

Privity of Contract and its Exceptions

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Privity of Contract and its Exceptions

Lorna J MacFarlane

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Preface

This book is a revised version of my doctoral thesis entitled “Privity and Exceptions to Privity in Scots Private Law: A New Taxonomy” submitted to the University of Edinburgh for the degree of Doctor of Philosophy in July 2018, defended in September 2018, and awarded in July 2019. I have attempted to state the law as at June 2021.

Neither PhD nor book would have been possible without the Edinburgh Legal Education Trust. I am immensely grateful for these opportunities, and to Professors Kenneth Reid and George Gretton for their encouragement during the PhD. I would also like to acknowledge the Clark Foundation for Legal Education for providing financial assistance.

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LORNA JANE MACFARLANE
Edinburgh
June 2021

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<i>SLT</i>	<i>Scots Law Times</i>

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1 Introduction

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A. OVERVIEW OF CHAPTER 1

1-01. This introductory chapter summarises the key research questions and explains why privity and its exceptions are of practical and doctrinal importance in Scots law. The chapter also describes the methodology and concludes with an overview of the book.

B. KEY RESEARCH QUESTIONS

1-02. The main aims of the book are to analyse and define the privity doctrine in Scots contract law, and to provide a taxonomy of concepts which operate where (i) there is an extra-contractual party (ii) which has suffered loss caused by non-performance or defective performance of a contract but (iii) lacks a contractual right to recover its loss, (iv) the concept providing a means of recovery for the extra-contractual party, and/or a means by which the contracting party which did not cause the loss can recover on behalf of the extra-contractual party.

1-03. In defining privity, the book analyses historical and modern case law and commentary on the doctrine to discuss whether privity is compatible with Scots

contract theory and the principles of freedom to contract and freedom of contract. The relationship between privity and delict has proved controversial in situations involving third-party loss, and so the book also examines the relationship between these two areas of law. The book addresses whether privity does and should exist, and identifies the policy reasons which justify the creation of exceptions to privity.

1-04. For the purposes of the taxonomy, the four relevant concepts are: (i) contracts for the benefit of another; (ii) transferred loss; (iii) *ad hoc* agency; and (iv) undisclosed agency. The book also assesses whether external network liability could and should be recognised in Scots law, because this form of liability is a normative concept which meets the specifications outlined above.

1-05. Third-party rights are not considered, because the third party has a contractual right (i.e. the third-party right) to recover its loss. The book does not address exclusion clauses, which allow for protection from liability rather than a means by which to recover loss.¹ Issues of unjustified enrichment are also excluded from the work. The book addresses third-party loss due to defective performance or non-performance of contracts, rather than situations in which the third party wishes to recover a gain made by a contracting party at its expense. Additionally, as the book considers claims made by or on behalf of parties external to contracts, it is not relevant to this work to consider whether a contracting party can make an unjustified enrichment claim against an external party.

1-06. The book considers whether the concepts under discussion are exceptions to the privity doctrine, determines whether the concepts are compatible with contract theory, and considers whether there are justifiable policy reasons in support of each concept. It also assesses whether any of the concepts ought to be classified as delictual, rather than contractual.

1-07. The key research questions are therefore:

1. What does “privity of contract” mean in Scots law?
2. Does and should Scots law recognise the privity doctrine?
3. How does the privity doctrine interact with delictual liability?
4. Which policy reasons justify the creation of exceptions to the privity doctrine?
5. Are contracts for the benefit of another, transferred loss, *ad hoc* agency, and undisclosed agency:
 - (a) compatible with the privity doctrine;
 - (b) compatible with Scots contract theory;
 - (c) classifiable as a form of delictual liability; and
 - (d) justifiable in terms of policy considerations?

¹ Discussion on exclusion clauses and privity is, however, found in: R Merkin, “Third Party Immunity granted under Contract”, in Merkin (ed), *Privity* 67; J L R Davis, “Privity and Exclusion Clauses”, in Kincaid (ed), *Privity* 284.

6. Would the recognition of external network liability be:
- (a) compatible with the privity doctrine;
 - (b) compatible with Scots contract theory;
 - (c) classifiable as a form of delictual liability; and
 - (d) justifiable in terms of policy considerations?

1-08. This book offers law reform proposals which are designed to ensure that the privity doctrine in Scots law and the aforementioned concepts are satisfactory from both a structural and a systematic perspective. The law must be clear, coherent, and capable of being applied in practice. Accordingly, the current law is assessed against these criteria, and the suggestions for reform seek to meet these criteria.

C. JUSTIFICATION FOR THE TOPIC OF THE BOOK

1-09. Walker comments, in respect of contract law in general, that:

Unfortunately it is increasingly the practice of unplanned and unconsidered legislation to make particular rules for particular kinds of contract or contracts in particular circumstances, and accordingly to multiply the number of specialties and of exceptions to general principles and rules of contract.²

1-10. This observation can certainly be applied to the state of the law on privity and its exceptions. Scots law recognises numerous exceptions to privity.³ However, the wide range of situations in which privity is bypassed leaves the privity doctrine and its exceptions in a state of confusion. The danger is that privity is hollowed out by its exceptions to the extent that it eventually collapses. Thus far, no attempts have been made in Scots law to synthesise the justifications for exceptions to privity. Indeed, as discussed in chapter 2,⁴ there is a lack of consensus as to whether the privity doctrine exists at all. The question thus arises as to whether Scots law recognises privity, and, if so, in which situations exceptions are and should be allowed. The book seeks to provide clarity on these issues, offering conclusions on the existence of the privity doctrine, the four concepts identified above, and offering policy considerations which justify new exceptions to privity.

1-11. This book therefore seeks to be of practical and doctrinal value, because it addresses the current confusion and lack of coherence in the law. There are a number of reasons why doctrinal clarity would be of benefit to both contracting parties and third parties.

(1) The protection of contracting parties

1-12. It is crucial that contracting parties can ascertain the existence and extent of their liabilities towards extra-contractual parties. Trebilcock notes that a strict privity

² Walker, *Contracts* para 3.4.

³ Statutory exceptions are discussed in paras 3-22ff and 5-03ff below.

⁴ See, in particular, paras 2-19 to 2-20 and 2-26 to 2-27 below.

doctrine excludes the possibility for third parties to claim rights under contracts,⁵ but the “opposite extreme” of delimiting the class of third-party beneficiaries too broadly “could deter socially beneficial contractual relationships”.⁶ In other words, if contracting parties are unable to estimate the costs of liability to external parties, they will enter into fewer socially beneficial transactions.⁷ This is because liability towards third parties affects the financial value of any commercial project or transaction, as well as the cost of insurance required to cover potential third-party claims. Brownsword observes that modern commerce necessitates a business culture of confidence rather than fear, and “this is where the law of contract makes a key contribution to the social and economic life of the nation”.⁸ The current lack of clarity on the status of privity in Scots law unnecessarily jeopardises parties’ confidence in transactions, whereas a clearly defined privity doctrine provides peace of mind⁹ for contracting parties to conduct business with an accurate understanding of their likely liabilities to third parties.

1-13. Whilst contracting parties should not be permitted to contract without regard for the consequences of their dealings for third parties,¹⁰ the law should provide sufficient clarity to protect them from unexpected liabilities. Otherwise, parties will justifiably choose to contract under systems other than Scots law. This book seeks to balance the competing considerations of the ability of contracting parties to predict accurately the risks and liabilities involved in their transactions, and the protection of third parties from the impact of contractual activities. The key contribution of the book is to suggest a practically workable framework for the former to anticipate their liability towards the latter. It is therefore of practical relevance in ensuring that contracting parties can apply clear, well-defined legal doctrine to predict liability which will result from defective performance or non-performance of a contractual obligation.

(2) The protection of third parties

1-14. Third parties are affected by defective performance or non-performance of a contract in many circumstances. Wilson offers various examples:¹¹ in *Glanzer v Shepard*,¹² public weighers, under contractual instruction from a seller, gave a buyer an incorrect certificate of weight, and the buyer overpaid in his contract with

⁵ The benefits of recognising third-party rights and other exceptions to privity are discussed in paras 5-03ff below.

⁶ M Trebilcock, “The doctrine of privity of contract” (2007) 57 *University of Toronto Law Journal* 269, 272. See also Brownsword, *Contract Law* 8.

⁷ Trebilcock, “The doctrine of privity of contract” 274.

⁸ Brownsword, *Contract Law* 8.

⁹ Morgan, *Great Debates* 275.

¹⁰ This is discussed in paras 5-37 to 5-56 below.

¹¹ These cases are discussed in W A Wilson, “Mapping Economic Loss”, in D M Walker and A J Gamble (eds), *Obligations in Context: Essays in Honour of David M Walker* (1990) 141, 143.

¹² 233 NY 236 (1922).

the seller; in *Junior Books v Veitchi*,¹³ a party was left with a defective floor due to the negligence of a sub-contractor with whom it was not in a direct contractual relationship; in *The Aliakmon*,¹⁴ a buyer sought to recover the price of goods lost due to defective performance of a contract of carriage between the carrier and the seller. It is questionable in each case whether the external party can recover losses resulting from defective performance or non-performance of a contract, and, if they can recover, whether the liability owed is contractual or delictual. It is important that third parties can easily predict whether they can recover their losses. Precise rules on the situations in which privity can be bypassed would allow third parties to make an informed decision as to whether they should bring a claim against one of the contracting parties. This book seeks to provide clarity as to when and how third parties can recover loss caused by defective performance or non-performance of a contract. The book also proposes reforms to various concepts which would allow them better to reflect a policy of protecting third parties.

(3) Summary

1-15. Clear, workable law on the privity doctrine and its exceptions is crucial from the perspective of both contracting and extra-contractual parties. The provision of a taxonomy of the exceptions to privity is therefore of practical importance.

1-16. Devlin observes that:

Rigidity and a regular pattern are pleasing to the legal mind, and so soon as he can the lawyer sets up a system of principles and rules from which he is reluctant to depart. He may start close to his subject, but because it is alive, illogical and contrary, it is likely to slip and slither out of the pattern he devises for it. *The danger in any branch of the law is that it ossifies*.¹⁵

1-17. As discussed in chapter 2,¹⁶ the privity doctrine has not been subject to maintenance in recent times. Its boundaries have not been examined and refined as new exceptions have been created, resulting in a lack of coherence in the law. It appears that the law has evolved to meet practical concerns without full consideration of its bedrock of privity. Consequently, the law on privity has “ossified”, and the extensive range of exceptions means that the law is uncertain. Accordingly, the book’s explanation of the role of privity in Scots law and identification of justifications for new exceptions contributes to doctrinal clarity and coherence. Ibbetson notes the “startling” lack of historical studies on the privity doctrine in English law.¹⁷ Whilst there are now several English texts on the doctrine,¹⁸ this book constitutes the first in-depth Scots study of privity and its exceptions.

¹³ 1982 SC (HL) 244.

¹⁴ *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785.

¹⁵ P Devlin, *Samples of Law-making* (1962) 30–31 (emphasis added).

¹⁶ See in particular paras 2-30 to 2-34 and 2-63 to 2-64 below.

¹⁷ D Ibbetson, “English Law before 1900”, in Hallebeek and Dondorp, *Contracts for a Third-Party* 93 at 93.

¹⁸ The leading examples are Kincaid (ed), *Privity*, and Furmston and Tolhurst, *Privity*.

D. METHODOLOGY

1-18. There are four methodological strands in this work: doctrinal, theoretical, comparative, and historical. These are explained in turn.

(1) Doctrinal analysis

1-19. Chapters 2 and 3 constitute a doctrinal examination of the privity doctrine. This is the foundation of the book: it will not be possible to classify exceptions to privity without a thorough understanding of the privity doctrine itself. Chapter 4 provides a doctrinal analysis of the relationship between contract and delict in situations involving third party loss.

1-20. In terms of exceptions to privity, chapter 5 examines the underlying policy justifications for existing statutory exceptions. Subsequent chapters on contracts for the benefit of another, transferred loss, *ad hoc* agency, and undisclosed agency gather and synthesise materials and commentary on each concept.

(2) Theoretical analysis

1-21. The book involves theoretical analysis on the question of whether the privity doctrine itself, as understood in Scots law, is compatible with the dominant theories of Scots contract law and the principles of freedom to contract and freedom of contract. Contracts for the benefit of another, transferred loss, *ad hoc* agency and undisclosed agency are also analysed from the perspective of whether they are compatible with Scots contract theory. This is to ensure that the theoretical classification of privity and of each concept is compatible with Scots law as a whole, workable in practice, and theoretically sound.

1-22. External network liability, a form of network theory, is a normative exception to privity in the sense that it is a theoretical model. It has not been expressly recognised or applied to date in Scots law. Chapter 10 provides a theoretical analysis addressing whether external network liability could and should be recognised in Scots law. The chapter includes comment on the compatibility of the concept with Scots contract theory.

(3) Comparative law

1-23. Whilst the book focuses primarily on Scots law, it also contains extensive research and analysis on English law. Scots and English law share many statutory exceptions to privity,¹⁹ and Scots law's acceptance of transferred loss²⁰ was based on an English House of Lords case.²¹ The Scots and English laws on undisclosed agency and contracts for the benefit of another are also closely intertwined.²² It is not, however,

¹⁹ For further discussion, see J N Adams, D Beyleveld, and R Brownsword, "Privity of contract – the benefits and burdens of law reform" (1997) 60 *MLR* 238, 243, and also paras 5-03ff below.

²⁰ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 *SCLR* 323.

²¹ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

²² See paras 9-03 to 9-14 and 6-05 to 6-14 respectively.

intended that the book should offer a full and detailed comparison between Scots and English law. Rather, English law is consulted and distinguished from Scots law where it is necessary to do so.

1-24. Chapter 10, on network theory, assesses the work of German academic Gunther Teubner.²³ German law is not consulted in other chapters.

1-25. There are therefore elements of comparative law within the book, but it is not a comparative project. The purpose of the book is rather to provide a study of privity and its exceptions in Scots law.

(4) Historical law

1-26. Finally, the book contains an in-depth historical analysis of the development of the privity doctrine in Scots law. To a lesser extent, the book also examines the historical development of undisclosed agency, in order to understand its doctrinal and policy background. Extensive historical research is not undertaken in respect of contracts for the benefit of another, transferred loss, and *ad hoc* agency, because these concepts are relatively novel.

E. SCOPE OF “LOSS”

1-27. The book does not seek to contribute to the doctrinal understanding of “loss” in Scots contract law. Rather, it identifies and analyses the situations in which third parties are adversely affected by defective performance or non-performance of contractual obligations, and ascertains whether resulting losses ought to be recoverable. Defective performance or non-performance of a contract may result in third-party loss in terms of personal injury, damage to property, or financial loss.²⁴

F. OVERVIEW OF THE BOOK

1-28. Chapters 2 and 3 provide a historical analysis of the privity doctrine, argue that privity does exist in Scots law, and explain that privity is compatible with Scots contract theory and the principles of freedom to contract and freedom of contract.

1-29. Chapter 4 addresses the contentious relationship between the privity doctrine and delictual liability. It concludes that delictual recovery of a third party’s loss does not constitute an exception to privity. The chapter also finds that concurrent liability in contract and delict in situations involving extra-contractual loss is and should be permissible.

²³ Teubner, *Networks*. The text is a translation of the German original: G Teubner, *Netzwerk als Vertragsverbund. Virtuelle Unternehmen, Franchising, just-in-time in sozialwissenschaftlicher und juristischer Sicht* (2004).

²⁴ See discussion in R Stevens, *Torts and Rights* (2007) ch 3.

1-30. Statutory exceptions to privity are identified and examined in chapter 5. It is argued that exceptions to privity should be recognised where doing so upholds the intentions of the contracting parties or reflects a sound policy consideration. The policy considerations identified are: physical or financial protection of weaker parties, ensuring recovery of loss caused by breach of contract, and commercial necessity.

1-31. Chapters 6 (contracts for the benefit of another), 7 (transferred loss), 8 (*ad hoc* agency), and 9 (undisclosed agency) assess whether each of these concepts is compatible with the privity doctrine and Scots contract theory, whether it could be explained in terms of delictual liability, and whether it is supported by sound policy considerations. The book concludes that:

- * Contracts for the benefit of another should be recognised as a passive form of third-party rights. The concept is compatible with privity and Scots contract theory.
- * Transferred loss in its current form is not an exception to privity, and is incompatible with contract theory. It could potentially be classified as delictual, but this would not be doctrinally satisfactory. Transferred loss should be reformed to allow the third party to bring a contractual action in its own name against the party which caused the loss. If this reform was permitted, transferred loss would operate as an exception to privity. It would, however, be underpinned by sound policy considerations, allowing the concept to be recognised as a justifiable exception to privity.
- * Undisclosed agency and *ad hoc* agency should be abolished, because the concepts deviate from privity and contract theory with no sound policy justification. Further, neither concept can be explained in terms of delictual liability.

1-32. In chapter 10, it is argued that external network liability should be recognised in Scots law. Whilst it is not compatible with privity, Scots contract theory, or delictual liability, there are sound policy considerations which justify the doctrinal recognition of such liability. It should therefore be recognised as a new exception to privity.

2 The Privity Doctrine

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A. OVERVIEW OF CHAPTER 2

2-01. This chapter defines the privity doctrine. It provides a historical overview of the use of the word “privity” in its ordinary and legal meanings and examines the historical development of the doctrine in Scots and English law. The chapter considers, as purposes of the privity doctrine, both (i) protecting contracting parties from liability towards third parties and (ii) protecting third parties from being burdened under contracts to which they are not party.¹

B. DEFINITIONAL ISSUES

2-02. This section concerns the linguistic development of the term “privity”, both within and outwith the context of Scots private law.

¹ Both aspects of privity are outlined in: A Mason, “Privity – A Rule in Search of Decent Burial?”, in Kincaid (ed), *Privity* 88.

(1) Historical development of the word “privity”

2-03. In the English language, the word “privity” was taken from the French *privauté*, meaning “privacy”.² Historically, when one took a walk in private, the journey was called a “privity-walk”.³ Whilst there are no entries for “privity” in the *Dictionary of the Scots Language*,⁴ the *Dictionary of the Older Scottish Tongue*⁵ yields several results, all with connotations of privacy, secrecy, intimacy, or seclusion. These definitions are reflected in the ordinary modern meaning of the word, which indicates secret matters or plans, private thoughts or business affairs, privacy, and close familiarity.⁶

(2) Use of “privity” in the context of contract law

2-04. The *Oxford English Dictionary* (‘OED’) offers the following definition of privity in its contractual sense:

the limitation of a contractual relationship to the two parties making the contract, which prevents any action at law by an interested third party such as a beneficiary.

2-05. This definition broadly aligns with legal commentary.⁷ Notably, this definition does not prevent a contract from conferring incidental benefits on third parties.⁸ For example, a contract between a landowner and an architect for an inner-city housing development may have a positive effect on local homeowners in terms of increased housing prices and a greater supply of amenities. Whilst privity does not prevent these incidental benefits, it prevents third parties from enforcing contracts which incidentally benefit them.

2-06. However, the OED definition only accounts for one aspect of the privity doctrine, namely, preventing third parties from claiming on or attempting to enforce a contract to which they are not party. A second aspect of privity prevents extra-contractual parties from being burdened by contractual obligations. The nuances of both aspects of the privity doctrine in Scots and English law are discussed further below.⁹

² Palmer, *Paths to Privity* 7, citing S Johnson, *Dictionary of the English Language* (1755) “Privity”. See also J Baker, “Privity of Contract in the Common Law before 1680”, in Schrage (ed), *IQT* 35.

³ “Privity: compounds” in the *Oxford English Dictionary* (online edition, available at: <http://www.oed.com/>). For further discussion of the earlier usage of the term, see Palmer, *Paths to Privity* 6.

⁴ *Dictionary of the Scots Language* (online edition, available at: <http://www.dsl.ac.uk/results/privity>).

⁵ The *Dictionary of the Older Scottish Tongue* (online edition, available at: <http://www.dsl.ac.uk/results/privity> as part of the *Dictionary of the Scots Language*).

⁶ See e.g. “privity” and “privy” in the *Oxford English Dictionary*.

⁷ See e.g. P Kincaid, “Preface”, in Kincaid (ed), *Privity* xi, xi; A Burrows, *A Restatement of the English Law of Contract* (2016) para 45; P Sutherland, “Third-Party Contracts”, in H MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (Edinburgh Studies in Law vol 2, 2006) 201, 204. The views of further commentators are examined below (see, in particular, paras 2-16ff).

⁸ Furmston and Tolhurst, *Privity* para 8.23. The authors assume that Scots law does not recognise the privity doctrine (para 8.20), but their comments apply equally in Scotland. The present chapter demonstrates that Scots law does recognise the privity doctrine.

⁹ The first aspect is discussed further below at paras 2-35ff, and the second at paras 2-41ff.

2-07. Privity in contract is sometimes denoted by the Latin maxim *res inter alios acta, aliis nec nocet nec prodest*.¹⁰ This book uses the terms “privity”, “privity of contract”, and “the privity doctrine”.

(3) Privity without contract?

2-08. Various Scots authorities indicate that it is possible for parties to be “in privity” without being in a direct contractual relationship. In 1933, the Lord Justice-Clerk (Lord Alness) considered that the Road Traffic Act 1930 section 36(4) might establish privity of contract between insurance companies and injured third parties.¹¹ More recently, Lord Skerrington commented that “there was no privity of contract except between the parties who contracted directly *or indirectly* with each other”.¹² Lord Moncreiff¹³ and Lord Cuninghame¹⁴ note (respectively) that brokers and agents may create privity between third parties and their clients/principals. However, these cases represent a small minority of the total number of cases discussing privity. Scots case law generally refers to privity only in the context of relationships between contractual parties.¹⁵

2-09. At least one English judge indicates that privity may arise outwith a direct contractual relationship. In *Collis v Selden*, Bovill CJ questioned whether there was “any contract or privity between the plaintiff and the defendant out of which a liability could arise”.¹⁶ This could be taken as implying that the notions of privity and contract are separate. However, this can also be construed as referring to “privity of contract or proximity between” the plaintiff and defendant. None of the judgments cited appears to intend making substantive comment on the privity doctrine itself. Rather, the statements were made in the context of determining which of the parties may owe liability based on the presence of contractual ties. Arguments founded on the creation of privity outwith a direct contract were dismissed in *Clavering, Son & Co v Hope*.¹⁷ The Scots and English authorities implying that privity might arise between non-contractual parties appear therefore to be discussing only whether the parties are closely interlinked despite their lack of contractual relationship.

(4) Uses of “privity” which are not relevant to the book

2-10. Numerous cases mention “privity” without necessarily referring to privity of contract. The non-legal use of the word “privity”, in the sense of proximity or

¹⁰ “A thing done between others does not harm or benefit others”: see Smith, *Short Commentary* 773.

¹¹ *Greenlees v Port of Manchester Insurance Co* 1933 SC 383 at 397 per Lord Justice-Clerk (Lord Alness). The Road Traffic Act 1930 s 36(4) states that insurers are liable in respect of third parties falling within the scope of their policies. It was found that the provision did not establish a direct right of action on the part of the third party.

¹² *Stuart v Potter, Choate & Prentice* 1911 1 SLT 377 at 378 (emphasis added). See also Lord Skerrington’s comments in *Bertram, Gardner, & Co’s Trustee v King’s Remembrancer* 1920 SC 555 at 562.

¹³ *Lamont, Macquisten & Co v Inglis* (1903) 11 SLT 409 at 409 per Lord Moncreiff.

¹⁴ *Farrar v North British Banking Co* (1850) 12 D 1190 at 1193 per Lord Cuninghame.

¹⁵ A discussion of these cases follows at paras 2-16ff below.

¹⁶ *Collis v Selden* (1867–68) LR 3 CP 495 at 497 per Bovill CJ.

¹⁷ (1897) 4 SLT 300 at 302 per Lord Stormonth Darling.

nearness, is found in many Scots¹⁸ and English¹⁹ cases. In England, it has been adopted judicially as a synonym for “private”.²⁰ In a Scottish case, a man purchased two flats in neighbouring tenement properties and wished to build a door from the common stair in one property directly into his flat in the neighbouring property. This was prevented by another user of the common stair on the grounds that creating the door would interfere with the “privity of the common stair”.²¹ Perhaps the most prevalent extra-contractual use of the term “privity” in the Scottish courts is as a synonym for “knowledge” or “concern”.²² The term has been used similarly in England.²³ In *The King v Ward*,²⁴ for example, a young woman was said to have eloped to Scotland with the privity of her aunt, who was the subject of an action to have her returned to England.

2-11. In terms of other legal doctrines, privity of contract ought not to be confused with privity of estate. The latter refers to situations, in English law, in which two or more parties have legal rights and obligations in respect of different estates, and their estates cover the same immovable property.²⁵ The concept developed due to the difficulties privity caused to landlords where leases were transferred from one tenant to another. If the second tenant defaults in an obligation, privity of contract normally prevents the landlord from suing that tenant, but privity of estate allows the landlord to sue the new tenant.²⁶ This concept has been recognised and discussed judicially in Scotland.²⁷ It is also recognised in English case law²⁸ and commentary, for example,

¹⁸ See, for example, *Henry v Gladstone* 1933 SC 283 at 309 per Lord Murray, and *M'Donald v M'Donald* (1879) 6 R 521 at 537 per Lord Gifford.

¹⁹ *Munster v Cobden Cox* (1885) 10 App Cas 680 at 686 per Earl of Selborne LC.

²⁰ *Residuum of Sir Francis Englefields Case* (1573) 4 L 169.

²¹ *Gellatly v Arrol* (1863) 1 M 592 at 602 per Lord Benholme.

²² Scots cases include: *Watson v George Gibson & Co* 1908 SC 1092 at 1096–97 per Lord Stormonth-Darling; *Lunnie v Glasgow and South-Western Railway Co* (1906) 8 F 546 at 550 per Lord Kyllachy; *Potter v Bartholomew* (1847) 10 D 97 at 108 per Lord Cuninghame; *Wilcox v Young or Farrell* (1847) 9 D 766 at 778 per Lord Jeffrey.

²³ See, for example, *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45, [2017] AC 1 at paras 60 and 62 per Lord Hughes; *Barclays Bank plc v Ente Nazionale di Previdenza ed Assistenza dei Medici e degli Odontoiatri* [2017] 2 All ER (Comm) 432 at para 22 per Moore-Bick LJ; *Midland Insurance Company v Smith* (1881) 6 QBD 561 at 567–68 per Watkin Williams J.

²⁴ [1762] 1 WLUK 73.

²⁵ Law Commission, Report on *Landlord and Tenant Law: Privity of Contract and Estate* (Law Com No 74, 1993) paras 2.1–2.3.

²⁶ R Merkin, “The Burden of Contracts and the Doctrine of Privity”, in Merkin (ed), *Privity* 79, para 4.2. Bankton acknowledged the concept of privity of estate in the context of his discussion of English law: Bankton, *Institute* 1.7.6 (Observations on the Law of England). See also *Tulk v Moxhay* (1848) 2 Ph 774 and Bell, *Principles* (1899) § 895A.

²⁷ *Spiers v Morgan* (1901) 9 SLT 162 at 164 per Lord Kincairney; *Earl of Zetland v Hislop* (1882) 9 R (HL) 40 at 48 per Lord Watson.

²⁸ *Budana v The Leeds Teaching Hospitals NHS Trust* [2017] EWCA Civ 1980, [2018] 1 WLR 1965 at para 55 per Gloster LJ; *Pye v Stodday Land Ltd* [2016] EWHC 2454 (Ch), [2016] 4 WLR 168 at para 32 per Norris J; *Titterton v Cooper* (1882) 9 QBD 473 at 489 per Brett LJ; *Papendick v Bridgwater* (1855) 5 E & B 166 at 176 per Lord Campbell; *Marquis of Anglesey v Lord Hatherton* (1842) 10 M & W 218 at 247 per Rolfe B.

as one of the four main forms of privity identified by Coke.²⁹ A similar concept, “privity of tenure”, is discussed in *Johnston v Irons*.³⁰

2-12. As part of his “Observations on the Law of England”, Bankton refers to “privies” in blood. For example, the privileges afforded by infancy can be used by “the infant himself, and his representative privies in blood”.³¹

2-13. Privity has also been used to indicate an individual’s proximity to a crime, resulting in liability for the commission of that crime.³² A court’s “privity of jurisdiction” refers to the competence of a court to hear a case.³³ In England, the defence of issue estoppel applies where current proceedings deal with the same issues as have been considered in previous proceedings. The defence requires that the parties to the original and current proceedings are the same unless a party to the current proceedings has “privity of interest” with a party to the previous proceedings.³⁴

2-14. None of these uses of the term is relevant to the examination of privity in contract law, and so they are not discussed further.

C. THE PRIVACY DOCTRINE IN SCOTS LAW

2-15. The privity doctrine, as previously mentioned, has two aspects, namely protecting contracting parties from liability towards third parties, and protecting third parties from being burdened under contracts to which they are not party. This section considers the historical development of both aspects of privity in Scots law.

²⁹ E Coke, *A Commentary upon Littleton* (15th edn, 1794) vol II, Lib 3, Cap 8, sec 461, 271a. See also Furmston and Tolhurst, *Privity* para 7.06.

³⁰ 1909 SC 305 at 312 and 316 per Lord President Dunedin. See also discussion of “horizontal privity” in US law in M Lewyn, “The puzzling persistence of horizontal privity” (2013) 27(3) *Probate and Property* 32. According to this doctrine, the burden of a restrictive covenant usually runs with the land only if the parties to the original covenant are in “horizontal privity”, or, in other words, they have an interest in the same land.

³¹ Bankton, *Institute* 1.7.5, and also 3.2.9. For English law, see further E Coke, *A Commentary upon Littleton* (15th edn, 1794) vol II, Lib 3, Cap 8, sec 461, 271a; *Stowel, Esquire v Zouch* (1563) 1 P 353 at 363; *Coward v Ambrosiadou* [2019] EWHC 2105 (Comm) at para 139 per Andrew Henshaw QC.

³² *Jameson v Barty* (1893) 1 Adam 92 at 95 Lord Justice-Clerk Macdonald: “privity to the act of poaching”. See also *Mackenzie & Johnston* (1846) Ark 135 at 136 per Lord Justice-Clerk Hope: “If there was privity, even by so slight a communication with the actual thief as a nod or a wink, that would make the party so privy, guilty of theft art and part”.

³³ See, for example, *Fitzpatrick v Glasgow District Licensing Board* 1978 SLT (Sh Ct) 63 at 64 per Sheriff Principal R Reid QC, citing *Lundie v Magistrates of Falkirk* (1890) 18 R 60 at 65–66 per Lord President Inglis.

³⁴ *MAD Atelier International BV v Manès* [2020] EWHC 1014 (Comm), [2020] QB 971 at paras 62–63 per Bryan J; *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 924, [2014] RPC 5 at paras 22–35 per Floyd LJ; *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 at 910–12 per Lord Reid.

(1) Historical development

2-16. The privity doctrine is manifested in numerous contexts in Scots law. For example, a creditor may not sue its debtor's debtor,³⁵ and a party cannot sue on a contract purely on the grounds that it has a financial interest in its fulfilment.³⁶ The doctrine is recognised by the Scottish Law Commission,³⁷ and privity is also expressly acknowledged in academic commentary. Walker encompasses both aspects of privity in his statement that it is:

clear and well settled, that under a contract between two parties no third party either acquires rights or comes under duties by virtue of the contract. Consequently no third party can, in general, sue for performance of a contract or for damages for breach thereof, nor be sued for performance or for damages.³⁸

2-17. According to Gloag, one cannot assume from a party's decision to enter into a contractual obligation the intention to be bound to "anyone who may think that the fulfilment of that obligation would be advantageous to him, and hence it is a general rule that only the parties to a contract have a title to sue upon it".³⁹

2-18. T B Smith observes that a "contract can neither benefit nor bind a stranger to it".⁴⁰ Similarly, Rankine notes that the lack of privity of contract between a lessor and sublessee means that "no rights or obligations can arise directly between them on the footing of contract".⁴¹ A clear declaration of the doctrine's existence in Scots law can be found in the most recent edition of *Gloag and Henderson*:

Scots law recognises the principle of privity of contract. In the ordinary case the only persons whose rights and liabilities are affected by a contract are the contracting parties. Strangers to the contract have no right to sue upon it and incur no liabilities under it.⁴²

2-19. MacQueen has, however, firmly stated that there is "no equivalent [in Scots law] to the common law doctrine of privity",⁴³ because Scots law recognises third-party rights and assignation.⁴⁴ The relationship between third-party rights and privity, including MacQueen's comments, is discussed in chapter 3.⁴⁵ It is noted at this stage that academic acceptance of privity in Scotland is not absolute.

³⁵ *Henderson v Robb* (1889) 16 R 341; *Prudential Assurance Co v Cheyne* (1884) 11 R 871.

³⁶ *Finnie v Glasgow and South-Western Railway Co* (1857) 20 D (HL) 2 at 4 per Lord Cranworth.

³⁷ SLC, Discussion Paper on *Third Party Rights* para 2.13.

³⁸ Walker, *Contracts* para 29.1.

³⁹ Gloag, *Contract* 218. See also 219.

⁴⁰ Smith, *Short Commentary* 773.

⁴¹ J Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916) 197.

⁴² *Gloag and Henderson* para 8.01.

⁴³ MacQueen, *SME* para 814. See also Norrie's statement that "Scots law has never been troubled by the English concept of privity of contract": K Norrie, "Professional Negligence", in J M Thomson (ed), *Delict* (looseleaf, 2007) para 19.11.

⁴⁴ MacQueen, *SME* para 814.

⁴⁵ See, in particular, paras 3-14ff below.

