

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

PASHA S. ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendant.

This Document Relates To: All Actions

Master File No. 09-cv-118 (VM)

**Affidavit of Mark A C Diel**

**Tab 17**

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVILEGE/(2) PRIVILEGE/(ii) Exceptions to the Doctrine of Privilege

## (ii) Exceptions to the Doctrine of Privilege

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVILEGE/(2) PRIVILEGE/(ii) Exceptions to the Doctrine of Privilege/A. AT COMMON LAW

### A. AT COMMON LAW

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVILEGE/(2) PRIVILEGE/(ii) Exceptions to the Doctrine of Privilege/A. AT COMMON LAW/754. Introduction.

#### 754. Introduction.

Partly for reasons of expediency, even the common law was forced to accept a number of real or apparent exceptions to the doctrine of privilege<sup>1</sup> in relation to:

- (1) agency<sup>2</sup>;
- (2) assignment of choses in action<sup>3</sup>;
- (3) carriage of goods<sup>4</sup>;
- (4) commercial letters of credit<sup>5</sup>;
- (5) covenants concerning land<sup>6</sup>;
- (6) claims in tort<sup>7</sup>;
- (7) proprietary or possessory rights<sup>8</sup>;
- (8) registered companies<sup>9</sup>; and
- (9) sub-bailments<sup>10</sup>.

<sup>1</sup> As to the doctrine of privilege see paras 748-753 ante.

<sup>2</sup> See para 755 post.

<sup>3</sup> Assignment of choses in action takes place when the liabilities imposed or the rights acquired under a contract between A and B are transferred to C, who was not a party to the original contract: *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA (the parties contemplated assignment when contracting); *British Gas Trading Ltd v Eastern Electricity* (1996) Times, 29 November (power to assign subject to consent not to be unreasonably withheld). For the general power of assignment of choses in action see CHOSSES IN ACTION vol 13 (2009) PARA 13 et seq. Such assignment may be made either by act of the parties or by operation of law. As to assignment by act of the parties see para 757 post; and as to assignment by operation of law see para 758 post.

<sup>4</sup> See para 756 post.

<sup>5</sup> A contract for the sale of goods may require A (the buyer) to open a letter of credit with B (a bank) in favour of C (the seller). Besides the contract of sale (from C to B), there is, of course, a contract between A and B; but additionally, where the letter of credit is expressed to be irrevocable and has been confirmed by B, then once C acts on that credit it may be enforced by C against B. This has been explained on the basis that there is a collateral contract between B and C: *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318 at 321-322 per Rowlatt J. But see *McInerney v Lloyds Bank Ltd* [1973] 2 Lloyd's Rep 389; aff'd on other grounds [1974] 1 Lloyd's Rep 246, CA. As to collateral contracts see generally para 753 ante; and for the position as between B and C see generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 791 et seq.

<sup>6</sup> A covenant entered into between A (a landlord) and B (his tenant) not only binds the parties, but may also be of a type to run with the land: see the second resolution in *Spencer's Case* (1583) 5 Co Rep 16a; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 559. See also para 640 ante 24 ante. Where this is the case, both the benefit and the burden of that covenant may be enforceable by and against the

successors in title of A and B on the basis of 'privity of estate': see eg *Official Custodian for Charities v Mackey (No 2)* [1985] 2 All ER 1016, [1985] 1 WLR 1308. Whilst the benefit of a covenant runs with the land (*Spencer's Case* supra fifth and sixth resolutions), the general common law rule was that the burden of a covenant did not do so, except in the case of leases (*Ansterberry v Oldham Corpn* (1885) 29 ChD 750, CA); and see further EQUITY; LANDLORD AND TENANT; REAL PROPERTY. However, the burden of a covenant might run with the land in equity: see para 760 post; and for a statutory provision with regard to the benefit of covenants see para 617 ante.

7 See para 759 post.

8 Where a contract between A and B grants B a possessory or proprietary interest in a chattel, it may be that B can enforce that right against C, a person acquiring the chattel from B: see para 750 note 15 ante. Quære whether this would be so where C was a bona fide purchaser for value?

9 Whilst a registered company has a separate legal personality, so that even the moving force behind it cannot at common law sue on the company's contracts (*Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, CA; and see para 706 note 6 ante), he may be able to do so where the corporate veil is pierced (*Jones v Lipman* [1962] 1 All ER 442, [1962] 1 WLR 832; and see COMPANIES vol 14 (2009) PARA 121). As to pre-incorporation contracts see para 755 note 9 post.

10 See para 817 post.

#### Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(ii) Exceptions to the Doctrine of Privity/A. AT COMMON LAW/755. Agency.

##### 755. Agency.

The relationship of agency arises when A (the principal) authorises B (the agent) to act on his behalf in making a contract with C (the third party)<sup>1</sup>. Amongst the legal consequences of the agency relationship between A and B are the following: the general rule is that B is neither liable under<sup>2</sup> nor entitled to enforce<sup>3</sup> a contract he makes on behalf of A, whereas there is a direct contractual relationship between A and C<sup>4</sup>; but exceptionally B may be liable or entitled under that contract because he contracts personally<sup>5</sup>, or as co-principal<sup>6</sup>, or acts for a principal who is undisclosed<sup>7</sup>, unnamed<sup>8</sup> or non-existent<sup>9</sup>. Even if it be only an apparent exception to the doctrine of privity where B, by acting within his actual authority<sup>10</sup>, binds A to a contract with C, there is a real exception where B does so notwithstanding that his act is unauthorised, or where A becomes a party to a contract by reason of the doctrines of ratification, undisclosed principal or agency by necessity<sup>11</sup>. The principles relating to agency have also been used to explain: (1) how the benefit of an exemption clause in a bill of lading might be extended to cover all who assist in the transportation process<sup>12</sup>; and (2) insurance by persons with a limited interest in property<sup>13</sup>.

1 As to contracts with unincorporated associations see paras 765-766 post.

2 *Ferguson v Wilson* (1866) 2 Ch App 77; *Fairline Shipping Corpn v Adamson* [1975] QB 180, [1974] 2 All ER 967.

3 See AGENCY vol 1 (2008) PARAS 157-159, 167.

4 See AGENCY vol 1 (2008) PARA 125. For instance, a contract whereby limitation of liability under the Merchant Shipping Act 1995 ss 185(1), (2), 186(1)-(3), (5), Sch 7 (see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1042 et seq) is excluded may, it seems, benefit persons not named as parties if it can be inferred that the shipowners were contracting not only for themselves but also as agents for their masters and crew: see *The Kirkney* [1957] 11 51, [1957] 1 All ER 97; of the dissenting judgment of Lord Denning in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 489-491, [1962] 1 All ER 1 at 20-22, HL; and see generally para 816 post.

5 See eg *Bazma v Weeks* [1950] AC 441, [1950] 2 All ER 146, PC. It is sometimes doubtful whether B acted as agent or on his own behalf: see eg *Samuel & Co Ltd v Dumas* [1923] 1 KB 592, CA (affd [1924] AC 431, HL); *Henry Brajyne & Son Ltd v Smith* [1964] 2 Lloyd's Rep 476. There may be similar difficulties where B employs a sub-agent: see paras 606 ante, 818 note 4 post; and AGENCY vol 1 (2008) PARAS 54-56. In respect of collective bargaining in industry see para 752 note 8 ante.

6 Eg (1) contracts by A also on behalf of his/her spouse (B) with C (*Daly v General Steam Navigation Co Ltd* [1979] 1 Lloyd's Rep 257 at 262; affd in damages [1980] 3 All ER 696, [1981] 1 WLR 120, CA); (2) a partner acting for a partnership. As to joint promises see para 1079 et seq post. Cf *Mannam v Bradford City Council* [1970] 2 All ER 690, [1970] 1 WLR 937, CA; *Kepong Prospecting Ltd v Schmidt* [1968] AC 810, PC. In the case of spouses contracting with C, courts have alternatively analysed the situation as each spouse separately contracting with C (*Lockett v A & M Charles* [1938] 4 All ER 170). Similar alternative analyses have been employed with sub-agents, eg forwarding agents (*Jones v European General Express Co Ltd* (1920) 25 Com Cas 296; *Salsi v Jetspeed Air Services* [1977] 2 Lloyd's Rep 57; *Elektronska Industrija Oovr TYA v Transped Oovr Kintinentalni Spedicim* [1986] 1 Lloyd's Rep 49).

7 See AGENCY vol 1 (2008) PARA 125.

8 B is generally liable where he purports to act for an unnamed principal, but in fact acts for himself: *Schmaltz v Avery* (1851) 16 QB 655; and see AGENCY vol 1 (2008) PARAS 157, 167.

