it should trump the changed intentions of the contracting parties. That is, the original parties' right to change their minds and vary the contract should be overridden once the third party has relied on, or accepted, the contractual promise.

3. The Person Who Has Suffered the Loss Cannot Sue, While the Person Who Has Suffered No Loss Can Sue

3.3 In a standard situation, the third party rule produces the perverse, and unjust, result that the person who has suffered the loss (of the intended benefit) cannot sue, while the person who has suffered no loss can sue. This can be illustrated by reference to *Beswick* v. *Beswick*. In that case ... the House of Lords held that the widow could not enforce the promise in her personal capacity, since the contract was one to which she was not privy. However, as administratrix of her husband's estate, she was able to sue as promisee, albeit that she could only recover

nominal damages because the uncle, and hence his estate, had suffered no loss from the nephew's breach. Hence we see that the widow in her personal capacity, who had suffered the loss of the intended benefit, had no right to sue, while the estate, represented by the widow in her capacity as administratrix, who had suffered no loss, had that right. As it was, a just result was achieved by their Lordships' decision that nominal damages were, in this three party situation, inadequate so that specific performance of the nephew's obligation to pay the annuity to the widow should be ordered in respect of the claim by the administratrix. But where specific performance is not available (for example, where the contract is not one supported by valuable consideration or where the contract is one for personal service) the standard result is both perverse and unjust.

4. Even if the Promisee Can Obtain a Satisfactory Remedy for the Third Party, the Promisee May not be Able to, or Wish to, Sue

3.4 In *Beswick* v. *Beswick*, the promisee, as represented by the widow as administratrix, clearly wanted to sue to enforce the contract made for her personal benefit. However, in many other situations in which contracts are made for the benefit of third parties, the promisee may not be able to, or wish to, sue, even if specific performance or substantial damages could be obtained. Clearly the stress and strain of litigation and its cost will deter many promisees who might fervently want their contract enforced for the benefit of third parties. Or the contracting party may be ill or outside the jurisdiction. And if the promisee has died, his or her personal representatives may reasonably take the view that it is not in the interests of the estate to seek to enforce a contract for the benefit of the third party.

5. The Development of Non-Comprehensive Exceptions

3.5 A number of statutory and common law exceptions to the third party rule exist. ... Where an
p. 1000 exception to the third party rule has been either recognised by case-law or created by statute, the rule may now not cause difficulty. Self-evidently, this is not the case where the situation is a novel one in which devices to overcome the third party rule have not yet been tested. We believe that the existence of exceptions to the third party rule is a strong justification for reform. This is for two reasons. First, the existence of so many legislative and common law exceptions to the rule demonstrates its basic injustice. Secondly, the fact that these exceptions continue to evolve and to be the subject of extensive litigation demonstrates that the existing exceptions have not resolved all the problems.

6. Complexity, Artificiality and Uncertainty

3.6 The existence of this rule, together with the exceptions to it, has given rise to a complex body of law and to the use of elaborate and artificial stratagems and structures in order to give third parties enforceable rights. Reform would enable the artificiality and some of the complexity to be avoided. The technical hurdles which must be overcome if one is to

circumvent the rule in individual cases also lead to uncertainty, since it will often be possible for a defendant to raise arguments that a technical requirement has not been fulfilled. Such uncertainty is commercially inconvenient.

7. Widespread Criticism Throughout the Common Law World

3.7 … we saw that there had been criticism of the third party rule and calls for its reform from academics, law reform bodies and the judiciary. We shall see … that the rule has been abrogated throughout much of the common law world, including the United States, New Zealand, and parts of Australia. The extent of the criticism and reform elsewhere is itself a strong indication that the privity doctrine is flawed.

8. The Legal Systems of Most Member States of the European Union Allow Third Parties to Enforce Contracts

3.8 A further factor in support of reforming the third party rule in English law is the fact that the legal systems of most of the member states of the European Union recognise and enforce the rights of third party beneficiaries under contracts. In France, for example, the general principle that contracts have effect only between the parties to them is qualified by Art 1121 of the Code Civil, which permits a stipulation for the benefit of a third party as a condition of a stipulation made for oneself or of a gift made to another. The French courts interpreted this as permitting the creation of an enforceable stipulation for a person in whose welfare the stipulator had a moral interest. In so doing, they widened the scope of the Article so as to permit virtually any stipulation for a third person to be enforced by him or her, where the agreement between the stipulator and the promisor was intended to confer a benefit on the third person. In Germany, contractual rights for third parties are created by Art 328 of the *Bürgerliches Gesetzbuch* permitting stipulations in contracts for performances to third parties with the effect that the latter acquires the direct right to demand performance, although the precise scope of these rights depends on the terms and circumstances of the contract itself. Surveying the member states of the European Union, we are aware that the laws of France, Germany, Italy, Austria, Spain, Portugal, Netherlands, Belgium, Luxembourg, and Greece recognise such rights (as does Scotland), whereas only the laws of England and Wales (and Northern Ireland) and the Republic of Ireland do not. With the growing recognition of the need for harmonisation of the commercial law of the states of the European Union—illustrated most importantly by the work being carried out by the Commission on European
p. 1001 Contract Law under the chairmanship of Professor Ole Lando—it seems likely that there will be ever increasing pressure on the UK to bring its law on privity of contract into line with that predominantly adopted in Europe.

> ### 9. The Third Party Rule Causes Difficulties in Commercial Life
>
> 3.9 Lest it be erroneously thought that the third party rule nowadays causes no real difficulties in commercial life, or that the case for reform is purely theoretical rather than practical, we have chosen two types of contracts—construction contracts and insurance contracts—to illustrate some of the difficulties caused by the rule. ...
>
> ### 10. Conclusion
>
> 3.28 For the reasons articulated above, we believe that a reform of the third party rule is necessary. Contracting parties may not, under the present law, create provisions in their contracts which are enforceable directly by a third party unless they can take advantage of one of the exceptions to the third party rule. Our basic philosophy for reform is that it should be straightforwardly possible for contracting parties to confer on third parties the right to enforce the contract.

The arguments are not all one way, however. While most commentators have accepted the validity of the arguments advanced by the Law Commission, there have been some critical voices. The most sustained critical analysis of the Law Commission's arguments has been provided by Professor Stevens (R Stevens, 'The Contracts (Rights of Third Parties) Act 1999' (2004) 120 *LQR* 292) who provides a point-by-point response to the arguments advanced by the Law Commission. In summary his views are as follows.

First, he points out that it is not entirely accurate to state that the denial of a third party action has the consequence of thwarting the intentions of the original contracting parties. The promisor's intention is only thwarted in the sense that he has refused to carry out the terms of his promise. It is the intention of the promisee which has not been fulfilled but, as Stevens points out, this lack of fulfilment does not require that the third party be provided with a remedy. Rather, it demands that the law fashion an effective remedy for the promisee, to the extent that it has not done so already. He also points out that 'intentions have the unfortunate habit of changing' and that the effect of conferring a right of action on the third party may be to deny to the original contracting parties the right to change their minds by taking away the entitlement of the third party.

Secondly, he disputes the proposition that the common law rule results in injustice to the third party. In his view, 'it may be queried how deserving of sympathy a party who relies upon a promise made to someone else is'. The party who has a legitimate expectation that the promise will be kept is the party to whom the promise was made, namely the promisee. This is a point to which we shall return.

Thirdly, he challenges the validity of the claim that the person who has suffered the loss cannot sue, while the person who has suffered no loss can sue. Here his argument turns in large part on the decision of the House of Lords in *Alfred McAlpine Construction Ltd* v. *Panatown Ltd* [2001] 1 AC 518 (see 23.3.2) and the extent to which that decision plugs any gaps that exist in the law. He notes that the 'weight of authority would seem to favour allowing the promisee to recover substantial damages for his own loss in the situation where the lacuna is
p. 1002 said to exist' and that the 'keenest supporters of the [Contracts (Rights of Third ↵ Parties) Act 1999] are

strongly critical of this approach'. Further, he points out that, even if there is a lacuna in the law, it does not justify conferring a cause of action on the third party: it suffices to 'reform the remedies available to the promisee'.

Fourthly, while he accepts that the promisee may not be able to sue or wish to sue, he points out that it is for the promisee to decide whether or not to enforce his rights and, if he chooses not to do so or is unable to do so, that does not justify the conferral of a right of action on a third party. It is for the promisee to decide what is to be done with his rights.

Fifthly, Professor Stevens claims that some of the alleged exceptions to the privity rule are not in fact true exceptions and, to the extent that they are exceptions, the existence of the present exceptions does not justify the creation of a further exception.

Sixthly, in so far as the common law is said to be complex, artificial, and uncertain, he points out that the Contracts (Rights of Third Parties) Act 1999 has not simplified the law; on the contrary, it has made the law more complex. Further, to the extent that the common law solutions in cases such as *The Eurymedon* [1975] AC 154 can be said to be artificial, Stevens' response is to advocate the adoption of a solution which is less artificial and 'more readily defensible'. Finally, he points to a number of uncertainties in the Act itself so that, once again, it cannot be said that the Act has reduced the uncertainty in the law.

Seventhly, while the existence of widespread criticism of the privity rule throughout the common law world should give us 'pause for thought', it does not 'necessarily demonstrate that English law is wrong and other systems are right'.

Eighthly, in relation to the claim that the legal systems of most Member States of the European Union allow third parties to enforce contracts, he points out that Roman law did not recognize third party rights arising from contracts and that it is necessary to see the third party rule in modern European legal systems in their context. In particular, some European legal systems look to the law of contract to do work which in English law is done by the law of tort. The reality is that English law, French law, and German law (for example) recognize the existence of third party rights in different situations so that it is not true to say that there is a 'European consensus with which English law is out of line'.

Finally, he doubts the validity of the claim that privity causes difficulties in commercial life. He examines the claim that the privity rule causes difficulties in the context of construction contracts and insurance contracts. In the case of construction contracts, he concludes that 'it is unlikely that the Act will have significant impact in the construction industry' and in the case of insurance contracts he claims that the Act 'fails to address the real source of difficulty' in that it is likely to be of 'little assistance to third party beneficiaries under insurance contracts when in competition with the creditors or the estate of the insured'.

The heart of the debate relates to the justice of giving a right of action to the third party. Two principal arguments have been advanced in support of the proposition that justice does not demand the recognition of a third party right of action. The first is that the third party is not a promisee and the second is that the third party has not provided any consideration for the promisor's promise. The first argument is developed in the following extract:

SA Smith, '*Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule*' (1997) 7 *OJLS* 643,

645–646

Defending the Third Party Rule

A simplified example is helpful in discussing the third-party rule. I will refer to the following case as the 'gardening contract':

p. 1003 ↵ A agrees with B that in return for B paying A £100, A will do C's gardening for one year (C is B's sister). A receives the money, does C's gardening for one month, and then goes on holiday for the rest of the year.