2-20. Scots law lacks a definitive judicial statement on the existence and exact meaning of privity in contract. Nonetheless, the concept is accepted judicially. Some judges, though not mentioning privity by name, recognise the principle that third parties cannot generally sue upon a contract to which they are not party. For example, Lord Low states that:

If the company alone had been pursuers, I should have had difficulty in sustaining the title, because there was never any contract between them and the defenders. But the individual pursuers are in a different position, because they are the very parties with whom the contract was admittedly made.⁴⁶

2-21. Other judges have expressly used the term “privity of contract”. In *Borders Regional Council v J Smart & Co (Contractors) Ltd*, for example, it was said that:

There was no privity of contract between the first parties and Macdougalls. There was accordingly no question of the first parties having any recourse against Macdougalls.⁴⁷

2-22. This understanding of privity – that extra-contractual parties cannot accrue enforceable benefits under a contract and cannot bring contractual claims against those with whom they lack a direct contractual relationship – is long-accepted in Scots law. According to a judgment given by Lord Brougham in 1837 in a Scottish appeal:

All conditions annexed to the enjoyment of property ... are to be strictly construed as against the grantor and in the grantee’s favour, but especially as between the grantor and parties who have no privity of contract with him.⁴⁸

2-23. Similarly, Lord Adam has recognised the difficulty in ascertaining the basis of a contractual claim by a pursuer against a defender, “there being no privity of contract between them”.⁴⁹ Throughout the nineteenth century, there are numerous other cases which assume the existence of privity of contract, and rely upon the doctrine to prevent recovery by extra-contractual parties.⁵⁰ In *Inglis v Mansfield*, it was said that: “Between the bankrupt and the trustee there can be no privity, such as to affect the latter with any personal obligation incurred by the former”.⁵¹ *Tulloch v Davidson* refers to the absence of “privity of contract between the parties, out of which legal liability could be inferred, or right of action could emerge”.⁵² This indicates that the right to sue in contract must stem from privity. Further, it is clear that privity of contract cannot be

⁴⁶ *MacLaren v Mayberry* (1904) 11 SLT 636 at 637 per Lord Low. In *Grant Central Developments Ltd v City of Edinburgh Council* [2021] CSOH 29, 2021 GWD 14-215 at para 21, Lady Wolfe similarly stated that “contractual obligations impose personal obligations which are, in the absence of assignation or the application of the doctrine of *jus quaesitum tertio*, generally binding only on the contracting parties”.

⁴⁷ *Borders Regional Council v J Smart & Co (Contractors) Ltd* 1983 SLT 164 at 172 per Lord Brand.

⁴⁸ *Tailors of Aberdeen v Coutts* (1837) 2 S & McL 609 at 667 per Lord Brougham.

⁴⁹ *Robertson v James Ross & Company* (1892) 19 R 967 at 970 per Lord Adam.

⁵⁰ For example: *Blumer v Scott* (1874) 1 R 379 at 386 per Lord Ardmillan; *Morier v Brownlie* (1895) 3 SLT 27 at 29 per Lord Low; *Edinburgh United Breweries Ltd v Molleson* (1894) 21 R (HL) 10 at 16 per Lord Watson.

⁵¹ *Inglis v Mansfield* (1835) 1 S & McL 203 at 339, (1835) 6 ER 1472 at 1481 per Lord Brougham.

⁵² *Tulloch v Davidson* (1858) 20 D 1045 at 1056–57 per Lord Cowan.

implied without the existence of a valid and enforceable contract.⁵³ Towards the end of the nineteenth century, Lord Adam stated that:

the fact that A has employed B to do something for the benefit of C, does not confer on C a right of action against B for any loss which he may have sustained through B's negligence, and for the plain reason that there is no privity of contract between B and C. That is exactly what this case comes to.⁵⁴

2-24. Judicial commentary indicates that privity was used to prevent actions on the part of third parties. Privity appears, therefore, to have been viewed by judges in this period as an exclusionary device.

2-25. Privity has been similarly recognised throughout the twentieth century, although without a great deal of judicial discussion on its nuances. Its validity and existence as a requisite for title to sue have, however, been accepted and applied.⁵⁵ Whilst Lord Thankerton stated that parties may demonstrate patrimonial interest other than by privity,⁵⁶ it is clear in twentieth-century case law that privity was recognised as a requirement to sue on a contract. In 1964, for example, Lord Sorn recognised the “ordinary rules of privity” in *Eagle Lodge, Limited v Keir and Cawder Estates, Limited*.⁵⁷

2-26. Admittedly, Lord Deas' comments in one First Division case from 1863 may cast doubt upon the existence of the privity doctrine. In the case in question, a Dundee company had arranged for goods to be delivered to a company in Glasgow by a railway company. When the Dundee company became bankrupt, the railway company declined to deliver the goods to the Glasgow company. The question arose as to whether the Glasgow company could sue the railway company for the goods. Lord Deas commented that:

The general principle recognised in England seems to be that you can go only against the company with whom the contract was made, and that there being no privity of contract with the other company ... it is incompetent to go against them. I am not, at present, prepared to say that that is the law of Scotland, but I should desire to give very grave and deliberate consideration to the question before coming to a decision upon it.⁵⁸

2-27. Lord Deas also refers to “what [the English] call a ‘privity of contract’”, perhaps implying that Scots law does not recognise privity. It is unclear whether he intended his comments to be applied to Scots law only in the context of company

⁵³ *McEwan v Campbell* (1853) 16 D 117 at 125 per Lord Ivory.

⁵⁴ *Tully v Ingram* (1891) 19 R 65 at 75–76 per Lord Adam.

⁵⁵ *George Heriot's Trust v Carter* (1902) 10 SLT 514 at 516 per Lord Pearson; *Anderson v Dickie* 1915 SC (HL) 79 at 81 per Lord Kinneir and at 90 per Lord Dunedin; *Michelin Tyre Company Ltd v Macfarlane (Glasgow) Ltd (in Liquidation)* 1916 2 SLT 221 at 226 per Lord Skerrington; *McHale v Fife Coal Company Ltd* 1947 SLT (Sh Ct) 77 at 78 per Sheriff John A Lillie KC; *MacDougall v MacDougall's Executors* 1994 SLT 1178 at 1183 per Lord Cameron of Lochbroom.

⁵⁶ *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1940 SC (HL) 52 at 55 per Lord Thankerton.

⁵⁷ 1964 SC 30 at 45 per Lord Sorn.

⁵⁸ *Scottish Central Railway Co v Ferguson & Co* (1863) 1 M 750 at 756 per Lord Deas.

liability, or whether they cast doubt on the existence of privity in Scots law generally. If the correct interpretation is the latter, however, the case can be viewed as an outlier: the vast majority of Scots cases which mention privity assume that it is recognised in Scots law. Another outlier is *Clark Contracts Ltd v The Burrell Co (Construction Management) Ltd (No 2)*, in which Sheriff Taylor acknowledged the submission of the pursuers' agents to the effect that privity is "an English problem".⁵⁹ However, he did not expressly exclude the possibility that Scots law recognises privity to some extent, and he also referred to "England's approach to the doctrine of privity of contract".⁶⁰ One could infer from this statement that Scots law takes a different, less problematic, approach to privity.

2-28. Perhaps the strongest judicial statement in favour of privity is its acknowledgement in *United Dominions Trust v Taylor* as "fundamental to the common law of contract".⁶¹ In the case, the defender's interpretation of the Consumer Credit Act 1974 section 75(1) was rejected by Sheriff Principal Reid on the ground that it contravened privity.⁶² The provision states that:

If the debtor under a debtor-creditor-supplier agreement ... has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor.

2-29. The pursuer had lent the defender money for the purchase of a car from a supplier. Due to the defective state of the car, the defender informed the pursuer that he viewed the contract of sale as breached, whereupon the pursuer sued the defender for return of the loan. The defender argued that his rescission affected both the contract of sale with the supplier of the car, and the loan agreement with the pursuer. Sheriff Principal Reid concluded that the suggestion that the provision could create "linked transactions" containing contracts with different parties and interdependent fates was not compatible with privity of contract.⁶³ Whilst his judgment as a whole has been subject to academic criticism,⁶⁴ his statement that privity is fundamental to Scots contract law has not.

2-30. Privity has also been recognised in the present century. For example, Lord Reed accepted that landlords cannot sue subtenants directly due to privity of contract.⁶⁵ Further, Lord Eassie acknowledged *Duke of Queensberry's Exrs v*

⁵⁹ *Clark Contracts Ltd v The Burrell Co (Construction Management) Ltd (No 2)* 2003 SLT (Sh Ct) 73 at para 7 per Sheriff Taylor.

⁶⁰ 2003 SLT (Sh Ct) 73 at para 37 per Sheriff Taylor.

⁶¹ *United Dominions Trust v Taylor* 1980 SLT (Sh Ct) 28 at 31 per Sheriff Principal R Reid QC.

⁶² This was followed in *Forward Trust Ltd v Hornsby and Windermere Aquatic Ltd* 1995 SCLR 574 at 575–76 per Sheriff Simpson.

⁶³ *United Dominions Trust v Taylor* 1980 SLT (Sh Ct) 28 at 31 per Sheriff Principal R Reid QC.

⁶⁴ See discussion in *Durkin v DSG Retail Ltd* [2010] CSIH 49, 2010 SC 662 at para 41 (submissions for the Second Respondents).

⁶⁵ *Douglas Shelf Seven Ltd v Co-operative Wholesale Society Ltd and Kwik Save Group Plc* [2007] CSOH 53 at para 577 per Lord Reed.

*Maxwell*⁶⁶ as an authority for the rule that there is “no privity of contract between [a] landlord and [a] subtenant”,⁶⁷ describing privity as a “well established rule”.⁶⁸ Lord Drummond Young referred in 2006 to the “ordinary principles of privity of contract”.⁶⁹

2-31. In a different case, in which a finance company entered into a contract with contractors for a new head office and sought to claim for defective work, Lord Drummond Young stated that:

privity of contract prevents any direct contractual action by the party who suffers the loss [i.e. the finance company] against subcontractors or works contractors or any member of the professional team.⁷⁰

2-32. This is also reflected in earlier construction cases from the Outer House involving chains of contracts between contractors, sub-contractors, sub-sub-contractors, and so on.⁷¹ The principle that chains of contracts cannot create privity outwith the context of a direct contractual relationship is also found in earlier cases involving feu duties.⁷² In a case from 2020 Lord Clark noted that investors in a contracting party could not challenge the actions of the other contracting party without making “very significant inroads into the doctrine of privity of contract”.⁷³

2-33. Whilst, however, the fundamentals of privity are impliedly accepted, there is a dearth of judicial comment on the nuances of the doctrine and the situations in which it may be circumvented. Only a small handful of cases emphasise that privity is an inherent part of Scots law. In *MacLachlan v Sinclair & Co*,⁷⁴ for example, Sheriff Dundas relied on Erskine’s *Principles* for his assumption that privity of contract is accepted in Scots law.⁷⁵ However, privity is not expressly recognised in any of the main Scots Institutional Writings. It is perhaps the case that privity is viewed judicially as a matter of common sense, and judges have not felt any great need to emphasise its existence and validity.

⁶⁶ (1831) 5 W & S 771.

⁶⁷ *Sears Properties Netherlands BV v Coal Pension Properties Ltd* 2001 SLT 761 at 765 per Lord Eassie.

⁶⁸ 2001 SLT 761 at 766 per Lord Eassie.

⁶⁹ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd* [2006] CSOH 197 at para 33 per Lord Drummond Young. See also A Warrender, “Title to sue and assignation” *Contract Journal*, 18 April 2007, 32.

⁷⁰ *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd (in liquidation)* [2010] CSOH 42, 2010 SLT 1102 at para 1 per Lord Drummond Young.

⁷¹ *Balfour Beatty Ltd v Britannia Life Ltd* 1997 SLT 10 at 16 per Lord Penrose. See also *J B Mackenzie (Edinburgh) Ltd v Lord Advocate* 1972 SC 231 at 237 per Lord Kissen.

⁷² In *Sandeman v The Scottish Property and Building Society and Others* (1885) 12 R (HL) 67, for example, it was found that there was no privity of contract between a superior and a sub-feuar, and consequently the latter party was bound to pay only the mid-superior (with whom he was in a direct contractual relationship).

⁷³ *Abundance Investment Ltd, Petitioners* [2020] CSOH 12, 2020 SLT 163 at para 53 per Lord Clark.

⁷⁴ (1897) 5 SLT 155.

⁷⁵ Erskine, *Principles* 2.6.14: “There being no privity of contract between the landlord and the sub-lessor, neither party can bring a direct action against the other on the contract [between the tenant and sub-lessor]”.

2-34. Accordingly, it can certainly be said that Scots law recognises the privity doctrine, but its academic and judicial acceptance is neither absolute nor uncontroversial. In light of the lack of judicial statement on privity's exact definition and scope, privity holds a tenuous position in Scots law. It is not clear from the above examples that the judges who apply the doctrine have considered privity in any depth, nor that they wish their statements to be taken as a firm endorsement of the doctrine. Academic support for privity is stronger, encompassing a range of firm statements defining and recognising the doctrine, although some writers do not recognise privity in Scots law.

(2) Benefiting the third party

2-35. The academic and judicial material discussed above demonstrates that privity in Scots law bars third parties from suing under contracts to which they are not party. That could mean either that the external parties may not derive contractual rights under contracts to which they are not party, or that they are excluded from deriving *any* rights from the contract.

2-36. Some of the statements considered above are ambiguous on this topic. For example, it has been said that a lack of privity means that the external party did not have “any recourse” against one of the contracting parties.⁷⁶ In another case, it was stated that, where there is no privity, the external party cannot “go against” the contracting parties.⁷⁷ These judicial comments do not expressly explain whether the external party is barred from making only contractual claims, or whether their lack of privity means that they cannot make a claim of any nature against the contracting parties.

2-37. Lord Drummond Young, however, has stated that privity “prevents any direct *contractual* action” by external parties.⁷⁸ Likewise, Walker says that the effect of privity is that “no third party can, in general, sue for *performance of a contract* or for damages for breach thereof”.⁷⁹ These comments indicate that privity bars contractual claims only.

2-38. Conversely, there is no definitive statement that privity bars *all* legal claims by external parties against contracting parties. Further, parties to a contract cannot treat their contractual relationship as a protective shield against any and all legal claims which external parties might have against them. For example, privity would not protect contracting parties against their obligations to pay costs associated with their transactions.⁸⁰ Indeed, as is discussed in chapter 4, third parties can, in certain circumstances, claim against contracting parties in delict.⁸¹

⁷⁶ *Borders Regional Council v J Smart & Co (Contractors) Ltd* 1983 SLT 164 at 172 per Lord Brand.

⁷⁷ *Scottish Central Railway Co v Ferguson & Co* (1863) 1 M 750 at 756 per Lord Deas.

⁷⁸ *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd (in liquidation)* [2010] CSOH 42, 2010 SLT 1102 at para 1 per Lord Drummond Young (emphasis added).

⁷⁹ Walker, *Contracts* para 29.1 (emphasis added).

⁸⁰ For example, the purchaser of a property might come under a duty to pay land and buildings transaction tax by virtue of its contract with the seller: see G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 19.01. Privity is no defence to the payment of this tax.

⁸¹ This is discussed in paras 4-25ff below.

2-39. The first view is therefore correct: privity prevents external parties from deriving contractual rights under contracts to which they are not party. This is not entirely clear from the relevant case law, but those who do provide detailed comment on the matter say that privity bars contractual claims only. Privity therefore (generally) prevents third parties from accruing enforceable contractual benefits.

2-40. This book addresses situations in which third parties can recover for losses sustained due to defective performance or non-performance of contracts to which they are not party and where the third party does not have a contractual right to performance.⁸² Legal concepts which operate in these situations are analysed in chapters 6 to 9. There are exceptions to the privity doctrine which arise where the third party does have a personal right to performance of the contract. These exceptions, their relationship with the privity doctrine, and their impact on the definition of privity are discussed further in chapter 3.⁸³

(3) Burdening the third party

2-41. Judicial and academic commentary recognises the second aspect of the privity doctrine, which provides that extra-contractual parties cannot be burdened by contracts to which they are not party. In *Ashley v Muir*, for example, Lord Fullerton mentions that a third party has “no direct responsibility [for contractual performance], or what is called ‘privity of contract’”.⁸⁴ Gloag notes that “it is not within the province of contract to impose any liability upon a third party” because “parties to a contract cannot fetter the free will of a third party”.⁸⁵ McBryde similarly states that it is “axiomatic that a duty could not be imposed on the third party against its will, but a right could be conditional on performance by the third party”.⁸⁶

2-42. The impact of this rule on the “burdens” aspect of privity, and on other exceptions to the no burdens rule, are discussed in chapter 5.⁸⁷

2-43. This aspect of privity is also accepted in English law.⁸⁸ Professor Neil H Andrews comments, for example, that the no burdens rule “appears sound”.⁸⁹

⁸² The scope of the book was outlined in paras 1-02 to 1-07 above.

⁸³ These concepts are agency/mandate (paras 3-03ff), third-party rights (paras 3-07ff), and a miscellany of others (paras 3-22ff).

⁸⁴ *Ashley v Muir* (1845) 7 D 524 at 530 per Lord Fullerton.

⁸⁵ Gloag, *Contract* 257.

⁸⁶ McBryde, *Contract* para 10.10. See also Gloag and Henderson paras 8.01–8.02.

⁸⁷ See paras 5-57ff below.

⁸⁸ V V Palmer, “Contracts in favour of third persons in Europe: first steps toward tomorrow’s harmonisation” (2003) 11 *European Review of Private Law* 8, 12; S Whittaker, “Reciprocity Beyond Privity”, in Kincaid (ed), *Privity* 259, 259–60; G Treitel, *Some Landmarks in Twentieth Century Contract Law* (2002) 48; J Beatson, A Burrows and J Cartwright, *Anson’s Law of Contract* (31st edn, 2020) 652; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

⁸⁹ N H Andrews, “Does a third party beneficiary have a right in English law?” (1988) 8 *Legal Studies* 14 at 14.

2-44. Whilst the first aspect of privity prevents external parties from making contractual claims, it is likely that the second aspect of privity is not an exact mirror of the first. Rather, it prevents the contracting parties from imposing any form of liability on an external party without its consent. Admittedly, the relevant cases and commentary do not provide certainty on this point. However, it would be absurd, for example, for a contracting party to be able to provide, without an external party's consent, that any claims in delict arising under the contract were to be met by the external party.

D. COMPARATIVE DISCUSSION

2-45. This section provides a brief overview of the recognition of privity in other jurisdictions. It then discusses the development of the privity doctrine in English law, including the interaction between privity and consideration.

(1) Comparative law on the privity doctrine: general remarks

2-46. Continental jurisdictions exhibit a more lenient view of the enforcement of third-party rights than common law jurisdictions, which have historically viewed such rights as violations of the privity doctrine.⁹⁰ The stance of public international law is closer to continental law than the common law.⁹¹ However, the privity doctrine itself is “deeply embedded” in every European legal system.⁹² In civilian jurisdictions, various Civil Codes embodying the strict Roman approach to privity⁹³ were revised to account for the commercial convenience of third-party rights.⁹⁴ This is relevant to the question of whether privity ought to be recognised in Scots and English law. If these jurisdictions depart entirely from privity, they will be considered as outliers in European comparative legal studies. The lack of certainty associated with a failure to recognise privity⁹⁵ might discourage commercial parties from concluding contracts under Scots and English law relative to other jurisdictions.

(2) English law

2-47. The current section discusses English jurisprudence and academic commentary, and addresses the relationship between privity and consideration.

(a) The development of English jurisprudence

2-48. Ibbetson observes the recognition of privity, in the sense that “persons not party to the agreement could not sue or be sued on it”, in covenant cases from as

⁹⁰ C Engel, “E Omnes: Why does public international law ignore privity of contract?” (2009) 165 *Journal of Institutional and Theoretical Economics* 24.

⁹¹ Ibid.

⁹² V V Palmer, “Contracts in favour of third persons in Europe: first steps toward tomorrow’s harmonisation” (2003) 11 *European Review of Private Law* 8, 12.

⁹³ Furmston and Tolhurst, *Privity* para 1.03, citing Paul D 44.7.11 (later qualified in Ulp D 45.1.38.20).

⁹⁴ V V Palmer, “Contracts in favour of third persons in Europe” 14–15.

⁹⁵ This is discussed further at para 5-38 below.

early as the thirteenth century.⁹⁶ However, Vernon Palmer's research on the sixteenth and seventeenth centuries reveals that, in the 1500–1680 period, courts took a liberal attitude to allowing third-party actions, such that the “sheer number of actions and the liberal results” indicate that a strict privity rule did not exist in England prior to 1680.⁹⁷ He concludes that privity was not yet a dominant doctrine in English law during this period.⁹⁸

2-49. In the sixteenth and seventeenth centuries, a party's right to sue was generally ascertained according to whether consideration had been given. There were, however three legal doctrines according to which a third party could sue on a contract to which it was not party.⁹⁹ Firstly, the “promisee in law” theory allowed third parties to sue if they declared that they were the promisee of the obligation in question. A second means of assessing the third party's action in 1500–1680 was the “interest” test: a party who had an interest in a promise had the right to enforce it. The rationale was that non-performance constituted an injury to the beneficiary's interest, for which it should be compensated.¹⁰⁰ Zimmermann draws a parallel between the interest theory and the Roman rule that a stipulator could enforce a performance due to a third party only where it had an interest in the fulfilment of the performance.¹⁰¹ The third doctrine was the “beneficiary” test, according to which “the party to whom the benefit of a promise accrues may bring the action”.¹⁰² This was applied, for example, in *Provender v Wood*,¹⁰³ where the plaintiff brought a successful action in assumpsit for a breach of the defendant's promise to pay the plaintiff's father £20 on the occasion of the plaintiff's marriage to the defendant's daughter.¹⁰⁴

2-50. In light of these doctrines allowing third-party recovery, privity was clearly not strictly applied in English law during the sixteenth and seventeenth centuries. Nonetheless, privity was recognised in some form during this period.¹⁰⁵ In *Humble v*

⁹⁶ D J Ibbetson, *A Historical Introduction to the Law of Obligations* (2001) 77.

⁹⁷ Palmer, “The history of privity” 5. See also Furmston and Tolhurst, *Privity* paras 1.07–1.08.

⁹⁸ Palmer, “The history of privity” 5.

⁹⁹ Palmer, “The history of privity” 6.

¹⁰⁰ Palmer, “The history of privity” 6. In *Hadves v Levit* (1631) Het 176, for example, the bride's father (the defendant) promised the groom's father (the plaintiff) that he would pay £200 to the plaintiff's son after he had married the defendant's daughter. The plaintiff promised to consent to the marriage and make a reciprocal grant to the bride. The defendant failed to pay, and the plaintiff brought an action in assumpsit, claiming that he was constrained, as a result of the breach of promise, to give the couple greater maintenance than would have otherwise been necessary. The plaintiff's claim was rejected on the grounds that the action was “more properly” brought by his son, because he was the person “in whom the interest is” (at 176).

¹⁰¹ R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 37.

¹⁰² Palmer, “The history of privity” 6.

¹⁰³ (1628) Het 30.

¹⁰⁴ See further N G Jones, “Aspects of Privity in England: Equity to 1680”, in Schrage (ed), *IQT* 135, 150–51 and 154–57, for discussion of marriage agreements in the fifteenth and sixteenth centuries respectively.

¹⁰⁵ *Anonymous* (1565) 2 D 247b; *Alexander v Dyer* (1588) CE 169; *Overton v Sydal* (1594) CE 555. Further discussion of case law from this period is found in Jones, “Aspects of Privity in England: Equity to 1680” 136–41.

Oliver, for example, it was said that an extra-contractual party could not “have advantage of the privity, he being a meer stranger to the contract”.¹⁰⁶ In *Living v Edmunds* it was similarly noted that an action could not be “grounded upon any privity of contract, for both the parties are strangers to it”.¹⁰⁷ Privity was recognised and applied to prevent third-party claims in numerous cases in the seventeenth century.¹⁰⁸ It was also held that an original lessee remained liable under a lease despite assignment to a third party, because there remained privity of contract with the lessor.¹⁰⁹ Accordingly, English law in this period appears to have recognised third-party claims in some circumstances, and upheld the privity doctrine in others.¹¹⁰ Two of the leading cases during this time came to contrasting views on the enforceability of third-party rights: *Bourne v Mason*,¹¹¹ in which a third-party right was held unenforceable, and *Dutton v Poole*,¹¹² in which a third-party claim was upheld. Towards the end of this 1500–1680 formative period, consideration emerged as the dominant means of assessing third-party actions. This replaced the previous tests, and had the effect of limiting the means of redress available to third parties at common law.¹¹³ In *Bourne v Mason*, for example, it was said that “the plaintiff did nothing of trouble to himself, or benefit to the defendant, but is a meer stranger to the consideration”.¹¹⁴

2-51. Alongside the increasing importance of the consideration test, Vernon Palmer recognises a “new assumption”,¹¹⁵ in the period between *Bourne v Mason*¹¹⁶ and *Dutton v Poole*,¹¹⁷ that third-party claims were generally not permissible. Flannigan also comments that these cases were the turning point of the “complete reversal” from recognition of third-party rights to a much stricter application of the privity doctrine.¹¹⁸ Palmer summarises the position as follows:

During the 16th and 17th century, the beneficiary suing in assumpsit succeeded as in no other period. The period ended, however, with the formation of a solid privity limitation based upon the consideration doctrine. Contemporaries may not have easily appreciated that such a significant event had occurred.¹¹⁹

2-52. During the eighteenth century, the tension between privity and third-party rights was not yet resolved, and common law outcomes were contradictory. Judicial opinion in the eighteenth century does not offer a definitive view on whether third-party

¹⁰⁶ *Humble v Oliver* (1593) P 55 at 56.

¹⁰⁷ *Living v Edmunds* (1597) CE 636.

¹⁰⁸ *Lord Rich v Franke* (1610) 2 B 202 and *March v Brace* (1613) 2 B 151, which refer to privity of contract between a lessor and lessee. See also *Brett v Cumberland* (1616) CJ 521 at 522.

¹⁰⁹ *Walker v Harris* (1793) 145 ER 861.

¹¹⁰ See also *Bell v Chaplain* (1675) H 321.

¹¹¹ (1668) 86 ER 5.

¹¹² (1677) 83 ER 523.

¹¹³ Palmer, “The history of privity” 7.

¹¹⁴ *Bourne v Mason* (1668) 86 ER 5 at 7. See also *Clypsam v Morris* (1669) 2 Keb 401 at 443 and 453.

¹¹⁵ Palmer, “The history of privity” 44.

¹¹⁶ (1668) 86 ER 5.

¹¹⁷ (1677) 83 ER 523.

¹¹⁸ R Flannigan, “Privity: the end of an era” (1987) 103 *LQR* 564, 565–66.

¹¹⁹ Palmer, “The history of privity” 52.

rights were enforceable. For example, *Crow v Rogers*¹²⁰ upheld *Bourne v Mason*,¹²¹ and *Martyn v Hind*¹²² followed *Dutton v Poole*.¹²³

2-53. Similarly, at the beginning of the nineteenth century, an examination of the relevant case law reveals that the courts continued both to recognise third-party rights and to uphold the privity doctrine. In this period, third-party rights were recognised in various cases, although Flannigan contrasts the “voluminous and continuous” recognition of third-party rights with “extremely modest” support for the privity doctrine.¹²⁴

2-54. Towards the end of the nineteenth century, however, the privity doctrine was recognised in the House of Lords¹²⁵ as well as in various lower courts.¹²⁶ As in Scots law, privity appears to have been applied in a variety of contexts without extensive judicial consideration as to the exact definition and scope of the doctrine. It cannot be said that there was a clear, overarching view of privity at this stage of its development in English law. Instead, its application was contextual and fact-specific.

2-55. The case of *Tweddle v Atkinson*¹²⁷ in 1861 marked the point at which third parties were prevented from enforcing contractual rights construed in their favour.¹²⁸ Prior to this case, as discussed above, there were conflicting judicial opinions on the question of whether third-party claims were enforceable. However, *Tweddle* has come to be treated as firm authority for the unenforceability of third-party claims in English law.

2-56. It is notable that the term “privity of contract” does not appear in *Tweddle v Atkinson*, and the case was decided “overwhelmingly in terms of consideration”.¹²⁹ It has accordingly been suggested that the case could be treated as authority for the consideration rule, rather than for privity.¹³⁰ Be that as it may, the case was accepted throughout the twentieth century as demonstrating that English law had adopted the privity rule. This is reflected in “case after case”.¹³¹

¹²⁰ (1724) 1 S 592.

¹²¹ (1668) 86 ER 5.

¹²² (1776) 2 Cowp 437.

¹²³ (1677) 83 ER 523.

¹²⁴ R Flannigan, “Privity: the end of an era” (1987) 103 *LQR* 564, 565–67; *Carnegie v Waugh* (1823) 1 LJ (KB) 89. See also *Philips v Bateman* (1812) 16 E 356; *Barford v Stuckey* (1820) 2 B & B 333.

¹²⁵ *Doolan v Directors, etc of the Midland Railway Company* (1877) 2 App Cas 792 at 802 per Lord Blackburn; *Directors, etc, of the Bristol and Exeter Railway v Canning Collins* (1859) 11 ER 78 at 91 per Justice Crompton.

¹²⁶ *Saxby v The Manchester, Sheffield, and Lincolnshire Railway Company* (1868–69) LR 4 CP 198 at 204 per Lord Keating; *Lofft v Dennis* (1859) 120 ER 987 at 990 per Lord Campbell CJ; *Smyth v Anderson* (1849) 7 CBR 21 at 33 and 42 per Maule J.

¹²⁷ (1861) 121 ER 762.

¹²⁸ Furmston and Tolhurst, *Privity* para 1.14.

¹²⁹ Furmston and Tolhurst, *Privity* para 1.15. See, for example, *Tweddle v Atkinson* (1861) 121 ER 762 at 764 per Wightman J.

¹³⁰ Furmston and Tolhurst, *Privity* para 1.19.

¹³¹ Furmston and Tolhurst, *Privity* para 2.03, citing *Gandy v Gandy* (1885) 30 Ch D 57 at 69 per Bowen J.

2-57. There has, however, been judicial backlash to this interpretation of *Tweddle v Atkinson*. Lord Denning, for example, stated in *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* that privity:

is not nearly so fundamental as it is sometimes supposed to be. It did not become rooted in our law until the year 1861 ... It has never been able entirely to supplant another principle whose roots go much deeper. I mean the principle that a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it.¹³²

2-58. Lord Denning expressed the same view in *Scruttons Ltd v Midland Silicones Ltd*.¹³³ Steyn J, too, raised similar concerns, asserting that the “genesis of the privity rule is suspect” and originates in a “misunderstanding” of *Tweddle*. He stressed that “there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties”.¹³⁴

2-59. Dillon J similarly described the rule as “beyond question unjust”,¹³⁵ and Lord Diplock’s view was that privity was “an anachronistic shortcoming that has for many years been regarded as a reproach to English private law”.¹³⁶

2-60. However, most judges during this period recognised the privity doctrine as part of English law. In *Beswick v Beswick*, for example, Lord Reid acknowledged Lord Denning’s view that extra-contractual parties should be able to enforce rights construed in their favour, but concluded that such rights were not enforceable.¹³⁷ Lord Reid was, however, of the view that legislation ought to be introduced to allow contracting parties to confer enforceable third-party rights, and this was supported by other members of the judiciary.¹³⁸ The Law Revision Committee had also previously recommended that third parties should be able to enforce rights expressly conferred in their favour.¹³⁹

¹³² *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 at 514 per Lord Denning.

¹³³ [1962] AC 446 at 483 per Lord Denning. See also *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522; *Drive Yourself Hire v Strutt* [1954] 1 QB 250; *Adler v Dickson* [1955] 1 QB 158.

¹³⁴ *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 at 76 per Steyn J.

¹³⁵ *Forster v Silvermere Golf and Equestrian Centre* (1981) 42 P & CR 255 at 258 per Dillon J.

¹³⁶ *Swain v The Law Society* [1983] 1 AC 598 at 611 per Lord Diplock.

¹³⁷ *Beswick v Beswick* [1968] AC 58 at para 72 per Lord Reid. See also Lord Hodson at para 78 and Lord Pearce at paras 92–93.

¹³⁸ *Beswick v Beswick* [1968] AC 58 at para 72 per Lord Reid. See also Lord Reid’s comments in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 473, and *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 at 300 per Lord Scarman and at 279–98 per Lord Keith of Kinkel.

¹³⁹ Law Revision Committee, *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)* (Cmd 5449, 1937) 31.

2-61. *Tweddle* was acknowledged as confirming the position of privity in English law in *Dunlop v Pneumatic Tyre*.¹⁴⁰ In the case, Viscount Haldane stated that English law upheld the fundamental principle that:

only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract ... A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognized in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established.¹⁴¹

2-62. This was affirmed by the House of Lords in *Scruttons Ltd v Midland Silicones Ltd*.¹⁴² Referring to Lord Denning's earlier comments, Viscount Simonds stated that "certain statements ... must be rejected",¹⁴³ referring to the "fundamental rule that a person not a party to a contract cannot sue to enforce it".¹⁴⁴

2-63. More recent judgments have, generally speaking, assumed the existence of privity of contract without discussing its meaning and origins.¹⁴⁵ For example, it was said in the High Court that an assignee could not be held liable for the actions of his assignor under the assignor's contract with a dairy company because of the lack of privity between the assignee and the dairy company.¹⁴⁶ The House of Lords held in 2000 that privity of contract prevents the formation of implied contractual relationships between an employer and a sub-contractor.¹⁴⁷ As in Scotland, some judgments uphold privity without referring to the doctrine expressly.¹⁴⁸

¹⁴⁰ *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (although Lord Dunedin dissented).

¹⁴¹ *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 853 per Lord Haldane.

¹⁴² [1962] AC 446 at 467–68 per Viscount Simonds.

¹⁴³ *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 468 per Viscount Simonds. He refers, for example, to *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 at 514 per Lord Denning (discussed above).

¹⁴⁴ *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 469 per Viscount Simonds.

¹⁴⁵ *Haberdashers' Aske's Federation Trust Ltd v Zurich Insurance Plc* [2018] EWHC 588 (TCC), [2018] Lloyd's Rep IR 382 at paras 41–42 and 56 per Fraser LJ; *Signature of St Albans (Property) Guernsey Ltd v Wragg* [2017] EWHC 2352 (Ch), [2018] Ch 264 at para 72 per Paul Matthews HHJ; *George v Countrywide Surveyors Ltd* [2002] 10 WLUK 129; *Western Digital Corp v British Airways Plc* [2001] QB 733; *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] UKHL 1, [1998] AC 605. Dyer observes that the lack of intensive judicial discussion on privity is perhaps because it is "so bound up with the concept and definition of contract itself that it is easy to find many cases where the principle is assumed and applied, but not many where it is analysed or its rationale explored": D L Dyer "Pulling the privity thread: will contract law unravel?" (1999) 2 *International Trade Law Quarterly* 105, 109.

¹⁴⁶ *Arla Foods UK plc v Barnes* [2008] EWHC 2851 (Ch) at para 49 per Sir Edward Evans-Lombe. The question of whether burdens are assignable in Scots law is discussed at paras 5-59 to 5-60 below.

¹⁴⁷ *Lafarge Redlands Aggregates Ltd v Shephard Hill Civil Engineering Ltd* [2000] 1 WLR 1621 at 1623 per Lord Hope of Craighead.