9 *Kelner v Baxter* (1866) LR 2 CP 174. As to pre-incorporation contracts see the Companies Act 1985 s 36C (as added).

10 See note 5 supra.

11 See further AGENCY vol 1 (2008) PARAS 24, 123.

12 See para 816 post.

13 See para 764 post.

## UPDATE

### 755 Agency

NOTE 9--Companies Act 1985 s 36C replaced by Companies Act 2006 s 51: see COMPANIES vol 14 (2009) PARA 66.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVILEGE/(2) PRIVILEGE/(ii) Exceptions to the Doctrine of Privilege/A. AT COMMON LAW/756. Carriage of goods.

### 756. Carriage of goods.

In the case of a contract for the carriage of goods the contract is, in the absence of express agreement, considered to be made between the carrier and the person at whose risk the goods are carried, who is in most cases the consignee<sup>1</sup>, in which case, therefore, there is no real exception to the doctrine of privilege<sup>2</sup>. Where the goods are lost or damaged, there may be prima facie liability in the tort of negligence<sup>3</sup>, perhaps because there is a sub-bailment<sup>4</sup>. The immunity which may be secured by the bill of lading for all those who assist in the process of transportation has been explained by way of agency<sup>5</sup>.

1 See eg the Carriage of Goods by Sea Act 1924 s 2(1); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 752 et seq.

2 As to the doctrine of privilege see para 748 et seq ante; and as to common law exceptions see generally paras 754-755 ante.

3 See para 759 post. It is otherwise where there is no privilege of contract between the carrier and the buyer who has not become the owner of the goods: see para 759 note 16 post.

4 See para 817 post.

5 See para 755 note 4 ante.

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### 757. Assignment by act of the parties.

Assignment by act of the parties may be an assignment either of rights or of liabilities under a contract; or, as it is sometimes expressed, an assignment of the benefit or the burden of the contract<sup>1</sup>. Assignment of the benefit of a contract is dealt with elsewhere in this work<sup>2</sup>.

As a rule a party to a contract cannot transfer his liability under that contract without the consent of the other party<sup>1</sup>. This rule<sup>4</sup> applies both at common law and in equity<sup>5</sup> and is generally unaffected by statute<sup>6</sup>.

There is, however, no objection to the substituted (vicarious) performance by a third person of the duties of a party to the contract where those duties are not connected with the skill, character, or other personal qualifications of that party<sup>7</sup>. In such circumstances, however, the liability of the original contracting party is not discharged, and the only effect is that the other contracting party, in addition, may be able to look to the third party for the performance of the contractual obligations<sup>8</sup>.

By the consent of all parties, liability under a contract may be transferred so as to discharge the original contract. Such a transfer is not an assignment of a liability but a novation of the contract<sup>9</sup>.

1 See *Bojuter & Sons v Mirror of Life Co Ltd* (1902) 50 WR 381.

2 See CHOSSES IN ACTION vol 13 (2009) PARAS 6, 13 et seq. As to non-assignable choses in action see para 758 post; and as to the creation of a trust of a non-assignable promise see para 761 note 3 post.

3 *Robson v Drummond* (1831) 2 B & Ad 303. "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract": *Humble v Hunter* (1848) 12 QB 310 at 317; see also *Johnson v Raylton, Dixon & Co* (1881) 7 QBD 438, CA. See further CHOSSES IN ACTION vol 13 (2009) PARAS 13 et seq, 92 et seq.

Distinguish the assignment of a limited benefit: see eg *Britain and Overseas Trading (Bristles) Ltd v Brooks Wharf and Bull Wharf Ltd* [1967] 2 Lloyd's Rep 51. Moreover, where a contract involves mutual rights and obligations, an assignee of a right may not be able to enforce that right without fulfilling the correlative obligation; as to non-performance as a bar to enforcement see paras 961-978 post.

4 As to covenants running with the land see paras 754 ante, 760 post; and EQUITY; LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 559; REAL PROPERTY.

5 *Tolhurst v Associated Portland Cement Manufacturers (1900), Associated Portland Cement Manufacturers (1900) v Tolhurst* [1902] 2 KB 660 at 668, 677, CA; affd sub nom *Tolhurst v Associated Portland Cement Manufacturers (1900), Tolhurst v Associated Portland Cement Manufacturers (1900) and Imperial Portland Cement Co* [1903] AC 414, HL.

6 It is not, for example, affected by the Law of Property Act 1925 s 136 (as amended): see *Tolhurst v Associated Portland Cement Manufacturers (1900), Associated Portland Cement Manufacturers (1900) v Tolhurst* [1902] 2 KB 660 at 670, 676, CA; affd on other grounds sub nom *Tolhurst v Associated Portland Cement Manufacturers (1900), Tolhurst v Associated Portland Cement Manufacturers (1900) and Imperial Portland Cement Co* [1903] AC 414, HL; and see CHOSSES IN ACTION vol 13 (2009) PARA 41 et seq; SALE OF LAND.

7 *Johnson Matthey & Co v Constantine Terminals Ltd and International Express Co Ltd* [1976] 2 Lloyd's Rep 215. Where a wagon company let a number of railway wagons to the defendants at an annual rent, and agreed to keep them in repair, it was held that the company's assignees were equally competent to keep the wagons in repair, and that the assignment of the company's liability did not put an end to the contract: *British Wagon Co v Leu* (1880) 5 QBD 149, DC. See further para 926 post; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) paras 55-60; CHOSSES IN ACTION vol 13 (2009) PARA 100.

8 The agreement between the original contracting party and the third party does not of itself confer any rights upon the latter party. However, express agreement in the conduct of all those parties may effect a novation of the old contract and give the latter party rights against the third party; as to novation generally see note 9 infra; and para 1036 et seq post.

9 See para 1036 et seq post. On a sale of goods, a condition cannot generally run with, or be attached to, the goods so as to bind the purchaser: see para 750 notes 5, 15 ante; and SALE OF GOODS AND SUPPLY OF SERVICES.

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#### 758. Assignment by operation of law.

The rights and liabilities of either party to a contract may in certain circumstances be assigned by operation of law, as, for example, when a party dies or becomes bankrupt<sup>1</sup>. Covenants relating to land, such as covenants entered into between the parties to a lease or between vendor and purchaser may in certain circumstances be enforceable by, or bind, their successors in title<sup>2</sup>.

No right or liability of a purely personal nature (that is one dependent on the skill or qualification of one party) can be assigned by operation of law<sup>1</sup>. Thus, the personal representatives of a deceased may not sue or be sued on such a contract made by the deceased and the contract is discharged by his death<sup>4</sup>. But the personal representatives may sue for any money earned by the deceased under the contract<sup>5</sup>, or even for money accruing after death, if it appears that the parties intended that the remuneration should continue to be payable after the ending of the contract<sup>6</sup>. If a party to a contract assigns his rights in equity before he dies, his personal representatives continue to represent him for the purpose of joining or being joined with the assignee in suing the debtor<sup>7</sup>.

Neither the rights nor liabilities of a party to a contract are assigned by his subsequently becoming a person suffering from mental disorder. Judgment may be recovered against him<sup>8</sup>, and he may sue on the contract, either by his next friend or committee, as the case may be<sup>9</sup>.

1 See the text and notes 2-9 infra; and para 1067 et seq post. As to assignment by operation of law see further CHOICES IN ACTION vol 13 (2009) PARA 86 et seq. As to the assignment of contracts of service on the restructuring of a company see CHOICES IN ACTION vol 13 (2009) PARA 100.

2 As to covenants contained in leases see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 132; and as to covenants on the sale of land see EQUITY; REAL PROPERTY; SALE OF LAND.

3 See also CHOICES IN ACTION vol 13 (2009) PARA 100.

4 *Chamberlain v Williamson* (1814) 2 M & S 408; *Finlay v Chirney* (1888) 20 QBD 494, CA; *Phillips v Alhambra Palace Co* [1901] 1 KB 59 at 63; *Shipton v Thompson* (1738) Willes 103 at 104n; *Firrov v Wilson* (1869) 1 R 4 Cl 744; *Phillips v Jones* (1888) 4 TLR 401; *Blades v Free* (1829) 9 B & C 167; *Foster v Bates* (1843) 12 M & W 226; *Campanari v Woodburn* (1854) 15 CB 400; *Friend v Young* [1897] 2 Ch 421; *Pont v Pual* (1889) 58 LJP 47; *Tasker v Shepherd* (1861) 6 H & N 575; *Graves v Cohen* (1929) 46 TLR 121. As to the principle that a personal contract is frustrated if the promisor becomes incapable of performing it see para 903 post; and for the effect of death on contracts generally see para 1078 post.

