PART IX – PRIVITY

I INTRODUCTION

A *The Doctrine of Privity*

Exam note: the doctrine of privity is highly likely to comprise a hybrid theoretical question on the mid-year examination.

Who is entitled to enforce a contract is determined by the doctrine of privity. Under the doctrine, those who are not direct parties to the contract are prevented from enforcing the terms of the contract (*Tweedle v Atkinson*).

The common law position is that only parties to the contract are bound by, and entitled to enforce, the rights and obligations that the contract imposes.

B *Exceptions*

There are ways of circumventing this common law rule, which can at times operate unfairly.

These include:

- Action by the promisee (only if not expressly ruled out)
- Arguing that the person attempting to enforce the provisions is a party to the contract (*Coulls v Bagot's Estate*)
- Situation specific exceptions (*Trident* per Mason CJ and Wilson J)
- Estoppel (elements need be satisfied)
- Agency (*Port Jackson*)
- Trust (*Trident* per Deane J)
- Tort (*Hawkins v Clayton*)
- Restitution/unjust enrichment (*Trident* per Gaudron J; sufficient to identify possibility)
- *Trade Practices Act 1974* (Cth) s 52 (misleading and deceptive conduct)
- Assignment and novation

These exceptions have arisen, in part, due to criticism of the doctrine of privity as leading to unfair outcomes and expressly contravening the intentions of the parties. After all, if it is the will of the parties to incur obligations to a third party, how can it be *against* their will to allow that third party to enforce the rights granted to it under the contract?

II METHODS OF CIRCUMVENTION

A *Action by the Promisee*

Where a party upon whom benefits have been conferred wishes to enforce those rights, but is barred from doing so by the doctrine of privity, they may be able to convince someone who *is* a party to the contract to enforce the contract for the third party.

A successful action on the contract by one of its parties could result in an order for specific performance to deliver the benefit to the third party as it was provided for by the contract if the expectation damages to be provided would be inadequate. However, the commencement of the action is contingent upon the person who *is* party to the contract being willing to undertake the (often costly and burdensome) proceedings. In the event that they are unwilling to enforce on behalf of the third party, another avenue will need to be pursued.

B *Establishing a Party to the Contract*

To avoid the operation of privity doctrine, an alleged 'third-party' may argue that he or she is in fact a party to the contract (*Coulls v Bagot's Executor*).

Coulls v Bagot's Executor:

Facts

- Mr C granted a company the right to quarry stone from his property in return for royalty payments
- The agreement was headed 'Agreement between Arthur Leopold Coulls and O'Neil Construction Pty Ltd'
- The agreement provided that Mr C authorized the company to pay all royalties to Mr and Mrs C as joint tenants
- The agreement was signed by both Mr C and Mrs C (as well as the appropriate representative of O'Neil)
- When Mr C died, his executor sought directions from the court as to whether O'Neill was bound to pay royalties to Mrs C (or whether the royalty payments should be made into Mr C's estate)

Issue

- Was Mrs C a party to the agreement?
- Was the promise to pay Mr C solely or to pay him and his wife jointly?

Reasoning

- The majority found that Mrs C was not a party to the Agreement
    - The contract expressed to be made between Mr C and O'Neill
    - The wording of the only clause that referred to Mrs C was such as to suggest that she was not a party
        - The clause said, 'I authorise payment to Mrs C'
        - This implies that Mrs C was not a direct payee under the agreement
        - The clause implicitly recognises that it is the right of Mr C to collect the money, and that the royalties are ultimately his
    - The fact that Mr C had given permission to the company to provide some royalties to Mrs C is indicative that this right is revocable, and mitigates against Mrs C being a direct party
    - Consideration is also a problem
        - Mrs C gave no promise to O'Neil Construction, unlike Mr C, who provided land
- The minority found that Mrs C was a party to the agreement
    - She had signed the agreement (strongly emphasised)
    - The relevant promise was made jointly (and consideration given jointly)

- It is possible for a person to be a party to a contract without giving consideration when the other party has presumed consideration to be provided on their behalf by the person who is a party and the consideration is given jointly
- Here, Mrs C presumed that consideration had been provided on her behalf by Mr C, who gave consideration jointly