¹⁴⁸ See, for example, Lord Bingham's statement that a contract "between A and B will not affect A's rights against C unless ... the agreement falls within that limited class of contracts which either at common law or by virtue of the Contracts (Rights of Third Parties) Act 1999 is enforceable by C as a third party": *Heaton v AXA Equity* [2002] UKHL 15, [2002] 2 AC 329 at para 9.

2-64. In summary, privity at an early stage of its development in English law was not strictly enforced. In the sixteenth and seventeenth centuries, privity was subject to various doctrines allowing third-party claims (the “promisee in law” theory, the “interest” test, and the “beneficiary” test). Privity was, however, judicially recognised during this period, as evidenced by its acknowledgment in a number of cases. The tension between privity and third-party claims remained throughout the eighteenth and nineteenth centuries. In some cases, third-party claims were denied because of privity, whereas in others the third party was able to enforce a contract in its favour. *Tweddle v Atkinson*¹⁴⁹ signposts an era of recognition of a strict form of privity. Whilst the case was decided in terms of consideration rather than privity, it was treated in the nineteenth and twentieth centuries as an authority for England’s recognition of privity. English judicial opinion was not wholly in favour of a strict privity doctrine, but by the end of the twentieth century the doctrine was strictly applied and deeply entrenched. Accordingly, the Law Commission’s proposals to introduce third-party rights into English law were viewed as a reform of the privity doctrine.¹⁵⁰ The impact of the introduction of a statutory third-party right on the English privity doctrine is further discussed in the following chapter.¹⁵¹

(b) Academic commentary

2-65. Various commentators recognise positive attributes in the privity doctrine. Collins’ most significant argument in favour of privity is that, in the absence of the doctrine, contracting parties could incur liability for non-performance to an unlimited number of extra-contractual parties, resulting in indeterminate liability.¹⁵² He also notes that, where privity is commercially obstructive, devices such as collateral contracts may be used to prevent direct challenge to the doctrine whilst protecting the expectations of the parties.¹⁵³ Sir Anthony Mason¹⁵⁴ and Kincaid¹⁵⁵ point out that privity embodies the theory of contracts as bargains (i.e. the principle that a contract can only confer rights and obligations on those who make the bargain). Kincaid also argues that it is not necessarily unjust to refuse third-party claims, given that contractual promises are not made to or paid for by third parties.¹⁵⁶

2-66. However, most commentators recognise that privity should not be strictly construed, and some argue that privity does not and should not exist in English law at all. Flannigan discusses how “a dogmatic approach has been necessary for

¹⁴⁹ (1861) 121 ER 762.

¹⁵⁰ Law Commission, Report on *Privity of Contract* para 1.2.

¹⁵¹ See paras 3–14ff below.

¹⁵² H Collins, *The Law of Contract* (4th edn, 2003) 316–18.

¹⁵³ Collins, *Law of Contract* 309. The interaction between privity and concepts which bypass privity in accordance with the intentions of the contracting parties is discussed at paras 3–14ff below.

¹⁵⁴ A Mason, “Privity – A Rule in Search of Decent Burial?”, in Kincaid (ed), *Privity* 88, 90.

¹⁵⁵ P Kincaid, “Privity and Private Justice in Contract”, in Kincaid (ed), *Privity* 60. See also Mason, “Privity – A Rule in Search of Decent Burial?” 92.

¹⁵⁶ P Kincaid, “Privity and Private Justice in Contract”, in Kincaid (ed), *Privity* 60.

the continued survival of the privity doctrine in its present form because ... there is precious little to support the doctrine or to show it to be a 'good and useful' rule".¹⁵⁷

2-67. Flannigan criticises Viscount Haldane's comments in *Dunlop v Pneumatic Tyre*¹⁵⁸ for their lack of doctrinal justification and the failure to examine earlier case law.¹⁵⁹ He further argues that courts in the nineteenth and twentieth centuries failed to recognise earlier cases permitting third party claims, and this led to a strict perception of privity.¹⁶⁰ Similarly, J A Andrews' view is that privity lacks a historical basis in English law.¹⁶¹ These commentators are correct that English law does not exhibit a strong historic privity doctrine, and that its relatively recent firm recognition has stemmed from an acceptance of consideration. However, the mere fact of tenuous roots does not lead to the conclusion that privity has been or should be abolished.

2-68. Vernon Palmer noted, prior to the Contracts (Rights of Third Parties) Act 1999, that English law's strict approach to privity cannot be explained as a matter of logic or justice,¹⁶² and Merkin stresses that privity has "proved to be inconvenient in commerce and unjust in private relationships".¹⁶³ Flannigan submits that privity is incompatible with a doctrine of unconscionability, referring to the idea that contract law should generally prevent contractual injustice and abuse of bargaining power.¹⁶⁴ He reasons that "everyone agrees that [privity] is productive of unfairness and hardship", and that it is obviously unfair for privity to allow a promisor in breach of contract to receive the "windfall benefit" of evading responsibility.¹⁶⁵ These comments, however, fail to acknowledge the fact that privity allows security and predictability to contracting parties.¹⁶⁶ Arguments based on the impact of privity on the fairness and justice of transactions which affect third parties must also account for the perspective of contracting parties. Further, Kincaid was critical of the Law Commission's view that privity produced unjust results,¹⁶⁷ arguing that "the third-party rule *is* about justice, and the exceptions [to privity] are about commercial convenience or efficiency".¹⁶⁸

2-69. In summary, most commentators accept that the privity doctrine is in itself a sensible principle, but they recognise that it should not be absolute. The question of

¹⁵⁷ R Flannigan, "Privity: the end of an era" (1987) 103 *LQR* 564, 564.

¹⁵⁸ See above at para 2-61.

¹⁵⁹ Flannigan, "Privity: the end of an era" 572.

¹⁶⁰ Flannigan, "Privity: the end of an era" 565.

¹⁶¹ J A Andrews, "Section 56 revisited" (1959) 23 *Conveyancer and Property Lawyer* 179, 188-89.

¹⁶² Palmer, *Paths to Privity* 4.

¹⁶³ R Merkin, "The Enforcement of Promises made for the Benefit of a Third Party", in Merkin (ed), *Privity* 21, para 2.1.

¹⁶⁴ See, for example M A Eisenberg, "The bargain principle and its limits" (1982) 95 *Harvard Law Review* 741, 799-800.

¹⁶⁵ Flannigan, "Privity: the end of an era" 592.

¹⁶⁶ This is discussed at paras 1-12ff above and para 5-38 below.

¹⁶⁷ Law Commission, Report on *Privity of contract* para 3.5.

¹⁶⁸ P Kincaid, "Privity and Private Justice in Contract", in Kincaid (ed), *Privity* 60, 68.

whether privity ought to continue to exist in Scots and English law is further discussed in chapter 5.¹⁶⁹

(c) Privity and consideration

2-70. Unlike Scots law, which does not require consideration in the formation of contractual obligations,¹⁷⁰ the consideration rule is well-established in England.¹⁷¹ In English law, there is a “long-running debate” on whether privity and consideration are essentially identical concepts, both serving the same function of preventing third parties from claiming on contracts to which they are not party.¹⁷² As such, consideration was previously considered an insurmountable obstacle to the enforcement of third-party rights.¹⁷³

2-71. This raises the question of whether privity is an application of the rule that those who do not provide consideration cannot enforce a contract, or whether privity operates independently from consideration, preventing the third party from enforcing regardless of whether it supplies consideration.¹⁷⁴ Whilst early English assumpsit cases concerned neither consideration nor privity, by the end of the sixteenth century the courts took the view that an action in assumpsit was dependent on consideration.¹⁷⁵ The reasons for this development are “obscure”, although Merkin surmises that this reflects the influence of equity and the belief that a *quid pro quo* should be required in the formation of contracts.¹⁷⁶ In dealing with assumpsit cases, the courts had accepted by the beginning of the eighteenth century that the doctrine of consideration was based on detriment on the part of the promisee, rather than any benefit to the promisor.¹⁷⁷ There are various sixteenth and seventeenth century cases in which third parties successfully brought actions in assumpsit.¹⁷⁸ However, it was asserted in other cases that the promisee rather than the third party is the correct claimant.¹⁷⁹ Some cases which could have been resolved in terms of privity turned instead on consideration.¹⁸⁰ The early cases therefore tended to resolve third-party claims in terms of consideration rather than privity.

¹⁶⁹ See in particular paras 5-38 to 5-42 below.

¹⁷⁰ *Gloag and Henderson* paras 1.12 and 5.03.

¹⁷¹ *Barber v Fox* (1671) 86 ER 108.

¹⁷² Furmston and Tolhurst, *Privity* para 2.26. See also S Swaminathan, “The great Indian privity trick: hundred years of misunderstanding nineteenth century English contract law” (2016) 16 *Oxford University Commonwealth Law Journal* 160.

¹⁷³ W Müller-Freienfels, “The undisclosed principal” (1953) 16 *MLR* 299, 305.

¹⁷⁴ R Merkin, “Historical Introduction to the Law of Privity”, in Merkin (ed), *Privity* 1, para 1.10.

¹⁷⁵ Merkin, “Historical Introduction to the Law of Privity” paras 1.11–1.12 and 1.14; J Baker, “Privty of Contract in the Common Law before 1680”, in Schrage (ed), *IQT* 35, 42–43.

¹⁷⁶ Merkin, “Historical Introduction to the Law of Privity” para 1.13.

¹⁷⁷ Merkin, “Historical Introduction to the Law of Privity” paras 1.16–1.19; *Manwood and Burston’s Case* (1587) 2 L 203.

¹⁷⁸ See, for example, *Provender v Wood* (1628) Het 30 and *Hadves v Levit* (1631) Het 176. These cases are discussed in Merkin, “Historical Introduction to the Law of Privity” para 1.21.

¹⁷⁹ *Jordan v Jordan* (1594) CE 369; *Taylor v Foster* (1599) CE 776.

¹⁸⁰ See, for example, *Ritler v Denet* (1606) 1 K 44.

2-72. The concepts of privity and consideration became more closely interlinked in later years. As discussed above, consideration is perhaps the cause of English law's recognition of privity.¹⁸¹ This is a logical assessment of the early case law. Whilst the courts did not expressly rely on the privity doctrine, the fact that consideration could only be provided by a contracting party emphasised that contractual benefits (receipt of consideration and enforceability of the right to receive consideration) and contractual burdens (obligations to provide consideration) accrued only to contracting parties. The link between privity and consideration was expressly developed in *Bourne v Mason*,¹⁸² where privity was framed in terms of the absence of consideration.¹⁸³

2-73. However, privity developed as a stand-alone doctrine during the nineteenth century.¹⁸⁴ It is now generally accepted that privity and consideration are separate tests to be used in ascertaining whether contractual obligations are enforceable.¹⁸⁵ Accordingly, a third party may be unable to enforce a contractual obligation because it has not provided consideration under the contract and/or because it is not a party to the contract. In practice, the third party will likely be excluded from enforcing the contract on both grounds. A third party could, however, potentially provide consideration under the contract (for example, through part-funding one party's performance) without intending to become a full contracting party. It is therefore logical to maintain the distinction between the two doctrines. Indeed, the Supreme Court recently acknowledged that consideration "has nothing to do with the doctrine of privity".¹⁸⁶

2-74. Further, the modern understanding of consideration in English law is logically incompatible with the privity doctrine. Throughout the nineteenth century, consideration continued to be thought of as a detriment to the promisee.¹⁸⁷ In the modern law, consideration must move to the promisor.¹⁸⁸ Allowing the consideration to take the form of a benefit to the promisor does not require that only the person providing consideration may sue on the contract – a third party could, according to the modern definition, provide the consideration. The reason third parties are barred from

¹⁸¹ See the summary of Palmer's discussion above at paras 2-48ff, and also Merkin, "Historical Introduction to the Law of Privity" para 1.21, and D Ibbetson, "English Law before 1900", in Hallebeek and Dondorp, *Contracts for a Third-Party* 93, 111–13.

¹⁸² (1668) 86 ER 5.

¹⁸³ Discussed above at para 2-50.

¹⁸⁴ *Jones v Robinson* (1847) 1 Ex 454; *Alton v Midland Railway* (1865) 19 CBNS 219. See also S Swaminathan, "The great Indian privity trick: hundred years of misunderstanding nineteenth century English contract law" (2016) 16 *Oxford University Commonwealth Law Journal* 160 at 173–77; J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (31st edn, 2020) 615–16.

¹⁸⁵ Furmston and Tolhurst, *Privity* para 2.27; A Mason, "Privity – A Rule in Search of Decent Burial?", in Kincaid (ed), *Privity* 88, 89; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847; *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 469 per Viscount Simonds.

¹⁸⁶ *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] AC 1172 at para 296 per Lord Toulson.

¹⁸⁷ *Crow v Rogers* (1724) 1 S 592.

¹⁸⁸ Merkin, "Historical Introduction to the Law of Privity" para 1.35.

suing on contracts to which they are not party (generally speaking) must therefore be privity.¹⁸⁹

2-75. Finally, recognition of consideration is not a prerequisite for the recognition of privity. Consideration is a common law concept which affects the formation of contracts, but does not prevent the imposition of a general rule against third-party claims on contracts. Roman law recognised privity without enforcing a consideration requirement,¹⁹⁰ and it appears that Scots law does the same.

E. CONCLUDING REMARKS

2-76. Whilst there are numerous meanings and uses of the term “privity”, this work considers privity in its contractual sense only. The contractual definition of privity encompasses two aspects: preventing third parties from accruing enforceable contractual benefits under contracts to which they are not party and protecting third parties from the imposition of obligations. Both aspects of privity are now accepted in both Scots and English case law, although in neither jurisdiction is the doctrine universally accepted by academic writers.

¹⁸⁹ Merkin, “Historical Introduction to the Law of Privity” para 1.36; R Merkin, “The Contracts (Rights of Third Parties) Act 1999”, in Merkin (ed), *Privity* 91, part VI.

¹⁹⁰ Furmston and Tolhurst, *Privity* para 1.03.

3 Compatibility of Privity and its Exceptions with Scots Contract Law

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A. OVERVIEW OF CHAPTER 3

3-01. Chapter 3 provides an overview of two concepts which appear to contravene the benefits aspect of privity, namely, agency and third-party rights. It explains the relationship between privity and these concepts. The chapter then addresses privity's compatibility with Scots contract law, in terms of the dominant theories of contract and the principles of freedom to contract and freedom of contract.

B. EXCEPTIONS TO THE PRIVACY DOCTRINE

3-02. This section examines privity's interaction with agency and third-party rights. It also provides a brief overview of concepts which are exceptions to privity but are not relevant to the book.

(1) Agency/mandate

3-03. It is said that agency “refers to a relationship ... in terms of which the principal instructs the agent to act on his behalf in order to produce legally binding effects for the principal”.¹

3-04. T B Smith² and, in England, the Law Commission³ treat agency as an exception to privity. This initially appears to be a reasonable assumption. The agent negotiates with the third party, but the principal, rather than the agent, benefits from this interaction. Accordingly, the principal appears to circumvent privity in enforcing the benefits stemming from the transaction between the agent and the third party.

3-05. However, the agent does not in fact contract with the third party. The agent merely negotiates with the third party for the purpose of concluding a contract between the third party and principal.⁴ Indeed, T B Smith recognises that agency is an “aspect of representation”.⁵ The “true” contracting parties throughout the transaction are the principal and the third party. The privity doctrine is irrelevant, because the agent is at all times a representative of the principal, and so the contract is between the principal and the third party.

3-06. Further, MacQueen comments that treating the principal as party to the contract, rather than the agent, is “perfectly consistent” with Scots contract law because this is “clearly the intention” of the parties concerned, including the third party.⁶ There is an assumption that the agent is only an intermediary, and not a contracting party, although it can be liable to the third party in certain circumstances.⁷ This aligns with the three parties’ contractual intentions. Accordingly, the parties have the flexibility to agree that the agent may be liable to the third party, for example, in the event of the

¹ Macgregor, *Agency* para 2.01.

² Smith, *Short Commentary* 773. See also J Beatson, A Burrows and J Cartwright, *Anson’s Law of Contract* (31st edn, 2020) 637.

³ Law Commission, Report on *Privity of Contract* para 2.15.

⁴ See further R Merkin, “The Enforcement of Promises made for the Benefit of a Third Party”, in Merkin (ed), *Privity* 21, para 2.26; A D M Forte and J P van Niekerk, “Agency”, in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 240, 257–58.

⁵ Smith, *Short Commentary* 774. Smith uses this terminology to denote the fact that agency is one of a number of legal concepts which allow a person to act on behalf of another. He indicates, for example, that mandate and *negotiorum gestio* are also encompassed within this term. See also Furmston and Tolhurst, *Privity* para 3.27.

⁶ MacQueen, *SME* para 816. See also Walker, *Contracts* para 29.4.

⁷ For example, the agent will be personally bound where the factual situation indicates that it intended to contract in its own capacity: Walker, *Contracts* para 29.5. It will also usually be liable to the third party if it refuses to identify its principal or purports to act for a principal who does not exist: Macgregor, *Agency* para 2.04. *Halifax Life Ltd v DLA Piper Scotland LLP* [2009] CSOH 74, 2009 GWD 19-306 has, however, cast doubt on the scope of this rule. For discussion, see L J Macgregor, “New Scottish Agency Case”, Edinburgh Centre for Commercial Law blog, 26 June 2009, available at: <http://www.ecclblog.law.ed.ac.uk/2009/06/26/new-scottish-agency-case/>.

principal's non-payment.⁸ Generally speaking, however, the agent is a representative of the principal: the agent contracts on the principal's behalf without personally accruing the benefits or burdens of the contract. There is no question of the principal bypassing privity to sue on the contract, because the principal is a contracting party.

(2) Third-party rights

3-07. A third-party right arises where the contracting parties intend to confer an enforceable contractual right on a third party.⁹ This subsection defines third-party rights and examines the interaction between such rights and privity.

(a) *The Scots third-party right*

3-08. Third-party rights are long-accepted in Scots law¹⁰ and now exist in statutory form, following the enactment of the Contract (Third Party Rights) (Scotland) Act 2017. The Scots third-party right, formerly known as a *jus quaesitum tertio*,¹¹ arises where the contracting parties intend to confer a benefit on a third party, and the contract contains an undertaking that at least one of the contracting parties will do or not do something for the third party's benefit.¹² Such intention can be express or implied.¹³

3-09. In order to confer an enforceable third-party right, the contracting parties must ensure that the contract adequately identifies the third party.¹⁴ A third party may acquire a right even if it was not in existence or did not fall within the class of those intended to benefit from the third-party right when the right was created.¹⁵

3-10. Prior to the Contract (Third Party Rights) (Scotland) Act 2017, there was a lack of consensus on whether an enforceable third-party right must necessarily be

⁸ Macgregor, *Agency* para 12.01.

⁹ The intention of the contracting parties is recognised as a requirement for the formation of a third-party right in both Scots and English law (as discussed below in paras 3-08 and 3-13 respectively).

¹⁰ Morison's *Dictionary of Decisions* lists cases under the heading "*jus quaesitum tertio*", the earliest being from 1591: see Hogg, *Promises and Contract Law* 305 n 71. The case from 1591 is *Wood v Moncur* (1591) Mor 7719: "albeit the defender was no contractor, yet there was a provision made in the same in his favours". Similar statements are found in *Renton v Ayton* (1634) Mor 7721 and *Supplicants v Nimmo* (1627) Mor 7740. See also T Hope, *Major Practicks 1608–1633* (ed Lord Clyde, Stair Society vol 3, 1937) 2.3.37; Stair, *Institutions* 1.10.5.

¹¹ McBryde, *Contract* para 10.01. The contracting parties were referred to as the debtor and stipulator (the former being responsible for performing in favour of the third party), and the third party was the *tertius*: MacQueen, *SME* paras 824–25. The term "*jus quaesitum tertio*" means "the third party has acquired a right", and the Scottish Law Commission suggest that the term was adopted by Stair due to the influence of civilian jurisprudence: Scottish Law Commission, *Memorandum on Constitution and Proof of Voluntary Obligations: Stipulations in Favour of Third Parties* (Scot Law Com Memorandum No 38, 1977) 2.

¹² Contract (Third Party Rights) (Scotland) Act 2017 s 1(1)(a)–(b).

¹³ 2017 Act s 2(3).

¹⁴ 2017 Act s 1(3).

¹⁵ 2017 Act s 1(4).

irrevocable.¹⁶ The Scottish Law Commission identified irrevocability as a “central issue of law reform”¹⁷ in their Report on *Third Party Rights*.¹⁸ The resulting legislation now provides that contracting parties may confer a revocable or modifiable third-party right.¹⁹

3-11. Some commentators view third-party rights as a form of unilateral promise.²⁰ However, it is submitted that the modern third-party right is not promissory in nature,²¹ and the analysis in the remainder of this section assumes that the third party’s right is a contractual benefit.

(b) The English third-party right

3-12. English law did not enforce third-party rights prior to the Contracts (Rights of Third Parties) Act 1999.²² Various judges indicated that the barrier to recognition of such rights posed by the privity doctrine was unsatisfactory.²³ However, the Law Revision Committee’s recommendation to introduce third-party rights²⁴ did not result in legislation, and the House of Lords declined to recognise such rights at common law in *Beswick v Beswick*.²⁵ Following the Law Commission’s Report on *Privity of Contract* in 1996,²⁶ English law eventually provided for a statutory third-party right with the enactment of the 1999 Act.

¹⁶ In *Baird v Creditors of Mr Hugh Murray* (1744) Mor 7737, for example, a party was contractually obliged to transfer money to another’s next of kin, but, because this arrangement was revocable, the situation did not give rise to a *jus quaesitum tertio*. See also *Carmichael v Carmichael’s Executrix* 1920 SC (HL) 195 at 200 per Lord Dunedin; J T Cameron “*Jus quaesitum tertio*: the true meaning of Stair I.x.5” 1961 *JR* 103, 118. Opposing views, according to which a third-party right need not be irrevocable, include Hogg, *Promises and Contract Law* 305–06; D N MacCormick “*Jus quaesitum tertio*: Stair v Dunedin” 1970 *JR* 228, 236–41; Gloag, *Contract* 242.

¹⁷ SLC, Report on *Third Party Rights* para 2.16 and ch 5.

¹⁸ Irrevocability of third-party rights is discussed in SLC, Report on *Third Party Rights* ch 5.

¹⁹ Contract (Third Party Rights) (Scotland) Act 2017 ss 2(4) and 3. This is subject to s 6, which provides for the third party’s protection from revocation in certain circumstances.

²⁰ See, for example, Hogg, *Promises and Contract Law* 284.

²¹ A promissory analysis of third-party rights is addressed in L MacFarlane, “The Nature of Third Party Rights: Lessons from German Law”, in S Lorenzmeier and D Miler (eds), *The New Law* (2018) 27, 28–30.

²² This was certainly the case immediately before the Act; it is debateable whether this was the case historically: see above at paras 2–48ff.

²³ *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 at 291 per Lord Salmon and at 300 per Lord Scarman; *Forster v Silvermere Golf and Equestrian Centre* (1981) 42 P & CR 255 per Dillon J. See also above at paras 2–57 to 2–59, and discussion in G W F Dold, *Stipulations for a Third Party* (1948) 98, and A M Tettenborn, “Third party contracts – pragmatism from the Law Commission” (1996) *Journal of Business Law* 602.

²⁴ Law Revision Committee, *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)* (Cmd 5449, 1937), discussed in J Beatson, “Reforming the law of contracts for the benefit of third parties: a second bite at the cherry” (1992) 45 *Current Legal Problems* 1.

²⁵ [1968] AC 58; Scottish Law Commission, Memorandum on *Constitution and Proof of Voluntary Obligations: Stipulations in Favour of Third Parties* (Scot Law Com Memorandum No 38, 1977) para 4.

²⁶ Law Commission, Report on *Privity of Contract*. The Report and its draft Bill are summarised in N H Andrews, “Reform of the privity rule in English contract law: The Law Commission’s Report No 242” (1997) 56 *CLJ* 25. See also C MacMillan, “A birthday present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999” (2000) 63 *MLR* 721.

3-13. In terms of formation requirements, the contracting parties must, as in Scots law, expressly or impliedly intend to confer an enforceable benefit on a third party.²⁷ The third party must be identified by name or as a member of a class of beneficiaries, but need not be in existence when the contracting parties create the right.²⁸ The contracting parties may not revoke the right where the third party communicates its assent to receiving the right, the promisor is aware that the third party has acted in reliance on its right, or it is reasonable to expect that the promisor had foreseen that the third party would rely on the right and the third party has done so.²⁹ The right is otherwise revocable.

(c) Third-party rights and the privity doctrine

3-14. There are three positions taken in commentary on the relationship between third-party rights and the privity doctrine.

3-15. Firstly, the Scottish Law Commission indicate that the *jus quaesitum tertio*:

is not ... an exception grafted onto the general rule of contract law that strangers to a contract cannot sue on it, but rather the application of a general principle of Scots law that pollicitation (in our ascribed sense) creates obligation – at least in those legal relationships which other systems would recognise as obligations in favour of third parties.³⁰

3-16. Secondly, there are those who view third-party rights as an exception to privity. For example, Gloag describes such a right as an exception to the privity doctrine, justified on the basis that the third party must show that the right to enforce the contract has been conferred upon it.³¹ This view is also found in judicial opinion.³² Lord Skerrington, commenting on the parties' obligations under a lease, states that "it confers a *jus quaesitum* upon the pursuer ... although there is no privity of contract between them".³³ This suggests that he viewed third-party rights as an exception to privity. Furmston and Tolhurst frame England as "a jurisdiction that has a general legislative exception to the privity rule",³⁴ and the Law Commission in England also view third-party rights as an exception to privity.³⁵

²⁷ Contracts (Rights of Third Parties) Act 1999 s 1(2).

²⁸ 1999 Act s 1(3).

²⁹ 1999 Act s 2(1).

³⁰ Scottish Law Commission, Memorandum on *Constitution and Proof of Voluntary Obligations: Stipulations in Favour of Third Parties* (Scot Law Com Memorandum No 38, 1977) para 12.

³¹ Gloag, *Contract* 218 and also 235; also McBryde, *Contract* para 10.01.

³² *D & J Nicol v Dundee Harbour Trustees* 1915 SC (HL) 7 at 13 per Lord Dunedin; *Laurence McIntosh Ltd v Balfour Beatty Group Ltd* [2006] CSOH 197 at para 35 per Lord Drummond Young.

³³ *Taylor v The Auchinlea Coal Company Ltd* 1912 2 SLT 10 at 12 per Lord Skerrington.

³⁴ Furmston and Tolhurst, *Privity* para 1.01 (referring to the Contracts (Rights of Third Parties) Act 1999).

³⁵ J N Adams, D Beyleveld, and R Brownsword, "Privity of contract – the benefits and burdens of law reform" (1997) 60 *MLR* 238, 263. The relevant Law Revision Committee document is the *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)* (Cmd 5449, 1937).

3-17. The third opinion is that of MacQueen. He asserts that there is no Scots privity doctrine because of Scotland's recognition of third-party rights and of assignation.³⁶ Lord Kingarth stated (prior to the Contracts (Rights of Third Parties) Act 1999) that privity of contract prevented recognition of third-party rights in English law,³⁷ and it is T B Smith's view that "[being] free from doctrines of 'consideration' and 'privity of contract' Scottish law developed a doctrine of *jus quaesitum tertio* at an early stage".³⁸

3-18. Confusingly, however, Smith also refers to the "primary rule" that only contracting parties can enforce contracts.³⁹ He further states that third-party rights are recognised as an exception to privity where "it can be shown that the agreed object of a contract between A and B was to benefit a third party".⁴⁰

3-19. Does the fact that Scots law has long recognised third-party rights mean that it does not recognise the privity doctrine? Certainly it is wrong to say that Scots law has historically *strictly* adhered to privity, given its acceptance of third-party rights and the fact that express judicial recognition of privity is relatively recent. In light of the numerous judicial references to privity discussed in the previous chapter,⁴¹ however, it is submitted that MacQueen's comment is inaccurate, because Scots law does recognise the privity doctrine. His statement was made prior to the Contracts (Rights of Third Parties) Act 1999, and so he is correct that privity previously prevented recognition of third-party rights in English law. However, it is clear that Scots law has (judicially) accepted privity since at least the nineteenth century, and that third-party rights are an exception to that doctrine. It may be that MacQueen would now acknowledge the existence of privity in Scots law, as the most recent edition of *Gloag and Henderson* (of which he is one of the editors) states that:

The rule that the contracting parties alone have the right to enforce their contract suffers exception in cases where it is shown that their object or intention was to advance the interests of a third party.⁴²

3-20. There is no logical reason why a legal system could not enforce the privity doctrine as a general, overarching principle subject to exceptions. This approach to privity was recognised in Roman law, which upheld the privity doctrine but recognised various exceptions.⁴³ In Scots law, it appears that third-party rights operate as an exception in accordance with the intentions of the contracting parties. They should be treated as an exception to privity because the third party is able to enforce

³⁶ MacQueen, *SME* para 814.

³⁷ *Holmes v Bank of Scotland* 2002 SLT 544 at para 17 per Lord Kingarth.

³⁸ Smith, *Short Commentary* 778.

³⁹ Smith, *Short Commentary* 777.

⁴⁰ Smith, *Short Commentary* 778.

⁴¹ See paras 2-20ff above.

⁴² *Gloag and Henderson* para 8.04. This appears to recognise that third-party rights are an exception to privity.

⁴³ R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 34-40; P du Plessis, *Borkowski's Textbook on Roman Law* (6th edn, 2020) 264; Ulp D 45.1.38.17; Ulp D 13.7.13 pr.

contractual performance. Accordingly, the second of the three views is an accurate description of Scots law. Third-party rights are an exception to privity, but the existence of such rights means that the character of the privity doctrine is affected, because privity in Scotland has never been absolute. The Scots third-party right will not be subject to further analysis in this book, because it has previously been fully analysed.⁴⁴

3-21. In England, the third-party right is similarly compatible with privity. Lord Denning states that privity has always been subject to the rule that promises ought to be binding, even if they are made in favour of a third party.⁴⁵ Further, during the debates in the House of Lords on the Contracts (Rights of Third Parties) Bill, the Lord Chancellor (Lord Irvine of Lairg) recognised that English law upholds privity, but that the Bill should give effect to the “simple and straightforward principle” that the will of the parties should be respected.⁴⁶ Indeed, it was said during the debates that the “theme” of the Bill was allowing contractual intentions to be effected.⁴⁷

(3) Other exceptions to the privity doctrine

3-22. There are various statutory exceptions to the privity doctrine, for example in the context of insurance and carriage of goods by sea.⁴⁸ Where a statutory provision allows external parties to enforce contractual obligations, the external party’s claim will not be negated due to an argument of lack of privity.⁴⁹ The statutory exceptions provide a specific right of enforcement for the third party and result from extensive

⁴⁴ A selection of relevant works includes: J T Cameron, “Jus quaesitum tertio: the true meaning of Stair I.x.5” 1961 *JR* 103; L Loewensohn, “Jus quaesitum tertio: a comparative and critical survey” (1940) 56 *Scottish Law Review* 77 and 104; W McBryde, “Jus quaesitum tertio” 1983 *JR* 137; D N MacCormick “Jus quaesitum tertio: Stair v Dunedin” 1970 *JR* 228; H L MacQueen, “Third Party Rights in Contract: *Jus Quaesitum Tertio*”, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 2 (2000) 220; A Rodger, “Molina, Stair and the jus quaesitum tertio” 1969 *JR* 128; J Brown, “Jus quaesitum tertio – a res, not a right?” 2019 *JR* 53.

⁴⁵ *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 at 514 per Lord Denning, discussed above at para 2-57. See also P Kincaid, “The UK Law Commission’s privity proposals and contract theory” (1994) 8 *JCL* 51 at 57: whilst Kincaid comments that the enforcement of third-party rights is not justified by contractual intention alone, he acknowledges that the contracting parties’ intention to benefit the third party is contained in their promise to do so.

⁴⁶ HL Deb 11 Jan 1999, vol 596, col 20.

⁴⁷ HL Deb 11 Jan 1999, vol 596, col 21 (Lord Irvine of Lairg LC). For further discussion, see H Beale, “A Review of the Contracts (Rights of Third Parties) Act 1999”, in A Burrows and E Peel (eds), *Contract Formation and Parties* (2010) 225, 246–47.

⁴⁸ For discussion of these provisions, see: J N Adams, D Beyleveld, and R Brownsword, “Privity of contract – the benefits and burdens of law reform” (1997) 60 *MLR* 238, 243. Discussion of statutory exceptions to privity more generally is found in D Ibbetson, “English Law: Twentieth Century”, in Hallebeek and Dondorp, *Contracts for a Third-Party* 115, 126–27.

⁴⁹ See, for example, *Waddell v Howat* 1924 SLT 468 at 469 per the Lord Ordinary (Lord Murray): “It is clear that privity of contract affords no test of the validity of such a claim. The claim rests upon statute”. See also S Whittaker, “Privity of contract and the tort of negligence: future directions” (1996) 16 *Oxford Journal of Legal Studies* 191, 215.

policy-based examination of the circumstances in which the exception is required. Some of the statutory exceptions are examined further in chapter 5, which assesses the policy considerations justifying deviation from the privity doctrine.

3-23. Walker lists the following examples of common law exceptions to the privity doctrine: transfer by negotiation; transmission of contract on death; transmission to or against successors in office; transmission on dissolution of a firm; transmission of the granting of trust deeds; transmission of contract on the appointment of a receiver; transmission of contract on the liquidation of companies; and contracts running with land or transmitting with goods.⁵⁰ These are not considered further, because they cannot be used to recover extra-contractual losses.

C. COMPATIBILITY OF PRIVACY WITH THE CURRENT LAW

3-24. Previous sections have demonstrated that the privity doctrine is accepted in Scots and English law, although the fact that both jurisdictions uphold third-party rights illustrates that privity is subject to the intentions of contracting parties. This section addresses whether the privity doctrine is compatible with the dominant theories of Scots contract law and the fundamental principles of freedom to contract and freedom of contract.

(1) Overview of the dominant theories of contract in Scots law

3-25. This subsection provides an overview of the dominant theories of Scots contract law: will, promissory, and assumption theories of contract. The book does not seek to provide an extensive overview of the competing theories, but asks whether the privity doctrine and its exceptions are compatible with these three theories.