5 *Stibbs v Holywell Rly Co* (1867) LR 2 Exch 311.

6 *Wilson v Harper* [1908] 2 Ch 370; and see *Robey v Arnold* (1898) 14 TLR 220, CA; *Salomon v Brownfield and Brownfield Guild Pottery Society Ltd* (1896) 12 TLR 239; *Bilbeu v Hasse* (1889) 5 TLR 677; *affd* (1890) Times, 16 January, CA; and cf *Naylor v Yearsley* (1860) 2 F & F 41; *Boyd v Mathers* (1893) 9 TLR 443, CA; *Morris v Hunt* (1896) 12 TLR 187; *Gerahty v Baines & Co Ltd* (1903) 19 TLR 554; *Knight v Burgess* (1864) 33 LJ Ch 727; and *Weire v Brimsdown Lead Co Ltd* (1910) 103 LT 429.

7 *Brandt v Heatig* (1818) 2 Moore CP 184; and see further EXECUTORS AND ADMINISTRATORS.

8 See *Re Leavesley* [1891] 2 Ch 1, CA.

9 See *Farham v Mibvard & Co* [1895] 2 Ch 730 at 735. As regards the position of a receiver in relation to income and the estate of a person of unsound mind, and as regards vesting orders, see MENTAL HEALTH vol 30(2) (Reissue) para 723.

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### 759. Claims in tort.

Facts which constitute a breach of the contract between A and B may also give rise to a claim in tort<sup>1</sup>; and, in such a case, C, who is not a party to that contract but has such a claim in tort, sometimes may indirectly enforce that contract.

First, the breach of contract may amount to the tort of negligence<sup>2</sup>; but C may not bring such an action unless the breach of contract is also a breach of a duty of care owed to him<sup>3</sup>. For instance, such a duty of care has been placed upon the following professional advisers: insurance brokers<sup>4</sup>; safety consultants<sup>5</sup>; solicitors<sup>6</sup>; valuers and surveyors<sup>7</sup>. The breach of that duty to C may arise from A's negligent act<sup>8</sup> or misstatement<sup>9</sup>, provided there is sufficient 'proximity' between A and C to give rise to a duty of care. With regard to negligent acts, an earlier more generous view of the requisite proximity<sup>10</sup> has since been doubted<sup>11</sup>; and it may in any event be limited by a contractual provision<sup>12</sup>. In the case of negligent misstatements, the proximity test has also restricted the liability of auditors (A) to those whose statements were made for the purposes of the transaction into which C entered<sup>13</sup>; has usually denied liability where C suffered only economic

loss<sup>h</sup>; and in respect of property damage has denied liability in so far as A indirectly supplied that property to C<sup>b</sup>, or where C has no title to the property<sup>b</sup>.

Secondly, where C acquires a chattel from B with actual knowledge of the terms of a contract between A and B affecting it, and the acquisition or use of that chattel is inconsistent with that contract between A and B, C may be liable to A for the tort of wrongful interference with contractual rights<sup>b</sup>. Thirdly, where C threatens to break his contract with B, and thereby induces B to break his (B's) contract with A, A may be entitled to sue C for the torts of unlawful interference with trade<sup>h</sup> and conspiracy<sup>h</sup>. Fourthly, there is some authority that an action in restitution may lie in respect of a benefit which A received under a contract with B if he then failed to perform his promise to B to make a payment to C<sup>20</sup>.

1 As between A and B see para 610 ante; as between A and C see para 611 ante.

2 *Meux v Great Eastern Rly Co* [1895] 2 QB 387, CA, distinguishing *Alton v Midland Rly Co* (1865) 19 CBNS 213. For example the contract might operate as a licence to be on B's premises or vehicles, and so raise a duty of care between B and C; cf *Astin v Great Western Rly Co* (1867) LR 2 QB 442; see also the Occupiers' Liability Act 1957 s 2; and NEGLIGENCE.

3 *Playford v United Kingdom Telegraph Co* (1869) LR 4 QB 706 (mistake in telegram); *Dickson v Reuter's Telegram Co* (1877) 3 CPD 1, CA (misdelivery of telegram); *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, [1988] 2 All ER 992, HL (contra *Winnipeg Condominium Corp No 36 v Bird Construction Co* (1995) 121 DLR (4th) 193, SCC); and see generally NEGLIGENCE. As to sub-bailments see para 817 post. There is no longer an inland telegram service: see para 682 ante.

4 *Punjab National Bank v de Boinville* [1992] 3 All ER 104, [1992] 1 WLR 1138, CA.

5 *Driver v William Willett (Contractors) Ltd* [1969] 1 All ER 665.

6 *Rass v Counters* [1980] Ch 297, [1979] 3 All ER 580; *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL.

7 *Yianni v Edwin Evans & Sons* [1982] QB 438, [1981] 3 All ER 592; and see the case cited in note 9 infra.

8 If A's negligent act in performance of his contract itself causes loss to C: *Rass v Counters* [1980] Ch 297, [1979] 3 All ER 580; *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL.

9 If in negligent performance of his contract, A makes a misstatement to C: *Smith v Eric S Bush*, *Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL.

10 *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, [1982] 3 All ER 201, HL (B contracted to build a factory for C, under which contract C nominated A as specialist flooring sub-contractor. The floor was laid negligently. There was no contract between A and C). Distinguish the situation where there is a contract between A and C: *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71, [1988] 2 All ER 971, CA.

11 See *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL; *Balsamo v Medici* [1984] 2 All ER 304, [1984] 1 WLR 951; *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd, The Mineral Transporter, The Ibaraki Maru* [1986] AC 1, [1985] 2 All ER 935, PC; *Muirhead v Industrial Tank Specialties Ltd* [1986] QB 507, [1985] 3 All ER 705, CA; *Leigh & Silvan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785, [1986] 2 All ER 145, HL; *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 All ER 135, [1987] 1 WLR 1, CA; *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, [1988] 2 All ER 992, HL.

12 *Southern Water Authority v Carey* [1985] 2 All ER 1077 (third and fourth defendants); *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA. But see *Pacific Associates Inc v Baxter* [1990] 1 QJ 993, [1989] 2 All ER 159, CA; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 166.

13 There is no liability by an auditor making a statutory audit on behalf of a company (B) to subsequent investors or lenders to B who rely on those accounts: *Al Saudi Banque v Clark Pixley (a firm)* [1990] Ch 313, [1989] 3 All ER 361; *Caparna Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 508, HL.

14 Otherwise, it would come perilously close to abrogating the doctrine of privity: see *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758, [1988] 1 All ER 791, CA; *Balsamo v Medici* [1984] 2 All ER 304, [1984] 1 WLR 951; *Murc Rich & Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1996] AC 211, [1995] 3 All ER 307, HL.

15 Where A sells goods to B, who resells them to C, A is not liable in tort to C for the defective state of the goods: *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 All ER 135, [1987] 1 WLR 1, CA. But see *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, [1982] 3 All ER 201, HL, cited in note 10 supra.

16 *Leigh & Silvan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785, [1986] 2 All ER 145, HL.

17 *British Motor Trade Association v Salvadori* [1949] Ch 556, [1949] 1 All ER 208; and see the cases cited in para 611 note 2 ante; see also TORT. The tort may be committed even though B was quite willing to break his contract with A: *Seston v Tapahams Ltd* [1964] 3 All ER 876 at 889, [1964] 1 WLR 1408 at 1425; affd [1965] 1 Ch 1140 at 1161, 1187, [1965] 3 All ER 1 at 9, CA; revsd without reference to this point [1967] 1 AC 50, [1966] 1 All ER 1039, HL. This avoids importing the doctrine of constructive notice (ie by C of B's intention) into the tort; but it is subject to the limitation that no tort is committed if C's interference was not the cause of A's loss: *De Minton v Gibson* (1858) 4 De G & J 276; *The Lord Strathcarron* [1925] 1143.

18 *Roake v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL. The House of Lords expressly rejected the suggestion that their decision outflanks the doctrine of privity: Lord Reid (at 1168 and at 374), Lord Hodson (at 1200, 1201 and at 394, 395), Lord Pearce (at 1235 and at 415). See further COMPETITION.

19 *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, [1942] 1 All ER 142, HL, and see TORT.

20 *Trident Insurance Co Ltd v Mc Niece Bras Pty Ltd* (1988) 165 CLR 107 at 177 per Gaudron J. But this seems to be an abrogation of the doctrine of privity in just the same way as if an actum were allowed in tort (see note 14 supra) and to be inconsistent with *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(ii) Exceptions to the Doctrine of Privity/B. IN EQUITY

## B. IN EQUITY

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(ii) Exceptions to the Doctrine of Privity/B. IN EQUITY/760. The equitable exceptions.