- Taylor and Owen JJ criticised the approach of the minority:
  - They admit that they are satisfied that Mr C intended Mrs C to receive royalty payments on his death, but held that this intent was not correctly expressed
  - This has been the subject of criticism – the Court has been seen as overriding the intention of the parties
  - They rejected the notion that consideration could be provided jointly
  - Mrs C had to have provided her own consideration

- Joint consideration not provided expressly *cannot* be assumed to have been provided by both parties

- Joint tenancy
  - When B dies the entire property defaults to A

- Tenancy in common
  - B owns a discrete interest (eg, 10%); when B dies, that portion goes to the estate, which distributes the interest among beneficiaries

Decision

- Majority: Mrs C was not a party to the contract; she only had an interest under a revocable mandate which lapsed on Mr C's death
  - Her interest returns to the estate
  - In reality, she is likely to receive a large portion of the royalties from the estate
    - It is possible that this factor influenced the reasoning of the majority
- Minority: Mrs C was a party to the contract and was entitled to enforce the promise
  - Her interest in the land is maintained when Mr C died, and she is now entitled to keep all the royalties

C *Situation-Specific Exceptions*

The High Court of Australia has recognised a general exception to the doctrine of privity in the context of contracts of insurance (*Trident* per Mason CJ and Wilson J).

- Draw analogies with insurance contracts and compare the nature of insurance to that of transportation by a carrier
- Mention that the High Court of Australia appears open to recognise another exception

D *Estoppel*

The requirements of estoppel need to be made out by the third party relying on the assumption induced by the party to the contract that a benefit would be conferred upon them.

Equitable estoppel will prevent injustice arising from a party relying to his or her detriment on an expected benefit or entitlement arising from a contract to which he or she is not a party, provided the promisor can be said to have induced or encouraged the adoption of the expectation.

E *Agency*

The privity rule does not apply if the third party can show that one of the contracting parties was acting as his or her agent.

The structure of a simple agency agreement is as follows:

- A acts as agent for B;
- A conducts contract negotiations with C;
- A contract is then formed between B and C.

An agency relationship need not be expressly stipulated – it can be inferred from the surrounding circumstances. However, in such cases it will be necessary to consider whether the alleged agent had the authority to so act on behalf of the third party.

1 *Principles of agency*

The doctrine of privity also means that third parties cannot rely on contractual terms limiting their liability. This problem is commonly circumvented using principles of agency.

The main difficulty is establishing that an agency relationship exists between A and B (*Trident* per Deane J). For example, when a third party wants to avail itself of liability, it will attempt to show that a contract was formed between it and the person acting against it by an intermediary (often a carrier of goods), who acted as agent for the third party.

In *Midlands Silicones v Scruttons*, a four-pronged test is formulated to determine whether a relationship of agency exists between the third party (B) and the person negotiating on their behalf (A).

Midlands Silicones v Scruttons:

Reasoning

- *Scruttons* set out a four step test to determine whether third party stevedores were protected by exclusion clauses in contracts between the carrier (the ship) and the consignor (the person who is having their goods transported)

- Where
  - The contract makes it clear that the intention of the parties was to protect third party stevedores;
  - The contract also makes clear that the carrier was contracting as agent for the stevedores in regard to the exemption clause;
    - The courts are willing to be quite inferential in this respect
  - The carrier was authorised to act as the stevedores' agent (expressly or by subsequent ratification); and
    - Express: 'I authorise the carrier to contract on my behalf' (unlikely); or
    - Ratification: after the contract has been formed, the stevedore knows of the arrangement but does not object to it
  - The stevedore provided consideration
    - Most commonly: loading the goods onto the ship

- The carrier may be said to be acting as agent for the stevedores.
    - A fairly creative means to circumvent the doctrine of privity
    - May be criticised as somewhat 'artificial'
    - Mitigates towards the abolition of privity

The *Scruttons* test was endorsed by the Privy Council in *The Eurymedon* (UK). The test is applied in Australia by Barwick CJ in *Port Jackson v Salmond*, and later followed on appeal to the Privy Council.