The effect of the third-party rule is to preclude C (the third party) from successfully suing A (the promisor) for the value (to C) of A's promise to B: in other words, the third-party rule prevents C from enforcing the contract.

How can this result be justified? The justification, it is suggested, flows from the nature of contractual obligations as voluntary obligations. The specific type of voluntary obligation (promise, agreement, consent, etc.) to which contractual obligations give rise is not important for our purposes: for ease of expression I will adopt conventional terminology and refer to contractual obligations as promissory obligations. What is important is that voluntary obligations, of whatever stripe, do not exist in the air: they are obligations undertaken to particular persons, extending to and only to those persons. A promise is formed by communicating an intention to undertake an obligation. The communication must be addressed to (and received by) the person to whom the obligation is undertaken. This is a general feature of voluntary obligations. In the case of a vow the obligation is addressed to and undertaken to oneself. In the case of a promise the obligation is undertaken to the addressee of the promise. The promissory obligation thus created is an obligation between the person undertaking it, the promisor, and the person to whom the obligation was given, the promisee. Thus the reason that C in our example should not be able to enforce A's promise is the simple but profound fact that A did not make a promise to *C.* The promisor A has a duty to perform his promise, but the duty is owed to B, the promisee, not to *C.*

That promisees and non-promisees are in a different position vis-à-vis the enforcement of a promise is a well-recognised feature of ordinary moral reasoning. Few would dispute that there is a difference between B in our example saying 'but you promised me you would do it' and C saying, 'but I heard you promise B that you would do it'. It is because of this difference that we get more upset, and with good reason, at promise-breakers when the promise broken was made to us than when it was made to someone else, even if the practical consequences are the same in each case. Indeed, that promisees and non-promisees are in a different position regarding the enforceability of a promise is accepted by even the strongest critics of the third-party rule. No one suggests that just anyone should be able to sue on a (legally valid) promise and no legal system allows just anyone to sue. Only some third parties should be able to sue. But if there is a difference between third parties and promisees, what is it? The difference cannot be merely that third parties have not provided consideration … no one supposes that were consideration abolished then just anyone would be able to sue on a promise and in legal systems without a requirement of consideration this clearly is not the case. Nor can the

> difference be that promisees are more likely than third parties to rely on the promise … the short response to this suggestion is that reliance is not relevant to the existence of promissory obligation. Promises may bind even when they have not been relied upon. The only possible significance of the distinction is the most obvious one: the promisee alone is the person to whom the promissory duty is owed. Thus only the promisee can complain of the promise qua promise being broken. This is what it means to be a promisee; and it is why contractual rights have always been understood, correctly, as personal rights.

The distinction that is drawn here by Smith is between a promisee and a third party. Thus a third party is a party to whom a promise of performance has not been made. It follows from this that a third party to whom a promise of performance is made must have a right to enforce that promise. Thus Smith continues (at p. 648):

p. 1004 ↵

> in some privity cases one or both of the contracting parties may have communicated to the third party an intention to undertake an obligation to that party … where such an intention has been communicated the third-party rule is not a bar to the third party bringing an action in contract (the primary bar is consideration). This is because where one or both of the contracting parties communicate to the third party an intention to be bound to that party, the requirements for promissory obligation are satisfied. A promise has been made to the third party. Thus, the third party is not a third party to the agreement made with her, but only to the agreement made between the other two parties. It remains to add only that it is crucial to distinguish this sort of intention (the intention to undertake an obligation) from a mere intent to benefit another or to grant another person legal rights. If X says 'it is my desire and intention to give Y £100 on 1 December' no contract has been created (even ignoring consideration). The same is true if X says 'I grant Y the right to cross over my property'. Assuming that X's words were intended to be understood in their ordinary sense, the reason no contract is created is that while X has intended to do something (to pay a sum of money, to grant a legal right), he has not communicated an intention to put himself under an obligation to do something for Y.

The Law Commission respond to this argument in a footnote located at the end of paragraph 3.1 (extracted earlier). They refer to an article by Kincaid (1994) 8 *JCL* 51 where Kincaid argues in similar terms that only a promisee can enforce the promise. The Law Commission respond by stating that 'in our view, this is to take an unnecessarily narrow view of the morality of promise-keeping where a promise is intended to benefit a third party'. Does this answer the points made by Smith and Kincaid?

The second objection is that the third party has not provided any consideration. Thus Kincaid has argued ('Third Parties: Rationalising A Right to Sue' [1989] *CLJ* 243, 244–245):

> Although frequently no coherent justification is offered for the proposition that it is unjust not to allow third parties to sue, when one is given it is usually that the promisor should not be allowed to get away with breaking his promise. My view is that such an approach is inconsistent with the common-law attitude to civil liability generally. The common law's concern in civil liability is to give redress to the plaintiff, not to punish the defendant. This attitude may be contrasted with the moral flavour of the criminal law, where the focus is on the wrongdoing of the defendant. To use such a focus as the rationale for third-party rights is to depart radically from the common law's approach to promissory liability. If such a departure is desirable, it should be the result of a conscious choice.
>
> Bargain is the common law's present general theory which answers the question, who should be able to enforce promises. The answer is, anyone to whom a promise was made and who has paid the price for it requested of him by the promisor. The plaintiff establishes his right by showing a change in his 'condition' (suffering a detriment as the consideration) and by showing a 'link' to the defendant (the request) which makes it just that the defendant should be responsible for loss suffered by the plaintiff as the result of these two factors.
>
> Clearly the third party cannot qualify as a plaintiff under the bargain theory. He has suffered no detriment at the request of the promisor …

Kincaid's point is not that the third party should not have a right to sue but that recognition of such a right would entail the development of a new theory of promissory liability and that theory would have to
p. 1005 encompass gratuitous promisees as well as third parties. But is it ↵ the case that the third party is in the same position as a gratuitous promisee? Does the fact that the promisee has provided consideration not make a difference? The third party is not seeking to enforce a wholly gratuitous promise. While it may be gratuitous as far as the third party is concerned, the promisee has paid for the promise. But this argument would appear to lead to the conclusion that the right of action belongs in truth to the promisee and not to the third party. However that may be, the arguments of the Law Commission won the day and their report led to the enactment of the Contracts (Rights of Third Parties) Act 1999.

25.3.6 Contracts (Rights of Third Parties) Act 1999

The Contracts (Rights of Third Parties) Act 1999 can now be said to be the principal source of the law relating to third party rights of action. The Act aims to provide a simple mechanism by which two contracting parties can give to a third party the right to enforce a term of their contract. However, the Act is not a straightforward piece of legislation and it requires careful analysis. It will therefore be set out section by section and brief comments will follow most sections.

25.3.6.1 Section 1

> **Right of third party to enforce contractual term**
>
> 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.
>
> (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.
>
> (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.
>
> (4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.
>
> (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).
>
> (6) Where a term of a contract excludes or limits liability in relation to any matter 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.
>
> (7) In this Act, in relation to a term of a contract which is enforceable by a third party—
>
> 'the promisor' means the party to the contract against whom the term is enforceable by the third party, and
>
> 'the promisee' means the party to the contract by whom the term is enforceable against the promisor.

p. 1006 ## Commentary

Section 1 establishes two separate tests of enforceability, the first to be found in section 1(1)(a) and section 1(3) and the second in section 1(1)(b) and section 1(3). The scope of these two tests has been set out by Professor Burrows, the Law Commissioner primarily responsible for the Law Commission report on which the Act was based, in the following terms:

A Burrows, '*The Contracts (Rights of Third Parties) Act and its Implications for Commercial Contracts*' [2000]

***LMCLQ* 540, 542–546**

> The first, and simplest [test of enforceability], is in s.1(1)(a) and s.1(3). By s.1(1)(a) a third party has a right to enforce a term of the contract where the contract expressly provides that he may. This is satisfied where the contract contains words such as 'and C shall have the right to enforce the contract' or 'C shall have the right to enforce terms 25, 26 and 27 of the contract' or 'C shall have the right to sue'. Section 1(3) makes clear that the third party does not have to be named (e.g. Joe Smith or X Co). Rather it is sufficient if the third party is expressly identified in the contract as a member of a class (eg, stevedores, subsequent owners, subsequent tenants) or as answering a particular description (eg, 'person living at 3 Coronation Street' or 'B's nominee'). And the third party does not need to be in existence when the contract is made, so that contracting parties may confer rights on an unborn child, a future spouse, or a company that has not yet been incorporated.
>
> The first test—as clarified in s.1(6)—also covers 'negative rights' (ie, exclusion and limitation clauses) conferred on expressly identified third parties. So, for example, in a head building contract between an employer and head-contractor, if there is a term excluding liability on the part of all subcontractors, and the employers sue a subcontractor in the tort of negligence for damage to the building, the subcontractor will be able to rely on the exclusion clause by reason of s.1(1)(a). Additional words, such as 'and the third party shall be entitled to rely on that exclusion or limitation clause', over and above words clarifying that the clause is for the third party's benefit, seem unnecessary. This is because, by definition, an exclusion or limitation clause is intended to affect the legal rights of beneficiaries of such clauses. The Act therefore provides a solution to the problems raised by cases in the construction industry on exclusion clauses, such as *Norwich City Council* v. *Harvey*. It also produces a solution to the even-better known 'Himalaya clause' difficulties in contracts for the carriage of goods by sea where stevedores wish to take advantage of exclusion clauses in the main contract of carriage to protect them against claims by the owner for negligent damage to the goods in unloading them. …
>
> Less straightforward, and less clear-cut, is the second test of enforceability, which is in section 1(1)(b) and 1(3). If s.1(1)(a) is concerned with the express conferral of rights on a third party, we can say that the second test is concerned with the implied conferral of rights on a third party.
>
> The Act has been criticised in some quarters for including this second test. It has been argued that everything would have been much more certain if there had just been the first test. But there are a number of important justifications for including the second test. I mention here three of them.
>
> (i) Contractual rights as between two parties are not merely a matter of express rights. Rather they include implied rights through the concept of implied terms. Just as the normal law of
p. 1007 contract would be artificially restricted if one confined it to express terms, so the same applies to third party rights. Put another way, if one is seeking to effect parties' intentions, these are not necessarily expressed intentions.
>
> (ii) Examination of past cases coming before the courts where privity has caused problems shows that a reform confined to an express conferral of rights would not solve many of the problems. For example, cases concerning A contracting with B to pay money to C, such as