### 760. The equitable exceptions.

In addition to the real and apparent exceptions to the doctrine of privity<sup>1</sup> allowed by the common law<sup>2</sup>, there are also some exceptions in equity:

- (1) in some cases, A may obtain a decree of specific performance of his contract with B, requiring B to confer a promised benefit on C. In the leading case<sup>3</sup>, the nephew (B) purchased the business of his uncle (A) in return for a promise by B to pay A's widow (C) an annuity; and, after A's death, C sued B, both as administratrix of her late husband<sup>4</sup> and in her own capacity<sup>5</sup> to enforce the promise<sup>6</sup>. She succeeded as administratrix<sup>7</sup> in obtaining a decree of specific performance requiring B to pay the annuity to herself<sup>8</sup>, the court rejecting her statutory claim<sup>9</sup> and not mentioning her common law claim<sup>10</sup>. It will be noted that, in an ordinary case where A and C are separate persons, the availability of this remedy is dependent on (a) the remedy of specific performance being available to A<sup>11</sup>; (b) the willingness of A to take proceedings<sup>12</sup>; and (c) the fact that it was the intention under the contract that payment should be made to C for his or her own benefit<sup>13</sup>;
- (2) in the case of a sale or lease of land, and particularly where there is a building scheme in prospect, the obligations relating to land and arising under valid restrictive covenants or agreements may, in appropriate circumstances, be enforced in equity against persons who were not parties to the original covenant or agreement<sup>14</sup>;
- (3) a covenant to settle after-acquired property contained in a marriage settlement may be enforced<sup>15</sup> by all persons within the marriage consideration<sup>16</sup>; that is, by the spouses and the issue of the marriage<sup>17</sup>;
- (4) where B makes a promise to A for the benefit of C, C can enforce the promise if A has expressly or impliedly constituted himself trustee for C<sup>18</sup>.

1 As to the doctrine of privity see paras 748-750 ante.

2 See paras 754-759 ante.

3 *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.



4 Hence in law representing A: see EXECUTORS AND ADMINISTRATORS.

5 He is as a stranger to the contract between A and B.

6 The action was argued on three grounds: (1) an action for damages by A and C; (2) an action for specific enforcement by A; and (3) an action by C for damages by virtue of the Law of Property Act 1925 s 56.

7 Their Lordships in *Beswick v Beswick* [1968] AC 58 at 72, [1967] 2 All ER 1197 at 1201, HL, per Lord Reid, at 81 and 1207 per Lord Hodson, at 92-93 and 1215 per Lord Pearce and at 95 and 1217 per Lord Upjohn all assumed that a contract can only be enforced by the parties to it. The House of Lords has several times indicated its willingness to review the position: *Beswick v Beswick* supra at 72 and at 1201; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571 at 583, [1980] 1 WLR 277 at 291, HL, per Lord Wilberforce, at 297-298 and 588-589 per Lord Keith and at 300 and 591 per Lord Scannan; *Swain v Law Society* [1983] 1 AC 598 at 611, [1982] 2 All ER 827 at 832, HL, per Lord Diplock. See also para 748 note 15 ante.

8 *Beswick v Beswick* [1968] AC 58 at 78, 81-82, [1967] 2 All ER 1197 at 1205, 1207-1208, HL, per Lord Hodson, at 91 and 1214 per Lord Pearce and at 101-102 and 1221 per Lord Upjohn. The unanimous House of Lords in this respect confirmed a unanimous Court of Appeal: [1966] Ch 538 at 555, 557, 560-561, [1966] 3 All ER 1 at 8, 9, 11, CA. See also *Gasparini v Gasparini* (1978) 87 D.L.R. (3d) 282, Ont CA. As to specific performance see para 896 post; and SPECIFIC PERFORMANCE.

9 See para 617 notes 18-23 ante.

10 See para 749 note 13 ante.

11 In *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL, it was said that specific performance would be available where 'damages for breach would be a less appropriate remedy' (per Lord Pearce at 88 and at 1212), or 'are inadequate to meet the justice of the case' (per Lord Upjohn at 102 and 1221); and see the situation cited in para 764 note 13 post; see further SPECIFIC PERFORMANCE vol 44(1) (Reissue) para 813 et seq. Cf *Boots v E Christopher & Co* [1952] 1 KB 89, [1951] 2 All ER 1045, CA; *Tanenbaum v Sears* [1971] SCR 67, 18 D.L.R. (3d) 709, Can SC. In circumstances such as those in *Beswick v Beswick* supra, C can enforce the order of specific performance even though he is not a party to the proceedings in which it was obtained: RSC Ord 45 r 9; and see CIVIL PROCEDURE. This could be seen in terms of good faith dealing: see para 613 ante.

12 Lord Denning MR has suggested that C could circumvent the doctrine by suing B and joining A as co-defendant: see *Beswick v Beswick* [1966] Ch 538 at 557, [1966] 3 All ER 1 at 9, CA (see also *Gurtner v Circuit* [1968] 2 QB 587 at 596, [1968] 1 All ER 328 at 331, CA); the point was not mentioned on appeal (see the text to note 11 supra). However, Diplock and Salmon LJ said in *Gurtner v Circuit* supra that the action could be brought only by A: see [1968] 2 QB 587 at 599-606, [1968] 1 All ER 328 at 334-338, CA.

13 *Ashby v Costin* (1888) 21 QBD 401; *Harris v United Kingdom Postal and Telegraph Services Benevolent Society* (1889) 87 LT Jo 272; *Re Davies, Davies v Davies* [1892] 3 Ch 63; *Beswick v Beswick* [1968] AC 58 at 71, 94, 96, [1967] 2 All ER 1197 at 1200-1201, 1216, 1217, HL (on this point overruling *Re Engelbach's Estate* [1924] 2 Ch 348 and doubting *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124).

14 *Tulk v Moxhay* (1848) 2 Ph 774; and see EQUITY vol 16(2) (Reissue) paras 616, 627. As to covenants running with the land at common law see para 754 note 26 ante; and for the rule that the equitable doctrine does not apply to contractual licences see para 750 note 14 ante.

15 Such a covenant cannot be enforced by volunteers outside the marriage consideration (as to which see para 737 ante), such as either spouse's next-of-kin: *Re Cook's Settlement Trusts, Royal Exchange Assurance v Cook* [1965] Ch 902, [1964] 3 All ER 898.

16 This proposition, and the cases cited for it (see note 17 infra), are difficult to reconcile with the modern definition of consideration; but see para 613 ante (good faith dealing). For the meaning of 'consideration' see para 728 ante; and for the rule that consideration must move from the promisee see para 734 ante.

17 *Hill v Gomme* (1839) 5 My & Cr 250 at 254 per Lord Cottenham LC; *Re D'Angibau, Andrews v Andrews* (1880) 15 ChD 228 at 242, CA, per Cotton LJ; *Green v Paterson* (1886) 32 ChD 95 at 107, CA, per Fry LJ; *Re Plumtree's Marriage Settlement, Underhill v Plumtree* [1910] 1 Ch 609 at 618 per Eve J.

18 As to trusts of promises see para 761 post; and for the requirements of a valid trust see generally TRUSTS vol 48 (2007 Reissue) para 604 et seq.

## UPDATE

### 760 The equitable exceptions

NOTE 11--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(ii) Exceptions to the Doctrine of Privacy/B. IN EQUITY/761. Trusts of promises.

### 761. Trusts of promises.

Provided it can be shown that A intended to create a trust of B's promise for the benefit of C<sup>1</sup>, C can sue B to enforce the promise if he joins A in the action<sup>2</sup>. As a general rule, C is then beneficially entitled to the benefit of that promise<sup>3</sup> and A has no such right<sup>4</sup>. Such a trust may therefore operate as an exception to the doctrine of privity<sup>5</sup>.

A person may be a trustee<sup>6</sup> not only of a chose in possession, but also of a chose in action<sup>7</sup>. Furthermore, equity held that A might be a trustee of a promise by B to pay money, not to A, but to C<sup>8</sup>; and even the common law sometimes allowed a party to recover more than he had lost on the grounds that he was bound to hold the surplus for a third party<sup>9</sup>. Finally, the House of Lords approved an action by C to compel B to perform a promise made by B under contract with A to pay commission to C<sup>10</sup>.