Port Jackson v Salmond:

Facts

- Parties:
    - Consignor: Schick ('S') – owned the goods
    - Consignee: Salmond & Spraggon ('S&S') – accepted the goods
    - Carrier: Blue Star Line ('BLS') – transported the goods
    - Stevedores: Port Jackson Stevedoring ('PJS') – unloaded the goods
- Facts:
    - S&S were the owners (consignees) of 37 cartons of razor blades, purchased under a distribution agreement with S
    - The razor blades were unloaded by PJS
    - 33 cartons were stolen as a result of misdelivery by the stevedores (PJS)
    - SS sued PJS for damages

Issue

- Are the stevedores (PJS) protected by the exclusion clause in their contract with the carrier (BLS)?
- PJS argued it was protected as a result of the following clauses:
    - Clause 2 – all exemptions from liability which applied to the carrier applied to independent contractors employed by the carrier
        - Note the conflict between intention and law: both parties accepted no liability to third parties, but a strict application of privity would ignore this expressly stated intent
    - Clauses 5 and 8 – the carrier's responsibility for goods ceased as soon as the goods left the ship
    - Clause 17 – in any event, the carrier ceased to be liable unless suit was brought within one year of delivery

Reasoning

- The action was actually founded in tort (negligence), but contractual provisions can modify tortious liability where, for example, liability for wrongful acts or defaults is exempted by an enforceable clause

- Stephen and Murphy JJ:
    - PJS was not protected because they had provided no consideration for BSL's promise to exempt them from liability
    - They refused to view consideration as being provided by the PJS's performance of the stevedoring services for BSL
    - PJS is thus not a party to the contract between BSL and S&S
    - In the original contract with the consignor (Schick), the offer was made by the carrier to the stevedore; there, acceptance and consideration had to be shown

- Barwick CJ:
  - PJS is protected by the exemption clauses
  - Barwick CJ adopted the approach in *Midlands*
    - There are two parties to the original contract (consignor and carrier)
    - Performing the transportation, the new owner (the consignee) accepts the terms to waive liability
    - Agency still needs to be shown: the carrier was authorised to act as agent for the stevedores – this was a finding of fact made by the trial judge
    - The agency was subsequently ratified by the stevedores
  - Consideration was provided by the stevedores in their unloading of the goods from BSL's ship

- A comparison of the reasoning of Stephen and Murphy JJ and Barwick CJ:
  - Giving effect to the provisions of contracts is commonly justified by reference to the intentions of the parties
  - However, here, the stevedores adopted standard terms
  - It is not always possible to formulate principle capable of universal application; the fact scenarios demanding assessment are many and nuanced; the outcome is largely dependant on how they are constructed by the trial judge
  - However, it might also be permissible to be judicially active in formulating principle of wide application; however, judges should be explicit about creating exceptions (eg, Mason CJ in *Trident*)

Decision

- Held:
  - 4:1 – PJS is not protected by the exemption clause
  - Barwick CJ (dissenting) – PJS was protected
  - Note: on appeal to the Privy Council, Barwick J's approach was endorsed and the appeal allowed
  - The High Court is no longer bound by Privy Council precedent, and there is strong opposition to the UK approach, so the status of the *Scruttons* test as it was applied in *Port Jackson* remains unclear
  - Lower courts are, however, bound by the Privy Council until such time as the High Court overturns the decision

F *Trust*

It is possible to hold a contractual promise for the benefit of another. In order to establish a promise held on trust, the third party needs to show that the promisee intended to create a trust.

In *Trident*, Deane J explained when the creation of a trust will be inferred:

> *[T]he requisite intention should be inferred if it clearly appears that it was the intention of the promisee that the third party should himself be entitled to insist on performance of the promise and receipt of the benefit and if trust is, in the circumstances, the appropriate legal mechanism for giving effect to that intention.*
>
> *A fortiori, equity's requirement of an intention to create a trust will be at least prima facie satisfied if the terms of the contract expressly or impliedly manifest that intention as the joint intention of both promisor and promisee.*

The effect of a trust is to impose, inequity, a fiduciary duty upon the promisee to exercise their contractual rights for the benefit of the third party. The third party beneficiary will thus have an equitable right to force the promisee to enforce the contract.

See also *Marks* per Mandie J.

G *Tort*

Liability in contract and tort can exist concurrently (*Hawkins v Clayton*). Tortious liability is not affected by a lack of contractual relations between the parties (though common law rights can be waived by a valid contract between promisor and promisee); however, to be successful, the third party will need to establish the elements of the tort.

Most commonly, the third party will sue the promisor (who confers the benefit upon the third party) in negligence, for failing to exercise that power.