> *Beswick* v. *Beswick* and *Woodar* v. *Wimpey*; the booking of a holiday for family members or friends, as in *Jackson* v. *Horizon Holidays*; or the taking out of liability insurance designed to protect third parties to the contract, as in *Trident General Insurance Co Ltd* v. *McNiece Bros.* In all of these well-known cases, unless the parties included a magic formula so as to fall within the first test (eg, 'and the third party shall have the right to enforce the term'), the 1999 Act would not have improved the position of the third parties.
>
> (iii) Closely linked to the second point is that a magic formula within the first test will only be used in well-drafted contracts. But not all contracts are well drafted, and in the consumer sphere good legal advice may not be affordable.
>
> For those sorts of reasons the Act contains a second test of enforceability according to which a third party will have a right to enforce a term if three conditions are satisfied: first, the term purports to confer a benefit on him (s.1(1)(b)); secondly, he is expressly identified by name, class or description (s.1(3)); unless, on a proper construction of the contract the parties did not intend the term to be enforceable by him (s.1(2)).
>
> The second test therefore uses a rebuttable presumption of intention. … It is this rebuttable presumption that provides the essential balance between sufficient certainty for contracting parties and the flexibility required for the reform to deal fairly with a huge range of different situations. The presumption is based on the idea that, if you ask yourself, 'When is it that parties are likely to have intended to confer rights on a third party to enforce a term, albeit that they have not expressly conferred that right', the answer will be: 'Where the term purports to confer a benefit on an expressly identified third party'. That then sets up the presumption. But the presumption can be rebutted if, as a matter of ordinary contractual interpretation, there is something else indicating that the parties did not intend such a right to be given.
>
> So, if money is to be paid by A not to B but to an expressly identified third party C, the presumption is that C has the right to enforce that term. But that presumption can be rebutted. For example, there may be an express term of the contract laying down that C shall have no right of enforceability. Or the rebuttal may occur because of other inconsistent terms. For example, the contract may prohibit assignment to C of B's right to enforce the payment without A's written consent. That would indicate that the parties did not intend to confer on C an immediate right of enforceability.
>
> There are two main additional points to make on this second test. First … the words 'purport to confer a benefit on' the third party are designed to ensure that the presumption is triggered only where the third party is to receive a benefit directly from the promisor. They are not designed to cover consequential or incidental benefits stemming from the promisor's performance. Professor Treitel gives a very good example. If A were employed by B to 'cut my (B's) hedge adjoining C's land', performance by A might benefit C but the term would not purport to confer a benefit on *C.* Similarly, a solicitor's contractual obligation to use reasonable care in drawing up a will would not, vis-à-vis, the beneficiaries of that will, fall within s.1(1)(b) because the term does not purport to confer a benefit on the beneficiaries of the will; the benefit to them derives from the testator not from the solicitor, whose role is to enable his client, at the client's discretion, to confer a benefit on the beneficiaries. …

p. 1008

> ↵ Secondly, what material can be used in determining the proper construction of the contract under s.1(2)? The idea was that the normal objective approach to contractual interpretation should be applied, subject to there being a reversed burden of proof …
>
> So much, then, for the two tests of enforceability. It can be seen that a contract draftsman can make the position absolutely certain; either by giving identified third parties express rights to enforce particular terms so as to fall within the first test; or by saying that third parties shall not have the right to enforce particular terms or indeed any terms. If a contract draftsman does not want anything to do with the 1999 Act, a simple standard term, such as the following, can be included: 'A person who is not a party to this agreement shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any of its terms [except and to the extent that this agreement expressly provides for such Act to apply to any of its terms]'.
>
> It should be noted that that term seems preferable, generally speaking, to merely saying: 'A person who is not a party to this agreement shall have no right to enforce any of its terms'. This formulation would exclude any right of a third party which exists apart from the 1999 Act (eg, by assignment or trust of the promise or existing statutory exceptions) and this may not be what is intended.
>
> The concern has been expressed that, if the contract draftsman does not say anything expressly one way or the other, the 1999 Act can lead to unintended liabilities being imposed on the parties. If that were the case it would certainly contradict the purpose of the second test, which is to give effect to the parties' intentions, albeit by using a presumption. If applying normal objective rules of construction, including implied terms, neither contracting party intended to confer a right on a third party, the presumption would be rebutted and no right would be conferred on the third party. The real concern, I would suggest, is that one party (the promisor) might conceivably find itself landed with an obligation to a third party that it subjectively did not intend to undertake; but unintended liabilities in that sense are a risk of any contract, given objective interpretation. …
>
> What does the right of enforceability mean? This is laid down in s.1(5). The third party has the same remedies for breach of the contractual term as if he had been a party to the contract. He can therefore recover expectation (or reliance) damages for his own loss (subject to normal restrictions, for example, remoteness or the duty to mitigate). Or applying analogous rules to those normally applied, the third party may be awarded specific performance or an injunction.

25.3.6.1.1 Expressly identified

A number of points arise here. The first relates to the requirement in section 1(3) that the third party must be expressly identified in the contract. A failure to identify the third party has the consequence that the third party cannot rely upon the Act. The word 'expressly' is important in this context; it has been held that it precludes identification of the third party by a process of implication (*Avraamides* v. *Colwill* [2006] EWCA Civ 1533, [2007] BLR 76), although it does permit a court to identify the third party by a process of construction of the contract as a whole (*Chudley* v. *Clydesdale Bank plc (trading as Yorkshire Bank)* [2019] EWCA Civ 344, [2020] QB 284). The requirement set out in section 1(3) is separate from that to be found in section 1(1)(b) and, while

the requirements of both provisions must be satisfied if the third party is to be entitled to assert a third party right under the Act, a single term of the contract can in principle satisfy the requirements of both provisions (*Chudley*).

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25.3.6.1.2 Purports to confer a benefit

The second relates to the meaning of the words 'purports to confer a benefit' on the third party in section 1(1)(b). It has proved to be a relatively easy test for third parties to satisfy (see, for example, *Nisshin Shipping Co Ltd* v. *Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38, *Laemthong International Lines Co Ltd* v. *Artis (The Laemthong Glory) (No 2)* [2005] EWCA Civ 519, [2005] 1 Lloyd's Rep 688, and *Great Eastern Shipping Co Ltd* v. *Far East Chartering Ltd (The Jag Ravi)* [2012] EWCA Civ 180, [2012] 1 Lloyd's Rep 637). As Lindsay J observed in *Prudential Assurance Co Ltd* v. *Ayres* [2007] EWHC 775 (Ch), [2007] 3 All ER 946, [29] (the Court of Appeal subsequently allowed an appeal from the decision of Lindsay J but, on the view which they took of the meaning of the deed, no question arose in relation to the scope of the 1999 Act: [2008] EWCA Civ 52) the requirements of the subsection are satisfied if on a true construction of the term in question its sense has the effect of conferring a benefit on the third party in question. There is no requirement that the benefit on the third party must be the predominant purpose or intent behind the term or that the subsection is inapplicable if a benefit is conferred on someone other than the third party (*Cavanagh* v. *Secretary of State for Work and Pensions* [2016] EWHC 1136 (QB), [2016] ICR 826). However, 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. One of the purposes of the contract must have been to benefit the third party. The fact that the third party has obtained an incidental benefit as a result of performance will not suffice (*Dolphin Maritime & Aviation Services Ltd* v. *Sveriges Angfartygs Assurans Forening* [2009] EWHC 716 (Comm), [2009] 2 Lloyd's Rep 123, [74]–[77]).

25.3.6.1.3 The scope of section 1(2)

This leads on to the third point, which relates to the scope of section 1(2). A third party who satisfies the modest requirements of section 1(1)(b) may be defeated by section 1(2). But, in relation to that subsection, the onus of proof is upon the party who alleges that section 1(1)(b) has been disapplied (*Nisshin Shipping Co Ltd* v. *Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38). To this extent, section 1(2) has been held to establish a 'rebuttable presumption' in favour of the existence of a third party right of action (*Secretary of State for the Home Department* v. *Cox* [2023] EWCA Civ 551, [2023] ICR 914, [72], [102] and [117]).

It is important to note the exact wording of section 1(2). It provides that section 1(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'. Two points should be noted when seeking to decide whether or not section 1(1)(b) has been disapplied. The first is the need for a 'proper construction of the contract' and here a court should apply the principles which it would ordinarily apply to the interpretation of a contract (on which see Chapter 11). The second is that the intention to be discerned is that of 'the parties' and not the intention of one of the parties to the contract. This being the case, it is not sufficient to negate the third party right of action for one of the parties to prove that it did not intend the term to be enforceable by a third party; it is necessary to go further and establish that such was the intention of both parties to the contract (*Secretary of State for the Home Department* v. *Cox* [2023] EWCA Civ 551, [2023] ICR 914, [77] and [118]).

Given the existence of this 'rebuttable presumption' in favour of the existence of a third party right of action, contracting parties who wish to avoid the creation of a third party right of action are best advised to insert
p. 1010 into their contract an express term which provides that no ↵ third party has a right to enforce a term of their contract. This will suffice to negate the third party right of action. More difficult is the case where the contract contains no such express provision but the contracting parties maintain that it was their intention to exclude the third party right of action. The difficulty which arises for the contracting parties in such a case is that silence is a problematic basis from which to argue that the contracting parties did not intend to confer a right of action upon the third party. As Colman J observed in *Nisshin Shipping* at [23], it does not suffice for the contracting parties to prove that the contract is 'neutral': they must prove that they did not intend third party enforcement in order to negate the existence of the third party right.

It should not be inferred from this that it is impossible for the contracting parties to prove that they had an implied intention to exclude the third party right of action. A court may conclude, having regard to the wider factual background, that the evidence establishes that the contracting parties did intend to exclude the third party right of action (a recent, and controversial decision to this effect is the majority decision of the Court of Appeal in *Secretary of State for the Home Department* v. *Cox* [2023] EWCA Civ 551, [2023] ICR 914 where it was held that the parties to a contract of employment did not intend a term of the contract to be enforceable by the trade union which represented the employees). Beyond evidence of the factual background (which will vary from case to case), are there any factors which can be identified which might assist in determining whether or not the parties impliedly intended to exclude the third party right of action? Two possibilities are worthy of further discussion in this context.