Although these developments have established a clear exception to the doctrine of privity<sup>11</sup>, the courts have sought to limit that exception by insisting in more recent times on strict proof of an intention on the part of A and B to create a trust of the promise<sup>12</sup>. So far, the law of trusts has only been applied as a means of avoiding the doctrine of privity in relation to promises to pay money or transfer property; it might conceivably be applied to other kinds of promises, such as to hold the benefit of an exemption clause for C<sup>13</sup>; but the recent judicial tendency to confine the scope of the trust exception makes this unlikely.

1 As to intention to create a trust see para 762 post.

2 As a general rule, A must be joined: see para 749 note 21 ante. However, B may waive this requirement: see eg *Les Affrèteurs Réunis SA v Leopold Walford (London) Ltd* [1919] AC 801, HL. Cf assignments, as to which see CHOSSES IN ACTION vol 13 (2009) PARA 13 et seq.

3 See *Dan King Productions Inc v Warren* [1988] 2 All ER 608 (trust of non-assignable promise). As to non-assignable promises see para 757 ante. Compare the position where there is no trust: see para 749 head (1) ante.

4 *Re Flavell, Murray v Flavell* (1883) 25 ChD 89, CA. For an exceptional case where A was held entitled to recover for his own benefit see *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, CA (but this decision may turn on the language of the statute creating the trust: see para 764 note 8 post).

5 It has been argued that in equity, a person for whose benefit a contract has been entered into had a remedy in equity against the person with whom it was expressed to be made, because the court would deem the latter a trustee for the former; and that, since the Supreme Court of Judicature Act 1873 (repealed), equity must prevail: *Drimmie v Davies* [1899] 1 IR 176 at 182 (decision that specific performance might be obtained in favour of C by the executors of A: as to which see para 760 note 8 ante). However, it is clear that C will only succeed where he can show a trust, and that the mere fact that the promise is made for the benefit of C is today insufficient to create a trust: see para 762 post.

6 As to the essentials of a valid trust see TRUSTS vol 48 (2007 Reissue) para 604 et seq.

7 *Talby v Official Receiver* (1888) 13 App Cas 523, HL; and see EQUITY; PERSONAL PROPERTY. As to equitable assignments of choses in action see CHOSSES IN ACTION vol 13 (2009) PARAS 3, 24 et seq.

8 *Tomlinson v Gill* (1756) Amb 330; *Gregory and Parker v Williams* (1817) 3 Mer 582; *Lloyd's v Harper* (1880) 16 ChD 290, CA; *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL (subject matter of the trust was the money, not a promise). See further EQUITY; GIFTS.

9 See eg *Lumb v Vize* (1840) 6 M & W 467; *Robertson v Wait* (1853) 8 Exch 299; *The Winkfield* [1902] P 42, CA; *Prudential Staff Union v Hall* [1947] KB 685. See also *Crowden v Aldridge* [1993] 3 All ER 603, [1993] 1 WLR 433 (no contract, but direction to executors in favour of third party).

10 *Les Affrèteurs Réunis SA v Leopold Walford (London) Ltd* [1919] AC 801, HL. But see *Marcan Shipping (London) Ltd v Polish Steamship Co, The Manifest Lipkawy* [1989] 2 Lloyd's Rep 138, CA.

11 See note 5 supra.

12 See para 762 post.

13 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC; and see para 813 note 6 post. However, this view was rejected in *Southern Water Authority v Carey* [1985] 2 All ER 1077 at 1083-1094 per Judge David Smout QC.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVILEGE/(2) PRIVILEGE/(ii) Exceptions to the Doctrine of Privity/B. IN EQUITY/762. Intention to create a trust.

#### 762. Intention to create a trust.

In respect of a promise made by B to A for the benefit of C, the question whether A has created a trust of that promise so that C may enforce it as beneficiary is one of intention<sup>1</sup>. A may expressly evince an intention to create a trust<sup>2</sup>, in which case it is merely a question of construction whether C is the beneficiary of that promise<sup>3</sup>. Alternatively, A may create a trust by implication.

The question of whether a trust of a promise has been created by implication is one that has caused the courts some difficulty and sometimes given rise to apparently contradictory conclusions. Thus, a promise to a person to provide for his dependants on his retirement or death has been held to create a trust in some cases<sup>4</sup>, but not in others<sup>5</sup>; life assurance policies expressed to be for the benefit of third parties have been held to create a trust in some cases<sup>6</sup>, but not in others<sup>7</sup>; and in relation to other types of insurance the courts have similarly sometimes held that a third party could take advantage of the policy under such an implied trust<sup>8</sup>, and sometimes that he could not by reason of the doctrine of privity<sup>9</sup>.

It may be that there is no point in trying to reconcile all the cases cited above, as they may represent different stages in the development of the notion of a trust of a promise<sup>10</sup>. The modern tendency, it would seem, is to narrow the scope for the use of the trust for avoiding the doctrine of privity, and the courts today are markedly more reluctant to imply such a trust<sup>11</sup>. Among the factors which appear to influence the courts in deciding whether to imply a trust are the following:

- (1) there must be an intention on the part of A that B's promise should benefit C<sup>12</sup>, not A<sup>13</sup>;
- (2) that intention to benefit C must be irrevocable; a power in A to divert the benefit of the promise to himself is fatal<sup>14</sup>; but a mere power in A to redistribute the benefit between other third parties will not necessarily negative a trust, whether the alleged trust is created by contract<sup>15</sup> or statute<sup>16</sup>;
- (3) such an irrevocable intention to benefit C is not necessarily conclusive in favour of a trust<sup>17</sup>, for it may merely show an intention to make a gift<sup>18</sup>; but it seems that an intention to create a trust of a promise will more readily be found where the promise by B to A was made in pursuance of some pre-existing contractual<sup>19</sup> or fiduciary<sup>20</sup> obligation owed by B to C.

1 *Swain v Law Society* [1983] 1 AC 598 at 620, [1982] 2 All ER 827 at 839, 111., per Lord Brightman. As to trusts of promises see para 761 ante; and for the equitable exceptions to the doctrine of privity generally see para 760 ante.

2 *Fletcher v Fletcher* (1844) 4 Hare 67; *Bmskill v Dawson* [1955] 1 QB 13, [1954] 2 All ER 649, CA.

3 See *Gandy v Gandy* (1885) 30 ChD 57, CA; and as to compliance with formal requirements imposed by the Law of Property Act 1925 s 53(1)(b) see EQUITY vol 16(2) (Reissue) paras 563-564, 851.

4 *Re Flavell, Murray v Flavell* (1883) 25 ChD 89, CA. Cf *Page v Cox* (1852) 10 Hare 163; *Re Gardin, Lloyds Bank and Harratt v Lloyd and Gardin* [1940] Ch 851; *Drimmie v Drives* [1899] 1 IR 176.

5 *Re Schebsman* [1944] Ch 83, [1943] 2 All ER 768, CA (argument in favour of a trust by B's trustee in bankruptcy). Cf *Re Stapleton-Bretherton, Weld-Blundell v Stapleton-Bretherton* [1941] Ch 482, [1941] 3 All ER 5; *Re Greene, Greene v Greene* [1949] Ch 333, [1949] 1 All ER 167. In the following cases, it was conceded that there was no trust: *Re Miller's Agreement, Uniacke v A-G* [1947] Ch 615, [1947] 2 All ER 78; *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, 111.

6 *Re Richardson, Weston v Richardson* (1882) 47 LT 514; *Royal Exchange Assurance v Hope* [1928] Ch 179, CA; *Re Webb, Barclays Bank Ltd v Webb* [1941] Ch 225, [1941] 1 All ER 321; *Re Foster's Policy, Menner v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222.

7 *Re Burgess' Policy* (1915) 113 LT 443; *Re Engelbach's Estate, Tibbetts v Engelbach* [1924] 2 Ch 348 (see para 764 note 5 post); *Re Clay's Policy of Assurance, Clay v Earnshaw* [1937] 2 All ER 548 (see para 764 note 5 post); *Re Foster, Hudson v Foster* [1938] 3 All ER 357; *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124.

*Re Engelbach's Estate* supra and *Re Sinclair's Life Policy* supra have been overruled on another ground: see para 749 note 18 ante.