H *Restitution and Unjust Enrichment*

Where:

- A promisor accepts consideration for a promise to benefit a third party
- The promisor is unjustly enriched by this consideration at the expense of the third party
- The promise is not fulfilled

the only way to rectify the unjust enrichment is to permit the third party to enforce the promise (Gaudron J in *Trident*)

However, by enforcing the promise (rather than refunding the consideration), the Court is really giving effect to an expectation-based remedy, which is typically not the concern of restitution (*Pavey & Matthews*). The amount awarded should be 'no more than what is fair and reasonable in the circumstances' (per Deane J in *Pavey & Matthews*).

I Trade Practices Act 1974 *(Cth)*

Section 52 of the *Trade Practices Act 1974* (Cth) provides a cause of action for third parties who suffer loss as a result of misleading and deceptive conduct causing them to act in reliance on a benefit promised to them:

> *When the making of a contractual promise contravenes the prohibition against misleading and deceptive conduct, and a person who is not party to the contract suffers loss as a result as a result of reliance on the promise, then that person will be entitled to damages.*

The promise must mislead the third party.

For example, in *Accounting Systems* (2000), CCH contracted with CIO, doing so on the basis of a second contract with another company. No terms relating to warranties were specified in CCH's contract, but it was held that this was misleading. Thus, even though CCH did not have warranties promised to it, this deception was still sufficient for a *Trade Practices Act* action.

[???]

J *Assignment and Novation*

Assignment involves the transfer of benefits under the contract.

Novation is the transfer of both the benefits and obligations under the contract.

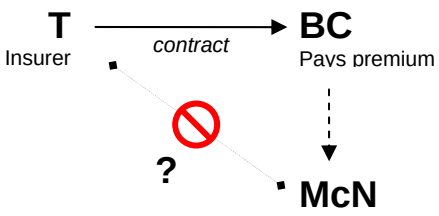
Exam note: the rules relating to assignment and novation are not examinable.

K *Application*

Trident v McNiece:

Facts

- Blue Circle ('BC'), the owner of a limestone crushing operation, entered into a contract of insurance with Trident ('T'), an insurer, in which Tagreed to indemnify 'the Assured' against liability in respect of injury to non-employees
- 'the Assured' was defined to mean 'Blue Circle, all of its related companies and all contractors and suppliers
- McNiece ('McN') was the principal contractor for construction work at a plant owned by T
- One of McN's employees (H) was injured and sued McN for damages
- McN sought indemnity from T under the terms of the contract of insurance which BC had taken out
- T denied liability and argued that McN had no right to sue on the contract since it was not a party to it and gave no consideration
- Factual diagram:



Issue

- McN is dependent upon BC to enforce the indemnification conferred upon it under the contract of insurance, because it is not a party to the contract between BC and T
- Can McN sue in its own right to enforce the benefit of T's insurance, or does it have to beseech BC to enforce the right as a party to the contract?

Reasoning

- Mason CJ and Wilson J:
  - Recognised a general exception to the doctrine of privity for contracts of insurance

- Criticise the doctrine of privity on the basis of fairness
- They could not identify a convincing justification for retaining the doctrine of privity
- It is inconsistent with contractual theory to overrule the parties' intentions if they are to confer benefits upon a third party; it is not inconsistent with contractual theory to confer such benefits

- Toohey J:
  - Recognised a similar exception to that of Mason CJ and Wilson J
  - This exception is slightly narrower: there needs to be express contemplation of the third party's benefit in the contract (ie, it cannot be implied from the terms)

- Gaudron J:
  - Used the doctrines of restitution and unjust enrichment to allow recovery by McN
  - Generally agreed with the reasons of Mason CJ and Wilson J (criticism of privity)
  - Nevertheless, found for McN on the basis of unjust enrichment (as opposed to an exception)
  - It is not necessary to make an exception
    - However, an action in equity would only allow recovery for immediate losses (ie, the premium payments)
    - If a contractual right were recognised, McN could recover expectation loss, which would mean indemnification (and a payout for the injured worker's compensation)
  - The elements of unjust enrichment are made out on the facts
    - T received money from BC for the promise to indemnify BC and third parties
    - T has kept that money
    - T has not performed their side of the promise
  - T cannot be allowed to keep the premium money and not perform its side of the bargain; to do so would be to allow it to be unjustly enriched
  - The source of the obligation is not contractual – it is equitable
    - Confines contractual remedies to the actual parties (in accordance with the doctrine of privity)
    - The remedy offered is equitable in nature