The first is to assert that the third party already has a right of action so that it is unnecessary to confer a further right of action under the Act. This technique was employed in *Nisshin Shipping* where it was argued that the third party did not have a right of action under the Act because the contracting parties intended to create a trust of a promise in favour of the third party (on which see 25.3.3.2). Colman J rejected this submission and held that the 1999 Act provided a much simpler method by which the third party could enforce its rights and, this being the case, it could not be inferred that the parties had intended to confine the rights of the third party to those arising under the trust and to deny it the right to rely on the 1999 Act. Thus it cannot be said that it follows from the fact that the third party has an existing, limited right of action that the contracting parties intended to exclude the existence of a right of action under the Act.

The second technique is to argue that the recognition of a third party right under the Act would be inconsistent with the contractual structure which the contracting parties have set up (on which see 25.2). This possibility was recognized by the Law Commission in paragraph 7.18 of its report where it stated:

> [W]e should clarify that … we do not see our second limb as cutting across the chain of sub-contracts that have traditionally been a feature of [the construction] industry. For example, we do not think that in normal circumstances an owner would be able to sue a sub-contractor for breach of the latter's contract with the head-contractor. This is because, even if the sub-contractor has promised to confer a benefit on the expressly designated owner, the parties have deliberately set up a chain of contracts which are well understood in the construction industry as ensuring that a party's remedies lie against the other contracting party only.

An unsuccessful attempt was made to rely on this passage for the purpose of negating the existence of a third party right of action in *Laemthong International Lines Co Ltd* v. *Artis (The Laemthong Glory) (No 2)* [2005] EWCA Civ 519, [2005] 1 Lloyd's Rep 688. The owners of a vessel chartered it to charterers. Cargo was loaded on the vessel and it was consigned to the receivers. The vessel arrived at its destination before the bill of lading and so an arrangement was made to deliver the cargo to the receivers in return for letters of indemnity. The charterers issued a letter of indemnity in favour of the owners, and the receivers in turn issued one which was addressed to the charterers. The central issue between the parties was whether the owners were entitled to enforce the letter of indemnity against the receivers. The receivers sought to prove that the contracting parties did not intend the terms of the receivers' letter of indemnity to be enforceable by the owners by relying upon the 'chain' of indemnities which the parties had created. In essence their submission was that the receivers had given an indemnity to the charterers and that the charterers had given an indemnity to the owners. In these circumstances, the receivers submitted, the owners could not jump up the chain of contracts and enforce the letter of indemnity given by the receivers. The Court of Appeal rejected this submission. In essence they held (at [52]–[54]) that there was no established practice of the type found by the Law Commission to exist in the construction industry which negated the existence of the third party right of action. Thus the key to the example provided by the Law Commission is probably the understanding and the practice of the construction industry. Where contracts are linked sequentially but there is no proven understanding that the sequence of contracts prevents recourse to a third party right of action, the linked nature of the contracts will not of itself preclude the existence of a third party right of action under the 1999 Act (see also *Great Eastern Shipping Co Ltd* v. *Far East Chartering Ltd (The Jag Ravi)* [2012] EWCA Civ 180, [2012] 1 Lloyd's Rep 637).

25.3.6.1.4 Applying the Act to case law which pre-dates the Act

Another way of attempting to ascertain the limits of section 1 is to apply it to the facts of cases decided prior to the enactment of the 1999 Act. This is not always an easy task because the parties, at the time of these cases, were operating on the assumption that the law did not recognize a third party right of action of the type contained in the 1999 Act. *Tweddle* v. *Atkinson* (25.3.1) would appear to fall within the scope of section 1(1)(a) because the contract between John Tweddle and William Guy expressly stated that William Tweddle was to have the right to enforce the contract. On the other hand, *White* v. *Jones* (25.3.3.6) satisfies neither test. The wording of section 1(1)(b) will not stretch to the *White* v. *Jones* fact situation because the undertaking of the solicitor to exercise reasonable care and skill does not purport to confer a benefit on the beneficiary. Section 1(6) deals with exclusion and limitation clauses and provides a much simpler mechanism by which the benefit of such clauses can be extended to third parties (and so would appear to cover *The Eurymedon* type case, 25.3.4).

Slightly more difficult are cases such as *Beswick* v. *Beswick* (25.3.2.1) and *Jackson* v. *Horizon Holidays Ltd* (25.3.2.3). Professor Burrows implies that they would now fall within the scope of the 1999 Act and this is confirmed by the Law Commission report at paragraphs 7.46 and 7.40 respectively. In relation to *Beswick* the Law Commission state (at para 7.46):

> [T]he provision of old Mr Beswick's contract with his nephew providing for payment of an annuity to Mrs Beswick would give Mrs Beswick a presumed right of enforceability under our second limb. The nephew promised to confer the benefit (the annuity payments) on Mrs Beswick, who was expressly named. The presumption could only be rebutted if the nephew could demonstrate that, on the proper
> p. 1012 construction of the contract, he and old Mr Beswick ↵ had no intention at the time of contracting that Mrs Beswick should have the right to enforce the provision. In our view, the nephew would not be able to satisfy the onus of proof so that Mrs Beswick would have the right of enforcement.

It is certainly the case that the 1999 Act makes it easier for the parties to confer an enforceable right of action on the third party. But it does not necessarily follow that *Beswick* would now fall within the scope of the Act. Professor Treitel has expressed his doubts on this score. He points out (*Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002), p. 87) that the agreement concluded between Peter and John Beswick was drawn up by a solicitor and that 'it would have been so easy for the solicitor to have drawn up the agreement so as to confer enforceable rights on Ruth [i.e., Mrs Beswick]'. It could have been done by, for example, making her a party to the agreement. Why did the solicitor not confer enforceable rights on Ruth? One possible answer, which Professor Treitel is reluctant to adopt in the absence of any evidence, is that the solicitor was negligent. The other possibility suggested by Professor Treitel is that:

> he was simply carrying out his instructions. We have no way of knowing what passed between him and his clients on 14 March 1962; but there is a possibility of his having told Peter and John (1) that they could create legally enforceable rights in favour of Ruth but (2) that if they did so, their right to vary their contract would be lost or limited. Peter and John might not have liked that idea and instructed him accordingly.

This latter possibility is significant in terms of the application of the Act. As Professor Treitel points out, the requirements of section 1(1)(a) were not satisfied, in that the agreement did not expressly provide that Mrs Beswick was to have the right to enforce any term of the contract. But she would have a prima facie right of action under section 1(1)(b) unless the presumption was rebutted under section 1(2). At this point it would be necessary to discover what was said by the parties in the solicitor's office on the fateful day in question and to explore the reasons for the failure of the solicitor to confer an enforceable right of action upon Mrs Beswick. If he was acting on instructions not to confer a right of action upon her then the presumption that she was intended to have a right of enforcement would be rebutted. Of course, as Professor Treitel points out, we will never know the reason for the failure to confer an enforceable right of action upon Mrs Beswick but his careful examination of the facts of the case serves as a helpful reminder of the point that we should not lightly assume that the intention of two contracting parties is inevitably to confer a right of action on the third party.

Cases such as *Jackson* v. *Horizon Holidays Ltd* probably fall within the scope of section 1(1)(b) provided that the members of the holiday party are identified at the time of entry into the contract. Thus Treitel states (*The Law of Contract* (14th edn, Sweet & Maxwell, 2015, edited by Edwin Peel), para 14-106):

> 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 subs 1(1); but no such rights are likely to be acquired if a person simply rented a holiday cottage without giving any information as to the number or names of the persons with whom he proposed to share the accommodation.

p. 1013 ↵ Professor Burrows also suggests that a third party, C, will not acquire a right to enforce a term of the contract where the contract between A and B contains a term which prohibits the assignment to C of B's right to enforce the payment without A's written consent. But can one go even further and suggest that a clause that entitles B to assign his rights to C operates to deny to C the right to enforce the term of the contract under section 1 of the Act? In such a case C acquires rights as the assignee of B. What useful purpose is served by conferring on C an additional right of action under the 1999 Act? Might it not be the case that the intention of the parties in such a case was to confer upon C one right of action, namely his rights as assignee of B and so negative the intention to confer a right of action under the Act? Obviously much will depend upon the facts of the individual case but there must at least be the possibility that a court would reach such a conclusion.

25.3.6.1.5 Drawing the threads together

The general impression which can be gleaned from the case-law to date is that the courts have on the whole adopted a broad interpretation of section 1, the consequence of which may be to confer a right of action on a third party which in all probability was not intended by the parties to the original contract (a possible example being the decision of the Court of Appeal in *Chudley* v. *Clydesdale Bank plc (trading as Yorkshire Bank)* [2019] EWCA Civ 344, [2020] QB 284). As Professor Davies has remarked (2021) 137 *LQR* 101, 111–112:

> The 1999 Act has been interpreted in a broad manner that favours third parties, so the choice of commercial parties to exclude the operation of the Act in order to avoid unanticipated outcomes remains justified. Ironically, the fact that the Act is excluded so frequently may drive the courts towards an expansive interpretation of the legislation. In *Chudley*, Longmore LJ emphasised that the parties could have excluded the third party's right to enforce the contract but did not do so. Where commercial parties do not make the most of this option, courts might feel emboldened to interpret the Act broadly in favour of third parties.

In this sense section 1 may be said to give to contracting parties an incentive to make their intention clear. They can do so either by conferring a right of action upon the third party or by making it clear that the third party has no such right of action. The initial reaction in commercial practice, particularly in the construction industry, was to insert into contracts a clause the effect of which was to exclude the application of the 1999 Act. This negative response to the Act is still to be found in standard form contracts in the construction industry. The attitude within commercial practice more generally remains cautious but the initial hostility is perhaps being replaced by a realization that the Act is beneficial where the contracting parties do intend to create an enforceable right of action in the third party. As this realization dawns, one might expect that greater use will be made of the Act. But in those cases where the intention is not to confer a right of action on the third party, the safest course remains to say so expressly and to exclude the operation of the Act.

Four other points can be made in relation to section 1. First, the section makes no mention of the doctrine of consideration but the effect of the statement that the third party 'may in his own right enforce a term of the contract' is sufficient to make it clear that the third party has a right to enforce the term notwithstanding the fact that he has not provided any consideration.