(a) Will theory

3-26. Whilst there is a “bewildering array of contract theories” in Anglo-American law generally, Scots law exhibits an “essentially uniform contract theory”.⁵¹ Stair’s view that contracts are based on the agreement of the contracting parties to be bound by obligations to one another⁵² is “largely unchallenged”.⁵³

3-27. According to Stair: “Conventional Obligations do arise from our Will and Consent; for as in the beginning hath been shown, the Will is the only Faculty constituting Rights, whether real or personal”.⁵⁴

⁵⁰ Walker, *Contracts* paras 29.36 to 29.47.

⁵¹ M Hogg, “Competing Theories of Contract: An Emerging Consensus?”, in L A DiMatteo and Q Zhou (eds), *Commercial Contract Law: Transatlantic Perspectives* (2013) 14.

⁵² Stair, *Institutions* 1.10.6.

⁵³ M Hogg, “Competing Theories of Contract: An Emerging Consensus?” 15.

⁵⁴ Stair, *Institutions* 1.10.1: obediential obligations arise from the will of God, and conventional obligations from the will of man.

3-28. Stair states that there are three acts of will: desire (a tendency or inclination of the will towards its object), resolution (the decision to do what is desired), and engagement.⁵⁵ This view is reflected in other Institutional Writings.⁵⁶ For example, Bell notes that a “full and perfect” obligation requires, on the part of the obligor, “a deliberate consent and engagement to him who is to have the right of exacting performance”.⁵⁷ Erskine similarly comments that a contract is a “voluntary agreement of two or more persons whereby something is to be given or performed ... upon one part for a valuable consideration either present or future ... on the other part”.⁵⁸

3-29. Will theory is also recognised in modern commentary. Gloag, for example, remarks that “the will to be bound to some obligation, actual, or implied by law, is necessary before contractual obligation can exist”.⁵⁹

3-30. The importance of contractual will is also emphasised in English law. Atiyah, for example, remarks that:

the modern lawyer ... sees little or no difference between saying that the parties voluntarily enter into a transaction to which the law attributes certain consequences, and saying that the consequences themselves are the creation of the will of the parties.⁶⁰

3-31. This work treats will theory as the dominant theory of Scots contract law, and as also influential in English law.

(b) Promissory theory

3-32. According to promissory theory, contracts consist of reciprocal promises.⁶¹ Hogg outlines the two main sub-types of promissory theories of contract.⁶² “Contractarianism” bases the duty to adhere to promises in a social contract, and provides that individuals adhere to promises because this facilitates trust amongst members of society.⁶³ “Contractualism”, on the other hand, views promise as an “institutional obligation” based on the rule that promises must be kept, which derives from the basic moral principle of fairness.⁶⁴ One of the most notable proponents of a

⁵⁵ Stair 1.10.2. Bell similarly recognises three acts of will: deliberation, resolution, and engagement, noting that the law enforces obligations at the engagement stage only: Bell, *Principles* (1839) § 7.

⁵⁶ Walker, *Contracts* para 3.1.

⁵⁷ Bell, *Commentaries* I, 313. See also Bell’s statement (at I, 335) that “In most codes of jurisprudence, with a view to the sure establishing of that consent which is of the essence of all contracts and obligations, there have been appointed certain requisites and solemnities, as at once evincing the deliberate act of consent and the authenticity of the contract”. In his *Principles* (1839) § 10 Bell further commented that: “To a perfect obligation (besides the proof requisite), it is necessary that there shall be a deliberate and voluntary consent and purpose to engage”.

⁵⁸ Erskine, *Institute* 3.1.16.

⁵⁹ Gloag, *Contract* 16. See also Hogg, *Promises and Contract Law* 169.

⁶⁰ P S Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 406.

⁶¹ S A Smith, *Contract Theory* (2004) 43–44.

⁶² Hogg, *Promises and Contract Law* 93–95.

⁶³ Hogg, *Promises and Contract Law* 93–94.

⁶⁴ Hogg, *Promises and Contract Law* 94; J Rawls, *A Theory of Justice* (reissue edn, 2005) 112.

promissory theory of contract in recent times is Fried, although Bix comments that Fried's work, *Contract as Promise*,⁶⁵ is best seen as restricted to an analysis of US law.⁶⁶

3-33. T B Smith notes that the distinction between unilateral promissory obligations and bilateral contractual obligations dates back to Roman and canon law.⁶⁷ Scotland has long-recognised the enforceability of unilateral promises.⁶⁸

3-34. In Scotland, will theory is dominant,⁶⁹ although Hogg casts third-party rights in promissory terms.⁷⁰ Hogg also analyses firm offers as comprising an offer and a promise to keep the offer open.⁷¹

3-35. Kincaid argues that English law currently embodies promissory theory.⁷² Brownsword and Hutchison explain that promissory theory can account for situations involving both direct promises to third parties (in which contracting party A promises contracting party B that it will confer a benefit on third party C, and A promises C that it will confer a benefit on C) and indirect promises (A promises B that it will benefit C, but does not make such a promise to C).⁷³ Atiyah notes that the theory "has had no serious rival" in the last century.⁷⁴ He surmises that promissory theory is "alive and well"⁷⁵ despite the fact that it requires qualification and modification in the context of analysing certain consumer and family arrangements.⁷⁶ Stephen Smith also favours promissory theory.⁷⁷

3-36. Promissory theories are compatible with will-based accounts of contract law. This is because promises are, in Scots law, historically rooted in unilateral declarations

⁶⁵ The most recent edition is: C Fried, *Contract as Promise: A Theory of Contractual Obligation* (2nd edn, 2015). Bix refers to the previous edition: C Fried, *Contract as Promise: A Theory of Contractual Obligation* (1990).

⁶⁶ B H Bix, "Theories of contract law and enforcing promissory morality: comments on Charles Fried" (2012) 45 *Suffolk University Law Review* 719, 721.

⁶⁷ T B Smith, "Pollicitatio – promise and offer: *Stair v. Grotius*" 1958 *Acta Juridica* 141. See also M A Hogg, "Promise: the neglected obligation in European private law" (2010) 59 *International and Comparative Law Quarterly* 461, 463–64.

⁶⁸ For an overview of the development of the law of promise in Scotland, see W D H Sellar, "Promise", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 2 (2000) 252.

⁶⁹ See above at para 3-26.

⁷⁰ Hogg, *Promises and Contract Law* 284.

⁷¹ Hogg, "Promise: the neglected obligation in European private law" 465.

⁷² Kincaid equates the will, promise, and assumption theories: "If the three terms do not mean exactly the same thing, they are variations on a common theme": P Kincaid, "The UK Law Commission's privity proposals and contract theory" (1994) 8 *JCL* 51 at 52.

⁷³ R Brownsword and D Hutchison, "Beyond Promissory Principle and Protective Pragmatism", in Kincaid (ed), *Privity* 126, 130.

⁷⁴ P S Atiyah, *Essays on Contract* (1990) 12. See also P S Atiyah, "Contracts, promises and the law of obligations" (1978) 94 *LQR* 193, 194.

⁷⁵ Atiyah, *Essays on Contract* 13. See also P S Atiyah, "The theoretical basis of contract law – an English perspective" (1981) 1 *International Review of Law and Economics* 183, 189–90.

⁷⁶ Atiyah, *Essays on Contract* 12.

⁷⁷ S A Smith, *Contract Theory* (2004) 60–68.

of the promisor's will.⁷⁸ T B Smith's view is that *pollicitatio* constitutes an expression of unilateral will,⁷⁹ and, more generally, that Scots law "has accepted a general doctrine of obligation by unilateral declaration of will".⁸⁰ Hogg recently acknowledged that a promise is "constituted by the act or declaration of will of one party alone, this making it a type of unilateral juridical act (or unilateral legal transaction)".⁸¹ Referring to English law, Stephen Smith comments that "contracts are promises or, if not promises, then agreements or something similar".⁸² Indeed, will theory was dominant in nineteenth-century English contract theory, and promissory theory is thought to be a "contemporary, if somewhat narrower" branch of will theory.⁸³

(c) Assumption theory

3-37. The most notable advocate of assumption theory is the New Zealand scholar, Coote.⁸⁴ According to Coote:

Contractual obligations are not imposed by the law *ab extra* but are those which at formation the parties have assumed, that is, have taken upon themselves. Whether there has been such an assumption falls to be determined objectively.⁸⁵

3-38. In Scots law, Hogg considers that there are elements of assumption theory in the work of Stair, explaining that Stair understood the "essence" of contract law to be the recognition of contractual parties' voluntary undertakings.⁸⁶ Hogg also notes that Scots lawyers more generally would perhaps agree with Coote's view that contract law involves the assumption of legal duties.⁸⁷ Indeed, Hogg has described Coote's theories as taking a "commendable approach to the importance of personal liberty and freedom of action, stressing ... the voluntary intention of the parties as the constitutive means of assuming an obligation".⁸⁸

3-39. Save for these comments, assumption theory has not gained much recognition in Scotland. Phang argues that various English cases can be explained in terms of

⁷⁸ T B Smith, "Pollicitatio – promise and offer: *Stair v. Grotius*" 1958 *Acta Juridica* 141, 142 and 145, citing Stair, *Institutions* 1.1.12 and 1.10.3–7. Stair appears to view third-party rights as promissory: 1.10.5 sees *jura quaesitum tertio* as the main example of promises which do not require acceptance.

⁷⁹ Smith, "Pollicitatio – promise and offer: *Stair v. Grotius*" 142 and 147.

⁸⁰ Smith, "Pollicitatio – promise and offer: *Stair v. Grotius*" 149. See also S A Smith, *Contract Theory* (2004) 57.

⁸¹ Hogg, "Promise: the neglected obligation in European private law" 462.

⁸² Smith, *Contract Theory* 168, and see also 44 and 56. Similarly, P S Atiyah, *Essays on Contract* (1990) 12 states that a contract "consists of an exchange of promises ... with the intention of creating a binding deal".

⁸³ Smith, *Contract Theory* (2004) 56.

⁸⁴ B Coote, *Contract as Assumption: Essays on a Theme* (2010).

⁸⁵ B Coote, *Contract as Assumption II* (2016) 1.

⁸⁶ M Hogg, "Publication review: *Contract as Assumption*" (2011) 15 *EdinLR* 315, 316. See also M Hogg, "Competing Theories of Contract: An Emerging Consensus?", in L A DiMatteo and Q Zhou (eds), *Commercial Contract Law: Transatlantic Perspectives* (2013) 14, 27.

⁸⁷ Hogg, "Publication review: *Contract as Assumption*" 316.

⁸⁸ Hogg, "Publication review: *Contract as Assumption*" 316–17.

assumption theory.⁸⁹ On the whole, however, assumption theory has gained less traction in English law than will-based theories and promissory theory.

3-40. Assumption theory is compatible with will-based theories of contract. According to the former, contracting parties voluntarily agree to uphold contractual obligations.⁹⁰ In other words, they voluntarily assume their respective contractual obligations because they intend to do so. Coote explains that an enforceable contract consists of promises or undertakings “in respect of which legal contractual obligation has been assumed by means that the law recognises as effective for that purpose”, such that the party’s intention to assume its obligations under the contract is treated as incidental to its intention to contract.⁹¹ Hogg surmises that Coote “does not reject out of hand promissory ideas about contract law, but rather suggests that what is crucial to a legally relevant promise is that the promisor is assuming an obligation in the act of promising”.⁹²

3-41. This demonstrates that, like will theory, assumption theory permits contractual obligations to arise only with the parties’ consent.

(d) Summary

3-42. These theories all share a core element of consent, demonstrating a uniform understanding that a contract in Scots (and English) law is based on voluntary obligations. A particularly clear statement of the consensual nature of contracts is provided by Stephen Smith:

The core offer-acceptance rule thus provides, in principle anyway, that contracting parties control the contract-making process: both the existence and the content of contractual duties are up to the parties.⁹³

3-43. These theories are also compatible with modern statements of contract as “agreement”.⁹⁴ If the contracting parties have voluntarily agreed to perform under the contract, they are bound by their own will to do so. Similarly, they can be said to have agreed to fulfil their promises to one another, and they have agreed to perform under their voluntarily assumed obligations.

3-44. The remainder of this book will not offer a view on which of the theories of contract outlined above is preferable. Rather, the work will proceed on the basis that contractual obligations are consensual in nature and based on the will of the contracting parties, because this aspect of contract law is shared by each of the theories.

⁸⁹ A Phang, “Contract as assumption – the scholarship and influence of Professor Brian Coote” (2011) 27 *JCL* 247, 250–55.

⁹⁰ Hogg, “Competing Theories of Contract: An Emerging Consensus?” 27.

⁹¹ Coote, *Contract as Assumption II* 11.

⁹² Hogg, “Publication review: Contract as Assumption” 317.

⁹³ Smith, *Contract Theory* 169.

⁹⁴ For English law, see A Burrows, *A Restatement of the English Law of Contract* (2016) para 2. For Scots law, McBryde, *Contract* para 1.07 notes that “In practice, lawyers talk of agreement”.

(2) Compatibility of privity with contract theory

3-45. It has been said that privity of contract is “difficult to accommodate” in will-based theories, because it is not entirely clear why the will of contracting parties should be restricted in respect of rights conferred on third parties.⁹⁵ Hogg states that there is “no convincing answer” to this question.⁹⁶ Kincaid asserts that the intention of the contracting parties does not create the third party’s right to sue – rather, the right is attached by law. He argues that the parties’ intention is relevant to the “fact and content” of the contract, but not to the creation of rights outwith the contract.⁹⁷ It is difficult to follow Kincaid’s logic. The third-party right is a term in the contract. As such, the obligation on the part of the debtor to perform in favour of the third party is part of the content of the contract to which the parties have consented. Kincaid’s argument is based on his view of contracts as bargains. He asserts that the legal relationship between the contracting parties is constituted by promises within the setting of a bargain and cannot encompass third parties.⁹⁸ This ignores the fact that at least one of the contracting parties has bargained for contractual performance in favour of the third party.

3-46. Third-party rights are conferred in accordance with the intentions of the contracting parties, and so the will of the parties is not circumvented where third parties enforce their rights. The Scots conception of privity is thus compatible with will theory: it does not prevent the recognition of third-party rights where this accords with contractual intention. MacQueen notes that, generally speaking, only the contracting parties will benefit under their contract, subject to their contrary intentions.⁹⁹ He adds that the “purpose of contract law is to give effect to the legitimate intentions of the parties, and in Scots law, if the intention is to confer enforceable rights upon third parties, that will be given effect”.¹⁰⁰

3-47. The Scottish Law Commission has recently stated that privity is an “important principle”, but it “yields to one even more fundamental”: giving effect to the intentions of contracting parties.¹⁰¹ These statements acknowledge that the privity rule accounts for will-based theories of contract law, in that it is subject to contractual intention. This explains why, alongside its acknowledgement of privity, Scots law recognised the *jus quaesitum tertio*, and has now introduced a statutory third-party right. Privity

⁹⁵ Hogg, “Competing Theories of Contract: An Emerging Consensus?” 36.

⁹⁶ Hogg, “Competing Theories of Contract: An Emerging Consensus?” 36.

⁹⁷ P Kincaid, “Privity and Private Justice in Contract”, in Kincaid (ed), *Privity* 60, 63–64; see also 74.

⁹⁸ Kincaid, “Privity and Private Justice in Contract” 63.

⁹⁹ MacQueen, *SME* para 814.

¹⁰⁰ MacQueen, *SME* para 814. See also Gloag, *Contract* 218–19.

¹⁰¹ SLC, Discussion Paper on *Third Party Rights* para 2.15. The Law Commission similarly comment that, in situations in which the law refuses to uphold third-party rights where the contracting parties seek to confer them, this “frustrates their intentions, and undermines the general justifying theory of contract”: Law Commission, Report on *Privity of Contract* para 3.1. See also P Sutherland, “Third-Party Contracts”, in H MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (Edinburgh Studies in Law vol 2, 2006) 201, 205.

and will theory are not contradictory. Rather, the former is subject to the latter. Privity is a default effect of contracting, which can be disappplied by the contracting parties' intentions.

3-48. In terms of the relationship between the privity doctrine and promissory theory, Flannigan argues that there is no theoretical justification for privity in systems adhering to promissory theory. According to Flannigan, if promises (and promisors) are to be taken seriously, we must "show respect" by allowing third parties to enforce promises made in their favour.¹⁰² Sir Anthony Mason's stance is that promissory theory is "even more opposed to the privity rule than will theory".¹⁰³ He does not discuss why this is the case, but refers to Macneil's comment that privity is "unrelated to social needs".¹⁰⁴ As discussed in chapter 1,¹⁰⁵ however, privity allows contracting parties to predict their liability towards external parties. Efficient contracting can be construed as a social good. If external parties were permitted to sue on contracts as they chose, this would result in increased costs for contracting parties who would be forced to defend such actions. This would be disadvantageous for commercial parties, and so applying the privity doctrine to limit the ability of external parties to enforce contracts promotes contractual efficiency. Sir Anthony Mason is therefore incorrect to suggest that privity and promissory theory are incompatible on the basis that privity does not promote social needs. Rather, the privity doctrine is compatible with promissory theory because it permits promises made to third parties to be enforced where the contracting parties so intend. Further, as Stephen Smith states:

The privity rule is consistent with [promissory theory] because promissory obligations are personal obligations. A promise is created by communicating an intention to undertake an obligation *to someone* – the promisee – and the obligation thus created is in principle owed to that person alone.¹⁰⁶

3-49. The Scots privity doctrine is also compatible with assumption theory. Contracting parties who wish voluntarily to assume obligations towards third parties are permitted to do so, thus upholding contractual intention.

3-50. In summary, privity is compatible with the dominant theories of Scots contract law, because the doctrine is not absolute but, rather, applies in accordance with the intentions of the contracting parties. The fact that privity yields to those intentions, permitting the creation of third-party rights, means that it is compatible with will theory, promissory theory, and assumption theory.

¹⁰² R Flannigan, "Privity: the end of an era" (1987) 103 *LQR* 564, 587.

¹⁰³ A Mason, "Privity – A Rule in Search of Decent Burial?", in Kincaid (ed), *Privity* 88, 99.

¹⁰⁴ I Macneil, *Contracts: Exchange Transactions and Relations* (2nd edn, 1978) 333 (cited in Mason, "Privity – A Rule in Search of Decent Burial?" 99). The same statement is found in I R Macneil and P J Gudel, *Contracts: Exchange Transactions and Relations* (3rd edn, 2001) 372.

¹⁰⁵ See, in particular, paras 1-12 and 1-13 above.

¹⁰⁶ S A Smith, *Contract Theory* (2004) 60.

(3) Freedom of contract and freedom to contract

3-51. This subsection outlines the principles of freedom of contract and freedom to contract in Scots law. It then analyses whether privity is compatible with these principles.

3-52. The principle of freedom to contract can be distinguished from freedom of contract: the former refers to a party's choice to enter into a contract, and the latter concerns freedom as to the content of the resulting contract.¹⁰⁷

3-53. The freedom to contract (or not) is a fundamental principle of Scots law. According to Stair:

that freedom we have of disposal of our selves, our actions, and things, which naturally is in us, is by our engagement, placed in another, and so engagement is a diminution of freedom, and constituting of power in another, whereby he may restrain, or constrain to the doing or performing of that whereof we have given him power of exaction.¹⁰⁸

3-54. Freedom of contract is also an important principle in Scots law. Bankton notes that conventional obligations arise “from the will of the parties, in matters wherein they are otherwise free, which happens by contracts among them”.¹⁰⁹

3-55. The privity doctrine is compatible with the principles of freedom to contract and freedom of contract. Regarding the former, privity ensures that parties owe obligations only to those with whom they contract, thus reflecting the parties' freedom to choose their contracting partners, and not to contract with others.

3-56. Allowing for exceptions to privity in line with the intentions of the contracting parties is also compatible with freedom of contract. In the case of third-party rights, one of the contracting parties has voluntarily curtailed its freedom by binding itself to perform in favour of the third party. Indeed, Gloag comments that a contracting party can consent to “the curtailment of his ordinary liberty of action” in respect of contractual rights owed to another who “need not necessarily be the other party to the contract”.¹¹⁰ The privity doctrine allows contracting parties to provide for third-party rights in their contracts, and so to control the content and scope of their contractual obligations.

(4) Summary

3-57. The Scots privity doctrine operates subject to the intentions of the contracting parties. Privity will generally apply to prevent claims made by external parties, but the contracting parties can override the doctrine if they so intend by providing for third-party rights. This qualified doctrine is compatible with the leading theories of

¹⁰⁷ *Gloag and Henderson* para 9.10.

¹⁰⁸ Stair, *Institutions* 1.10.1.

¹⁰⁹ Bankton, *Institute* 1.11.pr.

¹¹⁰ Gloag, *Contract* 218.

Scots contract law as well as with the principles of freedom to contract and freedom of contract.

D. COMMENTS ON ENGLISH LAW

3-58. The Contracts (Rights of Third Parties) Act 1999 has been described as delivering a “body blow”¹¹¹ to the privity doctrine. However, it is submitted that the Act has merely ensured that the application of the doctrine is subject to the intentions of the contracting parties, as required by will theory.

3-59. Whilst will theory is not necessarily the dominant theory of contract in English law,¹¹² recognition of third-party rights has been justified by reference to the intentions of contracting parties.¹¹³ Further, Vernon Palmer suggests that the English reception of will theory in the nineteenth century “changed the face of English contract” and allowed for a new conception of privity based on will theory rather than consideration.¹¹⁴ This second theory of privity was based on the premise that obligations were sourced in promises rather than consideration, and so, as third parties were recipients of promises, they should be able to enforce their rights directly.¹¹⁵ Palmer comments that, had will theory had an earlier reception in English law, its recognition might have “logically” resulted in a more liberal approach to privity, such that third-party rights were permitted.¹¹⁶

3-60. Accordingly, the privity doctrine in English law is compatible with contract theory on the same grounds as in Scotland. Will theory is not violated by privity because, following the Contracts (Rights of Third Parties) Act 1999, parties can exert their contractual intentions by providing for an enforceable third-party right. Privity is also compatible with a promissory theory of contract law: as third-party rights are permitted in English law, the contracting parties can confer an enforceable promise on the third party if they so intend. They are similarly permitted voluntarily to assume obligations in favour of third parties, upholding assumption theory. It is recognised in English law that allowing third-party rights extended the freedom of contracting parties to bind themselves to uphold obligations owed to third parties.¹¹⁷

¹¹¹ *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602, [2004] 1 All ER (Comm) 481 at para 1 per Colman J. Merkin has also described the Act as the “abolition of the privity rule”: R Merkin, “The Contracts (Rights of Third Parties) Act 1999”, in Merkin (ed), *Privity* 91, para 5.9. See also E McKendrick, “Breach of contract and the meaning of loss” (1999) 52 *Current Legal Problems* 37, 56; N Andrews, “Strangers to justice no longer: the reversal of the privity rule under the Contracts (Rights of Third Parties) Act 1999” (2001) 60 *CLJ* 353, 354.

¹¹² See the discussion above at para 3-30.

¹¹³ Law Commission, Report on *Privity of Contract* para 3.1; C Mitchell, “Privity reform and the nature of contractual obligations” (1999) 19 *Legal Studies* 229, 235–36. See also *Darlington BC v Wiltshier Northern Ltd* [1995] 1 WLR 68 at 75–76 per Steyn LJ.

¹¹⁴ Palmer, *Paths to Privity* 175.

¹¹⁵ Palmer, *Paths to Privity* 185.

¹¹⁶ Palmer, *Paths to Privity* 185.

¹¹⁷ Palmer, *Paths to Privity* 185.

3-61. Finally, the idea that privity has evaporated due to the development of third-party rights in England does not account for the numerous concepts which had already been framed as statutory exceptions to privity.¹¹⁸ Third-party rights in English law were in fact an addition to the large body of existing exceptions to privity. Indeed, MacMillan acknowledges that the Contracts (Rights of Third Parties) Act 1999 “does not abolish the privity rule but merely reforms it in certain circumstances”.¹¹⁹ More recently, it was observed in the Court of Appeal that the Contracts (Rights of Third Parties) Act 1999 created “only a limited and tightly constrained incursion into the rule of privity of contract”.¹²⁰ The view that legislation on third-party rights has abolished privity in English law is incorrect. Privity remains a default rule in both Scots and English law, barring recovery by third parties unless they can rely on a specific statutory or common law exception. These exceptions mitigate the unjust results of rigid adherence to the doctrine.¹²¹

E. CONCLUDING REMARKS

3-62. This chapter has examined the relationship between privity, third-party rights, Scots contract theory, and the principles of freedom to contract and freedom of contract. In particular, the chapter has shown that it is inaccurate to state that Scots or English law has exhibited a strict approach to privity throughout the last few centuries. Whilst there is a dearth of definitive commentary on the point, both jurisdictions recognise the privity doctrine subject to the intentions of the contracting parties. Both jurisdictions uphold third-party rights where the contracting parties intend the right to be enforceable at the suit of the third party. Accordingly, it can be said that, in both Scots and English law, the privity doctrine is subject to the principle that the intentions of the contracting parties should be upheld. This has been accepted in Scotland since at least the nineteenth century.¹²² In England, the blemishes on the legal landscape, consisting of cases which refused to enforce third-party rights, appear to have arisen because the courts gave greater weight to the fact that the third party had not provided consideration than to upholding contractual intention.¹²³

3-63. A strict application of privity would be incompatible with the leading theories of contract law, but the recognition of third-party rights in both jurisdictions ensures that privity applies in line with the intentions of the contracting parties. Privity is

¹¹⁸ Beale also comments that *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*; *St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85 went “some way to mitigating privity’s effects”: H Beale, “Privity of contract: judicial and legislative reform” (1995) 9 *JCL* 103, 104. This case, which was heard before the passage of the Contracts (Rights of Third Parties) Act 1999, is an early authority on the transferred loss doctrine, and is further discussed at para 7-08 below.

¹¹⁹ C MacMillan, “A birthday present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999” (2000) 63 *MLR* 721, 721.

¹²⁰ *Broadcasting Investment Group Ltd v Smith* [2021] EWCA Civ 912 at para 47 per Asplin LJ.

¹²¹ Discussed further at paras 5-37 to 5-40 below.

¹²² See above at paras 3-19 to 3-20.

¹²³ This is discussed above at paras 2-56 and 2-70ff above.

thus compatible with the will, promissory, and assumption theories. In both Scots and English law, privity allows contracting parties to confer an enforceable benefit on a third party if they so intend. It has also been shown that privity is compatible with the principles of freedom to contract and freedom of contract in both jurisdictions.

4 The Interaction between the Privity Doctrine and Delictual Liability

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A. OVERVIEW OF CHAPTER 4

4-01. This chapter briefly outlines the current law of delict and tort, in terms of the recoverability of losses for personal injury, damage to property, and pure economic loss. It then considers cases in which the imposition of delictual liability appears to bypass the privity doctrine, and analyses relevant commentary on the intersection of delict and contract in such situations. The chapter assesses whether delict should be classed as an exception to privity, and whether privity does and should prevent a third party from suing in delict in respect of the impact of defective contractual performance.

4-02. This chapter does not contain separate discussion of English law, as in the previous chapters, because the relevant Scots and English laws are closely intertwined and can be examined together. The term “delict” is used to refer to both delict and tort when discussing common elements of Scots and English law. “Tort” refers specifically to English law.

B. DELICT

4-03. This section defines delict, distinguishing it from contract, and summarises the law on delictual recovery of damages for physical and economic loss.

(1) Defining delict

4-04. According to Walker, a delict is “voluntary conduct, by act or omission, by one person, with the requisite state of mind, in breach of a duty, imposed on that person by general rules of law, owed in the circumstances by that person to another person, causing that other unjustifiable harm by the infringement of a legally protected interest”.¹

4-05. A delict results in an obligation to repair the damage caused.² The “basis” of delictual liability is accordingly *culpa*, or fault.³

4-06. Delict is distinguished from contract because the latter involves consensual obligations.⁴ Delictual obligations (not to cause harm by unjustifiably infringing on another’s interests, and to provide compensation for harm unjustifiably done) are imposed by law, regardless of the will of the parties.⁵ The primary contractual obligation (to perform in accordance with the contract) arises due to the parties’ agreement.⁶ The secondary obligation (to provide compensation for breach) is imposed by law, but only arises due to the primary obligations, to which the parties consented, and can generally be excluded by the parties’ agreement.⁷ Contractual liability is based on the contracting parties’ intentions, whereas delictual liability is imposed involuntarily. This is reflected in Stair’s distinction between conventional obligations (i.e. contract), and obidental obligations arising by force of law.⁸

(2) Recovery for personal injury and damage to property

4-07. In terms of personal injury, the leading case is, of course, *Donoghue v Stevenson*,⁹ in which Mrs Donoghue was averred to have suffered shock and gastroenteritis after consuming ginger beer from a bottle containing a decomposing snail. She was prevented from suing the manufacturer of the beverage due to privity of contract, but successfully sued in delict. In the case, Lord Atkin outlined the neighbour principle, according to which: “[you] must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour”.¹⁰

¹ Walker, *Delict* 52.

² Bankton, *Institute* 1.4.26; Thomson, *Delictual Liability* para 1.1; Walker, *Delict* 4–5.

³ Thomson, *Delictual Liability* para 3.1.

⁴ B Pillans, *Delict: Law and Policy* (5th edn, 2014) para 1.2. For English law, see Brownsword, *Contract Law* 197; A Robertson, “On the Distinction between Contract and Tort”, in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (2004) 87, 87–91 and 93.

⁵ Walker, *Delict* 13 and 52.

⁶ Walker, *Delict* 13–14.

⁷ Walker, *Delict* 13–14. The ability of contracting parties to exclude liability for breach of contract is subject to statutory restrictions: see, for example, Consumer Rights Act 2015 s 31.

⁸ Stair, *Institutions* 1.3.4 and 1.3.5.

⁹ 1932 SC (HL) 31.

¹⁰ *Donoghue v Stevenson* 1932 SC (HL) 31 at 44 per Lord Atkin.

4-08. *The Nicholas H*¹¹ indicates that a test of whether it is fair, just, and reasonable to impose a duty of care applies in cases involving damage to property. In the context of business-to-consumer contracts, the Consumer Protection Act 1987 now provides for strict liability in respect of defective products.¹²

(3) Recovery for pure economic loss

4-09. The law on delictual recovery for economic loss is not settled.¹³ Unlike personal injury and damage to property cases, foreseeability alone is insufficient to result in a duty of care.¹⁴ Following *Murphy v Brentwood District Council*,¹⁵ claims in respect of pure economic loss are not generally permitted.¹⁶ There are, however, four categories of case, considered below, in which pure economic loss is sometimes recoverable.

4-10. Scots and English law on the topic is similar; an “unsurprising case of insular convergence”.¹⁷ Duty of care is used as a screening device, preventing claims by those to whom the duty is not owed, and its scope being determined by policy considerations.¹⁸

(a) Hedley Byrne liability

4-11. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,¹⁹ a “major step” in the expansion of liability for pure economic loss,²⁰ the defendants were held liable for loss resulting from the plaintiff’s reliance on their negligent misstatement. There was no contract between the parties, but liability was based on their sufficiently proximate “special relationship”. Such a relationship arises where the pursuer reasonably relies on the defender’s statement, and it is reasonable that the defender knows that the pursuer will rely on that statement.²¹ The rationale of the case has applied in Scotland since *Martin v Bell Ingram*.²² There have been various formulations of the *Hedley*

¹¹ *Marc Rich and Co AG v Bishop Rock Marine Co Ltd (The Nicholas H)* [1996] AC 211. This case has been applied in Scotland: *British Telecommunications Plc v James Thomson & Sons (Engineers) Ltd* 1997 SC 59; *Coleridge v Miller* 1997 SLT 485.

¹² See paras 5-23ff below.

¹³ B Pillans, *Delict: Law and Policy* (5th edn, 2014) para 10.01; G Wagner, “Comparative Tort Law”, in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, 2019) 994, 1006.

¹⁴ Wagner, “Comparative Tort Law” 1009.

¹⁵ [1991] 1 AC 398.

¹⁶ See discussion in M Bussani and V V Palmer, “The liability regimes of Europe – their façades and interiors”, in M Bussani and V V Palmer (eds), *Pure Economic Loss in Europe* (2003) 120, 140.

¹⁷ Bussani and Palmer, “The liability regimes of Europe” 143.

¹⁸ Bussani and Palmer, “The liability regimes of Europe” 124–25 and 142.

¹⁹ [1964] AC 465.

²⁰ Wagner, “Comparative Tort Law” 1018. See also P Mitchell, “*Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963)”, in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Tort* (2010) 171.

²¹ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 539 per Lord Pearce.

²² *Martin v Bell Ingram* 1986 SC 208; Pillans, *Delict* para 11.32.

Byrne rule, but a *dictum* by Lord Morris reflects “the current view”²³ of the principles stemming from the case. He states:

if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.²⁴

4-12. *Hedley Byrne* has also been applied in cases involving physical damage arising from defective performance²⁵ and non-performance²⁶ of contractual obligations. Whilst the case has been subject to criticism,²⁷ it continues to provide a means of recovering pure economic loss.

(b) Bright-line non-liability cases

4-13. This is defined as “loss which arises as a consequence of physical injury to the person or property of another”, and is also referred to as “secondary” or “derivative” loss.²⁸ The “bright line” refers to the firm denial of liability for any economic losses which stem from another’s injury.²⁹ In *Allan v Barclay*,³⁰ for example, an employer could not recover for loss of his employee’s services when the latter was injured by the defender. Similarly, the House of Lords did not permit a delictual claim in respect of a company’s economic loss caused by damage to a property which the company did not own.³¹ There have, however, been a number of isolated cases in which recovery was permitted or carefully considered. Pillans³² offers several examples such as *Nacap Ltd v Moffat Plant Ltd*,³³ in which the pursuer was working on a pipe. The defender damaged the pipe at a time at which the pursuer was professionally responsible for the pipe, and the pursuer was allowed to recover in respect of its loss sustained due to the damage. These cases all require the narrow circumstance of the pursuer’s ownership or possession of the property in question.³⁴

²³ J L Powell and R Stewart, *Jackson & Powell on Professional Liability* (8th edn, 2017) para 17.056.

²⁴ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 503 per Lord Morris.

²⁵ *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619.

²⁶ *Barrett v Ministry of Defence* [1995] 1 WLR 1217.

²⁷ A Goodhart, “Liability for innocent but negligent misrepresentation” (1964) 74 *Yale Law Journal* 286; G Dworkin, “The value of a banker’s reference” (1962) 25 *MLR* 246, 248; P S Atiyah, “Judges and policy” (1980) 15 *Israel Law Review* 346, 355.

²⁸ A B Wilkinson and A D M Forte, “Pure economic loss – a Scottish perspective” 1985 *JR* 1, 8.