- Deane J:
  - Used a flexible application of trust law to allow recovery by McN
  - T promised BC insurance services, and BC held part of that contractual right on trust for McN (the trustee)
  - When McN seeks to invoke the contractual right held on trust, it must sue T *and* BC as joint defendants
  - Requirements are
    - Intention on the part of the promisee to create a trust
    - That the intention be readily discernible in certain classes of contracts (of which insurance contracts were one)

- Brennan J (dissenting):
  - Uses a traditional analysis to argue that there is a valid role for the doctrine of privity
    - The doctrine of privity prevents third parties enforcing benefits conferred upon them in contracts to which they are not a party
    - It does not matter if 'layers of sediment' obscure the fairness of the original doctrine
    - We should not start tinkering with contract law

  - The doctrine of privity is both settled and fundamental
  - Refuses to recognise an exception
  - Injustice (if any) can be overcome by other areas (such as trusts, estoppel)
    - Problematic: the doctrine of privity circumscribes the rights of parties to make amendments
  - Unlike Mason Cj and Wilson J, who confine the exception to contracts of insurance, Brennan J finds no distinguishing feature which would justify confining an exception to a particular class of contract
  - No exception recognised; McN is not indemnified

- Dawson J (dissenting):
  - Doctrine of privity applies; no exception recognised; McN is not indemnified
  - Rejection of privity doctrine requires a detailed consideration of the scope of the exception, when it applies, and how it is invoked
  - Any alteration to the current law should result from legislative change, otherwise the law will become too uncertain and confused
    - Need detailed legislation to resolve uncertainty
    - Similar to *Contracts (Rights of Third Parties) Act 1998* (UK)?
  - Also notes the impact the change would have upon defences
  - Uncertain as to how McN assumes the *obligations* of BC

- The rule could not be circumvented by agency:
  - It was not made out on the facts – McN could not establish that it had authorised BC to contract on its behalf
  - The approach is not rejected, however

- The rule could not be circumvented by estoppel:
  - This would require showing inducement by T, so estoppel could not be argued (T played no part in McN's assumption that it was indemnified)

- The doctrine of privity could not be circumvented by assignment:
  - BC had not assigned rights to McN

Decision

- The majority held that the operation of the doctrine of privity could be circumvented (by various means) and McN could recover directly from T; McN is indemnified against paying compensation to H

III POLICY JUSTIFICATIONS

A *In Favour of Privity*

The Court in *Trident* also identified several justifications in favour of the doctrine of privity:

- Prevention of double recovery (not a significant problem on the facts because only McN wanted to enforce the benefit)
- When does the chain of liability end? Contracting parties may be liable to third parties far removed from their contemplation (weak)
- Modifying the contract (strong)
  - *o* T and BC can alter the contract to preclude McN's recovery, without consulting McN

- *o* Parties are at liberty to vary contractual terms
- *o* The minority rely on this justification

Exam note: on the facts of *Trident*, it makes sense to let McNiece recover. Draw analogies with *Trident*'s case, apply the policy in support of privity to the facts, and conclude as to the possibility of recovery.

These justifications for privity are based upon the will theory of contract – there needs to be some exchange in order to justify enforcement of a promise. Because the third party has not provided consideration, there can be no bargain and thus no contract. This would suggest that where, as here, the third party has provided what can amount to consideration to the promisor, there would be no barrier to their enforcement of the promise.

However, the problem remains that parties to the contract have not necessarily assumed their obligations to the third party voluntarily (an important tenet of will theory). This suggests that any right conferred upon a third party would need to be expressly stated in a term and their rights clearly articulated. This being the case, the contemporary approach to the incorporation of terms may place onerous obligations upon the third party attempting to enforce the contract where it is deemed wholly in writing.

B *Against Privity*

The array of judicially-developed mechanisms for circumventing privity (and the increasing rate of their application) suggests that its eventual abandonment is inevitable. A legislative solution could swiftly redefine the role of the doctrine, or confine its significance (as, for example, in the *Property Law Act 1969* (WA) and *Property Law Act 1974* (QLD)), and would be a concrete expression of what the courts already seem willing to do.

See also Burrows' (1996) objections to the doctrine of privity, in the context of statutory reform in the United Kingdom.

III REFORMING PRIVITY

A Property Law Act 1969 *(WA)*

The *Property Law Act* provides an example of the types of factors that will be considered when developing a statutory exceptions to the operation of the doctrine of privity.