Secondly, as Professor Burrows points out, the third party has the same remedies for breach of the contractual
p. 1014 term as if he had been a party to the contract. Professor Andrews ↵ illustrates the point in the following way ('Strangers to Justice No Longer: The Reversal of the Privity Rule Under the Contracts (Rights of Third Parties) Act 1999' [2001] *CLJ* 353, 360):

> Suppose A promises B that A will pay C £100,000, and C relies on this promise to the extent of £5,000. The court must decide whether C is entitled on the facts to £5,000 (the amount of his reliance) or the sum of £100,000, the latter award fully vindicating C's expectation of performance by A … The Law Commission clearly wished third parties to gain satisfaction of their 'expectation interest' and not to be fobbed off with protection of their reliance loss. … It seems likely that the courts will give effect generally to the third party's expectation interest unless, in exceptional circumstances, this will lead to injustice. Here we can peer at the future only through a glass, darkly.

How much do you think C should be entitled to recover in this hypothetical case?

Thirdly, section 1 refers to 'contracts' and it is therefore a matter of some doubt whether or not the Act applies to a deed. The Act is silent on this point. This is unfortunate and is in marked contrast with section 4 of the New Zealand Contracts (Privity) Act 1982 which states that 'where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person … '. However, in *Prudential Assurance Co Ltd* v. *Ayres* [2007] EWHC 775 (Ch), [2007] 3 All ER 946, [27] there was no challenge to the proposition that a supplemental deed was a contract for the purposes of the Act. The lack of challenge on the point means that it cannot be taken to have been conclusively resolved. But the fact that no one challenged the assumption does indicate that the point was not thought to be seriously open for argument.

Finally, there is no requirement that the third party should have knowledge of its right to enforce a term of the contract at the time at which the parties entered into the contract which created the third party right. As Flaux LJ observed in *Chudley* v. *Clydesdale Bank plc (trading as Yorkshire Bank)* [2019] EWCA Civ 344, [2020] QB 284, [80], a claim under the Act is not a reliance-based claim. It is a claim for breach of contract and 'it is not a requirement of the 1999 Act that a third party who is entitled to the benefit of a contract was aware of the contract at the time it was made or at any particular time thereafter'.

25.3.6.2 Section 2

Variation and rescission of contract

2.—(1) 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,

(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.

(2) The assent referred to in subsection (1)(a)—

(a) may be by words or conduct, and

(b) if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until received by him.

p. 1015

(3) Subsection (1) is subject to any express term of the contract under which—

(a) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party, or

(b) the consent of the third party is required in circumstances specified in the contract instead of those set out in subsection (1)(a) to (c).

(4) Where the consent of a third party is required under subsection (1) or (3), the court or arbitral tribunal may, on the application of the parties to the contract, dispense with his consent if satisfied—

(a) that his consent cannot be obtained because his whereabouts cannot reasonably be ascertained, or

(b) that he is mentally incapable of giving his consent.

(5) The court or arbitral tribunal may, on the application of the parties to a contract, dispense with any consent that may be required under subsection (1)(c) if satisfied that it cannot reasonably be ascertained whether or not the third party has in fact relied on the term.

(6) If the court or arbitral tribunal dispenses with a third party's consent, it may impose such conditions as it thinks fit, including a condition requiring the payment of compensation to the third party.

(7) The jurisdiction conferred on the court by subsections (4) to (6) is exercisable by both the High Court and a county court.

Commentary

The aim of section 2 is to strike a balance between the rights of the third party and the rights of the original contracting parties. It does so by limiting the right of the parties to the contract to rescind or to vary the rights of the third party without the latter's consent. In this sense the right of the third party may trump the rights of the parties to the initial contract. The point at which the contracting parties lose the right to rescind or vary the terms of their contract is either when the third party communicates his assent to the term to the promisor (section 2(1)(a)) or where he relies on that term and the promisor is aware of that reliance or ought to have foreseen that reliance (section 2(1)(b), (c)). From the perspective of the third party, the safest course of action is expressly to communicate his assent to the promisor. More difficult is the case where the third party alleges that he has relied on the term. As Professor Andrews has pointed out ([2001] *CLJ* 353, 366) it 'seems inevitable' that sections 2(1)(b) and 2(1)(c) 'will excite litigation'.

But it is important to note that it is open to the contracting parties to reserve to themselves the right to rescind or vary their contract without obtaining the consent of the third party provided that they reserve such a power to themselves in their contract (section 2(3)). In this way the Act preserves the freedom of contract of the contracting parties. They remain entitled to define for themselves the scope of the right which the third party will acquire but, in the event of their failure to specify the scope of that right in their contract, they may lose their right to rescind or vary their contract if the third party satisfies the requirements of section 2(1).

What is the meaning of the word 'rescind' in section 2(1)? It clearly encompasses a case where the two parties to the contract attempt consensually to terminate their contract. But what happens in the case where the
p. 1016 promisor wishes to set aside the contract because of a ↵ repudiatory breach committed by the promisee? Can the promisor terminate the contract notwithstanding the fact that the third party has satisfied the requirements of section 2(1)? The word 'rescind' was inserted into the Bill by way of an amendment made in the House of Lords (the word used in the Law Commission draft Bill being 'cancel'). Moving the amendment the Lord Chancellor stated that 'we would not want a contracting party to be prevented from accepting a repudiation because of the interests of the third party' (HL Deb, vol 601, col 1055, 27 May 1999). This being the case, it would appear that the promisor can elect to terminate the contract in the event that the promisee commits a repudiatory breach and that the effect of the termination will be to deprive the third party of his right to enforce the term. This point is of significance with regard to *Tweddle* v. *Atkinson* (25.3.1). In *Beswick* v. *Beswick* (25.3.2.1) Lord Denning pointed out that it would appear that the reason for the failure of William Tweddle's claim was that his father had not paid the promised £100. Would this failure on his father's part also prevent William Tweddle from bringing a claim under the Act? It appears that it would. His claim would fail either because William Guy made a conditional promise to pay William Tweddle (that is, he would pay provided that John Tweddle also paid) and that condition was never fulfilled or because John Tweddle's failure to make the payment was a repudiatory breach of contract which William Guy accepted, thereby terminating the contract and with it any third party right previously enjoyed by William Tweddle. A similar result would appear to follow both in the case where the promisor has a right to set aside the contract against the promisee on a ground such as misrepresentation, undue influence, etc. and in the case where the contract is brought to an end as a result of the application of the doctrine of frustration. This result can be justified either on the ground that the contract has not been rescinded 'by agreement' within the meaning of section 2 or on the ground that section 3 (extracted later) entitles the promisor to invoke against the third party any defences that he would have had to the claim had it been brought by the promisee.

Can the contracting parties confer on the third party a right which is irrevocable from the moment of its creation? The Law Commission concluded that they could not. They stated at paragraph 9.46 of their report:

> We do not see the attraction, nor the justification, for holding the contracting parties to a contract which the third party has neither relied upon nor accepted. In our view this would be an unreasonable fetter on the contracting parties' freedom of contract which could not be justified by reference to any injustice to another party. In any event, this would cut across the standard contractual principle that the parties are free to vary any term of the contract, even a 'no-variation' term. We therefore consider that any provision of a contract for the benefit of a third party which purports to render that contract irrevocable should be as open to variation or discharge as any other contractual term. Similarly if the parties have expressly laid down a crystallisation test different from reliance or acceptance, they should be free to vary it prior to reliance or acceptance by the third party.

Professor Burrows has since stated that this passage is 'misleading' ([2000] *LMCLQ* 540, 547 fn. 22) and he concludes that it must give way to the 'broad wording' of section 2(3)(b) which, in his view, entitles 'the parties by an express term to make the contract irrevocable', that is to say they can give 'the third party absolute security irrespective of the third party's reliance or communication of intent'. As Professor Andrews has pointed out ([2001] *CLJ* 353, 362) it would be 'unfortunate if the Law Commission's view were to prevail
p. 1017 because this would create a trap for the third party. Faced by such an ostensibly irrevocable term, C might ↵ wrongly suppose that his rights under A and B's contract are indefeasible even if he neither assents to the relevant term nor relies upon it.' In the absence of case-law, and given this conflict of opinion, the matter must be regarded as one of some doubt. This being the case, parties who wish to confer on the third party a right that is irrevocable from the moment of its creation would be better advised to create a trust of the contractual right (on which see 25.3.3.2).

25.3.6.3 Section 3

> **Defences etc. available to promisor**
>
> 3.—(1) Subsections (2) to (5) apply where, in reliance on section 1, proceedings for the enforcement of a term of a contract are brought by a third party.
>
> (2) The promisor shall have available to him by way of defence or set-off any matter that—
>
> (a) arises from or in connection with the contract and is relevant to the term, and
>
> (b) would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.
>
> (3) The promisor shall also have available to him by way of defence or set-off any matter if—
>
> (a) an express term of the contract provides for it to be available to him in proceedings brought by the third party, and
>
> (b) it would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.
>
> (4) The promisor shall also have available to him—
>
> (a) by way of defence or set-off any matter, and
>
> (b) by way of counterclaim any matter not arising from the contract,
>
> that would have been available to him by way of defence or set-off or, as the case may be, by way of counterclaim against the third party if the third party had been a party to the contract.
>
> (5) Subsections (2) and (4) are subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim.
>
> (6) Where in any proceedings brought against him a third party seeks in reliance on section 1 to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract.

Commentary

The effect of this section is to protect the position of the promisor in so far as it entitles the promisor to rely, in an action brought by the third party, on the defences that would have been available to the promisor had he been sued on the contract by the promisee. This provision further demonstrates the fact that the third party right of action cannot be described as a right to enforce the promise of performance in that his right is subject to such rights as the promisor has against the promisee.

However, the entitlement of the promisor to bring into account matters relevant between himself and the promisee is limited by the terms of section 3(2). First, the promisor is entitled to rely on a 'defence or set-off' p. 1018 but cannot bring into account a counterclaim against ↵ the promisee. The reason for this is essentially to protect the position of the third party. The effect of a defence or set-off may be to reduce the third party's claim to zero but it cannot leave the third party with a liability to the promisor. However, had the promisor been entitled to rely on a counterclaim which he had against the promisee, and the size of that counterclaim had exceeded the amount claimed by the third party, the effect might have been to leave the third party liable to the promisor. Secondly the matter must have arisen 'from or in connection with the contract' and be 'relevant to the term'.

Section 3(4) takes into account the equities as between the third party and the promisor in that the third party's claim is subject to the defences, counterclaims (not arising from the contract), and set-offs that would have been available to the promisor had the third party been a party to the contract. This time the promisor is entitled to bring any counterclaim against the third party into account: the reason for this is that, if the promisor does have a counterclaim against the third party, the third party cannot be made worse off by allowing the promisor to bring that counterclaim into account in the proceedings.