- 8 *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E. & B. 870; *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282 (see para 764 note 13 post); *Prudential Staff Union v Hall* [1947] KB 685.
- 9 *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, PC; *Green v Russell* [1959] 2 QB 226, [1959] 2 All ER 525, CA.
- 10 *Hill v Gornite* (1839) 5 My. & Cr. 250; *Page v Cox* (1852) 10 Hare 163.
- 11 *Re Burgess' Policy* (1915) 113 L.J. 43; *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124; *Re Schebsman* [1944] Ch 83 at 104, [1943] 2 All ER 768 at 704, CA.
- 12 See *Lyus v Prowsa Developments Ltd* [1982] 2 All ER 953, [1982] 1 WLR 1044.
- 13 *West v Houghton* (1879) 4 CPD 197, DC (criticised in *Re Flavell, Murray v Flavell* (1883) 25 ChD 89 at 98 per North J). The same may be true if it seems from the facts that A took the promise as much for the benefit of C as for his own benefit: *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, PC (one of the grounds for the decision was that, under the law of British Columbia, a father was liable for the torts of his minor children. Had this not been the case, the decision might have gone the other way; cf *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282).
- 14 *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124 (overruled on another ground: see para 749 note 18 ante). Even if there is no express power in A to divert the benefit to himself, the contract may so restrict the freedom of A and B as to make the court reluctant to find a trust was intended: *Re Burgess' Policy* [1915] 113 LT 443; *Re Schebsman* [1944] Ch 83, [1943] 2 All ER 768, CA. The earlier view was that a trust may arise although the contracting parties could divert the benefit away from C: see note 10 supra. But see *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222 (A's power to divert benefit time-limited and expired).
- 15 *Re Webb, Barclays Bank Ltd v Webb* [1941] Ch 225, [1941] 1 All ER 321. Cf *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222; *Re Garbett, Garbett v IRC* [1963] NZLR 384.
- 16 *Re Policy of the Equitable Life Assurance of the United States and Mitchell* (1911) 27 TLR 213; *Re Fleetwood's Policy* [1926] Ch 48; *Swain v Law Society* [1983] 1 AC 598 at 621, [1982] 2 All ER 827 at 840, HL, per Lord Brightman. As to trusts created by statute see paras 763-764 post.
- 17 *Re Engelbach's Estate, Tibbets v Engelbach* [1924] 2 Ch 348 (overruled on another point: see para 749 note 18 ante); *Re Clay's Policy of Assurance, Clay v Earnshaw* [1937] 2 All ER 548; *Re Foster, Hudson v Foster* [1938] 3 All ER 357; *Re Stapleton-Bretherton, Wald-Blundell v Stapleton-Bretherton* [1941] Ch 482, [1941] 3 All ER 5; *Green v Russell* [1959] 2 QB 226, [1959] 2 All ER 525, CA; *Re Cook's Settlement Trusts, Royal Exchange Assurance v Cook* [1965] Ch 902, [1964] 3 All ER 898.
- 18 See *Richards v Delbridge* (1874) LR 18 Eq 11; *Swain v Law Society* [1983] 1 AC 598 at 620, [1982] 2 All ER 827 at 840, HL, per Lord Brightman; and GIFTS vol 52 (2009) PARA 269.
- 19 *Re Independent Air Travel Ltd* [1961] 1 Lloyd's Rep 604 (point conceded with approval of the court).
- 20 *Harmer v Armstrong* [1934] Ch 65, CA (fact that B was C's agent, and hence under a fiduciary duty, helped to establish the necessary intention). Cf *Pople v Evans* [1969] 2 Ch 255, [1968] 2 All ER 743.

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### C. BY STATUTE

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(ii) Exceptions to the Doctrine of Privacy/C. BY STATUTE/763. The statutory exceptions.

#### 763. The statutory exceptions.

In addition to the real and apparent exceptions to the doctrine of privacy<sup>1</sup> allowed by the rules of common law<sup>2</sup> or of equity<sup>3</sup>, there are also some laid down by statute:

- (1) a person may take an interest in land or other property or the benefit of any condition, covenant or agreement respecting land or other property, although not named as a party to the conveyance or other instrument<sup>1</sup>. On the basis that contractual rights are 'property', it has been suggested that this provision embodied a general exception to the privity doctrine<sup>2</sup>; but this view now appears to have been rejected<sup>3</sup>;
- (2) where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes them as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) includes the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty of care<sup>4</sup>. There are also specific provisions creating duties in respect of work in connection with a dwelling house which are owed, not only to the person ordering the work, but also to persons who later acquire an interest in the premises<sup>5</sup>;
- (3) whilst any term or condition of a contract for the sale of goods by a supplier to a dealer, or of any agreement between them relating to such a sale, is generally void in so far as it purports to establish the minimum price to be charged on the resale of the goods<sup>6</sup>, it may be valid in so far as it specifies a maximum resale price<sup>7</sup>;
- (4) the registered memorandum and articles of a company bind the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles<sup>8</sup>;
- (5) if a bill of exchange is dishonoured, the drawer, acceptor and indorsers are all liable to compensate the holder in due course<sup>9</sup>;
- (6) the court has a discretionary jurisdiction to grant a stay of proceedings in any cause or matter pending before it as might formerly have been restrained by injunction in equity at the suit of any party to that cause or matter<sup>10</sup>, or any third party<sup>11</sup>;
- (7) there are a number of statutory exceptions in respect of different types of contract of insurance<sup>12</sup> and carriage by sea<sup>13</sup>.

The Law Commission has proposed that there should be a new general statutory exception to the privity rule in respect of contracts between A and B under which B makes a promise in favour of C<sup>17</sup>.

1 As to the doctrine of privity see paras 748-750 ante.

2 See paras 754-758 ante.

3 See paras 760-762 ante.

4 See the Law of Property Act 1925 s 56; and para 617 ante.

5 See para 617 head 94) ante.

6 See para 617 ante.

7 See the Occupiers' Liability Act 1957 s 3(1); and NEGLIGENCE vol 33 (Reissue) para 637.

8 See the Defective Premises Act 1972 s 1; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Re-issue) para 77. Similarly, the landlord's duties under the Act to his tenant extend to third parties: see s 4.

9 See the Resale Prices Act 1976 ss 9, 10 (as amended). As to void contracts see generally para 836 et seq post.

10 See *ibid* s 26.

11 See the Companies Act 1985 s 14.

12 See the Bills of Exchange Act 1882 ss 54-56; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1515, 1574 et seq. But see *AEG (UK) Ltd v Lewis* [1993] 2 Bank L.R. 119, (1992) Times, 29 December, CA (third party paying A's debt by cheque not liable as been given no consideration).

13 See the Supreme Court Act 1981 s 49; and eg *Snelling v John G. Snelling Ltd* [1973] Q.B. 87, [1972] 1 All ER 79 (see also para 749 note 16 ante). See further CIVIL PROCEDURE.

14 See the Supreme Court Act 1981 s 49. But such third party can only obtain a stay where he can show that he might be placed under some legal liability if the case proceeded to judgment: *Gore v Van Der Lann* [1967] 2 QB 31, [1967] 1 All ER 360, CA (see also paras 814 note 7, 830 note 4 post); *Nippon Yusen Kaisha v International Import and Export Co Ltd, The Elbe Maru* [1978] 1 Lloyd's Rep 206. See generally CIVIL PROCEDURE.

15 See para 764 post; and INSURANCE.

16 See the Carriage of Goods by Sea Act 1971 s 1(2), Schedule art IV; and CARRIAGE AND CARRIERS.

17 See *Privity of Contract: Contracts for the Benefit of Third Parties* (1996) (Law Com no 242; Cm 3329). This new exception would not impose the burden of a contract on one not a party to it (C), but would allow him to take the benefit of it. Without detracting from the present exceptions, this new statutory one would allow C the usual rights of enforcement where he is either named in the contract or it purports to confer a benefit on him, upon which A and B would lose the right to vary or cancel the contract. Prima facie, C's proposed new statutory rights should be subject to all the defences and set-offs that B would have had against A. Further, under these proposed rules, C could rely on an exclusion or limitation clause in the contract; and B's duty should be owed to A and C, though without double jeopardy: see *Privity of Contract: Contracts for the Benefit of Third Parties* supra and the draft Contracts (Rights of Third Parties) Bill contained therein.

## UPDATE

### 763 The statutory exceptions

NOTE 8--1972 Act s 4 modified: Commonhold and Leasehold Reform Act 2002 Sch 7 para 2 (in force in relation to England: SI 2003/1986).

NOTES 9, 10--Resale Prices Act 1976 repealed: Competition Act 1998 Sch 14 Pt 1.

NOTE 11--Companies Act 1985 s 14 replaced by Companies Act 2006 s 33: see COMPANIES vol 14 (2009) PARA 243 et seq

NOTES 13, 14--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### 763A. Rights of third parties.

The following provisions do not apply in relation to a contract entered into before 11 May 2000, unless the contract is entered into on or after 11 November 1999 and expressly provides for the application of the Contracts (Rights of Third Parties) Act 1999: s 10(2), (3).

