

## CONTRACT – privity (lecture 8)

**Doctrine of privity** – a burden cannot be imposed on a third party AND to be able to claim the benefit of a contract you must be privy to it. Similar to the rule that consideration must move from the promisee. Common law and statute law co-exist. The aim was to prevent the need for courts to manipulate the system. The Act's impact has been limited in that it is often excluded from contracts. The common law rules still apply and there is large academic debate on the extent to which courts should go to restrict or extend the doctrine of privity.

### PROBLEMS

There are problems with privity – *Tweddle v Atkinson*. A man provides consideration but cannot enforce promise because it was not addressed to him. Privity bars claim despite consideration. This means: the intention of the parties thwarted, injustice to the third party, the person who has suffered the loss can't sue, the person who has no loss can sue but has no loss to recover.

**Law Revision Committee 1937** – “where a contract by its express terms purports to confer a benefit on a third party, it shall be enforceable by the third party in his own name subject to any defences”

### EXCEPTIONS

#### 1. Guarantor's right of subrogation

#### 2. TORT – *Donoghue v Stevenson*

#### 3. TRUST – *les affreteurs reunis sa v leopold walford ltd.*

**4. AGENCY** – *Dunlop v Selfridge*; *Scruttons v Midland Silicones Ltd* – *Scruttons* couldn't take advantage of limitation clause *Silicones* had with carriers, so *Silicones* were able to sue for full amount of damage caused by *Scruttons*.

#### Lord Reid's criteria for agency:

An agency will exist if it is clear:

- that the principal (third party) was intended to be protected by a clause in it.
- that the contracting party was acting as agent for the principal
- the contracting party has authority from the principal to act as his agent
- the principal has provided consideration to the other contracting party

Also see: *Eurymedon* – commercial agreement was set up differently so they were allowed to rely on the exemption clause as it stated ‘the carrier, its servants, agents and employees are exempted’ (Himalayan clause)

**5. COLLATERAL CONTRACTS** – Have to find consideration like in *Shanklin Pier v Detel Products*, *Detel's* guarantee that the paint would last for 10 yrs and the pier told the contractor to buy *Detel's* paint.

**6. ASSIGNMENT** – contractual device where A assigns rights from his contract with B to C. C sues B on basis of B's contract with A.

**7. JUDICIAL EXCEPTIONS (or activism)** – *Jackson v Horizon Holidays* – but it has been limited i.e. must be a contract for enjoyment (*Woodar v Wimpey*)

#### Albazero principle (commercial setting):

*Linden Gardens v Lenesta Sludge* – Assignment prohibition meant that *Albazero* couldn't apply.

*St Martins Property Corp v McAlpine* – The prohibition did not defeat the claim as both the owner and *St Martins* sued *McAlpine* together. Where A and B contract for goods, knowing the goods will be transferred to C before the breach, A will be treated as having entered into the contract for the benefit of C and is entitled to recover.

*Darlington BC v Wiltshire Northern*

However, where a 3<sup>rd</sup> party has a direct claim they must rely on that – *McAlpine v Panatown* – duty of care deed prevented *Albazero* exception applying.

### 7. STATUTE

*Contracts (Rights of Third Parties) Act 1999* – ‘Our proposed statute carves out a general and wide ranging exception to the third party rule but it leaves the rule intact for cases not covered by the statute’ – Law Commission Report 1996

1. No change to common law rule that a third party cannot be subject to a burden under a contract.

2. Certain contracts excluded from Act – section 6.

3. All exceptions still apply – S7(1) – the Act ‘does not affect any right or remedy of a third party that exists or is available apart from this act’.

4. The devices of collateral contracts, trusts, agency and tort can still be used.

5. Under s 6 of the Act, certain contracts are excluded from its ambit.

#### WHO BENEFITS?

1. third party where the contract expressly provides that he may enforce a term (s1(1)(a))

2. OR third parties where a term purports to confer a benefit on them (s1(1)(b)) may have a right of enforcement unless:

3. the parties did not intend the term to be enforceable by the third party (s1(2)) – note presumption of enforceability – *Nisbin Shipping Co Ltd v Cleaves & Co Ltd*

4. The third party must be expressly identified in the contract (s1(3)) – name, class, description – *Avraamides v Colwill*

5. The third party gets the same rights as if they had been a party to the contract (s1(5))

6. The third party can also rely on certain exemption clauses in the contract (s1(6))

#### Can third party rights be varied or taken away by the parties?

Variation or rescission of rights is not possible if the third party has assented to or relied on the term (s2)

#### Defences

The promisor has all the defences available to him that he would have been able to use against the promisee (s3)