Once again the contracting parties can contract out of this provision either by providing that the promisor may not raise any defence or set-off that would have been available against the promisee or by making the third party's claim subject to all defences and set-offs that the promisor would have had against the promisee whether or not they arose from or in connection with the contract and were relevant to the term.

25.3.6.4 Section 4

> **Enforcement of contract by promisee**
>
> 4. Section 1 does not affect any right of the promisee to enforce any term of the contract.

Commentary

The effect of this section is to preserve the rights of the promisee. It therefore follows that the rights of the promisee (discussed at 25.3.2) are unaffected by the enactment of the 1999 Act. This being the case, the promisor is now potentially exposed to liability both to the promisee and the third party. Section 5 of the Act seeks to protect the promisor against the possibility of double liability.

25.3.6.5 Section 5

> **Protection of promisor from double liability**
>
> 5. Where under section 1 a term of a contract is enforceable by a third party, and the promisee has recovered from the promisor a sum in respect of—
>
>   (a) the third party's loss in respect of the term, or
>
>   (b) the expense to the promisee of making good to the third party the default of the promisor,
>
> then, in any proceedings brought in reliance on that section by the third party, the court or arbitral tribunal 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.

p. 1019

Commentary

Section 5 deals with the case where the third party brings an action against the promisor after the promisee has brought an action against the promisor and has recovered from the promisor a sum of money in respect of the third party's loss. In such a case the court or tribunal shall reduce any award to the third party to the extent that it thinks appropriate taking account of the sum recovered by the promisee. The section does not deal with the case where the promisee brings an action against the promisor after the third party has sued the promisor and recovered damages in respect of its loss. In such a case the promisee will not be entitled to recover damages in respect of the loss that has already been made good and will be confined to a claim for its own loss (which is likely to be nominal in most cases).

25.3.6.6 Section 6

Exceptions

6.—(1) Section 1 confers no rights on a third party in the case of a contract on a bill of exchange, promissory note or other negotiable instrument.

(2) Section 1 confers no rights on a third party in the case of any contract binding on a company and its members under section 33 of the Companies Act 2006 (effect of company's constitution).

(2A) Section 1 confers no rights on a third party in the case of any incorporation document of a limited liability partnership or any agreement (express or implied) between the members of a limited liability partnership, or between a limited liability partnership and its members, that determines the mutual rights and duties of the members and their rights and duties in relation to the limited liability partnership.

(3) Section 1 confers no right on a third party to enforce—

(a) any term of a contract of employment against an employee,

(b) any term of a worker's contract against a worker (including a home worker), or

(c) any term of a relevant contract against an agency worker.

(4) In subsection (3)—

(a) 'contract of employment', 'employee', 'worker's contract', and 'worker' have the meaning given by section 54 of the National Minimum Wage Act 1998,

(b) 'home worker' has the meaning given by section 35(2) of that Act,

(c) 'agency worker' has the same meaning as in section 34(1) of that Act, and

(d) 'relevant contract' means a contract entered into, in a case where section 34 of that Act applies, by the agency worker as respects work falling within subsection (1)(a) of that section.

(5) Section 1 confers no rights on a third party in the case of—

(a) a contract for the carriage of goods by sea, or

(b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention, except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract.

(6) In subsection (5) 'contract for the carriage of goods by sea' means a contract of carriage —

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(a) contained in or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction, or

(b) under or for the purposes of which there is given an undertaking which is contained in a ship's delivery order or a corresponding electronic transaction.

(7) For the purposes of subsection (6)—

(a) 'bill of lading', 'sea waybill' and 'ship's delivery order' have the same meaning as in the Carriage of Goods by Sea Act 1992, and

(b) a corresponding electronic transaction is a transaction within section 1(5) of that Act which corresponds to the issue, indorsement, delivery or transfer of a bill of lading, sea waybill or ship's delivery order.

(8) In subsection (5) 'the appropriate international transport convention' means—

(a) in relation to a contract for the carriage of goods by rail, the Convention which has the force of law in the United Kingdom under regulation 3 of the Railways (Convention on International Carriage by Rail) Regulations 2005,

(b) in relation to a contract for the carriage of goods by road, the Convention which has the force of law in the United Kingdom under section 1 of the Carriage of Goods by Road Act 1965, and

(c) in relation to a contract for the carriage of cargo by air—

(i) the Convention which has the force of law in the United Kingdom under section 1 of the Carriage by Air Act 1961, or

(ii) the Convention which has the force of law under section 1 of the Carriage by Air (Supplementary Provisions) Act 1962, or

(iii) either of the amended Conventions set out in Part B of Schedule 2 or 3 to the Carriage by Air Acts (Application of Provisions) Order 1967.

Commentary

The aim of this section is to exclude certain types of contract from the scope of the Act. In the case of subsections (1), (5), (6), (7), and (8) the aim was to avoid a clash with existing legislative schemes which conferred rights of action upon third parties. In the case of subsections (2)–(4) the aim was rather different, namely to ensure that the third party did not have a right of action in the specified circumstances. Section 6(5) provides that the Act applies to contracts for the carriage of goods by sea only if the relevant term is an exclusion or limitation clause (section 1(6) is similarly confined to terms which exclude or limit liability) and this may suggest that an exclusive jurisdiction clause does not fall within the scope of the Act on the ground that the Privy Council in *The Mahkutai* (25.3.4) concluded that an exclusive jurisdiction clause was not an exception clause or a limitation clause because it was a clause which created mutual rights and obligations between the parties.

25.3.6.7 Section 7

> **Supplementary provisions relating to third party**
>
> 7.—(1) Section 1 does not affect any right or remedy of a third party that exists or is available apart from this Act.
>
> p. 1021 (2) Section 2(2) of the Unfair Contract Terms Act 1977 (restriction on exclusion etc. of liability for negligence) shall not apply where the negligence consists of the breach of an obligation arising from a term of a contract and the person seeking to enforce it is a third party acting in reliance on section 1.
>
> (3) In sections 5 and 8 of the Limitation Act 1980 the references to an action founded on a simple contract and an action upon a specialty shall respectively include references to an action brought in reliance on section 1 relating to a simple contract and an action brought in reliance on that section relating to a specialty.
>
> (4) A third party shall not, by virtue of section 1(5) or 3(4) or (6), be treated as a party to the contract for the purposes of any other Act (or any instrument made under any other Act).

Commentary

Section 7(1) preserves the existing exceptions to the doctrine of privity. In this sense the Act does not reduce the complexity of the law. That said, the practical significance of some of these exceptions is likely to reduce as use is made of the Act. Is it open to the judiciary to develop further exceptions to the doctrine of privity? The Law Commission concluded that it was. In their report they stated (at para 5.10):

> We should emphasise that we do not wish our proposed legislation … to hamper the judicial development of third party rights. Should the House of Lords decide that in a particular sphere our reform does not go far enough and that, for example, a measure of imposed consumer protection is required or that employees (even though not mentioned in the contract) should be able to rely on exclusion clauses that protect their employers under a doctrine of vicarious immunity, we would not wish our proposed legislation to be construed as hampering that development.

It therefore remains open to the judiciary (at least at the level of the Supreme Court) to take the step mentioned by Lord Goff in *The Mahkutai* (25.3.4) of recognizing a 'fully-fledged exception to the doctrine of privity of contract', perhaps by following the lead of the Supreme Court of Canada in *London Drugs Ltd* v. *Kuehne & Nagel International Ltd* (25.3.4). The Act has reduced the practical need for the courts to take such a step but the possibility cannot be ruled out.

Section 7(2) is a controversial provision. Its effect is to entitle a promisor to exclude his liability to the third party for a breach of the promisor's contractual duty of care without fear of challenge under section 2(2) of the Unfair Contract Terms Act 1977 (except where the third party suffers personal injury or death in which case section 2(1) of the Unfair Contract Terms Act 1977 continues to offer protection to the third party). The effect

of section 7(2) is therefore to put the third party in an inferior position in comparison with the promisee in that the promisee can invoke section 2(2) of the Unfair Contract Terms Act 1977 to challenge the validity of the promisor's exclusion or limitation clause but the third party cannot.

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25.3.6.8 Section 8

> **Arbitration provisions**
>
> 8.—(1) Where—
>
> (a) a right under section 1 to enforce a term ('the substantive term') is subject to a term providing for the submission of disputes to arbitration ('the arbitration agreement'), and
>
> (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996,
>
> the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.
>
> (2) Where—
>
> (a) a third party has a right under section 1 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration ('the arbitration agreement'),
>
> (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996, and
>
> (c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,
>
> the third party shall, if he exercises the right, be treated for the purposes of that Act as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right.

Commentary

The Law Commission recommended (para 14.19 of their report) that 'a third party shall have no rights of enforceability under our proposed reform in respect of an arbitration agreement or a jurisdiction agreement'. The Act did not give effect to this recommendation, at least in so far as it relates to arbitration clauses. Section 8 has its origins in an amendment made to the Bill at Report Stage in the House of Commons. Arbitration clauses present a particular challenge for the 1999 Act because, as we have noted, the Act is concerned with the acquisition of rights by third parties, not the imposition of liabilities on them. Arbitration clauses straddle that divide in that they carry burdens as well as confer benefits. The Law Commission foresaw some of the problems which would follow from the inclusion of arbitration clauses within the Act and so decided not to

include them within its scope. A different view was, however, taken by the Government and so section 8 was introduced into the Act. The limited case-law which section 8 has generated has, in the words of Tomlinson LJ, demonstrated that the fears of the Law Commission 'were not unfounded' (*Fortress Value Recovery Fund LLC* v. *Blue Skye Special Opportunities Fund* [2013] EWCA Civ 367, [2013] 1 WLR 3466, [1]).

Section 8 is divided into two subsections. Section 8(1) deals with the more common situation and it provides that where a third party is given a right to enforce a substantive term of a contract between two parties and that right is subject to a term requiring the submission of any dispute arising under the term to arbitration, then the third party is to be treated for these purposes as a party to the arbitration agreement and so must resort to arbitration if he is to enforce his substantive right under the contract. In this situation, in order to
p. 1023 obtain the benefit of his third party right of action, he must submit to the condition that he assert ↵ it in arbitral proceedings rather than litigation. Section 8(2) by comparison deals with the situation where a third party is given the right to require that a particular dispute with a promisor be referred to arbitration.

The difference between the two subsections was explained by Toulson LJ in *Fortress Value Recovery Fund LLC* v. *Blue Skye Special Opportunities Fund* [2013] EWCA Civ 367, [2013] 1 WLR 3466, [44] in the following terms: section 8(1) enables a promisor to give a third party an enforceable substantive right subject to a procedural condition (namely arbitration) on which the promisor may but need not insist, while section 8(2) enables a promisor to give a third party a unilateral, enforceable procedural right (to refer a dispute to arbitration) which the third party may but need not exercise.