#### 1. Right of third party to enforce contractual term

A person who is not a party to a contract may in his own right enforce a term of the contract if the contract expressly provides that he may<sup>1</sup>, or the term purports to confer a benefit on him<sup>1</sup>. 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<sup>2</sup>. A third party has no right to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract<sup>3</sup>. For the purpose of exercising his right to enforce a term of the contract, there is 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 apply accordingly<sup>4</sup>. Nothing in the above provisions affects any right of the promisee<sup>5</sup> to enforce any term of the contract<sup>6</sup>. Similarly, the above provisions do not affect any other right or remedy of the third party that exists or is available<sup>8</sup>.

<sup>1</sup> Contracts (Rights of Third Parties) Act 1999 s 1(1)(a).

- 2 Ibid s 1(1)(b). This 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: s 1(2). See *Nisslin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 All ER (Comm) 481; *Laemthong International Lines Co Ltd v Artis* [2005] EWCA Civ 519, [2005] 2 All ER (Comm) 167 (defendant failed to discharge burden of showing that letter of indemnity not intended to be enforceable by third party). See also *Prudential Assurance Co Ltd v Ayres* [2008] EWCA Civ 52, [2008] 1 All ER 1266; *Dolphin Maritime & Aviation Services Ltd v Sveriges Angartygs Assurans Forening* [2009] EWHC 716 (Comm), [2009] 2 Lloyd's Rep 123, [2009] All ER (D) 119 (Apr).
- 3 1999 Act s 1(3). See *Avraamides v Colwill* [2006] EWCA Civ 1533, [2006] All ER (D) 167 (Nov) (agreement did not identify any third party or class of third parties).
- 4 1999 Act s 1(4). Where a term of a contract excludes or limits liability in relation to any matter references in the 1999 Act to the third party enforcing the term are to be construed as references to his availing himself of the exclusion or limitation: s 1(6).
- 5 Ibid s 1(5). A party must not be treated, by virtue of s 1(5), as a party to the contract for the purposes of any other Act (or any instrument made under any other Act): s 7(4).
- 6 'Promisee' means the party to the contract by whom the term is enforceable against the promisor: s 1(7).
- 7 Ibid s 4.
- 8 Ibid s 7(1).

## 2. Variation and rescission of contract

Where a third party has a right to enforce a term of the contract<sup>1</sup>, 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 (1) the third party has communicated his assent to the term to the promisor<sup>2</sup>; (2) the promisor is aware that the third party has relied on the term<sup>3</sup>; or (3) 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<sup>4</sup>. However, this restriction 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<sup>5</sup>; or (b) the consent of the third party is required in circumstances specified in the contract instead of those set out in heads (1)-(3) above<sup>6</sup>. Where the consent of a third party is required<sup>7</sup>, the court or arbitral tribunal may, on the application of the parties to the contract, dispense with his consent if satisfied<sup>8</sup> that his consent cannot be obtained because his whereabouts cannot reasonably be ascertained<sup>9</sup>, or that he is mentally incapable of giving his consent<sup>10</sup>. The court or arbitral tribunal may, on the application of the parties to a contract, dispense with any consent that may be required under head (3) if satisfied that it cannot reasonably be ascertained whether or not the third party has in fact relied on the term<sup>11</sup>. 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<sup>12</sup>. The jurisdiction conferred on the court<sup>13</sup> by sub-ss (4) to (6) is exercisable by both the High Court and a county court<sup>14</sup>.

- 1 Ie under the Contracts (Rights of Third Parties) Act 1999 s 1: see PARA 763A.1.
- 2 Ibid s 2(1)(a). 'Promisor' means the party to the contract against whom the term is enforceable by the third party: s 1(7). The assent may be by words or conduct, and if sent to the promisor by post or other means must not be regarded as communicated to the promisor until received by him: s 2(2).
- 3 Ibid s 2(1)(b).
- 4 Ibid s 2(1)(c).
- 5 Ibid s 2(3)(a).
- 6 Ibid s 2(3)(b).
- 7 Ie under s 2(1), (3).
- 8 Ibid s 2(4).
- 9 Ibid s 2(4)(a).
- 10 Ibid s 2(4)(b).
- 11 Ibid s 2(5).

12 Ibid s 2(6).

13 Ie under ibid s 2(4)-(6).

14 Ibid s 2(7).

### 3. Defences available to promisor

Where proceedings for the enforcement of a term of a contract are brought by a third party<sup>1</sup>, the promisor has available to him by way of defence or set-off any matter that (1) arises from or in connection with the contract and is relevant to the term<sup>2</sup>; and (2) would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee<sup>3</sup>. The promisor also has 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<sup>4</sup>. Further, the promisor also has available to him by way of defence or set-off any matter, and by way of counterclaim any matter not arising from the contract, that would have been available to him by way of defence, set-off or counterclaim against the third party if the third party had been a party to the contract<sup>5</sup>. Where in any proceedings brought against him a third party seeks 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<sup>6</sup>.

Where a term of a contract is enforceable by a third party<sup>7</sup>, and the promisee has recovered from the promisor a sum in respect of the third party's loss in respect of the term or the expense to the promisee of making good to the third party the default of the promisor, then, in any proceedings brought by the third party, the court or arbitral tribunal must reduce any award to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee<sup>8</sup>.

1 Contracts (Rights of Third Parties) Act 1999 s 3(1). The proceedings are brought in reliance on s 1: see PARA 763A.1.

2 Ibid s 3(2)(a). Section 3(2) is 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: s 3(5). For the meaning of 'promisor' see PARA 763A.2 NOTE 2.

3 Ibid s 3(2)(b). For the meaning of 'promisee' see PARA 763A.1 NOTE 6.

4 Ibid s 3(3).

5 Ibid s 3(4). Section 3(4) is 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: s 3(5). A third party must not, by virtue of s 3(4) or 16) (see NOTE 6), be treated as a party to the contract for the purposes of any other Act (or any instrument made under any other Act): s 7(4).

6 Ibid s 3(6).

7 Ie under ibid s 1: see PARA 763A.1.

8 Ibid s 5.

### 4. Exceptions

No rights are conferred<sup>1</sup> on a third party in the case of a contract on a bill of exchange, promissory note or other negotiable instrument<sup>2</sup>. Similarly, no rights are conferred on a third party in the case of any contract binding on a company and its members under the statutory provision relating to the memorandum and articles<sup>3</sup>. No rights are conferred on a third party to enforce: (1) any term of a contract of employment against an employee<sup>4</sup>; (2) any term of a worker's contract against a worker (including a home worker)<sup>5</sup>; or (3) any term of a relevant contract against an agency worker<sup>6</sup>.

No rights are conferred on a third party in the case of (a) a contract for the carriage of goods by sea<sup>7</sup>; 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<sup>8</sup>. However, a third party may avail himself of an exclusion or limitation of liability in such a contract<sup>9</sup>.



- 1 le under the Contracts (Rights of Third Parties) Act 1999 s 1: see PARA 763A.1.
- 2 Ibid s 6(1).
- 3 Ibid s 6(2) (amended by SI 2009/1941). The statutory provision referred to is the Companies Act 2006 s 33: see COMPANIES vol 14 (2009) PARA 243.
- 4 1999 Act s 6(3)(a). 'Contract of employment' and 'employee' have the meaning given by the National Minimum Wage Act 1998 s 54 (see EMPLOYMENT vol 39 (2009) PARAS 2, 158); 1999 Act s 6(4)(a).
- 5 Ibid s 6(3)(b). 'Worker's contract' and 'worker' have the meaning given by the National Minimum Wage Act 1998 s 54, and 'home worker' has the meaning given by s 35(2) (see EMPLOYMENT vol 39 (2009) PARA 163); 1999 Act s 6(4)(a), (b).
- 6 Ibid s 6(3)(c). 'Agency worker' has the meaning given by the National Minimum Wage Act 1998 s 34(1) (see EMPLOYMENT vol 39 (2009) PARA 162); 1999 Act s 6(4)(e). 'Relevant contract' means a contract entered into, in a case where the 1998 Act s 34 applies, by the agency worker as respects work falling within s 34(1)(a): 1999 Act s 6(4)(d).
- 7 Ibid s 6(5)(a). 'Contract for the carriage of goods by sea' means a contract of carriage (1) contained in or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction; or (2) 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: s 6(6). 'Bill of lading', 'sea waybill' and 'ship's delivery order' have the same meaning as in the Carriage of Goods by Sea Act 1924 (see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 338, 364, 365) and a corresponding electronic transaction is a transaction within the 1924 Act s 1(5) (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 337) which corresponds to the issue, indorsement, delivery or transfer of a bill of lading, sea waybill or ship's delivery order: 1999 Act s 6(7).
- 8 Ibid s 6(5)(b). 'The appropriate international transport convention' means (1) 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 the Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 3 (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 683); (2) 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 the Carriage of Goods by Road Act 1965 s 1 (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 650); and (3) in relation to a contract for the carriage of cargo by air (a) the Convention which has the force of law in the United Kingdom under the Carriage by Air Act 1961 s 1 (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 121); or (b) the Convention which has the force of law under the Carriage by Air (Supplementary Provisions) Act 1962 s 1 (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 121); or (c) either of the amended Conventions set out in the Carriage by Air Acts (Application of Provisions) Order 1967 Sch 2 Pt B or Sch 3 Pt B (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 121); 1999 Act s 6(8).
- 9 Ibid s 6(5).