Property Law Act 1969 (WA) – s 11:

(2) Where a contract *expressly in its terms* purports to *confer a benefit* directly on a *third party*, the contract is, subject to subsection (3), *enforceable by that person in his own name* but —

- all defences are available against the third party;

- all parties to the contract must be joined in the proceeding;
- obligations imposed on the third party by the contract are enforceable

(3) Unless the contract otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the third party has adopted it either expressly or by conduct.

Important aspects:

- The benefit must be expressly conferred
- The promisor still has defences available
- Obligations are also enforceable by the promisor
- The parties can alter the terms at any time prior to adoption by the third party

Dawson J in *Trident* was a proponent of a legislative response because there were too many issues to consider in developing a judicial exception, which could result in uncertainty:

1 How do we identify third parties who have rights?

2 What Mason J did was a good idea, but it is not as simple as simply recognising an exclusion

3 Must the benefit be conferred directly (or can it be inferred)?

4 Will defences be available to the promisor? If so, how?

5 Can obligations also be imposed upon the third party? When? How?

6 How can the parties modify the contract without consent of the third party?

As an examination of the *Property Law Act* will show, most – if not all – of the above quandaries have been dealt with:

1 Third parties must be expressly acknowledged

2 Statutory schemes do not necessarily overcome this uncertainty, which will, to some extent, be inherent in any modification of a major doctrine of contract law – statutory or otherwise

3 The benefit must be express

4 Defences are available as if the third party was the promisee

5 All obligations can be imposed upon the third party

6 The parties can only modify the contract prior to the third party's adoption

In relation to modifying terms, the legislation might be criticised as reducing the freedom of the contracting parties to voluntarily change their relationship to one another. However, it must be remembered that their decision to expressly acknowledge the third party's rights was voluntary, and should not also be without consequence. Modifying terms reduces the certainty of the rights

and obligations of the third party; by freezing these obligations at the point when they are relied upon, the potential for injustice is minimised.

B Property Law Act 1974 *(QLD)*

The equivalent Act in Queensland endorses nearly every contractual doctrine *except* privity:

Property Law Act 1974 (QLD) – s 55:

s 1 A promisor who, for a valuable consideration moving from the promisee, promises to do or to refrain from doing an act or acts for the benefit of a third party shall, upon acceptance by the third party, be subject to a duty enforceable by the beneficiary to perform that promise.

A promise is accepted by a third party if, by words or conduct communicated by or on behalf of the third party, communicates his or her assent to the agreement.

A promise must:

(a) be or appear to be intended to be legally binding; **and**
(b) which creates *or appears to be intended to create* a duty enforceable by the third party

These provisions seem to be directed towards resolving certainty.

The Queensland *Property law Act* provisions are wider, because they have an objective test for determining whether rights are created under the contract: 'creates or appears to be intended to create'. This may mean that arguing for an implied right/obligation is easier under the Queensland statute.

However, *Cheshire & Fifoot's Law of Contract* notes that these provisions will probably be interpreted identically (because the Court is unlikely to give effect to purely subjective intention).

C Contract (Rights of Third Parties Act) 1999 *(UK)*

1 *Legislation*

The approach that has been adopted in the United Kingdom also seems to address Dawson J's concerns:

Contract (Rights of Third Parties) Act 1999* (UK)*:

s 1 Third parties have the right to enforce the contract if:

(a) The contract *expressly* provides that they may; or
(b) The terms purport to confer a benefit on the third party
    i. Unless it also appears that despite the conferral of a benefit, the parties did not intend that the third party could enforce the agreement.

s 2 Parties may not rescind the contract or vary it in such a way as to extinguish or alter his entitlement under that right without the consent of the third party if:

(a) The third party has communicated assent to the parties;
(b) The promisor is aware of reliance by the third party upon the right conferred; or
(c) It is reasonably foreseeable that the third party would so rely.
(d) This is subject to an express term to the contrary in the contract.

s 3 Provides that:

(a) The promisor shall have available the same defences against the third party as those which it has against the promisee;
(b) The promisor shall have defences against the third party if they are provided for in the contract (in addition to the defences available against the promisee).

s 5 Provides that where the promisee recovers first, any amount awarded to a third party will be reduced by an appropriate amount.