Section 8 has been considered by the courts on two occasions. The first was by Colman J in *Nisshin Shipping Co Ltd* v. *Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38 (25.3.6.1). One of the issues between the parties was whether or not the enforcement by Cleaves of their rights was subject to the arbitration agreement in the charterparties. Colman J held that the case fell within the scope of section 8(1) and that Cleaves were entitled to and were in fact obliged to refer the disputes to arbitration and that the arbitrators had jurisdiction to determine them. Thus the enforcement by Cleaves of their substantive rights was held to be subject to the procedural condition that the dispute be referred to arbitration.

The second case is the decision of the Court of Appeal in *Fortress Value Recovery Fund LLC* v. *Blue Skye Special Opportunities Fund* [2013] EWCA Civ 367, [2013] 1 WLR 3466 where, on rather complex facts, the central issue was whether third parties were entitled to rely on an arbitration clause contained in a partnership deed for the purpose of insisting that the claim brought against them by an assignee of a party to the partnership deed be referred to arbitration rather than litigation. The Court of Appeal held that the third parties were not entitled to insist that the dispute be referred to arbitration. The third parties were not entitled to invoke section 8(2) because the arbitration clause only applied to 'the parties hereto' and so did not extend to third parties. This suggests that it will be no easy task for a third party to invoke section 8(2) because it will require clear words to persuade a court that the parties to the contract intended to include third parties within an arbitration clause. Nor were the third parties entitled to invoke section 8(1). While certain provisions of the partnership deed did extend to the third parties (such as the exclusion of liability and the right to certain indemnities) this did not give them an entitlement to insist that all disputes between the parties be referred to arbitration. Rather, the requirement to refer the dispute to arbitration only applied to a dispute arising in connection with the substantive rights which the third parties had acquired. The dispute in the present case was not one which related to one of those substantive rights and accordingly the third parties did not have the right to insist that

the dispute be referred to arbitration. As Toulson LJ observed, the 'fallacy' in the third parties' argument was that they had confused 'the nature of a procedural qualification of a substantive right' (namely the requirement to refer a dispute relating to the enforcement of a substantive right under the contract to arbitration) with the grant of a 'positive procedural right' under section 8(2) (which the third parties were held not to have).

25.3.6.9 Section 9

Northern Ireland

9.—(1) In its application to Northern Ireland, this Act has effect with the modifications specified in subsections (2) and (3). ...

(2) In section 7, for subsection (3) there is substituted—

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(3) In Articles 4(a) and 15 of the Limitation (Northern Ireland) Order 1989, the references to an action founded on a simple contract and an action upon an instrument under seal shall respectively include references to an action brought in reliance on section 1 relating to a simple contract and an action brought in reliance on that section relating to a contract under seal.'

(4) In the Law Reform (Husband and Wife) (Northern Ireland) Act 1964, the following provisions are hereby repealed—

(a) section 5, and

(b) in section 6, in subsection (1)(a), the words 'in the case of section 4' and 'and in the case of section 5 the contracting party' and, in subsection (3), the words 'or section 5'.

Short title, commencement and extent

10.—(1) This Act may be cited as the Contracts (Rights of Third Parties) Act 1999.

(2) This Act comes into force on the day on which it is passed but, subject to subsection (3), does not apply in relation to a contract entered into before the end of the period of six months beginning with that day.

(3) The restriction in subsection (2) does not apply in relation to a contract which—

(a) is entered into on or after the day on which this Act is passed, and

(b) expressly provides for the application of this Act.

(4) This Act extends as follows—

(a) section 9 extends to Northern Ireland only;

(b) the remaining provisions extend to England and Wales and Northern Ireland only.

Commentary

The Act does not have retrospective effect. It applies to contracts entered into on or after 11 May 2000. This apparently straightforward proposition can give rise to difficulty in the case where the contract is entered into before 11 May 2000 but is varied after that date. In such a case does the variation constitute a new contract to which the 1999 Act will apply or is it the case that the original contract continues to bind the parties with the consequence that the 1999 Act is not applicable? No single answer can be given to this question. In all cases it is necessary to examine the facts and circumstances of the particular case. In the case where the effect of the variation is to bring about a fundamental change to the original terms and conditions, it is more likely that a court will conclude that a new contract has been concluded to which the 1999 Act will apply. Conversely, where the changes are minor in nature, it is more likely that the original contract will continue to govern and the Act will not be applicable (see *Secretary of State for the Home Department* v. *Cox* [2023] EWCA Civ 551, [2023] ICR 914, [93] and [123]).

25.4 Third Parties and the Imposition of Liabilities

As a general rule parties to a contract cannot impose an obligation on a third party without the latter's
p. 1025 consent. The existence of this general rule is widely accepted and consequently ↵ this area of law has not witnessed the upheaval we have seen in the context of the acquisition of rights by third parties. The general rule is subject to a number of exceptions and it is important to note that neither the rule nor its exceptions are affected by the 1999 Act (the Law Commission expressly stated in their report (para 2.1) that their proposed reforms 'do not … seek to change the "burden" aspect of the privity doctrine or the exceptions to it'). Three exceptions to the rule require further comment.

The first is that the existence of a contract imposes an obligation upon third parties in the sense that it is a tort to induce one party to a contract to break that contract. In this respect it can be said that third parties must respect the sanctity of contracts to which they are not a party. Take the case where A and B conclude a contract under which A agrees to work for B for a period of two years. C wishes to procure the services of A during that two-year period and so he offers to double A's salary if A terminates his contract with B. Does C commit a tort in seeking to persuade A to terminate his contract with B? The answer depends on whether or not C persuaded A to terminate the contract lawfully. If C offered A an increase in salary and A gave notice of termination in accordance with the terms of the contract then C would incur no liability towards B. But the position is different in the case where C persuades A to breach his contract with B. In such a case C may be liable in tort to B. Authority for this proposition is to be found in the case of *Lumley* v. *Gye* (1853) 2 El & Bl 216. The plaintiff and the defendant were rival theatre owners. Miss Wagner, a famous opera singer, had entered into a contract with the plaintiff under which she agreed to sing at his theatre for a period of time. The defendant induced her to break her contract with the plaintiff by promising to pay her more if she sang at his theatre. The plaintiff brought an action against the defendant. He succeeded on the ground that the defendant had committed a tort in inducing Miss Wagner to break her contract with the plaintiff. The case has been a source of some controversy on the ground that it can be argued that the plaintiff should have brought his claim against Miss Wagner (who had, after all, broken her contract with the plaintiff) and not against the defendant. According to this view, it should be for a contracting party to decide whether or not to perform her

obligations under the contract and she must decide whether or not to resist the inducement to breach her contract. But this is not the view that the courts have taken. Instead they have concluded that it is a tort intentionally to induce one party to a contract to break it and thereby cause loss to the other contracting party. It is also a tort to interfere with contractual rights by unlawful means. The latter tort is, however, clearly distinguishable from the tort of inducing breach of contract. It is a form of primary liability, whereas the tort of inducing breach of contract is an example of accessory liability, being dependent upon the primary wrongful act of the contracting party, namely the breach of contract (*OBG Ltd* v. *Allan* [2007] UKHL 21, [2008] 1 AC 1).

A second exception is the doctrine of bailment on terms, to which reference has already been made (see 25.3.4). The effect of this doctrine is to bind an owner of goods to the terms of a sub-bailment provided that certain conditions are satisfied (see *The Pioneer Container* [1994] 2 AC 324 (discussed at 25.3.4) and *Morris* v. *C W Martin & Sons Ltd* [1966] 1 QB 716).

The third and most controversial exception is the extent to which a purchaser of land or goods is affected by a contract relating to the land or the goods which was entered into by the vendor prior to the sale of the land or goods to the purchaser. On what basis can the purchaser be affected by a contract to which he was not a party? One view is that he is affected because he has notice of the existence of the contract at the time of acquisition of the land or goods. Authority to this effect can be found in the judgment of Knight Bruce LJ in *De Mattos* v. *Gibson* (1858) 4 De G & J 276 when he stated (at p. 282):

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> 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. This rule, applicable alike in general as I conceive to moveable and immoveable property, and recognised and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances; but I see at present no room for any exception in the instance before us.

This statement is open to challenge. The right of the third party is a personal right which is exercisable against the vendor; it is not a property right which can be asserted and enforced against third parties, such as the purchaser. And the fact that the purchaser has notice of the third party's contractual right against the vendor ought not to be able to transform the third party's personal right against the vendor into a property right binding on the purchaser. Yet the authorities appear to say otherwise.

In relation to the acquisition of land there is long-standing authority to the effect that a party who acquires property that is, to his knowledge, subject to a restrictive covenant is bound by the terms of that covenant and may be restrained from acting inconsistently with the terms of the covenant (*Tulk* v. *Moxhay* (1848) 2 Ph 774). But this principle operates within narrow limits. In particular, the person seeking to enforce the covenant must show that the covenant was imposed for the benefit of neighbouring land owned by him.