²⁹ W J Stewart, *Delict* (4th edn, 2004) para 10.08. Similarly, Pillans refers in *Delict: Law and Policy* (5th edn, 2014) para 11.40 to secondary or relational pure economic loss “that is parasitic of the harm suffered by the person directly affected by the negligent act”.

³⁰ (1864) 2 M 873.

³¹ *Simpson & Co v Thomson* (1877) 5 R (HL) 40.

³² Pillans, *Delict* paras 11.41–11.43.

³³ 1987 SLT 221. See also, more recently, *Cruden Building & Renewals Ltd v Scottish Water* [2017] CSOH 98, 2017 GWD 22-363.

³⁴ Pillans, *Delict* para 11.41.

(c) *Henderson v Merrett Syndicates Ltd liability*

4-14. This is an extension of *Hedley Byrne* liability.³⁵ In *Henderson v Merrett Syndicates*,³⁶ Lord Goff of Chieveley commented that the principle of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*³⁷ was not confined to negligent misstatements, but “extends beyond the provision of information and advice to include the performance of other services”.³⁸ The case concerned insurance syndicates. Such syndicates share the profits and risks of underwriting insurance policies, and are managed by underwriting agents. Those who invest in the syndicates are known as “names”, and the liability of the names is unlimited. Following a series of hurricanes in the USA, the syndicate demanded that the names covered their proportionate share of the losses associated with meeting the insurance pay-outs. The names sued the underwriting agents on the grounds that the agents had mismanaged the syndicate’s funds. It was found that a duty of care was owed by underwriting agents to the names in respect of running the syndicates because the agents had assumed responsibility for the names.³⁹ This form of liability can extend to physical or economic loss.⁴⁰

(d) *White v Jones liability*

4-15. *White v Jones*⁴¹ is the leading “disappointed beneficiary” case. Such cases arise where a beneficiary does not receive an intended inheritance because the testator’s legal representative does not properly execute the testator’s instructions. Disappointed beneficiaries cannot make contractual claims⁴² and, whilst Scots law did not previously allow a claim in delict,⁴³ *Robertson v Bannigan*⁴⁴ permitted such claims.⁴⁵ In a recent similar case, *Antonio Caliendo Barnaby Holdings LLC v Mishcon*

³⁵ P Mitchell, “*Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963)”, in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Tort* (2010) 171. See also *Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd* [2021] EWHC 590 (TCC), [2021] TCLR 4 at paras 127–29 per Fraser J.

³⁶ [1995] 2 AC 145.

³⁷ [1964] AC 465.

³⁸ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 180 per Lord Goff of Chieveley.

³⁹ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 168 per Lord Goff of Chieveley. See further S Hedley, “Negligence – pure economic loss – goodbye privity, hello contorts” (1995) 54 *CLJ* 27, 27–28.

⁴⁰ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 180 per Lord Goff of Chieveley.

⁴¹ [1995] 2 AC 207.

⁴² *Tully v Ingram* (1891) 19 R 65; *Raes v Meek* (1889) 16 R (HL) 31; *Robertson v Fleming* (1861) 23 D (HL) 8. See further K Norrie, “Professional Negligence”, in J M Thomson (ed), *Delict* (looseleaf, 2007) para 19.19.

⁴³ *Robertson v Fleming* (1861) 23 D (HL) 8; *Weir v JM Hodge & Son* 1990 SLT 266; *MacDougall v MacDougall’s Executors* 1994 SLT 1178.

⁴⁴ 1965 SC 20.

⁴⁵ In Scots law, *White v Jones* [1995] 2 AC 207 was accepted in *Robertson v Watt & Co*, Court of Session Inner House, 4 July 1995, unreported; *Holmes v Bank of Scotland* 2002 SLT 544; and *McLeod v Crawford* [2010] CSOH 101, 2010 SLT 1035. For further discussion see S Waddams, “Breaches of Contracts and Claims by Third Parties”, in J W Neyers, E Chamberlain and S G A Pitel (eds), *Emerging Issues in Tort Law* (2007) 191, 191–98.

de Reya LLP,⁴⁶ the defendant solicitors were found to have assumed responsibility for the third-party claimant's interests. It is not necessary that the intended beneficiary demonstrates that the client's testamentary intention remained constant until death.⁴⁷ Where the solicitors' duty to the testator is contrary to their potential duty to the intended beneficiary, a duty of care will not be owed to the latter.⁴⁸ It was acknowledged in *White v Jones* in the Court of Appeal that liability might be owed where a solicitor was instructed to complete the transfer of a gift during the client's lifetime.⁴⁹ The principle has been similarly applied where a solicitor did not complete the variation of a lease,⁵⁰ and it has been held that a company operating a will-making service owes a duty of care to disappointed beneficiaries, despite the fact that the company is not a firm of solicitors.⁵¹

4-16. *Henderson v Merrett Syndicates*⁵² liability does not apply in disappointed beneficiary cases. In that case, the names had relied on the underwriting agents for the proper management of the syndicate funds. In disappointed beneficiary cases, however, the beneficiary has not relied on the solicitor's performance.⁵³ Even if the solicitor can be said to have assumed responsibility for the beneficiary (as the agents assumed responsibility for the names), this form of liability is not applicable.

(e) Implications for professional liability generally

4-17. In terms of professional liability generally, Scots law recognises the *spondet peritiam artis* principle, which requires that a person who professes a skill must answer for the failure to deliver it.⁵⁴ This principle did not initially permit third-party claims. According to Bell, "one who professes any art is, in general, liable only to

⁴⁶ [2016] EWHC 150 (Ch). The case cites *Dean v Allin & Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249 at para 33 per Lightman J: where a solicitor "is retained by one party and there is a conflict of interest between the client and the other party to a transaction, the court should be slow to find that the solicitor has assumed a duty of care to the other party to the transaction, for such an assumption is ordinarily improbable".

⁴⁷ *Humblestone v Martin Tolhurst Partnership* [2004] EWHC 151 (Ch).

⁴⁸ J L Powell and R Stewart, *Jackson & Powell on Professional Liability* (8th edn, 2017) para 11.055. See also *Clarke v Bruce Lance & Co* [1988] 1 WLR 881; *Bacon v Kennedy* [1999] PNLR 1.

⁴⁹ *White v Jones* [1993] 3 WLR 730 at 743 per Sir Donald Nicholls VC.

⁵⁰ *Clarke v Bruce Lance & Co* [1988] 1 WLR 881.

⁵¹ *Esterhuizen v Allied Dunbar Assurance Plc* [1998] Fam Law 207. In *Equitas Ltd v Sande Investments Ltd* [2021] EWHC 631 (Comm), the Deputy High Court Judge (Leigh-Ann Mulcahy QC) considered (at paras 143–48) whether an insurance intermediary could owe *White v Jones* liability but concluded that it did not, because the intermediary had not on the facts of the case assumed responsibility towards the claimant.

⁵² [1995] 2 AC 145.

⁵³ Thomson, *Delictual Liability* paras 7.5–7.6.

⁵⁴ Pillans, *Delict* para 1.3; K Norrie, "Professional Negligence", in J M Thomson (ed), *Delict* (looseleaf, 2007) para 19.22. The historical law is discussed in C B Labatt, "Negligence in relation to privity of contract" (1900) 16 *LQR* 168, 173. See also Bell, *Principles* (1899) § 153. An overview of the relevant English law is given in A J E Jaffey, "Contract in tort's clothing" (1985) 5 *Legal Studies* 77, 79–87.

his employer, and not to those who may have been intended to benefit by his work”.⁵⁵ However, the modern law has expanded the scope of this principle. According to Norrie, there is “little doubt” that professional persons are held to higher standards than non-professional persons by the courts.⁵⁶

4-18. The standard of care imposed is that which can be reasonably expected from a professional person.⁵⁷ In the context of construction, for example, foreseeable injury caused by defects can give rise to liability,⁵⁸ and construction professionals are under a duty not to cause physical damage either to the property on which they are working or to other properties adjacent to or nearby their worksites.⁵⁹ Previously, the key test in ascertaining whether accountants and auditors were liable for negligent misstatements was the three-fold test developed in *Caparo Industries Plc v Dickman*.⁶⁰ together with the assumption of responsibility test.⁶¹ According to *Caparo*,⁶² accountants are generally under a duty to take reasonable care in preparing their accounts and reports, but they are not liable for casual remarks in general conversation, statements made outwith their work, and statements made in a personal capacity.⁶³ Lord Jauncey of Tullichettle refines the scope of liability by making the accountant’s knowledge that the accounts were to be submitted to the third-party claimant a condition of liability.⁶⁴ Further, accountants are liable only in respect of transactions for which they had knowledge that the accounts were required.⁶⁵ The “special relationship” dictum in *Hedley Byrne*⁶⁶ has influenced the development of liability of accountants and auditors,⁶⁷ and the actuarial profession.⁶⁸

⁵⁵ Bell, *Principles* (1899) § 154.

⁵⁶ Norrie, “Professional Negligence” para 19.20.

⁵⁷ Norrie, “Professional Negligence” para 19.20.

⁵⁸ *Jackson & Powell on Professional Liability* para 9.059; *Eckersley v Binnie Partners* [1955–95] PNLR 348. In *Perrett v Collins* [1998] 2 Lloyds Rep 255 Lord Hobhouse said (at 261) that: “Where the defendant is involved in an activity which, if he is not careful, will create a foreseeable risk of personal injury to others, the defendant owes a duty of care to those others to act reasonably having regard to the existence of that risk”.

⁵⁹ *Jackson & Powell on Professional Liability* para 9.061; *North West Water Authority v Binnie* [1990] 3 All ER 547.

⁶⁰ The test is: whether the imposition of liability is fair, just, and reasonable; whether the harm was reasonably foreseeable; and whether there was a proximate relationship: see *Caparo Industries Plc v Dickman* [1990] 2 AC 605, and also the discussion in *Jackson & Powell on Professional Liability* para 17.061.

⁶¹ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 181 per Lord Goff of Chieveley; *White v Jones* [1995] 2 AC 207 per Lords Goff of Chieveley and Browne-Wilkinson. See further *Jackson & Powell on Professional Liability* para 17.056.

⁶² *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

⁶³ [1990] 2 AC 605 at 655 per Lord Jauncey of Tullichettle.

⁶⁴ [1990] 2 AC 605 at 662 per Lord Jauncey of Tullichettle.

⁶⁵ [1990] 2 AC 605 at 662 per Lord Jauncey of Tullichettle, and see also *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 486 per Lord Reid.

⁶⁶ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

⁶⁷ *Jackson & Powell on Professional Liability* para 17.056.

⁶⁸ *Jackson & Powell on Professional Liability* paras 18.024–18.026.

4-19. The Supreme Court has, however, recently found that *Caparo*⁶⁹ has been wrongly applied in case law to date. In *Steel v NRAM Limited*,⁷⁰ it was determined that a two-part test applies: it must have been reasonable for the third party to rely on the representation,⁷¹ and the representor should have reasonably foreseen that the third party would do so.⁷²

(4) Concurrent actions in contract and delict

4-20. In recent years, concurrent liability has been the subject of judicial and academic interest.⁷³ It is clear that Scots law recognises concurrent liability, and that a contractual relationship is not a barrier to the imposition of delictual obligations between the contracting parties.⁷⁴

4-21. Hogg comments that, whilst Stair did not discuss concurrency in his *Institutions*, his view of delict as a prior, obediential obligation is consistent with the idea that delictual obligations will be owed by parties unless excluded by contract,⁷⁵ thus permitting the concurrency of claims in contract and delict.⁷⁶ Walker explains, for example, that a passenger injured in a railway accident can sue in respect of his injuries for breach of the implied contractual term that the train company must carry him safely, and in delict for the breach of the company's general duty of care not to injure him.⁷⁷

4-22. In England, the early common law was generally hostile to concurrent remedies.⁷⁸ However, concurrency of claims is now permitted in English law.⁷⁹

4-23. Accordingly, delictual claims may arise from contractual relationships in both Scots and English law. In the example above, the railway passenger accrues the right to make a delictual claim because he has a contractual relationship with the transport provider. This demonstrates that privity does not mean that the contracting

⁶⁹ [1990] 2 AC 605.

⁷⁰ [2018] UKSC 13, 2018 SC (UKSC) 141.

⁷¹ [2018] UKSC 13 at paras 32 and 35 per Lord Wilson.

⁷² [2018] UKSC 13 at paras 19, 23, and 32 per Lord Wilson.

⁷³ Hogg, *Obligations* para 3.63. See also M Hogg, "Concurrent liability in the Scots law of contract and delict" 1998 *JR* 5; J Gardner and J Murphy, "Concurrent liability in contract and tort: a separation thesis" (2021) 137 *LQR* 77.

⁷⁴ *Realstone v Messrs J & E Shepherd* [2008] CSOH 31, [2008] PNLR 21 at para 11 per Lord Hodge. See also *Norwich Union Life Insurance Society v Covell Matthews Partnership* 1987 SLT 452; K Norrie, "Professional Negligence", in J M Thomson (ed), *Delict* (looseleaf, 2007) paras 19.08 and 19.11; W J Stewart, *A Casebook on Delict* (2nd edn, 1997) para 13.5.12; Hogg, *Obligations* para 3.67; F McManus and E Russell, *Delict: A Comprehensive Guide to the Law in Scotland* (2011) paras 9.3–9.4.

⁷⁵ Hogg, *Obligations* para 3.64; Stair, *Institutions* 1.4–6.

⁷⁶ Hogg, *Obligations* para 3.64.

⁷⁷ Walker, *Delict* 14. See also *Gray v London and North Eastern Railway Co* 1930 SC 989; Walker, *Contracts* paras 3.3 and 29.2.

⁷⁸ Palmer, *Paths to Privity* 202, citing *Hambly v Trott* (1776) 1 C 371.

⁷⁹ See, for example, *Wellesley Partners LLP v Withers LLP* [2016] WLR 1351.

parties derive only contractual rights from their relationship. Rather, their contractual connection might also give rise to a delictual duty of care.

C. DELICT AS AN EXCEPTION TO PRIVACY

4-24. In case law and commentary, delict has erroneously been treated as circumventing the privity doctrine. This section briefly summarises the relevant case law and commentary, and explains why delict is not an exception to privity.

(1) The development of case law at the intersection of privity and delict

4-25. Vernon Palmer identifies the English case of *Winterbottom v Wright*⁸⁰ as the initial cause of the controversial relationship between tort and privity.⁸¹ In *Winterbottom*, the coach-driver of a Post Office mail carriage was held to have no claim in respect of personal injuries sustained following the breakdown of a defective coach supplied by the defendant to the Post Office. Lord Abinger said that there was “no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action”.⁸²

4-26. Thus, as noted by Vernon Palmer, “originated the famous citadel of privity in the field of tort”.⁸³

4-27. This case was not strictly adhered to in later Scots or English case law involving personal injury or damage to property. Ibbetson acknowledges *Donoghue v Stevenson*⁸⁴ as a reversal of the line of cases (beginning with *Winterbottom v Wright*) which denied delictual recovery on the grounds that this would violate privity of contract.⁸⁵ As discussed above,⁸⁶ concurrent claims in contract and delict are permissible in Scots (and English) law. This has resulted in cases such as *Donoghue v Stevenson*⁸⁷ in which the party who has suffered the loss succeeds in suing in delict although its claim failed (or would likely have been unsuccessful, had it been pled) in contract. Mrs Donoghue

⁸⁰ (1842) 152 ER 402. See also *Tollit v Sherstone* (1839) 5 M & W 283.

⁸¹ Palmer, *Paths to Privity* 198. See also V V Palmer, “Why privity entered tort” (1983) 27 *American Journal of Legal History* 85.

⁸² *Winterbottom v Wright* (1842) 152 ER 402 at 404–05 per Lord Abinger.

⁸³ Palmer, *Paths to Privity* 205.

⁸⁴ 1932 SC (HL) 31.

⁸⁵ D J Ibbetson, *A Historical Introduction to the Law of Obligations* (2001) 190–93. It was acknowledged in the earlier case of *McGowan v Barr & Co* 1929 SC 461 that there could be a claim in delict on behalf of two children who had suffered injury after drinking a bottle of ginger beer which contained a dead mouse, despite the fact that there was no privity of contract between the children and the manufacturers (Barr & Co). However, it was found that the facts of the case did not give rise to a duty of care. See *McGowan v Barr & Co* 1929 SC 461 at 479 per Lord Anderson. For further discussion of the case, see W W McBryde, “Donoghue v. Stevenson: The Story of the ‘Snail in a Bottle’ Case”, in D M Walker and A J Gamble (eds), *Obligations in Context: Essays in Honour of David M Walker* (1990) 13, 21–22.

⁸⁶ See paras 4-20ff.

⁸⁷ 1932 SC (HL) 31.

was not the recipient of a third-party right,⁸⁸ and could not therefore have made a contractual claim, but her claim in delict succeeded. Similarly, relatives of tenants may not sue contractually on the lease where they are injured due to defects in the leased premises,⁸⁹ but they may sue in delict.⁹⁰ An injured employee cannot sue contractually a party employed by his or her employer for defective work which caused the injury, but the employee can make a delictual claim.⁹¹ *Donoghue v Stevenson*⁹² clarified that the English legal “fallacy”, that a party who owes a contractual duty to one party cannot owe delictual liability to another in respect of its contractual performance, is not part of Scots law.⁹³ In particular, Lord Macmillan stated that there is “no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort”.⁹⁴

4-28. In terms of pure economic loss, case law reveals a movement towards a high point of permissibility of delictual claims in circumstances where a contractual claim would be denied. This was followed by a stricter approach, according to which delictual liability was denied if there was no privity of contract between the parties. *Dutton v Bognor Regis Building Co Ltd*⁹⁵ was one of the first cases in which a tortious claim was permitted to “overcome” privity.⁹⁶ In that case, it was found that any person who had negligently caused risk to the health or safety of the occupiers of a building was liable in tort regardless of whether any damage had materialised, and regardless of whether they were in a contractual relationship with the occupiers. This judgment resulted in a “flood” of cases, “exacerbated”⁹⁷ by *Anns v Merton London Borough Council*.⁹⁸ The high point was the decision of the House of Lords in *Junior Books*.⁹⁹ Following the

⁸⁸ A third-party rights claim would have been unsuccessful, because the contracting parties (Mrs Donoghue’s friend and Mr Stevenson) did not expressly or impliedly confer a right on Mrs Donoghue: see J Steele, *Tort Law: Text, Cases, and Materials* (3rd edn, 2014) 144. Some suggest that the case should have been pled as a *jus quaesitum tertio* (see, for example, W W McBryde, “Contract law – a solution to delictual problems?” 2012 *SLT (News)* 45). However, these arguments do not fully address the lack of intention in the case (i.e. that the contracting parties did not intend to confer a *jus quaesitum tertio* on Mrs Donoghue).

⁸⁹ *Cameron v Young* 1908 SC (HL) 7.

⁹⁰ Occupiers’ Liability (Scotland) Act 1960 s 3.

⁹¹ *Campbell v Morrison* (1891) 19 R 282.

⁹² *Donoghue v Stevenson* 1932 SC (HL) 31.

⁹³ Scottish Law Commission, *Memorandum on Constitution and Proof of Voluntary Obligations: Stipulations in Favour of Third Parties* (Scot Law Com Memorandum No 38, 1977) para 43. See also R Stevens, *Torts and Rights* (2007) 177; R Baker and J Garton, “*Cavalier v Pope* (1906)”, in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Tort* (2010) 153, especially 153 and 158; *Greene v Chelsea Borough Council* [1954] 2 QB 127 at 138 per Lord Denning.

⁹⁴ *Donoghue v Stevenson* 1932 SC (HL) 31 at 64 per Lord Macmillan. See also *Edgar v Lamont* 1914 SC 227; *J G Martin Plant Hire Ltd v Macdonald* 1996 SC 105.

⁹⁵ [1972] 1 QB 373.

⁹⁶ See discussion in J Jenkins and J Duckworth, “The Construction Industry”, in Merkin (ed), *Privity* 185, para 8.5.

⁹⁷ Jenkins and Duckworth, “The Construction Industry” para 8.7.

⁹⁸ *Anns v Merton London Borough Council* [1978] AC 728.

⁹⁹ *Junior Books Ltd v Veitchi Co Ltd* 1982 SC (HL) 244. This was the first case to allow negligence-based recovery for pure economic loss: see Jenkins and Duckworth, “The Construction Industry” para 8.8.

case, commentators expressed concern that contractors would be exposed to unlimited liability.¹⁰⁰ The key concern was that *Junior Books*¹⁰¹ allowed claimants to circumvent the privity doctrine by framing their claims in terms of negligence rather than contract.¹⁰² Thereafter, the courts gradually withdrew from this approach. The case was “all but overruled”¹⁰³ in *Murphy v Brentwood District Council*¹⁰⁴ and *D & F Estates Ltd v Church Commissioners for England and Wales*.¹⁰⁵ The latter case restricted tortious liability owed to third parties in respect of defective contractual performance to claims for personal injury or damage to property.

4-29. A separate issue is that, in some instances in Scots law, privity is bypassed, and it is unclear whether the relevant contracting party’s liability ought to be viewed as contractual or delictual. In *Fortune v Young*,¹⁰⁶ for example, it was held that a guarantor of an individual’s financial standing is liable to anyone who gives credit to that individual in reliance on the guarantee, even if the guarantee is not addressed to any particular person. This is a case from 1918, and has not been followed; the judgment is unsatisfactory because the basis of liability is unclear. As well as being problematic in itself, the case reveals confusion in the relationship between contract and delict. It will not be considered further here, because it appears to result from inadequate judicial reasoning in a particular context and does not provide analysis on the concurrency of claims or the relationship between privity and delict.

4-30. The confusion in the interaction between privity and delict is also reflected in cases and commentary erroneously referring to privity in the context of tortious claims. For example, the *Solicitors Journal*, discussing *George v Skivington*,¹⁰⁷ claims that the fact that defective hairwash was purchased for Mrs George (the plaintiff) by her husband “was held to create a sufficient privity between her and the defendant to support the right of action by her”.¹⁰⁸ Similarly, Robert Stevens argues that privity is “a

¹⁰⁰ Views of commentators are discussed further below at paras 4-31ff.

¹⁰¹ *Junior Books Ltd v Veitchi Co Ltd* 1982 SC (HL) 244.

¹⁰² R Brownsword, “Network Contracts Revisited”, in Amstutz and Teubner (eds), *Networks* 31. Whilst Lord Fraser questioned why a contractual case had not been raised against the builders in *Junior Books Ltd v Veitchi Co Ltd* 1982 SC (HL) 244, there was no evidence of intention on the part of the contracting parties to create a third-party right in favour of the employer. Accordingly, it is unlikely that a claim based on third-party rights would have been successful.

¹⁰³ R Merkin, “The Enforcement of Promises made for the Benefit of a Third Party”, in Merkin (ed), *Privity* 21, para 2.2.

¹⁰⁴ [1991] 1 AC 398.

¹⁰⁵ [1989] AC 177. See also Burnton LJ’s more recent comment, in *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2012] QB 44 at para 92, that *Anns v Merton London Borough Council* [1978] AC 728 and *Junior Books Ltd v Veitchi Co Ltd* 1982 SC (HL) 244 “must now be regarded as aberrant, indeed as heretical”.

¹⁰⁶ 1918 SC 1.

¹⁰⁷ (1869–70) LR 5 Ex 1.

¹⁰⁸ (1870) 14 *Solicitors Journal* 314, 315. In the case, a husband purchased hairwash from the defendant, which both parties knew was for his wife, Mrs George, who suffered extensive injury and hair loss due to the corrosive nature of the hairwash. Mrs George’s claim in tort was unsuccessful. The case is said to be “vindicated” in *Donoghue v Stevenson* 1932 SC (HL) 31; see D Ibbetson, “*George v Skivington*”, in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Tort* (2010) 69, 69.

principle most commonly considered within the law of contract, but it is applicable to all rights".¹⁰⁹ He applies the privity doctrine in tortious contexts, noting that, for example, only those with a proprietary right over land can sue in delict in respect of nuisance interfering with the quiet enjoyment of the land, whereas others, such as licensees cannot.¹¹⁰ Stevens uses privity to explain concepts such as *per quod consortium*, according to which a husband could recover against an individual who caused harm to his wife in respect of the loss of her affection.¹¹¹ These are, however, unusual uses of the term "privity". Stevens appears to be discussing the notions of proximity and remoteness in the context of tortious liability. Whilst other commentators have not adopted "privity" terminology in reference to delict or tort, these uses of the concept of privity in tortious circumstances risks doctrinal uncertainty. Further, the concepts of proximity and remoteness are adequate in discussing tortious liability. It is suggested that the term "privity" should not be used in the context of tortious or delictual claims, in light of the historical difficulties in understanding the relationship between privity and delict. Instead, the normal language of delictual claims (i.e. remoteness and title to sue) should be used.

(2) Analysis of commentary on the intersection between privity and delict

4-31. The tortious cases discussed above were decided prior to the passage, for England and Wales, of the Contracts (Rights of Third Parties) Act 1999. Accordingly, the cases could not, in English law, have been decided on the basis of third-party rights. Numerous commentators suggest that the move towards a high point of delictual liability was influenced by the need to correct the perceived rigidity of contract law, and the move away from this high point was driven by a desire to respect the privity doctrine. Jenkins and Duckworth, for example, say that the strict application of privity resulted in judicial intervention through tort to "mitigate its rigidity".¹¹² O'Sullivan describes the disappointed beneficiary cases¹¹³ as the "most obvious example" of tort law's use in bypassing "the strictures of privity".¹¹⁴ Similarly, Brownsword notes that, "in the context of third-party claims, it is well known that a restrictive law of tort can result in pressure being put on contract law, and vice versa".¹¹⁵

4-32. In Scots law, a "correction" of the privity doctrine through the imposition of delictual liability was unnecessary, because Scots law recognised third-party rights. Nonetheless, Scottish cases permitting delictual liability where third-party rights were

¹⁰⁹ R Stevens, *Torts and Rights* (2007) 173; also 174–76.

¹¹⁰ Stevens, *Torts and Rights* 173, citing *Hunter v Canary Wharf Ltd* [1997] AC 655.

¹¹¹ Stevens, *Torts and Rights* 174.

¹¹² J Jenkins and J Duckworth, "The Construction Industry", in Merkin (ed), *Privty* 185, para 8.5.

¹¹³ An overview of the law on disappointed beneficiaries is provided above at paras 4-15ff.

¹¹⁴ J O'Sullivan, "Suing in tort where no contractual claim will lie – a bird's eye view" (2007) 23 *Professional Negligence* 165, 172.

¹¹⁵ Brownsword, *Contract Law* 196–97. See also Palmer, *Paths to Privty* 198; P Mitchell, "*Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963)", in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Tort* (2010) 171, 172; J Fleming, "Comparative law of torts" (1984) 4 *Oxford Journal of Legal Studies* 235.

not possible have also been characterised as violations of the privity doctrine, and commentators recognise an apparent tension between third-party delictual claims in respect of defective contractual performance and the privity doctrine. For example, Swain suggests that, in asking “Who, then, in law, is my neighbour?”, Lord Atkin “[opened] up the way for claims in negligence which in contract would run up against the privity rule”.¹¹⁶

4-33. Whilst these commentators might have intended only to point out that delictual actions might arise where contractual claims will fail, others have been more overt in their treatment of delictual liability as an exception to privity. For example, the Law Commission lists the tort of negligence as such an exception,¹¹⁷ and Merkin remarks that a “boisterous and expansive approach to the duty of care in tort could easily have undermined the doctrine of privity of contract”.¹¹⁸ Hutchison and Van Heerden state that the boundary between contract and tort is breaking down due to the “steady expansion” of the tort of negligence in England.¹¹⁹ More recently, Furmston and Tolhurst include tort in their discussion of exceptions to privity.¹²⁰

4-34. However, views such as these do not properly reflect the definition of privity: this bars external parties from making *contractual* claims,¹²¹ and so has no bearing on whether the external party can make a claim in delict. Whilst Pillans notes that the existence of the *jus quaesitum tertio* means that it is in some cases unnecessary to apply delictual liability,¹²² the absence of a third-party right does not mean that delictual liability in respect of a third party is an impossibility.

4-35. The fact that external parties can make delictual claims against contracting parties despite being barred from bringing contractual actions is a clear and justifiable consequence of the privity doctrine. Stewart comments that increasing support for Lord Brandon’s dissent in *Junior Books v Veitchi*¹²³ may be due to the fact that it is “grossly unfair” to hold someone to a higher standard under delict than they would have been under the contract establishing their liability.¹²⁴ As noted by Lord Goff of Chieveley, “the law of tort is the general law, out of which the parties can, if they wish,

¹¹⁶ W Swain, “Third Party Beneficiaries in English Law 1880–2004”, in Schrage (ed), *IQT* 331, 343 (quoting *Donoghue v Stevenson* 1932 SC (HL) 31 at 44 per Lord Atkin).

¹¹⁷ Law Commission, Report on *Privity of Contract* paras 2.13–2.14.

¹¹⁸ R Merkin, “The Enforcement of Promises made for the Benefit of a Third Party”, in Merkin (ed), *Privity* 21, para 2.2. See also D Beyleveld and R Brownsword, “Privity, transitivity and rationality” (1991) 54 *MLR* 48, 50–51.

¹¹⁹ D Hutchison and B van Heerden, “The tort/contract divide seen from the South African perspective” 1997 *Acta Juridica* 97, 97.

¹²⁰ Furmston and Tolhurst, *Privity* paras 3.03–3.11.

¹²¹ See paras 2-35ff above.

¹²² B Pillans, *Delict: Law and Policy* (5th edn, 2014) para 1.3, citing *Scott Lithgow Ltd v GEC Electrical Projects Ltd* 1989 SC 412.

¹²³ 1982 SC (HL) 244.

¹²⁴ W J Stewart, *A Casebook on Delict* (2nd edn, 1997) para 13.4.3. See also S Hedley, “Negligence – pure economic loss – goodbye privity, hello contorts” (1995) 54 *CLJ* 27, 28–29.

contract”.¹²⁵ However, a contracting party can only contract out of delictual liability owed to fellow contracting parties, not to the public at large. This is supported by the general rule of professional responsibility, discussed above,¹²⁶ that a professional has a general duty of care to carry out work properly. A contracting party cannot expect that its defective performance of a contract can only be subject to claims under the contract itself. Where, according to the normal principles of delictual liability, a contracting party breaches a duty of care owed to third parties affected by the contractual performance, the third party should be permitted to bring a delictual claim.

4-36. The tension between privity and delictual liability is simply an instance of confusion between two separate areas of law. It is likely that this confusion has resulted from English law’s strict adherence to the privity doctrine and consequent use of tort law in situations which might otherwise have been resolved through the use of third-party rights. In Scots law, this is reflected in the belief of some commentators that delictual liability should not be imposed where there was no possibility of a third-party right. There is no logical reason for such an approach: delict does not operate according to whether or not there is an opportunity for a contractual remedy, and the law of delict does not require the pursuer to have the right to make a contractual claim. The boundary between privity and delict may, in situations involving third-party loss, appear at first to be permeable, given that the third party can (in some cases) sue in delict but not in contract. However, this is the result of the normal application of the privity doctrine together with the rules of delict. The dividing line between contractual and delictual recovery is clear: contractual recovery is possible if the requirements of third-party rights are met, and the third party can recover in delict if its claim meets the requirements for delictual recovery.

4-37. Vernon Palmer comments that the relationship between privity and tort is “one of the most enigmatic, controversial, and misunderstood phenomena of 19th century law”.¹²⁷ The enigma is resolved simply by acknowledging that privity bars only *contractual* claims by non-contracting parties: it ought not to have any bearing on the question of whether the contracting party might owe a delictual duty of care to the third party. Indeed, Vernon Palmer also points out that the “privity doctrine in the field of tort turns out to be a haunting tale about a judicially-created phantom”.¹²⁸ The explanation of the contract-tort fallacy is that English judges have incorrectly viewed themselves as restrained by privity in tortious claims in *Winterbottom v Wright*¹²⁹ and similar cases,¹³⁰ and academic writers have wrongly characterised cases expanding

¹²⁵ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 193 per Lord Goff of Chieveley.

¹²⁶ See paras 4-17ff above.

¹²⁷ Palmer, *Paths to Privity* 198. Palmer 10 explains that there are three further historical functions of the privity doctrine (schematic, evidentiary, and denoting relationships required by writs), but clarifies that these are no longer useful.

¹²⁸ Palmer, *Paths to Privity* 206.

¹²⁹ *Winterbottom v Wright* (1842) 152 ER 402.

¹³⁰ Palmer, *Paths to Privity* 212.

the law on negligence as infringing on the privacy doctrine. Delict is not therefore an exception to privacy.

(3) Further points on delict and contract

4-38. This subsection returns to the distinction between contract and delict first introduced above:¹³¹ that contract involves consensual obligations, whilst delictual liability is imposed by law.

4-39. According to Catherine Mitchell, the Law Commission's Report on *Privacy of Contract* reflects, for England and Wales, a commitment to maintaining the distinction between contractual and tortious liability. She comments that there is a "neat dividing line" between third-party beneficiaries who are granted the right to sue, and strangers who are not, noting that this defines the boundary between those whose claims are contractual, and those who must proceed in tort.¹³² Jenkins and Duckworth observe that the Contracts (Rights of Third Parties) Act 1999 does not grant third-party rights in cases which have been subject to judicial expansion of tortious liability.¹³³ This reflects the fact that third-party rights are found where the parties to the contract wish to confer them, whereas delictual liability is imposed regardless of the parties' intentions (subject to the express exclusion of delictual liability in the contract). The separation between delictual and contractual liability must be maintained, because there is a clear difference between obligations which arise consensually and obligations which arise by operation of law. Recognition in case law and commentary that privacy does not have an impact on the permissibility of delictual claims would reinforce that these types of liability are distinct.

4-40. It is acknowledged that contracting parties should be permitted to alter the delictual duties of care they owe to one another. Generally, the parties to a contract can expressly limit their duty of care, the standard of that duty of care, and the losses which will be recoverable in the event of breach, subject to the law that one cannot exclude or restrict liability for death or personal injury.¹³⁴ This allows a great deal of scope for defining their duty of care towards each other. If the parties have not made specific provision in their contract, then the normal principles of delict should apply. In *Gilmour v Simpson*,¹³⁵ for example, a painter's negligent use of a blow lamp resulted in the destruction of the pursuer's farmhouse. T B Smith notes that damages were assessed on the basis of negligence on the same grounds as *Hutchison v Davidson*,¹³⁶ a similar case in which there was no contractual relationship.¹³⁷ Unless they have specifically excluded the application of delictual liability, there is no reason to claim

¹³¹ See para 4-06 above.