2 *Justifications in favour of*

Burrows (1996) gives several policy reasons in favour of the UK reforms:

- The privity rule can prevent effect being given to the intentions of the contracting parties (see, eg, *Coulls*)
- The privity rule can result in injustice to a third party where a valid contract has engendered reasonable expectations in the third party
    - *o* Contrast this claim with the responses of other theories of contract law
- The privity rule produces a perverse result where the person who has suffered the loss cannot sue and the person who has not can
    - *o* But: what about avoiding uncertainty?
- Even if a promisee can obtain a satisfactory remedy for the third party, the promisee may not be able, or wish, to sue
- The statutory and judge made exceptions (such as that recognised by Mason CJ and Wilson J in *Trident*) suggest that the rule is unjust
    - *o* Frequent circumvention is indicative of a tacit judicial awareness that the doctrine produces unjust results
- The exceptions that have been recognised strain traditional notions of privity and cause uncertainty in the law and in relations between contracting parties and others
- There has been widespread criticism of the doctrine of privity throughout the common law world (see, eg, Barwick CJ in *Port Jackson*)

- Other countries, such as the legal systems of most Member States of the European Union, allow third parties to enforce contracts

- The privity rule causes difficulties in commercial life

Exam question: do you think the UK approach is an appropriate response? Write.

Burrows also notes many parties are contracting out of the provisions (as they are permitted to do). This suggests that parties do not want to incur additional obligations to third parties with whom they deal. Arguably, however, the legislation was still warranted, because it remedies uncertainty in the law. Though many transactions may be invoking a privity-like rule, the legislation has made parties turn their minds to the issue of whether third parties can sue on the contract, improving clarity and preventing potentially unintended consequences.

3 *Objections to*

Peter Kincaid (2000) has a different objection to the Act:

- The connection between P and D in a civil cause of action is comprised of fact (causation of harm to P by D) and fault (wrongfulness of D invoking P's trust by making a promise and breaking it, and having extracted payment from P in consideration of the broken promise)

- All civil actions are consistently matters of private (corrective) justice; the law defines the elements of these private relationships that justify a cause of action

- The proposed reforms to privity depart from this pattern of civil liability: no relationship justifies the third party's claim because they are not party to the contract; the promise was not made by the third party, and they did not provide consideration

- The primary justification for abolishing privity in favour of recognising third party rights is to give effect to the intentions of the contracting parties
    - However, the intentions of the contracting parties do not establish or define a relationship between the promisor and the third party beneficiary – their intentions only go towards their relations with one another
        - I would question this assumption: where a third party is expressly acknowledged, it seems reasonable to suggest that their intentions relate to that third party and their relationship to them
        - Other recognised legal relationships (estoppel, restitution) achieve corrective justice even where the third party does not figure in the contracting parties' intentions

    - It is for the law to define what is just: the third party's success should not be determined by the intentions of the parties, but rather by the law
        - The Act allows contracting parties to create a cause of action by intending that a third party should have one
        - 'Justice is whatever you, the parties, say it is'
            - Is there anything wrong with this? Surely this is more consistent with the underlying justification for giving effect to *any* promise
                - Contractual theory: intention
                - Will theory: voluntary assent

    - Promise theory: value of the promise
  - Broadening the class of recognised contractual relationships does not equate to subjectifying the legal conception of justice – any action on the contract is still subject to legal determination by application of decided legal principles
  - The doctrine of privity often arrives at results openly acknowledged by the judiciary as unjust in the circumstances; 'justice', at present, is not given effect to by the doctrine of privity

- In the absence of a contractual relationship between third party beneficiary and promisor, the law's motivations for giving effect to the intention of the parties is based on public interest, not private
  - The civil law should be concerned with balancing the interests of P and D where there is a relationship between them to justify that balancing
  - Without the requisite legally recognised legal relationship, there can be no corrective justice

    - But: by allowing recovery by the third party, all the Court is really recognising is the reality of contemporary business transactions – which involve many more than two parties
    - Envisaging civil law as a purely corrective (and not distributive) system is indeed an assumption outmoded by modern practices

- Judicial hesitancy to recognise an exception of any scope (eg, Dawson J in *Trident*) suggests that we should not recognise it at all
  - Equally, the judiciary's hesitation to enforce unqualifiedly the doctrine of privity is indicative of its frequent arrival at unjust outcomes
  - Abolition, followed by the introduction of a new, legislative scheme defining the rights of third parties is likely to be more certain than recognising categorical or other exceptions, but maintaining the doctrine