The position is more complex in relation to the acquisition of goods or chattels. Here we encounter the statement of principle made by Knight-Bruce LJ in *De Mattos* v. *Gibson* (extracted earlier). This statement of principle has given rise to difficulty, particularly in the cases of *Lord Strathcona Steamship Co Ltd* v. *Dominion Coal Co Ltd* [1926] AC 108 and *Port Line Ltd* v. *Ben Line Steamers Ltd* [1958] 2 QB 146. These cases were summarized and then analysed by Browne-Wilkinson J in *Swiss Bank Corporation* v. *Lloyd's Bank Ltd* [1979] Ch 548, 572–575 in the following terms:

In *De* Mattos v. *Gibson*, 4 De G & J 276, the plaintiff had chartered a ship from its owner Curry. Curry had subsequently charged the ship to Gibson, who had actual notice of the charterparty. Curry got into financial difficulties and was unable to continue the voyage. Gibson was proposing to sell the ship of which he had taken possession. In the action the plaintiff claimed an injunction against Gibson restraining him from interfering with the charterparty. The plaintiff applied for an interim injunction which was granted, on appeal. The grounds for the decision of Knight Bruce LJ were those set out at p. 282, in the passage I have already read. The decision of Turner LJ at p. 284 was founded entirely on balance of convenience, but one of the three questions he said would have to be decided at the trial was whether the plaintiff, even if not entitled to specific performance of the charterparty, was entitled to an injunction to restrain a breach of the charterparty. In due course the action came on for trial before Page Wood V-C from whose decision there was an appeal to Lord Chelmsford LC. The Lord Chancellor held that no injunction should be granted against Gibson. He referred expressly to the three questions posed by Turner LJ, at p. 294, and after holding that the charterparty could not be specifically performed, said, at p. 299, that Gibson having taken with full knowledge of the charter could be restrained from doing any act which would have the immediate effect of preventing its
p. 1027 performance. But Lord Chelmsford LC went on to show that on the ↵ facts there was no real possibility of Curry performing the charterparty whatever Gibson did, and therefore there was no question of any act by Gibson constituting an interference by Gibson with the plaintiff's contractual rights. In my judgment that case is an authority binding on me that a person taking a charge on property which he knows to be subject to a contractual obligation can be restrained from exercising his rights under the charge in such a way as to interfere with the performance of that contractual obligation: in my judgment the *De Mattos* v. *Gibson* principle is merely the equitable counterpart of the tort. But two points have to be emphasised about the decision in *De Mattos* v. *Gibson*: first, the ship was acquired with actual knowledge of the plaintiff's contractual rights, secondly, that no such injunction will be granted against the third party if it is clear that the original contracting party cannot in any event perform his contract. It is this second point which in my judgment accounts for the fact that the *De Mattos* v. *Gibson* principle is not applicable to restrictive covenants: the original contracting party—even if traceable—could not carry out his contract relating to the land or the chattel once he had parted with it.

In *Lord Strathcona Steamship Co Ltd* v. *Dominion Coal Co Ltd* [1926] AC 108, the facts were that a ship which was the subject matter of a charterparty to Dominion was sold to Strathcona expressly subject to the rights of Dominion under the charterparty. The Privy Council held that an injunction could be granted restraining Strathcona from interfering with Dominion's rights under the charterparty. It will be noted that the *Strathcona* case is of the type I considered under category (b) above, i.e. Strathcona bought expressly subject to Dominion's rights, and certainly one ground of decision is that, in the circumstances, Strathcona was a constructive trustee: see pp. 124–125. It is not clear to me whether this was the only ground of decision since the passages in the judgment dealing with *De Mattos* v. *Gibson*, 4 De G & J 276—which was held to be good law—certainly seem to proceed on the basis of knowing interference with another's contract: see p. 119. The Privy Council accepted that, in order to get an injunction the plaintiff had to have a continuing interest in the property but undoubtedly held that a bare contractual right, as opposed to a property interest, was a sufficient interest for this purpose.

> There are parts of the judgment in the *Strathcona* case [1926] AC 108 which I find difficult to follow but in my judgment it certainly decides (a) that *De Mattos* v. *Gibson*, 4 De G & J 276, is good law and (b) that an injunction can be granted to restrain a subsequent purchaser of a chattel from using it so as to cause a breach of a contract of which he has express notice.
>
> In *Port Line Ltd* v. *Ben Line Steamers Ltd* [1958] 2 QB 146 Diplock J—sitting as a judge of first instance—stated that he thought the *Strathcona* case [1926] AC 108 was wrongly decided and refused to follow it. In that case Port had chartered a vessel from Silver. Silver then sold to Ben but subject to an immediate re-charter by Ben to Silver. Under the charterparty between Port and Silver the requisitioning of the vessel did not determine the charter: under the charterparty between Ben and Silver it did. The vessel was requisitioned and Port was claiming from Ben compensation received by Ben for the requisition. It is important to notice that Port could only succeed if it showed either that it had a positive right to possession of the vessel or that Ben was accountable for the compensation as constructive trustee. Diplock J was not concerned with the question whether Port was entitled to a negative injunction to restrain the tort.
>
> It is not necessary for me to express any view as to whether the *Strathcona* case was rightly decided so far as it was a decision based on constructive trusteeship, which was all that Diplock J was concerned with: the *Strathcona* case itself decided that there was no right to specific performance of the charterparty. However, although I of course differ from Diplock J with diffidence, in my judgment the *Strathcona* case was rightly decided on the basis that Dominion was entitled to an injunction against Strathcona to prevent Strathcona from interfering with the contract between Dominion and
p. 1028 the original charterer. Diplock J at ↵ p. 165, explained *De Mattos* v. *Gibson*, 4 De G & J 276, on that ground, and at p. 168, gave as an alternative ground for his decision that actual, as opposed to constructive, notice was necessary in such a case. To that extent his decision supports my own view.
>
> What then are the authorities which suggest that the *De Mattos* v. *Gibson* principle is not good law? In my judgment apart from the *Port Line* case [1958] 2 QB 146 they are all cases falling within category (a) above [namely cases involving restrictive covenants affecting land and resale price maintenance conditions affecting chattels]; that is to say not cases in which the plaintiff sought an injunction to restrain the defendant from committing the tort but cases where the plaintiff was seeking to make the defendant positively perform a contract to which he was not a party. In particular, it is in my judgment clear that the remarks of Scrutton LJ in *London County Council* v. *Allen* [1914] 3 KB 642 and *Barker* v. *Stickney* [1919] 1 KB 121 are to be read in their context as cases where the plaintiff was seeking to enforce performance of the contract against the defendant who was not a party to the contract. So far as I can see, in neither of those cases was there any consideration of the rights of the plaintiff to a negative injunction restraining the defendant from causing someone else to breach the contract with the plaintiff.
>
> Therefore, in my judgment the authorities establish the following propositions. (1) The principle stated by Knight Bruce LJ in *De Mattos* v. *Gibson*, 4 De G & J 276, is good law and represents the counterpart in equity of the tort of knowing interference with contractual rights. (2) A person proposing to deal with property in such a way as to cause a breach of a contract affecting that property will be restrained by injunction from so doing if when he acquired that property he had

> actual knowledge of that contract. (3) A plaintiff is entitled to such an injunction even if he has no proprietary interest in the property: his right to have his contract performed is a sufficient interest. (4) There is no case in which such an injunction has been granted against a defendant who acquired the property with only constructive, as opposed to actual, notice of the contract. In my judgment constructive notice is not sufficient, since actual knowledge of the contract is a requisite element in the tort.

Commentary

This line of cases has generated a considerable academic literature (see, for example, S Gardner (1982) 98 *LQR* 279, A Tettenborn [1982] *CLJ* 58, N Cohen-Grabelsky (1982) 45 *MLR* 241, and W Swadling in N Palmer and E McKendrick (eds), *Interests in Goods* (2nd edn, LLP, 1998), ch. 20). The cases give rise to two principal difficulties. The first is one of principle: what principle is it that demands that the purchaser should be affected by a contract that had been concluded by the vendor with a third party? The second relates to the scope of the doctrine. When will the purchaser be affected by the contract and with what effect? It would appear that the principle can only be invoked where the purchaser has actual knowledge of the existence of the contract at the time of acquisition. Further, the only remedy to which the third party is entitled is an injunction to restrain the purchaser from acting inconsistently with the terms of the contract between the third party and the vendor. In particular, the third party is not entitled to a specific performance order requiring the purchaser to give effect to the contract between the vendor and the third party.

25.5 Conclusion

The importance of the 1999 Act should not be underestimated. It provides a relatively simple mechanism by which contracting parties can confer upon a third party a right to enforce a term of their contract. The
p. 1029 dominant philosophy that underpins the 1999 Act is one of ↵ freedom of contract and, this being the case, the success of the Act in practice will depend upon contracting parties themselves. A review of the Act (Beale, 'A Review of the Contracts (Rights of Third Parties) Act 1999' in A Burrows and E Peel (eds), *Contract Formation and Parties* (Oxford University Press, 2010), pp. 225, 250) concluded that:

> while it is perhaps too soon to claim that the Contracts (Rights of Third Parties) Act 1999 has been an outstanding success, in that as yet its use seems to be limited, I think we can say that it has certainly not been a failure. Rather I regard is as useful but still underused.

The statement that the Act remains 'underused' perhaps reflects a hangover from the fact that many commercial lawyers were initially hostile to the Act and systematically excluded its operation. Today a more reflective attitude is apparent and lawyers seem more willing to invoke the Act where it is appropriate to do so.

While the 1999 Act expressly preserves the exceptions to the doctrine of privity that pre-dated the Act, it is likely that the significance of these exceptions will diminish over time. Contracting parties who wish to confer a right of action upon a third party are probably more likely to make use of the 1999 Act than to rely upon one of the common law or other statutory exceptions to the doctrine of privity. In many ways the 1999

Act has given contracting parties an incentive to make their intention clear in relation to the creation of third party rights of action. Where they make that intention clear, whether in favour of or against the existence of a third party right of action, the court must respect and give effect to their choice.

More difficult is the case where the contracting parties do not make their intention clear. In such a case a court must first decide whether or not the third party has acquired a right to enforce a term of the contract under section 1(1)(b) of the 1999 Act. Where the requirements of that subsection are satisfied the Act will determine the rights of the third party. In the case where the requirements of section 1(1)(b) have not been satisfied, the court must go on to consider whether the third party has acquired rights by virtue of one of the common law exceptions to the doctrine of privity or one of the other statutory exceptions to the doctrine. While the Act expressly preserves the existence of these exceptions, and indeed preserves the ability of the judiciary to develop still further exceptions to the doctrine of privity, the willingness of the judges to make use of these exceptions in the light of the enactment of the 1999 Act remains to be tested. It is possible that they will be more reluctant to make use of the common law exceptions to the doctrine of privity on the basis that the parties could have made use of the 1999 Act but have chosen, for one reason or another, not to do so. On the other hand, they are directed by the Act itself to continue, where appropriate, to make use of these exceptions. The precise role of these exceptions, following the Act, remains to be seen but it is suggested that the fundamental point that has to be grasped is that the 1999 Act is now the first port of call in any case concerned with third party rights of action and, in many cases, it is also likely to be the last port of call.

Further Reading

ANDREWS, N, ‘Strangers to Justice No Longer: The Reversal of the Privity Rule Under the Contracts (Rights of Third Parties) Act 1999’ [2001] *CLJ* 353.

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Notes

[1] A *jus quaesitum tertio* is a third party right of action.

[2] Where there is a right, there is a remedy.

[3] Section 151 invalidated any clause in a contract for the conveyance of a passenger in a public service vehicle which purported to exempt a person from liability in respect of death or personal injury suffered while being carried in, entering, or alighting from the vehicle.

[4] An act done by one party for the benefit of another party, but without the latter’s authority, can be ratified or confirmed by the party for whose benefit the act was performed in such a way as to render it his act.

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