¹³² C Mitchell, "Searching for the Principles Behind Privacy Reform", in Kincaid (ed), *Privacy* 105, 112.

¹³³ J Jenkins and J Duckworth, "The Construction Industry", in Merkin (ed), *Privacy* 185, para 8.100.

¹³⁴ Jackson, *SME* para 148, noting also the restrictions under the Unfair Contract Terms Act 1977 s 16. See also Part II of the Consumer Rights Act 2015 in the case of consumers.

¹³⁵ 1958 SC 477.

¹³⁶ 1945 SC 395.

¹³⁷ Smith, *Short Commentary* 864.

that parties in a contractual relationship owe exclusively contractual liability to one another.

4-41. Regarding third parties, the boundary between contract and delict may appear to be blurred by so-called “paracontractual”¹³⁸ situations. In *Hedley Byrne v Heller*,¹³⁹ Devlin LJ states that “I have found ... in the idea of a relationship that is equivalent to contract all that is necessary to cover the situation that arises in this case”.¹⁴⁰ Similarly, in *Junior Books v Veitchi*, Lord Fraser states that the exceptionally close proximity between the parties is “only just short of a direct contractual relationship”.¹⁴¹ In these cases, however, the factor which determines the existence of a duty of care is that the relationship between the parties is very close. In other words, the “paracontractual” connection is evidence of close proximity between the parties: it does not affect the rules on contractual liability. Wilson’s characterisation of these cases as involving “Contract Leap-frog”¹⁴² is perhaps not wholly accurate. The third party’s proximity to the defender is based on the fact that they are connected through a chain of contracts. In a sense, therefore, the third party could be viewed as leapfrogging on to the contract between the defender and those with whom the defender contracted, bypassing its own lack of contractual connection. However, the third party is not relying on another’s contract to make a contractual claim. Rather, it is suing in delict because the circumstances of the contractual connections give rise to a proximate relationship between itself and the defender. The fact that this relationship has been described as akin to contract does not detract from the fact that the liability owed is delictual.

4-42. The relevancy of contractual chains to delictual liability is considered in a modern Outer House judgment. In *Realstone v Messrs J & E Shepherd*,¹⁴³ the pursuer owned land earmarked for housing development. The pursuer instructed an architect to prepare plans for the site, and the architect subcontracted the work to the defender. The defender’s negligence in mis-designating the plot (such that it obtruded on to a roadway) resulted in loss to the pursuer, because the pursuer incurred the cost of repurchasing the plot from the party to whom it had sold the plot. Lord Hodge was:

not persuaded that the mere existence of a contractual chain from A to B to C means in all circumstances that C cannot owe A a duty of care to avoid causing A pure economic loss ... Nonetheless, there are many circumstances in which either the structure of the contracts in a contractual chain or the terms of those contracts, or both, will exclude a duty of care by C to A in relation to economic loss. One has to look at the circumstances of the particular case.¹⁴⁴

¹³⁸ W A Wilson, “Mapping Economic Loss”, in A J Gamble (ed), *Obligations in Context: Essays in Honour of David M Walker* (1990) 141, 147.

¹³⁹ [1964] AC 465.

¹⁴⁰ [1964] AC 465 at 530 per Devlin LJ.

¹⁴¹ *Junior Books Ltd v Veitchi Co Ltd* 1982 SC (HL) 244 at 265 per Lord Fraser.

¹⁴² Wilson, “Mapping Economic Loss” 148.

¹⁴³ [2008] CSOH 31, [2008] PNLR 21.

¹⁴⁴ [2008] CSOH 31 at para 12.

4-43. Accordingly, it may be that the contractual relationship between parties is structured so as to protect a particular party against delictual claims, or indeed to ensure that delictual redress is available in particular cases. In *Realstone* there was no suggestion that the pursuer's delictual claim would circumvent any of the contractual agreements.¹⁴⁵ However, the existence of a contractual chain does not indicate definitively that delictual liability should or should not arise in a particular context. In *Realstone*, the factors which led Lord Hodge to conclude that there might be liability were the defender's awareness that the pursuer would use the plans, and the extent to which the architect would review the defender's work.¹⁴⁶ Lord Hodge also considered whether the defender "voluntarily" agreed to produce the plans, and, by doing so, "placed themselves in a special relationship with the pursuers which is akin to contract" which may result in a duty to protect the pursuer against economic loss. He surmised that the architect's supervision of the defender would reduce the likelihood that the court would find that the defender could be held liable to the pursuer.¹⁴⁷ Lord Hodge notes the reluctance of the judiciary to rely on *Junior Books*.¹⁴⁸ This judgment illustrates that the concept of a "special relationship" continues to be influential in Scots law.

4-44. Of course, in some situations the contracting parties may have structured their relationships to avoid contractual connections between certain parties. Hogg notes that one issue at play in the boundary between contract and delict is the policy against allowing delictual claims to subvert contractual relationships and contractual structures chosen by parties.¹⁴⁹ In *Pacific Associates Inc v Baxter*,¹⁵⁰ the parties made an arrangement such that there was no contract between an engineer and a contractor, although their employer had entered into separate contracts with both parties. Russell LJ said that the:

absence of any contract between the engineer and the contractor is not without significance. The tests of proximity and foreseeability may be satisfied, but it is not just and reasonable that there should be imposed on the engineer a duty which the contractor chose not to make a contractual one.¹⁵¹

4-45. This passage erroneously assumes that the engineer wished its lack of contractual connection to be treated as an indication that it wished to neither sue nor be sued in delict. It is illogical to assume that a person's lack of desire to contract with another means that it implicitly abandons any legal right of redress through delict when it is adversely affected by the other's professional work. Contracting parties should not be able to exclude liability towards third parties by virtue of their contract

¹⁴⁵ [2008] CSOH 31 at para 18.

¹⁴⁶ [2008] CSOH 31 at paras 13 and 18.

¹⁴⁷ [2008] CSOH 31 at para 13.

¹⁴⁸ *Junior Books Ltd v Veitchi Co Ltd* 1982 SC (HL) 244.

¹⁴⁹ Hogg, *Obligations* para 3.67.

¹⁵⁰ [1990] 1 QB 993.

¹⁵¹ [1990] 1 QB 993 at 1039 per Russell LJ. See also *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 470–71 per Viscount Simonds. For further discussion, see J Jenkins and J Duckworth, "The Construction Industry", in Merkin (ed), *Privity* 185, para 8.12.

with each other, because the third party has not consented to such limitation. The lack of contractual connection is, however, relevant to the question of proximity: Walker states that “a contract may bring parties into such proximity as to give rise to a primary obligation to refrain from harm which might not otherwise have arisen”.¹⁵²

4-46. This is compatible with the dominant views on the hierarchy of obligations in Scots law more generally. Hogg notes that there are two main theories as to how private law obligations should be placed in a hierarchy.¹⁵³ According to the first, “the 3:1”, contract, promise, and delict are equal, and unjustified enrichment is lower and thus applicable only in situations in which the other three are not. Conversely, “the 2:2” provides that delict and unjustified enrichment ought to be placed at the top of the hierarchy, because they are imposed by the law and can only be excluded if the parties so agree, unlike contract and promise which can only arise from the intentions of the contracting parties. If the first theory is accurate, and contract and delict are of equal status, then there is no reason why the doctrine of privity of contract, as a contractual rule, should usurp the operation of delictual liability. If the latter theory is correct, this strengthens the idea that contracting parties ought not to evade delictual liability through arguments based on privity, but, rather, only through arguments based on contractual consent. Where parties expressly agree in their contract that they should or should not have the ability to sue one another in delict, this agreement should be upheld. However, the existence of a contract between two parties does not prevent the parties (or external parties) from claiming in respect of losses suffered as a result of defective contractual performance.

4-47. The concurrency of claims is clear: the “professional man owes a duty of care *ex contractu* to his client ... and a duty of care *ex lege* to persons, including clients ... who may foreseeably be harmed in mind, body, or pocket, by failure to show adequate skill and care in doing his professional work”.¹⁵⁴

4-48. Indeed, as Labatt recognised in 1900, it is logically unsound to argue that “a party to the contract, whatever the form of his action, can recover only where he could have recovered in a suit directly upon the contract [since this] involves the corollary that a stranger to the contract, being unable to sue upon it, is precluded from redress altogether”.¹⁵⁵

(4) Reasonable expectation

4-49. The distinction between contractual and delictual liability is further reflected in the different expectations which contracting parties and third parties have under the laws of delict and contract. Brownsword’s view is that the “baseline” of the

¹⁵² Walker, *Delict* 14, citing *Donoghue v Stevenson* 1932 SC (HL) 31 at 64 per Lord Macmillan; *Vacwell Engineering Co v BDH Chemicals Ltd* [1971] 1 QB 88 at 108 per Rees J.

¹⁵³ Hogg, *Obligations* para 3.19.

¹⁵⁴ Walker, *Contracts* para 3.3. See also Gloag, *Contract* 241.

¹⁵⁵ C B Labatt, “Negligence in relation to privity of contract” (1900) 16 *LQR* 168, 171–72.

intersection between contract and delict is reasonable expectation.¹⁵⁶ Delictual liability reflects the expectations of the community in respect of compensation for wrongful behaviour, whilst contractual liability recognises the reasonable expectations of the contracting parties operating in the relevant business sector.¹⁵⁷ Specific contractual provisions, Brownsword says, can alter contractual expectations only. Contracting parties can also, of course, determine the extent and scope of delictual liability towards one another. However, non-contractual parties have not contractually assented to the alteration of their reasonable expectation to redress under delict law. A third party will have the reasonable expectation of any third-party right under the contract being upheld. A third party may also be protected by an exclusion of liability clause.¹⁵⁸ They will not otherwise have the right to sue on, or claim protection under, a contract to which they are not party. The lack of direct contractual connection does not, however, have any consequences for the third party's reasonable expectation to redress under delictual law if the third party is affected by defective contractual performance and the requirements for a successful delictual claim are met.

4-50. It is therefore reasonable that contracting parties may alter their own delictual expectations by means of the contract. However, a third party cannot be viewed as forgoing its right to redress in delict under a contract to which it is not party. Privity allows the contractual rights and liabilities to be defined according to the parties' intentions, in accordance with the reasonable contractual expectations of the contracting parties. Delict protects the contracting parties and third parties from harm from which the contracting parties ought to protect each other and third parties. Allowing privity to prevent delictual claims where a third party had not assented to the curtailment of its protection under the law of delict unreasonably alters the third party's right to redress.

4-51. It is not immediately obvious why the imposition of delictual liability owed to third parties is unreasonable on the basis that a more onerous duty may be owed to the third parties than in contract. This is the result of the normal application of the law of delict, out of which contracting parties cannot contract on behalf of third parties. It is unjust to prevent third parties from recovering their losses when the only barrier is privity of contract, and they did not assent to the contractual limitation of their reasonable expectations.

(5) Public and private obligations

4-52. Weinrib distinguishes between private obligations (involving particular relationships between persons) and public obligations (based on the notion of "public rightfulness" – that private law should provide redress for infringement of one's

¹⁵⁶ Brownsword, *Contract Law* 229.

¹⁵⁷ See also *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCC 533 at 533 per Steyn LJ: a "theme that runs through our law of contract is that the reasonable expectations of honest men must be protected".

¹⁵⁸ See the materials cited ch 1 n 1 above.

interests by another party regardless of any prior relationship between the two).¹⁵⁹ This serves as a further useful illustration of the boundary between contractual and delictual liability in situations involving extra-contractual loss. For example, the tort of inducing breach of contract provides that a party can be sued where they induce someone to break their contract with another.¹⁶⁰ In *Lumley v Gye*,¹⁶¹ a singer was contracted to sing at Lumley's opera house. Gye offered the singer a higher fee, and was held liable in tort for Lumley's loss caused by the singer's breach of contract. Weinrib describes how the private element of the tort of inducing breach of contract is the contract between the contracting parties, and the public aspect is the obligation imposed on the rest of the world to respect that contract.¹⁶² This could potentially be a useful frame of reference for the distinction between contractual and delictual obligations in the context of extra-contractual loss. Cases involving delictual liability owed to third parties can be said to arise from public rights, in Weinrib's sense, rather than contractual personal rights. In *Donoghue v Stevenson*,¹⁶³ for example, the contract between the café owner and the manufacturer resulted in private contractual rights between them as well as public obligations owed by the manufacturer to subsequent purchasers of the goods sold by the manufacturer to the café owner.

4-53. This distinction also highlights the doctrinal incoherence of disappointed beneficiary cases. The public are not owed a right against all legal professionals such that the professional must ensure that the public inherit according to the wishes of testators.¹⁶⁴ This can be contrasted with Robert Stevens' example of a pedestrian who has been injured because a bicycle has been manufactured carelessly. In such a case, the question of whether there is a contract between, for example, the manufacturer and the cyclist is "irrelevant to the claim brought by the pedestrian".¹⁶⁵ The pedestrian has a right to safety, enforceable in delict against the world, whereas it is not immediately obvious why a disappointed beneficiary should have a right to certainty of inheritance.

¹⁵⁹ E J Weinrib, "Private law and public right" (2011) 61 *University of Toronto Law Journal* 191, 191–92.

¹⁶⁰ P S Davies, *Accessory Liability* (2015) 1–2 and 6. See further F Sayre, "Inducing breach of contract" (1992) 36 *Harvard Law Review* 663, 669; M R Macnair, "Free association versus juridification" (2011) 39 *Critique* 53; *Quinn v Leathem* [1901] AC 495; *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1.

¹⁶¹ (1853) 2 E & B 216. The concept is also accepted in Scots law: J Macleod, "Offside goals and induced breaches of contract" (2009) 13 *EdinLR* 278, 279–80; *British Motor Trade Association v Gray* 1951 SC 586 at 603 per Lord Russell; *Couper v Macfarlane* (1879) 6 R 683; *Exchange Telegraph Co v Giulianotti* 1959 SC 19.

¹⁶² Weinrib, "Private law and public right" 204. This case has been criticised on the grounds that "[w]hen I make a contract with someone to do something, I do not expect that, by making the contract, the whole world comes under an obligation to ensure that it is performed": D Howarth, "Against *Lumley v Gye*" (2005) 68 *MLR* 195, 209. See also R Merkin, "The Burden of Contracts and the Doctrine of Privity", in Merkin (ed), *Privity* 79, para 4.1, and further concerns raised in A P Simester and W M F Chan, "Inducing breach of contract: one tort or two?" (2004) 63 *CLJ* 132, 144.

¹⁶³ 1932 SC (HL) 31.

¹⁶⁴ R Stevens, *Torts and Rights* (2007) 178.

¹⁶⁵ Stevens, *Torts and Rights* 176–77.

D. CONCLUDING REMARKS

4-54. It is reasonable that contracting parties should be able to exclude delictual liability towards one another by express provision. However, contracting parties ought not to have the ability to disallow delictual recovery on the part of third parties where the normal principles of delictual liability would permit their claims. Successful third-party delictual claims in situations in which a contractual claim would not have succeeded should not therefore be viewed as infringing the privity doctrine. Privity does not, and should not, bar delictual claims by third parties. The doctrine provides a useful limitation of contractual liability, subject of course to its exceptions, but it does not have any bearing on the imposition or prohibition of delictual liability. Delict therefore does not operate as an exception to privity.

5 Policy Considerations justifying Statutory Exceptions to Privity

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A. OVERVIEW OF CHAPTER 5

5-01. As noted in chapter 3,¹ there are various statutory exceptions to the privity doctrine. This chapter is not intended to provide a list of all statutory exceptions, but it discusses a selection of modern and historical examples in order to identify the common policy considerations justifying deviation from the benefits aspect of

¹ See paras 3-22ff above.

privity. Later chapters will consider whether the concepts of contracts for the benefit of another, transferred loss, undisclosed agency, and *ad hoc* agency also reflect these policy considerations.

5-02. This chapter also assesses whether privity itself does and should exist in light of the numerous justifications for deviating from the doctrine. The final section examines exceptions to the burdens aspect of privity and identifies the policy considerations which justify deviation from this aspect of the rule.

B. STATUTORY EXCEPTIONS AND THEIR POLICY JUSTIFICATIONS

5-03. This section identifies the policy considerations which justify the statutory exceptions to privity in: the Married Women's Property Act 1882; the Carriage of Goods by Sea Act 1924; the Third Parties (Rights against Insurers) Act 2010; relevant road traffic legislation; the Defective Premises Act 1972 and the Latent Damage Act 1986; the Fire Prevention (Metropolis) Act 1774; the Consumer Protection Act 1987 Part I; the Package Travel and Linked Travel Arrangements Regulations 2018; and third-party rights legislation.

(1) Married Women's Property Act 1882

5-04. Historical exceptions to privity include, in English law, the Married Women's Property Act 1882. The Act aimed to mitigate the effects of a House of Lords' decision² that married women could not enter into contracts in their own right.³ Section 11, which is still in force, allows a married woman to rely on a life insurance policy on her or her husband's life for her own benefit, according to which a trust is created in favour of the person(s) named in the policy.⁴ The requirements are less stringent than under the general law of trusts,⁵ providing a straightforward solution in allowing a married woman to protect herself (and, where relevant, her children) financially in the event of her husband's death.⁶ The scope of the Act has been extended to policies effected by civil partners for the benefit of their partner and/or their children⁷ by the Civil Partnership Act 2004 section 70. The 1882 Act provides for a specific statutory exception to privity: the widow can enforce the life insurance contract between her husband and the insurance provider despite the fact that she is not a party to that contract. The key policy consideration is the protection of women from laws which would otherwise cause financial hardship.

² *Cahill v Cahill* (1883) 8 App Cas 420.

³ R Merkin, "The Enforcement of Promises made for the Benefit of a Third Party", in Merkin (ed), *Privity* 21, para 2.52.

⁴ The provision is reproduced in full in Furmston and Tolhurst, *Privity* para 4.04.

⁵ Merkin, "The Enforcement of Promises made for the Benefit of a Third Party" para 2.54.

⁶ *Cousins v Sun Life Assurance Society* [1933] Ch 126 at 133 per Lord Hanworth MR.

⁷ Including children of either or both of the civil partners.

5-05. This specific statutory right is no longer required. According to the doctrine of coverture, a wife's legal rights and obligations were subordinate to her husband's, such that a married woman could not enter into contracts in her own name.⁸ This doctrine has been abolished, and beneficiaries under life insurance contracts can now enforce their rights under the Contracts (Rights of Third Parties) Act 1999. Modern life insurance contracts, more generally, also protect third parties from financial hardship.⁹ Similar Scots legislation (the Married Women's Property (Scotland) Act 1881) is no longer in force.

(2) Carriage of Goods by Sea Act 1992

5-06. Section 2 of the Carriage of Goods by Sea Act 1992 was enacted because of the commercial impracticalities of disallowing a consignee to sue a carrier for loss resulting from a breach of a bill of lading to which it was not party.¹⁰ The provision allows the consignee to sue the carrier directly despite the lack of privity between them, thus creating a specific statutory exception to privity. This ensured that the law was up-to-date in respect of modern carriage practices and compatible with the international rules of carriage.¹¹ The Act replaced the Bills of Lading Act 1855, which was passed in response to delict and tort claims against carriers.¹² The 1855 Act granted the buyer of goods a specific remedy against the carrier although it was not privity to the contract of carriage.¹³ The 1992 Act addressed practical deficiencies in the 1855 Act, modernising the law and providing a clearer statutory regime.¹⁴

5-07. The Law Commissions indicated that their key concern in proposing the legislation was "reconciling the interests of all parties to a contract of sea carriage, in accordance with the dictates of good sense and commercial certainty".¹⁵

5-08. This demonstrates a policy objective of circumventing privity where doing so is commercially convenient for the parties concerned. Bradgate and White add that the legislation also fulfils the policy objective of ensuring that the person who suffers

⁸ T Stretton and K J Kesselring, "Introduction: Coverture and Continuity", in T Stretton and K J Kesselring (eds), *Married Women and the Law* (2013) 3, 3 and 6–8.

⁹ See discussion in MacQueen, *SME* para 841, and further below at paras 5-10ff.

¹⁰ T Howard, "The Carriage of Goods by Sea Act 1992" (1993) 24 *Journal of Maritime Law and Commerce* 181, 186. See also Merkin, "The Enforcement of Promises made for the Benefit of a Third Party" para 2.73.

¹¹ R Bradgate and F White, "The Carriage of Goods by Sea Act 1992" (1993) 56 *MLR* 188, 188–89. The changes in the law brought about by the 1992 Act are summarised in Howard, "The Carriage of Goods by Sea Act 1992" 188–89.

¹² Bradgate and White, "The Carriage of Goods by Sea Act 1992" 193.

¹³ For discussion, see Bradgate and White, "The Carriage of Goods by Sea Act 1992" 188–89; *Sevylor Shipping and Trading Corp v Altfadul Company for Foods, Fruits & Livestock* [2018] EWHC 629 (Comm), [2018] All ER (Comm) 847 at para 42 per Baker J.

¹⁴ Bradgate and White, "The Carriage of Goods by Sea Act 1992" 190–91. Potential deficiencies in the 1992 Act are identified and discussed in S Baughen, "Title to sue and COGSA 1992: Is there still a legal black hole for cargo claimants?" (2019) 25 *Journal of International Maritime Law* 463.

¹⁵ Law Commission and Scottish Law Commission, *Report on Rights of Suit in respect of Carriage of Goods by Sea* (Law Com No 196, Scot Law Com No 130, 1991) para 1.10.

loss recovers compensation from the person who causes it,¹⁶ highlighting a second justification of ensuring that those who cause loss do not escape liability because of privity.

5-09. Section 2 of the Carriage of Goods by Sea Act 1992 can be classified as a specific statutory third-party right. Clive notes that the 1855 Act was unnecessary in Scots law due to the common law recognition of the *jus quaesitum tertio*, “but as a matter of practical politics, it was obvious that it would be extended to Scotland”.¹⁷ Therefore, the policy objectives achieved in recognising third-party rights¹⁸ more generally apply to the provision.

(3) Third Parties (Rights against Insurers) Act 2010

5-10. The Third Parties (Rights against Insurers) Act 1930 (now repealed) allowed for the rights of an insured person against its insurers to transfer to and vest in an injured person to whom the insured person owed liability, in the event of the insured’s insolvency.¹⁹ The third party’s right following the insolvency of the insured could not surpass the insured’s prior right (because the insured’s right was transferred).

5-11. This legislation was enacted following a case in which a third party was injured in a motor accident by a car owned by an insured company in liquidation. The court concluded that the insurance proceeds were to be treated as part of the assets of the insured company to be allocated to the creditors as a whole.²⁰ Atkin LJ and Lord Hanworth MR indicated that the law ought to be reformed,²¹ and the 1930 Act was the eventual result. The legislation was intended primarily to address situations involving insured but insolvent motorists,²² although the scope of the Act

¹⁶ Bradgate and White, “The Carriage of Goods by Sea Act 1992” 189. The authors note at 198, however, that this policy objective is not perfectly fulfilled, because sellers may suffer loss resulting from breach of contract on the carrier’s part which is not associated with the passing of risk (which determines who is liable under the 1992 Act). For example, the loss may be caused by delay in loading the ship. Clive also raised this point in his Note of Partial Dissent to the Law Commissions’ Report: Law Com No 196, Scot Law Com No 130, para 5. See also E Clive, “*Jus Quaesitum Tertio* and Carriage of Goods by Sea”, in D L Carey Miller and D W Meyers (eds), *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith QC* (1992) 47.

¹⁷ Clive, “*Jus Quaesitum Tertio* and Carriage of Goods by Sea” 51.

¹⁸ The policy justifications are discussed further below at para 5-32.

¹⁹ For discussion, see MacQueen, *SME* para 841; Law Commission and Scottish Law Commission, Discussion Paper on *Third Parties (Rights Against Insurers) Act 1930* (Law Com No 152 and Scot Law Com DP No 104, 1998) paras 1.2–1.5.

²⁰ *Re Harrington Motor Co Ltd* [1928] Ch 105. See also *Hood’s Trustees v Southern Union General Insurance Co* [1928] Ch 739.

²¹ *Re Harrington Motor Co Ltd* [1928] Ch 105 at 118 per Atkin LJ and at 117 per Lord Hanworth MR.

²² Law Commission and Scottish Law Commission, Discussion Paper on *Third Parties (Rights Against Insurers) Act 1930* para 2.2, citing Hansard Debates on the 1930 Act; *McCormick v National Motor and Accident Insurance Union Ltd* (1934) 49 Ll L Rep 361 at 363 per Scrutton LJ. See also R Merkin, “The Enforcement of Promises made for the Benefit of a Third Party”, in Merkin (ed), *Privity* 21, para 2.58.

was intentionally wider, to cover, for example, employees of insolvent employers.²³ The Law Commissions recognised, in their Discussion Paper considering the Act, that liability insurance protects the financial interests of those to whom the insured might owe liability as well as the insured itself.²⁴ The key policy consideration behind the Act was, as its title suggests, the protection of third parties.²⁵

5-12. This objective of protecting third parties continues to be recognised in the new Third Parties (Rights against Insurers) Act 2010.²⁶ According to these new provisions, the third party is now able to proceed directly against the insurer, and the previous requirement that the claim must be transferred from the insolvent company no longer applies.²⁷ This provides a more cost-effective and efficient solution for the third party,²⁸ further demonstrating that the purpose behind this legislation is the protection of the third party's interests.

(4) Road traffic legislation

5-13. Third parties injured in motor accidents did not have a direct right of enforcement against the insurer of the person who caused the accident under the previous road traffic legislation. In *Greenlees v Port of Manchester Insurance Co*,²⁹ for example, Lord Alness concluded that the Road Traffic Act 1930 section 36(4) did not provide for a direct right of action against the insurer on the part of the third party injured by the policy-holder. Rather, he held that the provision required the insurer to indemnify all persons and classes of persons specified in the policy. The more recent provisions – the Road Traffic Act 1988 sections 144, 148(7), and 151 – grant the third party a direct right of enforcement.³⁰ Section 151 embodies the right of direct enforcement which was previously found in the Road Traffic Act 1934.³¹ MacQueen acknowledges these provisions as “important”, explaining that they strengthen what may have been viewed as a straightforward third-party right in Scots law.³² The legislation is treated as a statutory exception to privity in

²³ Law Commission and Scottish Law Commission, Discussion Paper on *Third Parties (Rights Against Insurers) Act 1930* para 2.2.

²⁴ Law Commission and Scottish Law Commission, Discussion Paper on *Third Parties (Rights Against Insurers) Act 1930* para 1.10.

²⁵ HC Deb vol 231, cols 128–143 (29 Oct 1929, Sir William Jowitt, Attorney-General).

²⁶ The Act came into force on 1 August 2016. For further discussion, see Furmston and Tolhurst, *Privity* para 4.23. The Act has been amended by the Insurance Act 2015 and by the Third Parties (Rights against Insurers) Regulations 2016, SI 2016/570.

²⁷ Third Parties (Rights against Insurers) Act 2010 s 1.

²⁸ Forte, *SME* para 904A.

²⁹ 1933 SC 383 at 397 per Lord Justice-Clerk Alness.

³⁰ The third party's direct action under these provisions was recognised and upheld in *Williams v Baltic Insurance* [1924] 2 KB 282.

³¹ For discussion, see R M Merkin, *Colinvaux and Merkin's Insurance Contract Law* vol 3 (loose-leaf, 2021) D-0372/6–7.

³² MacQueen, *SME* para 841.

commentary³³ and case law.³⁴ This is correct: the third party is able to enforce a claim under the insurance contract to which it is not a party.

5-14. The Road Traffic Act 1988 is a consolidation statute, and the materials produced by the Law Commissions do not discuss the matter of third-party protection.³⁵ However, Merkin describes the purpose of the Road Traffic Act 1988 section 144 as being to ensure “that the victim of a negligent driver is able to recover compensation from the driver or his insurers”.³⁶ Whilst, as noted above, third parties did not have direct rights of enforcement under the Road Traffic Act 1930 section 36, Goddard J notes that this Act was “aimed at the protection of the public by providing that there should be a body of insurers behind every driver of a car”.³⁷ Commentary on more recent motor insurance regimes in the Road Traffic Acts reflects a policy objective of protecting third parties against the financial implications of personal injury and damage to property sustained in road traffic accidents.³⁸

5-15. A similar regime, which also circumvents the privity doctrine, is recognised in the Motor Insurers’ Bureau’s *Uninsured Drivers Agreement*. According to this Agreement, the Motor Insurers’ Bureau will indemnify those who hold judgments against uninsured drivers for any damage caused by the driver.³⁹ The Agreement is between the Motor Insurers’ Bureau and the Secretary of State for Transport. Whilst the Bureau refers to its obligation to handle claims in accordance with the Agreements, the obligation thus owed is to the Secretary of State for Transport. A person who suffers injury and/or damage to a vehicle and who seeks to claim under the scheme is a third party to the Agreement. The Motor Insurers’ Bureau could technically, therefore, attempt to bar a claim on the part of an injured third party on grounds of lack of

³³ In England, Henley recognised the provisions in the 1988 Act as exceptions to the privity doctrine prior to the passage of the Contracts (Rights of Third Parties) Act 1999: C Henley, “Insurance”, in Merkin (ed), *Privity* 213, para 9.3. See also R Merkin, “The Enforcement of Promises made for the Benefit of a Third Party”, in Merkin (ed), *Privity* 21, para 2.50.

³⁴ *Tattersall v Drysdale* [1935] 2 KB 174; *Austin v Zurich Insurance* [1945] 1 KB 250.

³⁵ Law Commission and Scottish Law Commission, Report on *The Consolidation of Certain Enactments relating to Road Traffic* (Law Com No 56, Scot Law Com No 22, 1971); Law Commission and Scottish Law Commission, Report on *The Consolidation of the Road Traffic Regulation Act 1967 and Certain Related Enactments* (Law Com No 133, Scot Law Com No 85, 1984).

³⁶ Merkin, “The Enforcement of Promises made for the Benefit of a Third Party” para 2.50.

³⁷ *Tattersall v Drysdale* [1935] 2 KB 174 at 181 per Goddard J.

³⁸ See discussion in MacQueen, *SME* para 841. Merkin, “The Enforcement of Promises made for the Benefit of a Third Party” para 2.50 discusses the Road Traffic Act 1988 ss 144, 148(7) and 151. See also *Tattersall v Drysdale* [1935] 2 KB 174; *Austin v Zurich Insurance* [1945] 1 KB 250; *Williams v Baltic Insurance* [1924] 2 KB 282.

³⁹ The most recent document is the Motor Insurers’ Bureau, *2015 Uninsured Drivers’ Agreement England, Scotland, and Wales* (applying to accidents on or after 1 August 2015) and *Supplementary Agreement 2017* (updated definitions), available at: <https://www.mib.org.uk/downloadable-content/>. The key provision is Article 3(1) of the former document: “if a claimant has obtained an unsatisfied judgment against any person in a Court in Great Britain then MIB will pay the relevant sum to the claimant or will cause the same to be so paid”. Essentially identical Agreements are also in place in respect of Northern Ireland, Gibraltar, the Isle of Man, Jersey, and Guernsey. The Motor Insurers’ Bureau, *2017 Untraced Drivers Agreement* provides similar protections to the victims of hit-and-run incidents.

privity, although it has never done so.⁴⁰ Lord Denning notes that the Agreements are “as important as any statute”,⁴¹ and Upjohn LJ stresses that he could not envisage a privity argument being raised judicially.⁴²

5-16. Accordingly, both the current statutory scheme and the Motor Insurers’ Bureau’s Uninsured Drivers Agreement provide for exceptions to privity aimed at protecting third parties from dangerous driving.

(5) The Defective Premises Act 1972 and the Latent Damage Act 1986

5-17. There is a limited measure of protection for third parties in the Latent Damage Act 1986 section 3, which applies only in England and Wales.⁴³ The provision allows a cause of action on the part of a person who acquires an interest in property after the date on which a cause of action in negligence arises in respect of damage to that property. The action is to be “treated as if based on breach of a duty of care at common law owed to the person to whom it accrues”.⁴⁴ Similarly, the Defective Premises Act 1972 requires that dwellings are built in a workmanlike manner, so that they are suitable for habitation.⁴⁵ Where construction, repair, maintenance, or demolition is not properly carried out, a duty of care is owed to those who “might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work”.⁴⁶ This duty is not “abated by the subsequent disposal of the premises by the person who owed the duty”.⁴⁷ This Act also applies only in England and Wales,⁴⁸ and provides for a duty of care only in respect of physical injury.⁴⁹ This scheme might allow, for example, the resident owner of a house to claim against the builder for defects in the property despite the fact that the two parties are not in a contractual relationship. The scheme therefore allows privity to be bypassed, because the owner can make a claim despite its lack of contract with the person responsible for the defects.

⁴⁰ Merkin, “The Enforcement of Promises made for the Benefit of a Third Party” para 2.51. It is noted that the Motor Insurers’ Bureau has attempted to utilise other defences against third-party claimants, such as Art 10(2) of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability. This provision allows for the exclusion of payments where the third party “voluntarily entered the vehicle which caused the damage or injury when the [body providing compensation] can prove that they knew it was uninsured”. See, for example, *Colley v Shuker* [2020] EWHC 3433 (QB), [2021] 1 WLR 1889. The provisions of the Directive no longer apply to accidents which occurred after 11 pm on 31 January 2020.

⁴¹ *Hardy v Motor Insurers’ Bureau* [1964] 2 QB 745 at 757. See also *Gardner v Moore* [1984] AC 548.

⁴² *Coward v Motor Insurers’ Bureau* [1963] 1 QB 259 at 265.

⁴³ Latent Damage Act 1986 s 5(4).

⁴⁴ Latent Damage Act 1986 s 3(2)(a).

⁴⁵ Defective Premises Act 1972 s 1(1). Britton suggests that the limitation of liability to situations in which defects affect habitability is too narrow: P Britton, “Post-Grenfell reform: rethinking civil liability” (2021) 37 *Construction Law Journal* 243, 250.

⁴⁶ 1972 Act s 3(1).

⁴⁷ 1972 Act s 3(1).

⁴⁸ 1972 Act s 7(3).

⁴⁹ 1972 Act, Preamble.