- An alternative justification for circumventing privity is as follows:
  - Where D deliberately causes harm to the third party because of their reasonable reliance upon the contract, it would be unjust if a positive duty to act to prevent damage to a third party were recognised
  - Such a duty is onerous and unlikely to be adopted, but there needs to be some private justification for P's action against D

D *UNIDROIT Provisions*

UNIDRIOT – Chapter 5, s 2:

5.2.1.1 Parties may confer by express or implied agreement a right on a third party
5.2.1.2 The existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or limitations under the agreement

5.2.2 The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made

5.2.3 The conferral of rights upon the third party includes the right to invoke a clause in

the contract which excludes or limits the liability of the beneficiary

5.2.4 The promisor may assert against the beneficiary all defences which the promisor could assert against the promisee

5.2.5 The contracting party may modify or revoke the rights conferred by the contract on the third party until the third party has accepted them or reasonably acted in reliance on them

5.2.5.1 The third party may renounce a right conferred on it

Differences between the UNIDRIOT principles and the UK regime:

- Conferral can be implied, rather than only express
- Both emphasise reliance as the criterion of alteration
- UK deals less explicitly with the third party invoking an exclusion clause

Ultimate question: should the privity rule be reformed in Victoria?

IV HYPOTHETICAL SCENARIOS

A *June 2001 Examination*

- Mention *Coulls*, *Port Jackson*, *Trident*
- Don't wast time with the facts of these cases too much
- Look at ways the exceptions to the doctrine of privity have been developed
- Using the case law, approach the question of whether the doctrine of privity should be abolished, etc

B *June 2002 Examination*

- Note the tension between business practice and the legal doctrine of privity (especially *Trident*)
- Be sure to refer to secondary and comparative materials extensively – one of the examiners' main points of feedback is that these materials are not sufficiently treated by student papers
- Structuring answers is very important

Exam note: the doctrine of privity and related theory *will* be examined in some form.

C *Hypothetical Exercise*

1 *Preliminary observations*

- Title of the contract: no mention of LA as a party
    - Who signed the contract? (*Coulls*)
- BVI (promisee) does not want to bring an action
- Estoppel argument against BVI: 'we'll make sure the clubhouse is built to your specifications' (assumption, inducement)
    - But LA are unwilling to sue BVI (because they're a charity)
- Note criticism of the doctrine of privity and the judicial creativity employed to circumvent it

2 *Arguing LA is a party to the contract*

- Note the meaning of privity and explain attempts to bring LA within its scope
- Note *Coulls* – analogise and distinguish:
    - The majority in *Coulls* emphasised the lack of references in the contract to Mrs Coulls, but here, there are references to LA in every clause
    - The minority noted the importance of Mrs Coulls signing the contract, and here LA's representative signed it
- Problem of lack of consideration in *Coulls* also arises here:
    - Entire $200 000 came from BVI, since $70 000 was given back
    - No joint consideration given here

3 *Restitution approach*

- Per Gaudron J in *Trident*
- Note as a means to circumvent the operation of the doctrine of privity
- But: the association provided a building that is worth $200 000 objectively, so there is no enrichment (its value is only subjectively less to LA)
- However: they haven't provided something of value due to their cutting corners; they saved themselves money as a result, so they may have been unjustly enriched

4 *Estoppel*

- Against BVI:
    - Assumption by BVI – yes
    - Inducment: terms refer to L getting the clubhouse – yes
    - Detriment: lost $70 000, hassle of recollecting it – yes
    - Remedy might fall short of $100 000, however (since reliance not expectation loss is compensated in equity)

5 *Trusts*

- Per Deane J in *Trident*
- Conjob made the promise to BVI, who holds that promise on trust for L
- But: if L sues Conjob, BVI must join Conjob as defendant
- LA have indicated they are not willing to sue BVI, a charity

6 *Trade Practices Act* – s 52

- Misleading conduct: *Accounting Systems 2000*

- The third party can ground an action in a promise made to another that references them

7 *General Exception*

- Note insurance contracts exemption: there are no real analogies to be drawn with the present facts, though

8 *Agency*

- Finally, ask whether BVI was acting as agent of the association – yes
- Need authority – given
- But consideration to BVI?
- Comment on policy; note that criticism of privity is rife in the judgments, but that comprehensive legislative reform is going to lead to more certain, equitable outcomes than judicial improvisation