## 5. Arbitration

Where (1) a third party's right to enforce a term<sup>1</sup> ('the substantive term') is subject to a term providing for the submission of disputes to arbitration<sup>2</sup>; and (2) that agreement is an agreement in writing for the purposes of legislation relating to arbitration<sup>3</sup>, the third party is to be treated for the purposes of that legislation as a party to the arbitration agreement as regards disputes between himself and the promisor<sup>4</sup> relating to the enforcement of the substantive term by the third party<sup>5</sup>.

Where (a) a third party has a right to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration<sup>6</sup>; (b) that agreement is an agreement in writing for the purposes of legislation relating to arbitration<sup>7</sup>; and (c) the third party does not fall to be treated under heads (1) and (2) above as a party to that agreement<sup>8</sup>, the third party must, if he exercises the right, be treated for the purposes of that legislation as a party to that 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<sup>9</sup>.

- 1 le under the Contracts (Rights of Third Parties) Act 1999 s 1: see PARA 763A.1.
- 2 Ibid s 8(1)(a).
- 3 Ibid s 8(1)(b). The legislation referred to is the Arbitration Act 1996 Pt 1 (ss 1-84).
- 4 For the meaning of 'promisor' see PARA 763A.2 NOTE 2.
- 5 1999 Act s 8(1). See *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38.
- 6 1999 Act s 8(2)(a).

7 Ibid s 8(2)(b). The legislation referred to is the Arbitration Act 1996 Pt 1 (ss 1-84).

8 1999 Act s 8(2)(c).

9 Ibid s 8(2).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVILEGE/(2) PRIVILEGE/(ii) Exceptions to the Doctrine of Privilege/C. BY STATUTE/764. Insurance.

#### 764. Insurance.

Whilst the doctrine of privilege applies to contracts of insurance<sup>1</sup>, its effects in relation to these contracts has been modified, not only by the doctrine of agency<sup>2</sup> and by certain trusts<sup>3</sup>, but also by a number of statutory exceptions.

With regard to fire insurance, where an insured house or building is destroyed by fire, the insurer may generally be required by any person interested in that house or building to lay out the insurance moneys towards its reinstatement<sup>4</sup>.

With regard to life insurance, a policy of insurance effected by one spouse on his or her own life<sup>5</sup> and expressed to be for the benefit of his or her spouse and/or children<sup>6</sup> creates a statutory trust<sup>7</sup> in favour of the objects named in the policy<sup>8</sup>.

With regard to insurance by persons with limited interests, where a person with a limited interest in property insures it for its full value, the common law rule is that the insurance inures for the benefit of all persons interested in the property; the person effecting it is regarded as effecting it as agent on their behalf<sup>9</sup>. He may recover the full value from the insurers; but he is regarded as trustee of any such sums recovered as exceed his loss<sup>10</sup>, and is liable to pay those sums to the other persons interested in the property<sup>11</sup>. Several real or supposed common law exceptions to this principle have been removed by statute<sup>12</sup>.

Motor insurance provides exceptions with regard to two classes of person, a third party driver and an injured third party, as follows:

- (1) without having to prove that the owner of a vehicle intended to constitute himself a trustee of his insurance for that driver<sup>13</sup>, a third party driving a vehicle with the consent of the owner can take the benefit of any provision in his favour in the owner's insurance policy<sup>14</sup>;
- (2) where there is a provision insuring against liability to a third party, an injured third party falling within the terms of that provision may in certain circumstances take proceedings directly against the insurer<sup>15</sup>; and, where there is no such protection available to the injured third party, he may have recourse against the Motor Insurers' Bureau<sup>16</sup>.

1 See *Boston Fruit Co v British and Foreign Marine Insurance Co* [1906] AC 336, 411.; *Yangtze Insurance Association v Lukmanjee* [1918] AC 585, PC.; *Normid Finishing Association Ltd v Ralphs and Mansell and Assicurazioni Generali SpA* [1989] 1 Lloyd's Rep 274, CA.

2 See para 755 ante.

3 See para 761 ante.

4 See the Fires Prevention (Metropolis) Act 1774; and INSURANCE. Thus, a tenant may claim under his landlord's insurance (*Portoven Cinema Co Ltd v Price and Century Insurance Co Ltd* [1939] 4 All ER 601) and vice versa. Cf the position of a devisee: see *Re Rushbrook's Will Trusts*, *Alwood v Norwich Diocesan Fund and Board of Finance* [1948] Ch 421, [1948] 1 All ER 932; and EXECUTORS AND ADMINISTRATORS.

5 This provision only applies where a person insures his own life, and not that of his child; *Re Engelbach's Estate*, *Tibbets v Englebach* [1924] 2 Ch 348 (overruled on another ground: see para 749 note 18 ante). It does not apply to dependants other than the spouse and children of the marriage: *Re Clay's Policy of Assurance*, *Clay v Earnshaw* [1937] 2 All ER 548 (informally adopted child). See also para 762 note 7 ante.

6 Including illegitimate children: see the Family Law Reform Act 1969 s 19(1).

- 7 In a case falling outside the statutory trust, it is possible to create an express or implied trust: *Re Finster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222; and see para 761 ante.
- 8 See the Married Women's Property Act 1882 s 11 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 274. For an exceptional case where the promisee's executors were held entitled to the benefit of the policy moneys see *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, CA. See also para 761 note 4 ante.
- 9 See paras 754-755 ante.
- 10 See para 761 ante.
- 11 *Waters v Monarch Fire and Life Insurance Co* (1856) 5 E & B 870; *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL; and see INSURANCE.
- 12 See the Marine Insurance Act 1906 s 14(2); the Law of Property Act 1925 s 47; and INSURANCE; SALE OF LAND.
- 13 In *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282 an owner was found to be a trustee of the benefit of his insurance policy for a third party driving with his consent. For intention to create a trust see para 762 note 8 ante.
- 14 See the Road Traffic Act 1988 s 148(7); and INSURANCE vol 25 (2003 Reissue) paras 708, 721, 738; ROAD TRAFFIC vol 40(2) (2007 Reissue) para 948.
- 15 See the Third Parties (Rights against Insurers) Act 1930 s 1 (as amended); the Road Traffic Act 1988 ss 151-153 (amended by the Road Traffic Act 1991 ss 48, 83, Sch 4 para 66, Sch 8); and INSURANCE vol 25 (2003 Reissue) para 750; ROAD TRAFFIC vol 40(2) (2007 Reissue) paras 951-953. For the rights of such persons where the insurance company is in liquidation see the Policyholders Protection Act 1975 s 7 (as amended); and INSURANCE vol 25 (2003 Reissue) para 156; ROAD TRAFFIC.
- 16 By agreement between the Motor Insurers' Bureau and the Secretary of State for the Environment, Transport and the Regions, the Bureau promises to pay any unsatisfied judgment in respect of the compulsory motor insurance against injury to third parties. That agreement is specifically enforceable by the minister (*Gurtner v Circuit* [1968] 2 QB 587, [1968] 1 All ER 328, CA) and the Bureau has never repudiated an action by an injured third party on grounds of lack of privity; *Gurtner v Circuit* supra at 599 and at 334 per Diplock LJ. Whilst the foundations of the agreement 'are better not questioned' (*Gardner v Moore* [1984] AC 548 at 556, [1984] 1 All ER 1100 at 1102, HL, per Lord Hailsham of St Marylebone LC), Bureau policy is not to rely on the doctrine of privity as against the injured third party (*Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, [1964] 2 All ER 742, CA; *Randall v Motor Insurers' Bureau* [1969] 1 All ER 21, [1968] 1 WLR 1900; *Perrson v London Country Buses* [1974] 1 All ER 1251, [1974] 1 WLR 569, CA; *Porter v Addo* [1978] RTR 503). See generally INSURANCE; ROAD TRAFFIC.

## UPDATE

### 764 Insurance

NOTE 15--Policyholders Protection Act 1975 repealed: Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649.