5-18. Whilst the Defective Premises Act 1972 section 2 provides that a claim cannot be made under the Act where there is a right of recovery under an “approved scheme”, there are not currently any such approved schemes.⁵⁰ The term “dwelling” is not defined in the Act, but has been interpreted as meaning a person’s home or one of the person’s homes,⁵¹ provided that the building is used or capable of being used as a dwelling house, rather than predominantly for commerce.⁵²

5-19. The 1972 Act was thought to be necessary because liability in tort was not possible unless the premises were dangerous, and “the proper development” of tort law in respect of other defects was potentially “inhibited by the erroneous belief that [tortious liability] would necessarily entail an extension of the contractual liability for defects of quality”.⁵³ The liability imposed under the statute is more akin to tort than contract and, as discussed in the previous chapter, third-party delictual claims do not circumvent privity. The legislation is nonetheless included in this chapter because it is not clear whether the liability is intended to be treated as contractual or delictual, and it serves as a useful example of the statutory protection of third parties.

5-20. Merkin notes the similarities between the 1972 Act and the Consumer Protection Act 1987 Part I (discussed below).⁵⁴ It is clear that the two statutes share similar policy objectives: protecting consumers.⁵⁵

(6) The Fire Prevention (Metropolis) Act 1774

5-21. The Fire Prevention (Metropolis) Act 1774 section 83, which is still in force, allows insurance companies and other interested parties to prevent tenants with short-term leases from claiming the full value of their insurance policies in the event of a fire.⁵⁶

⁵⁰ J L Powell and R Stewart, *Jackson & Powell on Professional Liability* (8th edn, 2017) para 9.031. Powell and Stewart note that, until 31 March 1979, the 10-year protection under the National House-Builders Registration Council (now known as the National House Building Council) was the main approved scheme. As such the Act has found application in numerous cases including *Thompson v Clive Alexander and Partners* [1955–95] PNL R 605; *Alexander v Mercouris* [1979] 1 WLR 1270; *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), (2011) 27 Const LJ 709. See also Law Commission, Report on *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com No 40, 1970) paras 22–25.

⁵¹ *Jackson & Powell on Professional Liability* para 9.032. The Act was interpreted in this manner for the purposes of the Housing Act 1988 in *Uratemp Ventures v Collins* [2001] UKHL 43, [2002] 1 AC 301.

⁵² *Catlin Estates Ltd v Carter Jonas* [2005] EWHC 2315 (TCC), [2006] PNL R 15, discussed in *Jackson & Powell on Professional Liability* para 9.032. See also *Jenson v Faux* [2011] EWCA Civ 423, [2011] 1 WLR 3038, which holds that the Act does not apply where an existing dwelling is refurbished or renovated to the extent that it creates a building “wholly different” from the original.

⁵³ Law Commission, Report on *Civil Liability of Vendors and Lessors for Defective Premises* para 3.

⁵⁴ At paras 5–23ff. See further R Merkin, “The Burden of Contracts and the Doctrine of Privity”, in Merkin (ed), *Privity* 79, para 4.23.

⁵⁵ Law Commission, Report on *Civil Liability of Vendors and Lessors for Defective Premises* para 2; Law Reform Committee, *Twenty-fourth Report (Latent Damage)* (Cmd 9390, 1984) paras 2.11 and 4.21; R Stevens, *Torts and Rights* (2007) 184.

⁵⁶ The detailed application of the provision is discussed in Furmston and Tolhurst, *Privity* paras 4.10–4.13.

The insurers can instead require that the proceeds of the policy go towards rebuilding the premises.⁵⁷ The Act applies only in the Cities of London and Westminster.⁵⁸ This is an exception to privity because the insurers and other interested persons can determine that the moneys payable under the policy do not directly reach the insured.⁵⁹ In other words, the interested persons are benefited by the policy to the extent that they can control the use of funds issued under the policy and have a right to determine how the policy is paid out.

5-22. The provision itself refers to the effect of wilful fire-raising on “the lives and fortunes of many families [which] may be lost or endangered”. Its aim is thus to protect people in the vicinity of such fire-raising from physical and financial harm.⁶⁰ The provision also prevents fraud on the part of those who set alight their own properties in an attempt to benefit from insurance policies.⁶¹

(7) Consumer Protection Act 1987 Part I

5-23. The Consumer Protection Act 1987 Part I implements the Product Liability Directive.⁶² It provides for strict liability on the part of the manufacturer and first importer of defective goods where consumers suffer personal injury and/or damage to their property.⁶³ Merkin notes that the Act is an exception to privity because it “allows the victim to proceed directly against the manufacturer or first importer despite the absence of any contractual relationship with that person”.⁶⁴

5-24. Liability in such circumstances may already have existed in tort, following *Donoghue v Stevenson*.⁶⁵ However, a tortious claim would not protect the consumer in all circumstances due to the difficulty in establishing negligence and the causal link between negligence and loss suffered by the claimant.⁶⁶

⁵⁷ Merkin, “The Enforcement of Promises made for the Benefit of a Third Party” para 2.56; Furmston and Tolhurst, *Privity* para 4.11.

⁵⁸ Fire Prevention (Metropolis) Act 1774, Preamble. It was confirmed in *Westminster Fire Office v The Glasgow Provident Investment Society* (1888) 13 App Cas 699 at 716 per Lord Watson that the Act was not intended to apply to Scotland. See further J Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916) 232.

⁵⁹ Merkin, “The Enforcement of Promises made for the Benefit of a Third Party” para 2.56. See also C Henley, “Insurance”, in Merkin (ed), *Privity* 213, para 9.3.

⁶⁰ Furmston and Tolhurst, *Privity* para 4.11.

⁶¹ Merkin, “The Enforcement of Promises made for the Benefit of a Third Party” para 2.56. The Preamble refers to “preventing Mischiefs by fire”.

⁶² Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

⁶³ Consumer Protection Act 1987 s 2(1)–(2).

⁶⁴ Merkin, “The Burden of Contracts and the Doctrine of Privity” para 4.22.

⁶⁵ 1932 SC (HL) 31.

⁶⁶ Merkin, “The Burden of Contracts and the Doctrine of Privity” para 4.22. Similar provisions, discussed in Merkin’s chapter at para 4.23, apply to those injured on another’s land: Defective Premises Act 1972 ss 1 and 4. See also Occupiers’ Liability Act 1957 (duty of care on occupiers of the land towards any person lawfully on the land); Occupiers’ Liability Act 1984 (lesser duties towards trespassers).

5-25. The purpose of this piece of legislation is obvious from its title: it is intended to protect consumers from defective goods. The Preamble to the Directive repeatedly mentions the need for consumer protection. For example: “in situations where several persons are liable for the same damage, the protection of the consumer requires that the injured person should be able to claim full compensation for the damage from any one of them”.

5-26. Further, neither manufacturers nor first importers can exclude or limit their liability under the Act.⁶⁷ This is referred to in the Preamble to the Directive as a means of achieving the “effective protection of consumers”.

5-27. The justification for protecting the consumer at the expense of the parties upon whom liability is imposed is the “fair apportionment of the risks inherent in modern technological production”.⁶⁸ At the Bill’s Second Reading in the House of Lords, it was also recognised that unsafe goods distort a consumer’s ability to participate in a “free and fair market”.⁶⁹

5-28. The provisions were also recognised to be of benefit to retailers, because liability is “channelled” towards others (i.e. manufacturers and importers).⁷⁰ The primary aim of the Act, however, is consumer protection.

(8) Package Travel and Linked Travel Arrangements Regulations 2018

5-29. The Package Travel and Linked Travel Arrangements Regulations 2018⁷¹ replaced the Package Travel, Package Holidays and Package Tours Regulations 1992.⁷² This subsection primarily discusses case law and commentary on the 1992 Regulations, due to the large body of materials concerning this legislation. Under the 2018 Regulations, organisers are liable to travellers for defective performance of package holiday contracts, and “traveller” is defined as “any individual who is seeking to conclude a contract, or is *entitled to travel on the basis of a contract concluded*, within the scope of these Regulations”.⁷³ This means that a traveller can sue the organiser despite the fact that the two parties are not in a direct contractual relationship. “Package holiday” has been interpreted broadly: it has been found that consumers have entered into package holidays for the purposes of the Regulations where they have booked flights, transfers, and accommodation with a single provider, despite disclaimers stating that the provider is not a package holiday company.⁷⁴ A substandard holiday is, arguably, not comparable to injury which could

⁶⁷ Consumer Protection Act 1987 s 7.

⁶⁸ Product Liability Directive, Preamble.

⁶⁹ HL Deb 20 January 1987, vol 483.

⁷⁰ HL Deb 20 January 1987, vol 483.

⁷¹ SI 2018/634.

⁷² SI 1992/3288. The 2018 Regulations implement Directive 2015/2302/EU of the European Parliament and of the Council on package travel and linked travel arrangements.

⁷³ 2018 Regulations regs 2 and 15 (emphasis added).

⁷⁴ See, for example, *O'Donnell v On the Beach Ltd* 2021 SLT (Sh Ct) 70 at paras 42–62 per Sheriff Holligan.

be suffered due to a defective product⁷⁵ or, for example, the significant financial losses which could result if the relevant parties were not protected under the Carriage of Goods by Sea Act 1992.⁷⁶ Nonetheless, the 2018 Regulations can still be said to protect third parties, and it is relevant to consider the scope of this protection and the policy reasons why third parties are so protected in the event of disappointing holidays.

5-30. Damages awarded in the relevant cases take account of the emotional impact of disappointing holidays as well as financial loss. Stephen Mason notes a tendency towards special pleading, for example, in respect of damages sought for the particular disappointment suffered due to a lost holiday of a lifetime or a ruined wedding anniversary celebration.⁷⁷ Lord Denning notes that, when holidays fail, consumers are “greatly disappointed and upset” and, whilst this disappointment cannot accurately be quantified in monetary terms, “it is the task of the judges to do the best they can”.⁷⁸ In *Milner v Carnival Plc*,⁷⁹ the plaintiffs booked a holiday on the *Queen Victoria*’s maiden voyage for a total cost of £59,052. They only stayed on board for 28 days of the planned 106-day cruise, due to loud, reverberating noise caused by defective flooring in their cabin, and their dissatisfaction with the proposed alternatives. They were compensated for wasted expenditure (on visas, clothing, etc), as well as stress, anxiety, loss of enjoyment, and disappointment.⁸⁰ The *solatium* element of the damages amounted to £4,000 for Mr Milner and £4,500 for Mrs Milner. In his judgment, Ward LJ observes that damages for disappointment and distress will vary according to the significance of the holiday. Honeymoons and trips to attend weddings, for example, attract higher damages than “run of the mill” holidays. The fact that the Milners expected a holiday of a lifetime (an expectation influenced heavily by the lavish descriptions of the cruise in Carnival’s brochures) meant that the damages awarded were of “platinum quality”.⁸¹ Essentially, the Regulations and relevant case law demonstrate a policy objective of protecting consumers against emotional distress caused by ruined holidays. The Regulations also allow for monetary redress in situations involving significantly more severe distress than that caused by substandard accommodation and excess noise. More recently, the European Court of Justice indicated that the 1992 Regulations should be interpreted such that a travel organiser was liable for improper performance of a package holiday

⁷⁵ The relevant legislation is discussed immediately above at paras 5-23ff.

⁷⁶ See above at paras 5-06ff.

⁷⁷ S M Mason, “Holiday damages: the gravy train slows down” [1987] *Law Society Gazette* 3002. Katyar and Cairns also note that damages for distress, disappointment, and inconvenience can “substantially inflate awards over and above the actual contract price”: A Katyar and P Cairns, “It’s just not cricket” (1998) 9 *Entertainment Law Review* 196, 197.

⁷⁸ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 at 1473 per Lord Denning.

⁷⁹ [2010] EWCA Civ 389, [2010] 2 All ER (Comm) 397.

⁸⁰ According to Ward LJ’s judgment, damages should be assessed and offered under two heads: diminution in value, and distress and disappointment.

⁸¹ [2010] EWCA Civ 389 at para 43. See also paras 4–7, where Ward LJ discusses phrasing in the brochures such as “our most lavish expression of elegance”.

contract when a consumer holiday-goer was raped by an employee at her hotel. The judgment reasoned that acts and omissions of an employee of a supplier of services in the performance of a package holiday contract were within the sphere of control of the travel organiser.⁸² This demonstrates a strong protectionist approach towards consumers.

5-31. Liability under the 1992 Regulations was not strict, and this aspect of the law was not changed by the new legislation. In *Hone v Going Places Leisure Travel Limited*,⁸³ the claimant argued that Going Places were liable in respect of injuries he sustained during the emergency exit procedure on the return flight from his package holiday in Turkey. Due to a bomb scare, the flight was diverted to Istanbul for an emergency landing, during which the claimant suffered a spinal injury. It was found that Going Places could only be liable in respect of fault-based obligations, and that the onus was on the claimant to prove fault on the part of the tour operator.⁸⁴ Urbanowicz and Grant suggest that it is “unfortunate” for consumers that the legislation is limited in this respect.⁸⁵ It is submitted, however, that this offers a balance between consumer protection and exposing the tour operator to no more than reasonable risks. This can be contrasted with the scope of protection available under the Consumer Protection Act 1987 Part I. Consumers have a reasonable expectation that products purchased will not cause personal injury or damage to property, and those liable under the 1987 Act bear responsibility when this is not the case because the product should have been under the control of at least one of those parties. Tour operators, however, will not be able to control all of the potential risks to their consumers. Further, there are always risks associated with travelling, and the consumer cannot expect the tour operator to bear responsibility for any and all injuries, damage, or causes of distress.

⁸² *X v Kuoni Travel Ltd* (Case C-578/19, decision of 18 March 2021) paras 50–51 and 61. In *X v Kuoni Travel Ltd* [2018] EWCA Civ 938, [2018] 1 WLR 3777 the Court of Appeal found that a package-tour provider was not liable in respect of a sexual assault allegedly committed by an electrician employed at the claimant’s hotel. However, Longmore LJ dissented (at para 14) on the grounds that the sexual assault meant that the holiday arrangements were not to a reasonable standard under Regulation 15(2) of the Package Travel, Package Holidays and Package Tours Regulations 1992. The case was appealed and the Supreme Court referred questions concerning the interpretation of the 1992 Regulations to the ECJ (*X v Kuoni Travel Ltd* [2019] UKSC 37).

⁸³ [2001] EWCA Civ 947. For discussion see S Mason, “Package holiday claims – ‘the short but tortured history of tour operator liability’” (2001) 4 *Journal of Personal Injury Law* 396, 401.

⁸⁴ [2001] EWCA Civ 947 at para 8 per Longmore LJ. See also *Codd v Thomson Holidays Ltd*, Court of Appeal, 7 July 2000, unreported, discussed in Mason, “Package holiday claims” 402, which did not rely on the Regulations, but also makes clear that liability on the part of tour operators is not strict. In that case a child was injured when his finger was caught in a lift door. The door had jammed, and the boy reached around the door to pull it towards him. This caused the door to shut quickly, and the boy’s finger was caught in the door, causing injury. The plaintiff could not establish liability against the tour operator because negligence could not be proved on the part of the hotel owners or managers.

⁸⁵ P Urbanowicz and D Grant, “Tour operators, package holiday contracts and strict liability” [2001] *Journal of Business Law* 253, 272. For further discussion see S Prager and S Mason, “Regulation 15 of the Package Travel Regulations. Where are we now? And where are we going?” (2008) 4 *International Travel Law Journal* 149.

(9) General third-party rights

5-32. General third-party rights now exist by statute in both Scots and English law.⁸⁶ Kincaid criticised the Law Commission's proposals for the English statutory right on the grounds that neither they nor the draft Bill sufficiently explained the values embodied by the new third-party right.⁸⁷ However, it is clear that the key policy aims are contractual efficiency and giving effect to contractual intentions.⁸⁸ It is generally accepted that third-party rights offer an efficient means of contracting. For example, Vogenauer notes that:

From the perspective of law and economics, the contract in favour of a third party is a mechanism for increasing efficiency. It enables the parties to create an enforceable right for the third party by way of a single transaction, as opposed to conferring it first on one of the parties and then transferring it to the third by way of a second, separate transaction.⁸⁹

5-33. In terms of the use of third-party rights in practice, the insurance industry is the “most important application” of the principle in Scots law, in light of the prevalence of the use of third-party rights in this context.⁹⁰ In various jurisdictions, third-party rights are used in the context of liability insurance, partnership agreements for the benefit of a third person, contracts made by municipalities for the benefit of inhabitants, indemnification terms in construction contracts, and collective labour agreements.⁹¹ The Scots *jus quaesitum tertio* was used relatively frequently in contracts for the carriage of goods by sea.⁹² This demonstrates that third-party rights offer contractual efficiency in a range of contexts and industries.

5-34. Whilst some of the statutory third-party rights discussed in this chapter provide redress against physical harm, neither the Contract (Third Party Rights) (Scotland) Act 2017⁹³ nor the Contracts (Rights of Third Parties) Act 1999⁹⁴ were aimed at such protection. However, the contracting parties would be permitted, under either Act, to

⁸⁶ See above at paras 3-08ff (Scots law) and paras 3-12ff (English law).

⁸⁷ P Kincaid, “The UK Law Commission’s privity proposals and contract theory” (1994) 8 *JCL* 51, 51–52.

⁸⁸ See paras 3-14ff above.

⁸⁹ S Vogenauer, “Contracts in Favour of a Third Party”, in J Basedow, K J Hopt, R Zimmermann and A Stier (eds), *The Max Planck Encyclopaedia of European Private Law* vol 1 (2012) 385, 386. Further, Ibbetson outlines various doctrinal means of bypassing the former prohibition on third-party rights in English law. It is clear that these methods (making the third party a contractual party, or creating a collateral contract between the promisee and the third party) are less efficient than conferring an enforceable third-party right: D Ibbetson, “English Law: Twentieth Century”, in Hallebeek and Dondorp, *Contracts for a Third-Party* 115, 127–28. See also G Treitel, *Some Landmarks in Twentieth Century Contract Law* (2002) 84–89; M Trebilcock, “The doctrine of privity of contract” (2007) 57 *University of Toronto Law Journal* 269, 271.

⁹⁰ MacQueen, *SME* para 841.

⁹¹ SLC, Report on *Third Party Rights* para 1.13. This list is not exhaustive.

⁹² See further E Clive, “*Jus Quaesitum Tertio* and Carriage of Goods by Sea”, in D L Carey Miller and D W Meyers (eds), *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith QC* (1992) 47.

⁹³ SLC, Report on *Third Party Rights* paras 1.13–1.14.

⁹⁴ Law Commission, Report on *Privity of Contract* paras 3.9–3.27.

provide for the third party to make a contractual claim in respect of a failure to protect it from physical harm.

(10) Summary

5-35. Parliament has provided statutory exceptions where “injustice has been glaring”,⁹⁵ or, in other words, for “reasons of commercial necessity or consumer

Legislation	Policy Justifications			
	Economic protection of weaker parties*	Physical safety of weaker parties	Ensuring recovery of loss caused by breach of contract	Commercial necessity
Married Women’s Property Act 1882	✓			
Carriage of Goods by Sea Act 1992	Sometimes		✓	✓
Third Parties (Rights against Insurers) Act 2010	✓	Sometimes	✓	
Road Traffic Legislation	✓	✓		
Latent damages/defective premises legislation	✓	✓		
Fire Prevention (Metropolis) Act 1774	✓	✓		
Consumer Protection Act 1987 Part I	✓	✓		
Package Travel and Linked Travel Arrangements Regulations 2018	✓	✓	✓	
Third-party rights legislation	✓			✓

Table 1: Policy Justifications

* It is acknowledged that an external party might be in a stronger economic position than the contracting party against whom it claims. For example, the personal assets of a wealthy consumer injured by a defective product might be greater than the value of the business which sold the product. Nonetheless, the analysis in the following sections proceeds on the basis that consumers will generally be in a weaker position than commercial contracting parties.

⁹⁵ R Merkin, “The Enforcement of Promises made for the Benefit of a Third Party”, in Merkin (ed), *Privity* 21, para 2.1.

protection”.⁹⁶ All of the exceptions considered protect parties who would otherwise have no financial recourse due to the privity doctrine. Some of the statutory exceptions protect against financial loss, and the Package Travel and Linked Travel Arrangements Regulations 2018 recognise recovery in respect of emotional distress. The diversity of provisions is unified by the policy objective of protecting non-contracting parties.

5-36. As summarised in Table 1, the dominant policy objective behind the statutory exceptions is the protection of weaker parties, most often consumers. This is predominantly in terms of financial protection but also, in some cases, physical safety. Some provisions are also justified by reference to notions of justice, notably ensuring recovery of loss caused by breach of contract. Only the Carriage of Goods by Sea Act 1992 and the general third-party rights legislation developed due to considerations of commercial necessity.

C. WHEN OUGHT THE LAW TO RECOGNISE EXCEPTIONS?

5-37. The wide array of exceptions to the privity doctrine gives rise to the conviction that privity is “more honoured in its breach”,⁹⁷ and can hardly be said to exist in modern law. Certainly, the sheer number of exceptions identified in this chapter demonstrates that privity, if it exists, is not absolute.

5-38. However, third parties should not always be able to recover losses caused by breach of contract. Contracting parties cannot be liable for every loss suffered by third parties that are caused by defective performance of their contractual obligations. This would make the scope of their liability impossible to predict and would make contracting in Scots law inefficient and commercially unappealing. It is more helpful to recognise privity but subject to exceptions, rather than refuse to recognise that contracts generally do not confer benefits or burdens on external parties. If the latter approach were to be followed (i.e., if it is said that privity ought not to be recognised), the default rule would be that third parties *are* able to enforce contractual performance and claim in contract when they are adversely affected by defective performance. This would make it impossible to enter into a contract with an accurate impression of the parties to whom one might incur liability, resulting in an inefficient and unworkable contract law. Recognition of clearly defined exceptions allows for a balance to be struck between the interests of third parties and contracting parties. Third parties are protected in appropriate situations, and contracting parties can predict the scope of their liability. Abolishing the privity doctrine in its entirety removes control from the contracting parties and would allow for recovery of losses in situations where the third party does not necessarily merit protection.

⁹⁶ Merkin, “The Enforcement of Promises made for the Benefit of a Third Party” para 2.49.

⁹⁷ R Merkin, “Historical Introduction to the Law of Privity”, in Merkin (ed), *Privity* 1, para 1.1. See also R Merkin, “The Contracts (Rights of Third Parties) Act 1999”, in Merkin (ed), *Privity* 91, para 5.2.

5-39. Dyer comments that privity:

may well have arisen as a natural or logical incident of the definition of contract itself, rather than as a rule deliberately formulated to give effect to deeper policy considerations.⁹⁸

5-40. The development of privity in Scots and English law demonstrates the truth of this statement.⁹⁹ Nonetheless, there are clear policy considerations supporting the continued recognition of privity, namely, certainty for contracting parties and third parties. Flannigan argues that privity is in opposition to an economic theory of contract, because “a privity rule is unnecessarily costly and results in the misallocation and wasting of resources”, submitting that the costs stemming from transactions structured to bypass privity are unjustifiable.¹⁰⁰ However, as discussed above,¹⁰¹ parties are able to confer rights on third parties, and can therefore distribute resources according to their intentions in a manner which allows for maximum efficiency in their particular transaction. The key question is therefore ascertaining when exceptions to privity are and should be permitted. This is the focus of the remainder of this section.

5-41. There can be said to be two classes of exceptions to privity in Scots law. The first is traditionally understood third-party rights, which arise where the contracting parties so intend. This may also encompass some of the statutory exceptions (namely, specific statutory third-party rights in the context of, for example, third party motor insurance).¹⁰² The second class of exceptions is those exceptions justified on the basis of policy considerations which are sufficiently strong to outweigh the privity doctrine and the intentions of the contracting parties. This method of ascertaining whether exceptions are justifiable is outlined in Diagram 1.

5-42. The policy justifications examined in this chapter are not intended as an exhaustive list of the only considerations which can justify present and future exceptions to privity. Other exceptions may be justified by reference to considerations which do not apply to the particular exceptions discussed in this chapter.¹⁰³ The following section further examines the common policy justifications identified in the consideration of the exceptions discussed above.

⁹⁸ D L Dyer, “Pulling the privity thread: will contract law unravel?” (1999) 2 *International Trade Law Quarterly* 105, 109.

⁹⁹ The recognition of privity in Scots jurisprudence is examined at paras 2-16ff above. English law is discussed at paras 2-48ff.

¹⁰⁰ R Flannigan, “Privity: the end of an era” (1987) 103 *LQR* 564, 590. See also R Merkin, “Historical Introduction to the Law of Privity” para 1.1. Henley has made similar arguments in the context of the insurance industry: C Henley, “Insurance”, in Merkin (ed), *Privity* 213, para 9.1.

¹⁰¹ See above at paras 5-32ff.

¹⁰² For discussion see MacQueen, *SME* para 841.

¹⁰³ Chapter 9 concludes that undisclosed agency is an exception to privity (paras 9-17ff) and examines potential justifications for the concept which are not considered in this chapter (paras 9-66ff).

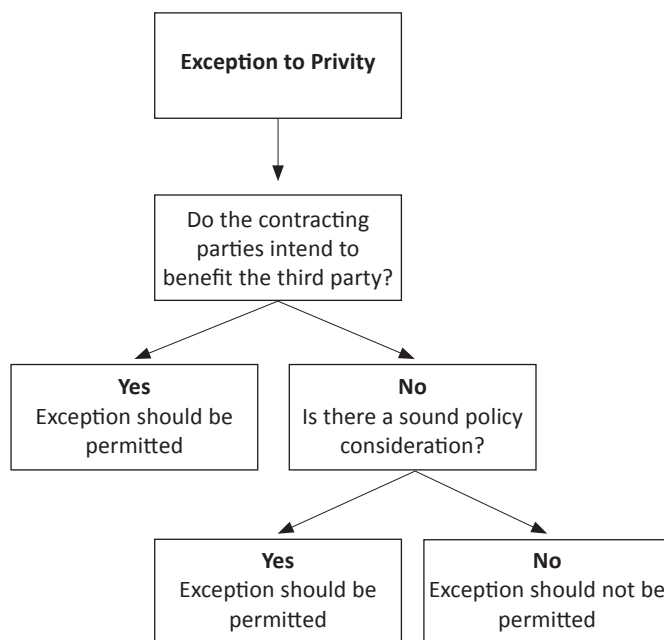


Diagram 1: Determining whether exceptions should be recognised

D. UNIFYING POLICY CONSIDERATIONS AND THEIR IMPACT ON THE PRIVACY DOCTRINE

5-43. This section discusses the interaction between the privity doctrine and its statutory exceptions, addressing how to obtain a balance between upholding the privity doctrine and bypassing the doctrine on policy grounds.

(1) Protection of weaker parties

5-44. The statutory exceptions all reflect a balance of interests between the third party and the contracting party which causes the loss. The contracting party ought to be able to predict to whom it will owe liability, but sometimes the protection of weaker parties necessitates the imposition of liability in respect of third-party loss. The latter consideration ought not easily to outweigh the former where the law provides means by which a party can protect itself, or could easily have done so. In other words, if the loss could have been easily prevented by the third party, the law ought not to interfere with the contracting parties' ability to predict and control their liability, but where it is unrealistic for the third party to have secured, for example, a collateral warranty, it is easier to justify the imposition of liability.

5-45. The point at which a third party's loss becomes legally significant (i.e. worthy of protecting against) is difficult to pinpoint precisely. Bagchi argues that the terms of contracts which inflict third-party losses (directly or indirectly) ought to

be construed narrowly, to allow recognition of third-party interests.¹⁰⁴ For example, she notes that non-compete clauses (known as restrictive covenants in Scots law)¹⁰⁵ concluded between employers and employees have negative consequences for third-party competitors of the employer, in the form of the loss of opportunity to hire the employee. These clauses should, according to Bagchi, be interpreted narrowly, considering the negative impact these clauses have on competitor firms.¹⁰⁶ Regardless of whether such a principle is too broad to be applied to all contracts which have harmful consequences for third parties, her argument is not directly applicable to the topics considered in this work. The loss suffered by third parties in such contexts does not arise because the contracting parties have concluded a contract which harms the interests of the third party. Rather, the third party suffers loss because the contract is defectively performed. Nonetheless, it is possible to identify a principle similar to that proposed by Bagchi: that third parties should be protected from defective contractual performance where their protection can be justified.

5-46. It is submitted that a third party's loss should be recoverable where the third party cannot reasonably be expected (or was unable) to protect itself against the loss, and the contracting party could reasonably foresee that defective performance would negatively affect those in the position of the third party. There are thus two aspects of ascertaining whether the third party's loss is recoverable: (a) the third party's ability to protect itself, and (b) whether the third party's loss is reasonably foreseeable to the relevant contracting party.

5-47. Regarding the third party's ability to protect itself, this should be determined on a case-by-case basis, examining factors such as the ease with which a third party could have taken out insurance in respect of the loss, and whether there is a party other than the party responsible for the loss which could be sued in respect of the loss. Commercial third parties would be more likely to be expected to have taken out insurance in respect of potential loss than consumers. It would also be relevant to consider whether the third party had a weak bargaining position in respect of one or both contracting parties. In the case of someone purchasing a newly-built house, for example, the buyer would likely not have had an opportunity to bargain with the construction company, and it would be in a significantly weaker bargaining position than the seller (who did). Indeed, the Defective Premises Act 1972 was enacted specifically to provide consumer purchasers with statutory protection to counteract their weak bargaining position in respect of commercial builders.¹⁰⁷ Another consideration is whether the third party reasonably expected that the loss would be recoverable. A person who has booked a holiday on behalf of the person and the person's friends, for example, may reasonably

¹⁰⁴ A Bagchi, "Other people's contracts" (2015) 32 *Yale Journal on Regulation* 211.

¹⁰⁵ A discussion of restrictive covenants in Scots law generally is found in R Bradley, "Restrictive covenants" (2014) 121 *Employment Law Bulletin* 2. See also Gloag, *Contract* 569; MacQueen and Thomson, *Contract* paras 8.27–8.43.

¹⁰⁶ Bagchi, "Other people's contracts" 238.

¹⁰⁷ Law Commission, *Report on Civil Liability of Vendors and Lessors for Defective Premises* (Law Com No 40, 1970) paras 15–16.

expect that loss suffered as a result of defective performance of the holiday contract would be fully recoverable. However, this factor must be balanced with consideration of whether the party in question had access to, or ought to have sought, appropriate legal advice. Consumers would not normally be expected to have a solicitor read over their package-holiday contract, whereas commercial parties should arguably be assumed to have the requisite funds to access legal advice. Consumer third parties are less likely to have had access to legal advice, but may have (reasonably) assumed that they would be able to recover for losses caused by latent defects in a residential property. These factors indicate that consumers will generally be more likely to be protected than commercial parties.

5-48. However, that is not to say that new exceptions to privity could not protect commercial parties, and must protect consumers; as stated above, this should be considered on a case-by-case basis. Ideally, future statutory exceptions should provide for specific tests within the legislation to determine whether the external party can rely on the exception. The factors discussed in this subsection can be used to determine whether the exception in question should be enacted.

5-49. The matter of whether the loss is reasonably foreseeable should be determined according to the normal application of the test of reasonable foreseeability used in calculating damages in contract law more generally.¹⁰⁸ For example, a construction company can foresee that loss caused by a latent defect in a building may fall on a party to whom the building is sold rather than the landowner with whom it originally contracts.

(2) Ensuring recovery for losses caused by breach of contract

5-50. A second policy justification for the recognition of statutory exceptions is ensuring recovery of loss caused by breach of contract, even where the loss does not fall on the person with whom the contract-breaker originally contracted. This consideration supports the Carriage of Goods by Sea Act 1992, the Third Parties (Rights against Insurers) Act 2010, and the Package Travel and Linked Travel Arrangements Regulations 2018.

5-51. A closely related consideration is ensuring that contractual obligations are upheld. This accords with Stair's statement that "there is nothing more Natural, than to stand to the Faith of our Pactions".¹⁰⁹ Whilst the statutory exceptions may violate the privity doctrine, they do in fact play a role in protecting and upholding contracts. Enforcing liability in situations where a third party suffers loss at the hands of a contract-breaker ensures that contractual promises are kept. The relevant statutory exceptions can thus be said to support rather than threaten contractual obligations, despite the fact that they violate privity and the intentions of the contracting parties. Flannigan notes

¹⁰⁸ In accordance with the two-part test in *Hadley v Baxendale* (1854) 156 ER 145, the loss will be recoverable if it arises in the usual course of things, or if it fell within the reasonable contemplation of the contracting parties as a likely result of the breach.

¹⁰⁹ Stair, *Institutions* 1.1.20.

the public interest “in seeing to the enforcement of individual agreements in order to maintain the integrity of the contracting process”.¹¹⁰

5-52. However, contractual obligations are not always upheld. Contracting parties can cancel contracts where they both agree to do so, and the interests of third parties are not generally relevant to their ability to terminate a contract or alter their contractual obligations. In the case of *Finnie v Glasgow and South-Western Railway Co*,¹¹¹ for example, Finnie sought to enforce a contract between the railway authority and a local council which would have allowed for more efficient transport links for (third-party) consumers. He was not able to enforce this contract, because his benefit was only incidental to the contract and he was not intended to have the right to enforce the contract. Public interest in seeing contracts upheld must be balanced against the interests of contracting parties in exercising their freedom to cancel contracts, and their interests in ensuring that the liability they owe in respect of defective performance or non-performance is predictable and easily defined. The view that a failure in contractual performance ought always to be remediable regardless of whether the loss falls on a contracting party is not currently reflected in Scots¹¹² or English¹¹³ law. The fact that a third party will suffer loss as a result of defective performance or non-performance of the contract does not justify upholding the contractual obligations contrary to the intentions of one or all contracting parties, through the recovery of third-party loss, unless there are other policy considerations which justify the imposition of liability. Lord Millett comments that allowing contractual recovery in respect of a performance not rendered ought always to be possible, even where the performance was due to another, and that developing a wide concept of contractual loss would be beneficial.¹¹⁴ However, he does not convincingly argue that *all* losses stemming from defective performance or non-performance ought to be accounted for in circumstances where the loss falls on a third party, and he does not assert that the third party itself should have the ability to enforce the contract. Accordingly, the policy of ensuring recovery for losses caused by breach of contract is a relevant consideration in ascertaining whether deviation from privity is justified, but this factor alone does not permit the creation of an exception to privity.

(3) Commercial convenience or efficiency

5-53. This policy justification is perhaps the least controversial. Contractual efficiency and convenience are undoubtedly of benefit to the contracting parties. Further, commercial convenience is a worthwhile policy aim in its own right, because lower transaction costs increase commercial activity. This justification ought to be upheld where there are no adverse consequences to third parties in allowing the contracting parties to contract efficiently. For example, third-party rights can save

¹¹⁰ R Flannigan, “Privity: the end of an era” (1987) 103 *LQR* 564, 583.

¹¹¹ (1857) 20 D (HL) 2 at 4 per Lord Cranworth.

¹¹² This rule is discussed at para 6-24 below.

¹¹³ *Cassell v Broome* [1972] AC 1027; E McKendrick, “Breach of contract and the meaning of loss” (1999) 52 *Current Legal Problems* 37; R Stevens, *Torts and Rights* (2007) 191.

¹¹⁴ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 587–88 and 591 per Lord Millett.

transaction costs,¹¹⁵ and ought to be permitted, given that they do not pose any burden to the third party.¹¹⁶

(4) Upholding the contracting parties' intentions

5-54. It is relevant to consider a policy consideration competing against the justifications reflected in the statutory exceptions: upholding the contracting parties' intentions. Such intentions are expressed in their choice of contractual structure and their chosen means of distributing liability.

5-55. The principle that the contracting parties should be able to predict and control their liability is not absolute. Some of the statutory exceptions – for example, the Consumer Protection Act 1987 Part I – apply strict liability, because this was viewed as necessary for the protection of consumers. It is submitted that the contracting parties' intentions and chosen contractual structure should be overcome where the protection of the third party outweighs the importance of allowing their contractual freedom. As above, this is not necessarily the case where a collateral warranty could easily have been secured in respect of the third party.

5-56. Adams, Beyleveld, and Brownsword state that, where parties enter into contracts which are subject to statutory exceptions to privity, their intentions to enter these particular species of contract can be assumed to encompass an intention to fulfil liability owed under the exceptions.¹¹⁷ This accords with the current position in the law that, where a statutory provision affords title to sue outwith a contract, this will not be negated due to an argument of lack of privity.¹¹⁸ This is logically sound – parties can be assumed to have awareness of the legislation which affects their contracts. They therefore ought to take steps in contractual negotiations to ensure that liability is distributed between the parties in such a way as to acknowledge liability which could be owed under relevant legislation. Each individual statutory provision has been enacted because other factors outweigh the privity doctrine and contractual intention, although, once the legislation is enacted, the parties are able to make an active choice as to whether they wish to enter a contract to which statutory exceptions to privity apply. This allows the parties to exercise their intentions without being blindsided by the imposition of liability where they would otherwise be protected by the privity doctrine. However, consideration of the contracting parties' intentions highlights the need for clear, workable law on the exceptions to the privity doctrine, so that they can adequately identify potential third parties to whom they might owe liability.

¹¹⁵ See para 5-32 above.

¹¹⁶ If the third party views the receipt of a third-party right as detrimental (because, for example, it does not wish to be associated with one or both of the contracting parties for reputational reasons), it can likely reject the right: SLC, Report on *Third Party Rights* paras 6.1–6.8.

¹¹⁷ J N Adams, D Beyleveld, and R Brownsword, "Privity of contract – the benefits and burdens of law reform" (1997) 60 *MLR* 238, 243.

¹¹⁸ See, for example, Lord Murray's statement in a note produced in *Waddell v Howat* 1924 SLT 468 at 470 that: "It is clear that privity of contract affords no test of the validity of such a claim. The claim rests upon statute".

E. EXCEPTIONS TO THE “NO BURDENS” RULE

5-57. This section examines concepts which have been identified as exceptions to the “no burdens” aspect¹¹⁹ of the privity rule, namely, assignation, and forcing third parties to comply with arbitration clauses to enforce their third-party rights. It assesses whether these are in fact exceptions to privity and identifies common policy considerations which justify deviation from the “no burdens” rule. This section considers common law exceptions because of the lack of relevant statutory exceptions.

(1) Assignation

5-58. This subsection briefly outlines the law on assignation, and then explains the relationship between assignation and the privity doctrine.

(a) *The law on assignation*

5-59. Assignation (also sometimes known as “cession” or “assignment”)¹²⁰ is long-recognised in Scots law.¹²¹ In essence:

A right arising under a contract may be assigned by the creditor (cedent) to a third party (assignee) so as to give that third party a title to sue the debtor for performance of the right.¹²²

5-60. Accordingly, assignation involves the transfer of rights, but (generally) not burdens.¹²³ The assignee is not, therefore, a full contracting party.¹²⁴ It is possible to assign obligations, but the consent of the debtor in the contract being assigned (i.e. the cedent’s creditor) is required.¹²⁵ Assignable rights encompass the right to payment or performance under a contract¹²⁶ as well as damages for breach of contract.¹²⁷ An assignation is completed by intimation to the debtor.¹²⁸

5-61. For the transfer of rights, the consent of the debtor is not required.¹²⁹ However, *delectus personae* applies.¹³⁰ This refers to “the choice of a particular person which

¹¹⁹ The “no-burdens” rule is outlined at para 2-41.

¹²⁰ McBryde, *Contract* para 12.05; Anderson, *Assignation* para 1.01.

¹²¹ McBryde, *Contract* paras 12.01 and 12.05; MacQueen, *SME* para 854.

¹²² MacQueen, *SME* para 855.

¹²³ Anderson, *Assignation* para 1.04; McBryde, *Contract* para 12.14; Gloag and Henderson para 8.17; G Lubbe “Assignment”, in H MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (2006) 307, 310.

¹²⁴ Anderson notes the historical confusion on this point: Anderson, *Assignation* para 1.04. See also MacQueen and Thomson, *Contract* paras 3.48–3.51.

¹²⁵ Anderson, *Assignation* para 1.04; McBryde, *Contract* para 12.42; MacQueen, *SME* para 856. All of these commentators acknowledge the lack of clarity in Scots law on the question of when and how an obligation can be assigned.

¹²⁶ MacQueen, *SME* para 855, citing *Dampskibsselskabet Aurdal v Compania de Navegacion La Estrella* 1916 SC 882.

¹²⁷ MacQueen, *SME* para 855, citing *Constant v Kincaid & Co* (1902) 4 F 901.

¹²⁸ MacQueen and Thomson, *Contract* para 3.48.

¹²⁹ Anderson, *Assignation* para 1.03; McBryde, *Contract* para 12.02.

¹³⁰ MacQueen, *SME* para 855; Anderson, *Assignation* para 1.03; Gloag and Henderson para 8.16.

implies the exclusion of others”.¹³¹ In accordance with Lord Dunedin’s judgment in *Cole v Handasyde*, a right is not assignable if the contract in which it is sourced contains an element of *delectus personae*.¹³² This may be the case if the contract concerns “a personal service of a peculiar nature”, or where a purchaser wishes goods to be made by a particular manufacturer due to considerations of, for example, the latter’s character or reputation.¹³³ McBryde makes clear that whether assignation is restricted on grounds of *delectus personae* depends on the intentions of the contracting parties,¹³⁴ and *delectus personae* can be bypassed through the parties’ agreement.¹³⁵ Assignation may also be restricted by express terms in the contract in question.¹³⁶

(b) Assignation and the privity doctrine

5-62. T B Smith states that assignation is an exception to privity, although he does not explain this view.¹³⁷ He is, however, correct. Where A has a right to claim against B, and A assigns that right to C, a contract is not formed between B and C, yet C receives a right to claim against B for payment under the contract between A and B. Where an obligation of A’s is assigned with the consent of B, C becomes burdened to B, with whom C is not in a contractual relationship. This constitutes an exception to the “no burdens” aspect of privity. B also enjoys the benefit of having a right against C, despite the fact that B is a third party to the assignation agreement between A and C. Assignation is, therefore, clearly an exception to privity regardless of whether rights or obligations are assigned.

5-63. The interaction between privity and third-party rights, as discussed in chapter 3,¹³⁸ demonstrates that privity is generally applied subject to the intentions of the contracting parties. The assignation of obligations due by A requires the active consent of B, and so the intentions of both contractual parties (i.e. A and B) are protected. Further, the third party (C) clearly consents to this burden under the assignation agreement with A. This situation would also constitute a deviation from privity in respect of the benefit accrued by B, as B receives a right under the contract between A and C. This does not present any new challenge to the relationship between privity and contractual intention. Both parties to the contract between A and C actively consent to

¹³¹ McBryde, *Contract* para 12.36. See also paras 12.33 and 12.79.

¹³² *Cole v Handasyde & Co* 1910 SC 68 at 73 per Lord Dunedin. See also *International Fibre Syndicate Ltd v Dawson* (1901) 3 F (HL) 32 at 33 per Lord Robertson.

¹³³ *Cole v Handasyde & Co* 1910 SC 68 at 73 per Lord Dunedin.

¹³⁴ McBryde, *Contract* para 12.36, citing *Cole v Handasyde & Co* 1910 SC 68 and *Berlitz School of Languages v Duchêne* (1903) 6 F 181.

¹³⁵ Anderson, *Assignation* para 1.03 citing Stair, *Institutions* 3.1.3.

¹³⁶ McBryde, *Contract* paras 12.38–12.39; MacQueen, *SME* para 855.

¹³⁷ Smith, *Short Commentary* 773. Similar comment is found in A Burrows, *A Restatement of the English Law of Contract* (2016) para 48, and J Beatson, A Burrows and J Cartwright, *Anson’s Law of Contract* (31st edn, 2020) 637. Furmston and Tolhurst state that assignment is not an exception to privity: Furmston and Tolhurst, *Privity* para 3.52; the remainder of this subsection explains why their view is incorrect.

¹³⁸ See, in particular, paras 3-14ff.

the latter becoming bound to B. Contractual intention is therefore upheld.

(2) Arbitration

5-64. The Scottish Law Commission recently addressed the debate on whether a third party should be required to engage in arbitration to enforce its third-party right if so provided in the contract, given that the “very essence” of arbitration is its consensual nature.¹³⁹ The Contract (Third Party Rights) (Scotland) Act 2017 section 9 provides that a third party is to be treated as if it was a party to any arbitration agreement referred to in the contract which provides for its right. The provision is construed as a conditional benefit rather than a burden.¹⁴⁰

5-65. In England and Wales, the Law Commission recommended that third parties ought not to be treated as arbitral parties, because this would be seen as imposing a duty to follow the arbitral procedure.¹⁴¹ Tettenborn disagreed with this proposal, commenting that this would allow the third party’s “having it both ways”.¹⁴² In the event, the Contracts (Rights of Third Parties) Act 1999 section 8 provides that third parties are to be treated as parties to any arbitration agreement required by contract to enforce their right.¹⁴³ The provision resulted from lobbyists’ arguments that the legislation would be more useful if the Arbitration Act 1996 could apply to third-party rights formed under the Act.¹⁴⁴ There is ongoing debate on whether “arbitration without privity” can be imposed in situations such as multiparty construction contracts.¹⁴⁵

5-66. This so-called burden can, however, be construed as a condition attached to the third party’s right. The Scots position is logical: if the third party is to take advantage of its right, it must do so in accordance with the conditions outlined in the contract as a whole.

5-67. If, however, requiring the third party to undergo arbitration is in fact a burden on the third party, this is justified on the grounds of commercial efficiency and commercial necessity from the perspective of the contracting parties. Ambrose comments that it

¹³⁹ SLC, Report on *Third Party Rights* paras 7.3–7.18.

¹⁴⁰ SLC, Report on *Third Party Rights* paras 7.5–7.6, Draft Bill cl 9 (available at Appendix A of the Report).

¹⁴¹ Law Commission, Report on *Privity of Contract* para 14.18.

¹⁴² A M Tettenborn, “Third party contracts – pragmatism from the Law Commission” [1996] *Journal of Business Law* 602, 610.

¹⁴³ For discussion, see C MacMillan, “A birthday present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999” (2000) 63 *MLR* 721, 733; C Ambrose, “When can a third party enforce an arbitration clause?” [2001] *Journal of Business Law* 415. See also *Shipowners’ Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS* [2016] EWCA Civ 386, [2016] 2 All ER (Comm) 933 at para 2 per Lord Justice Longmore.

¹⁴⁴ SLC, Report on *Third Party Rights* para 7.4. See also N Andrews, “Strangers to justice no longer: the reversal of the privity rule under the Contracts (Rights of Third Parties) Act 1999” (2001) 60 *CLJ* 353, 373–74.

¹⁴⁵ For an overview of the discussion on this issue, see SLC, Report on *Third Party Rights* para 7.18; A M Steingruber, *Consent in International Arbitration* (2012) para 1.13; J Paulsson, “Arbitration without privity” (1995) 10 *ICSID: Foreign Investment Law Journal* 232.

is a matter of “common sense and principle” that the contracting parties should have the ability to make the third party’s right conditional on the third party’s consent to the arbitration clause, particularly where the contract concerns confidential or otherwise sensitive information.¹⁴⁶ This would not, of course, justify revision of the general rule that contracting parties cannot impose burdens on third parties. Rather, this limited deviation from privity is justified on the grounds that a person stands only to gain by a third-party right, and ought to follow the contracting parties’ dispute resolution provisions should they wish to enforce the right.

(3) Summary

5-68. These scenarios highlight very limited instances in which the “no burdens” rule is bypassed. The policy considerations underlying deviation from this aspect of privity are narrow, encompassing only intention (on the part of the third party as well as the contracting parties) and commercial convenience. The law ought not otherwise to allow contracting parties to burden third parties, in order that the third party’s freedom of contract and financial and personal interests are protected.

F. CONCLUDING REMARKS

5-69. This chapter has identified the policy considerations which justify deviation from the privity doctrine, and has explained why, despite the number of exceptions, privity must continue to be recognised. The chapter has also provided a means of identifying when new exceptions to the benefits aspect of privity should be accepted, namely, when the exception reflects the intentions of the contracting parties, or when there is a justifiable policy reason. The chapter also summarises the considerations which justify deviation from the “no burdens” rule.

5-70. The statutory exceptions to privity indicate that the benefits aspect of the doctrine and contractual intention can and should be bypassed to reflect the following policy considerations: protection of third parties from physical and financial harm, ensuring that loss caused by breach of contract is recoverable, and commercial convenience. Regarding the first of these considerations, the third party should not always be protected. The loss should only be recoverable where the third party cannot reasonably be expected (or was unable) to protect itself against the loss, and the contracting party could reasonably foresee that defective performance would have an adverse effect on those in the position of the third party. The second consideration, ensuring that loss caused by breach of contract is recoverable, is a relevant consideration but cannot provide the sole justification for creating a new exception to privity. Commercial convenience provides a suitable justification where the third party is not disadvantaged.

¹⁴⁶ Ambrose, “When can a third party enforce an arbitration clause?” 418.

6 Contracts for the Benefit of Another

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A. OVERVIEW OF CHAPTER 6

6-01. This chapter analyses contracts for the benefit of another in Scots law. It follows the same structure as chapters 7 (transferred loss), 8 (*ad hoc* agency), and 9 (undisclosed agency). Each chapter defines its respective concept and explains the concept's development in Scots law, offering comparative comment where relevant. The chapters then address whether the concept is compatible with privity and Scots contract theory, whether the concept could and should be explained in terms of delictual liability, and whether there are sound policy considerations justifying the existence of the concept. Each chapter concludes with discussion on whether the concept should continue to be recognised in Scots law.

6-02. This chapter also considers the interaction between contracts for the benefit of another and third-party rights.

B. CONTRACTS FOR THE BENEFIT OF ANOTHER IN SCOTS LAW

6-03. This section defines contracts for the benefit of another, explains the development of this concept in Scots and English law, and considers the potential impact of relevant English case law in Scotland.

(1) Defining contracts for the benefit of another

6-04. A contract for the benefit of another arises where one of the contracting parties enters into a contract for the benefit of an extra-contractual party, and may recover damages for that party's losses resulting from defective contractual performance.¹ The extra-contractual party cannot recover damages for itself.²

(2) Development of contracts for the benefit of another in Scots law

6-05. The authorities on contracts for the benefit of another in Scots law are limited. It is, however, accepted that where A contracts with B for services to be provided by B for the benefit of C, the measure of damages recoverable by A in the event of B's breach is the actual loss suffered by C.³ In *Blyth & Blyth Ltd v Carillion Construction Ltd*, for example, Lord Eassie explained that if a husband contracted with a surgeon for his wife's treatment, the liability of the surgeon for treating the wife negligently should be quantified by the loss suffered by the wife.⁴ However, the case itself concerned financial damages, and there is no definitive authority for the recovery of damages for another's physical injury (save for Lord Eassie's analogy), damage to their property, or injury to feelings. Nonetheless, Scots law generally allows for contractual damages to be awarded for injury to feelings⁵ and psychological injury.⁶ Such damages could potentially be recovered in the context of contracts for the benefit of another.

(3) Contracts for the benefit of another in English law

6-06. In English law, contracts for the benefit of another allow recovery of damages for injury to feelings as well as for financial loss. The leading authority is *Jackson v Horizon Holidays Ltd*,⁷ in which the plaintiff booked a holiday for himself, his wife, and his two toddler sons. The standard of accommodation did not meet various contractual conditions, and he recovered damages for the distress and discomfort suffered by his family as well as himself. Lord Denning stated that the facts of the case were comparable with situations in which, for example, a host contracts with

¹ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 at 1473 per Lord Denning.

² The contrast between contracts for the benefit of another and contracts providing enforceable third-party rights is discussed further below at paras 6-16ff.

³ Hogg, *Obligations* para 3.198.

⁴ *Blyth & Blyth Ltd v Carillion Construction Ltd* 2002 SLT 961 at para 36 per Lord Eassie. In the Outer House, Lord Johnston had previously held, in *Rosen v Stephen* (1907) 14 SLT 784, that a contractual action was not possible in a case in which a father had contracted with a chemist for ringworm treatment for his daughter, and the treatment caused her injury. Lord Johnston arrived at this conclusion on the grounds of the lack of privity between the defender and the pursuer's daughter. He did not consider whether the father could make a contractual claim on his daughter's behalf.

⁵ *Graham v Ladeside of Kilbirnie Bowling Club* 1994 SLT 1295; *Buchanan v Newington Property Centre* 1992 SCLR 583; *Black v Gibson* 1992 SLT 1076; *Diesen v Samson* 1971 SLT (Sh Ct) 49.

⁶ *Ward v Scotrail Railways Ltd* 1999 SC 255; *Logan v Falkirk and District Royal Infirmary NHS Trust* 1999 GWD 30-1431.

⁷ [1975] 1 WLR 1468.

a restaurant for a meal for himself and his friends, or where a vicar contracts for transportation for his choir. He describes the concept as “a contract by one for the benefit of third persons”.⁸ According to his judgment, only the party who made the contract can sue, and the extra-contractual party cannot recover damages in its own name. In a similar Court of Appeal case, a contractual party was able to recover damages for disappointment and distress suffered by his friends for whom he had booked a skiing holiday.⁹

6-07. Whilst *Jackson v Horizon Holidays*¹⁰ has been described as “obscure”,¹¹ it has not been expressly overruled. Contracts for the benefit of third parties are acknowledged judicially in various circumstances. In *Panatown Ltd v Alfred McAlpine Construction Ltd*,¹² Lord Millet mentions *Jackson*¹³ as a “broad decision on the measure of damages or as an example of a type of contract calling for special treatment”.¹⁴ Lord Wilberforce makes similar comment, acknowledging that *Jackson*:

may be supported either as a broad decision on the measure of damages ... or possibly as an example of a type of contract – examples of which are persons contracting for family holidays, ordering meals in restaurants for a party, hiring a taxi for a group – calling for special treatment.¹⁵

6-08. The decision has also been applied outwith the context of holiday cases. In *Buckley v Lane Herdman & Co*,¹⁶ a married couple sued their solicitor for their expenses and distress resulting from the solicitor’s failure to ensure that the sale of their house was simultaneous with the purchase of a new family home. Their stress resulted from the search for accommodation and the fact that the only available alternative accommodation was in a noisy and unpleasant neighbourhood. *Jackson*¹⁷ was accepted as an authority for allowing the recovery of damages for the emotional impact of the breach of contract. The couple did not sue for the distress suffered by their children, but this arguably could have been accounted for, because damages were awarded in respect of the distress experienced by Mr Jackson’s toddler sons.

⁸ [1975] 1 WLR 1468 at 1473.

⁹ *Clive Avon Adcock v Blue Sky Holidays Ltd* 1980 WL 613068, which cited but did not rely on *Jackson* (see the judgment of Cumming-Bruce LJ). See also *Thomson v RCI Europe* [2001] 2 WLUK 380 (in which the claimant recovered damages for distress and inconvenience suffered by her and her relatives caused by defective holiday accommodation in the USA) and *Sutcliffe v Cosmoair* [1996] CLY 711 (the claimant had paid for a holiday for himself and his partner, and recovered damages in respect of the couple’s distress at discovering a dirty swimming pool and damp bed-linen).

¹⁰ [1975] 1 WLR 1468.

¹¹ Morgan, *Great Debates* 277.

¹² [2001] 1 AC 518.

¹³ [1975] 1 WLR 1468.

¹⁴ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 588 per Lord Millet.

¹⁵ *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 at 283 per Lord Wilberforce.

¹⁶ [1977] 10 WLUK 11.

¹⁷ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

6-09. The specific circumstances of *Jackson* now fall within the provisions of the Package Travel and Linked Travel Arrangements Regulations 2018. This legislation allows consumers to claim against tour operators in certain circumstances where their package holidays are unsatisfactory.¹⁸ The European Court of Justice found that non-material damages are recoverable under the Directive which underpinned the previous version of these Regulations (the Package Travel, Package Holidays and Package Tours Regulations 1992).¹⁹ This would clearly encompass Mr Jackson's claim for the distress suffered by his family. In the more recent case of *Minhas v Imperial Travel Ltd*,²⁰ a woman brought a claim under the Regulations against the tour operator with whom she had contracted for a holiday for herself and her partner. Following *Jackson*, District Judge Young permitted her to recover damages in respect of the impact of unsuitable accommodation on her and her partner. It is likely that future holiday-makers will rely on the statutory principle in the Regulations rather than on *Jackson*. However, the principle from the case remains applicable to the recovery of losses suffered outwith holiday contexts, such as those identified by Lord Wilberforce.²¹

6-10. The concept of contracts for the benefit of another appears to be accepted in English law, in light of its recognition in *Jackson v Horizon Holidays*²² and similar cases. However, the exact scope of the doctrine is unclear. In *Jackson*, Lord Denning relied on the case of *Lloyds v Harper*²³ for his proposition that, where two parties contract for one of them to perform in favour of a third party, the other contracting party can recover for the third party's losses stemming from defective performance, regardless of whether there is a fiduciary relationship between that party and the third party.²⁴ The plaintiff in *Lloyds v Harper*²⁵ was acting as a trustee for the external party for whom damages were sought. In *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*,²⁶ the House of Lords did not accept that *Lloyds v Harper* supported the general proposition put forward by Lord Denning. They did, however, find that *Jackson* could be treated as an authority for the narrower proposition that the plaintiff could recover where its personal loss was made worse by disappointment in the fact that relevant family members did not enjoy their holiday.²⁷

6-11. The implications of *Woodar v Wimpey* are unclear. Merkin has suggested that the speeches highlight that a contracting party can recover only if it is "affected" by the

¹⁸ See discussion in para 5-29 above.

¹⁹ *Leitner v Tui Deutschland GmbH & Co KG* (C0168/00) EU:C:2002:163, [2002] All ER (EC) 561. The relevant Directive is the Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

²⁰ [2002] 6 WLUK 491.

²¹ See para 6-07 above.

²² [1975] 1 WLR 1468.

²³ [1888] 16 Ch D 290.

²⁴ [1975] 1 WLR 1468 at 1473.

²⁵ [1888] 16 Ch D 290.

²⁶ [1980] 1 WLR 277 at 293 per Lord Russell of Killowen and at 297 per Lord Keith of Kinkel.

²⁷ See also *Calabar Properties Ltd v Sticher* [1984] 1 WLR 287.

third party's loss.²⁸ This is not reflected in subsequent case law. In *Forster v Silvermere Golf and Equestrian Centre*,²⁹ the defendant agreed to build a house which would be occupied rent-free by the plaintiff and her children, but did not uphold this agreement. When the defendant refused to provide the house, the plaintiff could recover for her own loss, but was not able to obtain damages in respect of her children. It is difficult to see why Mr Jackson's suffering caused by the impact on his children's holiday was greater than that of a mother affected by the loss of her children's future home. However, in *Forster v Silvermere* Dillon J reasoned that the mother could not recover for her children because she had not acted as their trustee or agent;³⁰ the concept of contracts for the benefit of another was not considered. Whilst Merkin's comment is not therefore correct, the qualifications in *Woodar v Wimpey* dilute Lord Denning's wide-ranging principle from *Jackson*, and the scope of the concept is accordingly unclear in English law.

6-12. Contracts for the benefit of another are perhaps a remnant from the inadmissibility of third-party rights in English law. In *Hohler v Aston*, for example, Sargant J remarked that the "third parties, of course, cannot themselves enforce a contract made for their benefit, but the person with whom the contract is made is entitled to enforce the contract".³¹

6-13. The relationship between contracts for the benefit of another and third-party rights is discussed further below.³²

(4) Impact of English case law on Scots law

6-14. The concept of contracts for the benefit of another exists in Scots law: Lord Eassie's judgment in *Blyth & Blyth Ltd v Carillion Construction Ltd*³³ is authority for the principle that a contractual party can recover damages for financial loss and personal injury suffered by the party for whom the contract was made in the event of defective performance. However, it cannot be said with certainty that *Jackson*³⁴ would be followed in future cases in which the pursuer attempted to recover contractual damages for the emotional suffering of those for whom the contract was made. There is no barrier in Scots law to the recovery of damages in respect of suffering and discontent in disappointing holiday cases or similar situations such as Lord Denning's example of a vicar who books transportation for his choir. Scots law may thus follow English law in future by allowing damages in such cases. At present, however, the concept of contracts for the benefit of another is more fully developed and wider in scope in English law than in Scots.

²⁸ R Merkin, "The Enforcement of Promises made for the Benefit of a Third Party", in Merkin (ed), *Privity* 21, para 2.11.

²⁹ (1981) 42 P & CR 255.

³⁰ (1981) 42 P & CR 255 at para 258 per Dillon J.

³¹ *Hohler v Aston* [1920] 2 Ch 420 at 425 per Sargant J.

³² See paras 6-16ff.

³³ 2002 SLT 961 at para 36 per Lord Eassie. See above at para 6-05.

³⁴ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

C. COMPATIBILITY WITH SCOTS LAW

6-15. This section discusses the interaction between contracts for the benefit of another and third-party rights, and then considers the compatibility of contracts for the benefit of another with privity, contract theory, and delict. The final subsection addresses whether the recognition of contracts for the benefit of another is supported by relevant policy considerations.

(1) Interaction between contracts for the benefit of another and third-party rights

6-16. The Scottish Law Commission has recently described *Jackson v Horizon Holidays*³⁵ as a “possible modern example of a contract with a third-party right in favour of young children”.³⁶ However, they distinguish between the case and third-party rights as traditionally understood in Scots law, noting that there are some circumstances in which third parties have “passive capacity only”, and are unable to enforce the contracts from which they benefit.³⁷ The term “passive” here refers to the external party’s inability to enforce the contract in its own right, rather than the party’s lack of contractual capacity. The external party’s inability to sue on the contract indicates that third-party rights and contracts for the benefit of another are separate concepts. Whilst contracts for the benefit of another can be treated as a passive form of third-party rights, there is however a key distinction between the two concepts: a third party can enforce a third-party right in its own name, whereas the external party for whom a contract for the benefit of another is made cannot.

6-17. The question of whether the external party can enforce its benefit is determined according to the intentions of the contracting parties. The Scottish Law Commission recognises that: “third parties benefited by contracts between others may not have rights to those benefits because the contracting parties do not so intend”.³⁸ In the case of both third-party rights and contracts for the benefit of another, the parties intend to confer a benefit on an external party. However, the parties intend to confer an enforceable benefit on the third party (in the case of a third-party right), but not the external party (in the case of a contract for the benefit of another). A contract for the benefit of another may arise where, for example, parents wish to agree on a child-support agreement for the benefit of their child, but they do not intend the child to have the ability to enforce this agreement at its own suit. Beale discusses the possibility of passive third parties, acknowledging that a contracting party may actively choose for the third party not to acquire a right. He notes that a person may, for example, engage a builder to repair his elderly uncle’s house, without intending the uncle to have any contractual right to enforce the contract with the builder, because the uncle can no

³⁵ [1975] 1 WLR 1468.

³⁶ SLC, Discussion Paper on *Third Party Rights* para 2.33. See also SLC, Report on *Third Party Rights* para 1.13, citing *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 and *Lougheed v On The Beach Ltd* [2014] EWCA Civ 1538.

³⁷ SLC, Discussion Paper on *Third Party Rights* para 2.33.

³⁸ SLC, Report on *Third Party Rights* para 1.14.

longer manage his own affairs. Beale submits that the person who makes the contract should be able to obtain a remedy on behalf of the uncle.³⁹

6-18. The Scottish Law Commission did not make clear, in their discussion of *Jackson v Horizon Holidays*,⁴⁰ that there is a sharp distinction between passive external parties and the recipients of third-party rights.⁴¹ Whilst the Scottish Law Commission's reforms dealt with "active" third-party rights only, it is helpful to acknowledge that these concepts are separate. It is suggested that the terminology of third-party rights should be restricted to cases where the third party is intended to receive an enforceable right. Cases in which the external party has a passive capacity only can be referred to as contracts for the benefit of another.

6-19. Merkin argues that, if contracting parties are able to enforce third-party rights, there is no need for a separate concept of contracts for the benefit of another, because such contracts can be viewed as giving rise to enforceable third-party rights.⁴² Allowing contracting parties to enforce third-party rights would undeniably be useful. The Scottish Law Commission, for example, acknowledge situations in which a third party is willing to receive the benefit conceived in its favour, but is unable to raise an action through, for example, a lack of funds or poor health.⁴³ However, it is not clear in Scots law whether a contracting party can enforce a third party's right or recover damages for defective performance or non-performance of the right.⁴⁴ This contrasts with contracts for the benefit of another. It is clear from *Jackson v Horizon Holidays*⁴⁵ and similar cases⁴⁶ that the party who makes the contract can recover damages for the third party's loss. Further, the crucial distinction remains that, in the case of contracts for the benefit of another, the external party cannot enforce its own right. Accordingly, third-party rights and contracts for the benefit of another would remain as distinct concepts even if it was clarified that contracting parties could enforce third-party rights. Contracts for the benefit of another should, however, be viewed as a passive form of third-party rights.

³⁹ H Beale, "Privity of contract: judicial and legislative reform" (1995) 9 *JCL* 103, 108.

⁴⁰ [1975] 1 *WLR* 1468.

⁴¹ For example, they mention in SLC, Report on *Third Party Rights* para 2.14 that a "contract with a third-party right in favour of young children might arise when a parent books a family holiday for him- or herself and the rest of the family". It is true that the parents and holiday-company may intend to confer an enforceable right on the children. However, the Report appears to offer this example in reference to *Jackson*, in which the parties did not intend the children to have an enforceable third-party right.

⁴² R Merkin, "The Enforcement of Promises made for the Benefit of a Third Party", in Merkin (ed), *Privity* 21, para 2.4.

⁴³ Scottish Law Commission, Memorandum on *Constitution and Proof of Voluntary Obligations: Stipulations in Favour of Third Parties* (Scot Law Com Memorandum No 38, 1977) para 48. See also McBryde, *Contract* para 10.10.

⁴⁴ This was not clarified in the Contract (Third Party Rights) (Scotland) Act 2017. See also MacQueen, *SME* para 839; Scottish Law Commission, Memorandum on *Constitution and Proof of Voluntary Obligations* para 48. In English law, it is clear that the contracting party not bound to perform in the third party's favour can enforce the third-party right: Contracts (Rights of Third Parties) Act 1999 s 1(7).

⁴⁵ [1975] 1 *WLR* 1468.

⁴⁶ See discussion above at paras 6-07 to 6-09.

(2) Compatibility with the privity doctrine

6-20. As mentioned immediately above, contracts for the benefit of another are a passive form of third-party rights. In Scotland, third-party rights are accepted as an exception to the privity doctrine.⁴⁷ This does not necessarily lead to the conclusion, however, that contracts for the benefit of another are also an exception. Indeed, it is submitted that contracts for the benefit of another do not operate as an exception to privity.

6-21. As discussed in chapter 2,⁴⁸ privity prevents an external party from enforcing contractual obligations in contracts to which it is not party. Regarding contracts for the benefit of another, however, the external party cannot at any stage enforce the benefit in its favour, nor does it receive the damages recovered in respect of its loss. The cases discussed in previous chapters did not consider the impact of the privity rule on a contracting party's ability to recover damages on behalf of the person benefited by a contract. However, Burrows' view is that privity does not prevent the contracting party from enforcing the contract even though the contract is one for the benefit of a third party.⁴⁹ This is correct, because the purpose of the "benefits" aspect of the privity doctrine is to protect the contracting parties against contractual claims from external parties to whom they did not intend to owe liability. Privity is not therefore breached when a contracting party is permitted to make a contract to benefit another and can recover damages where the contract is not properly performed.

6-22. A parallel can be drawn between contracts for the benefit of another and contracts conferring incidental benefits on third parties. Regarding the latter, completion of the contract results in a positive outcome for external parties, but the contracting parties do not intend that the external parties will have the right to enforce the incidental benefit. This does not breach privity, because the external parties cannot enforce the incidental benefit.⁵⁰ The benefit to the external party conferred under a contract for the benefit of another is intended to be enforceable by the party who contracts for the external party. However, this benefit is also, from the perspective of the external party, merely incidental. The external party cannot interfere in the operation of the contract, and it cannot claim damages for itself if the contract is not properly performed. The external party cannot therefore bypass privity to claim in respect of its incidental benefit.

6-23. Contracts for the benefit of another are therefore compatible with the privity doctrine. However, the concept usefully highlights the scope of privity in Scots law by demonstrating that privity is not breached where a contracting party can enforce a term in a contract in favour of an external party. In contrast, third-party rights are an exception to privity because the third party can enforce the right in its own name. Privity permits the contracting parties to create an enforceable contractual obligation

⁴⁷ This is discussed in para 3-20.

⁴⁸ See, in particular, paras 2-04 to 2-05 and 2-16 to 2-18.

⁴⁹ A Burrows, *A Restatement of the English Law of Contract* (2016) para 46.

⁵⁰ See also para 2-05 above.

involving performance in favour of an external party, provided that the external party can enforce this obligation only if it is the recipient of a third-party right.

6-24. There is a general rule in both Scots and English law that damages cannot be recovered in respect of a loss which falls on a third party.⁵¹ This reflects the principle that damages are compensatory.⁵² The rule can be distinguished from the privity doctrine: privity excludes third parties from receiving enforceable benefits under the contract and from being burdened under the contract, whereas the “third-party loss” rule prevents contracting parties from recovering losses which they do not suffer. The two rules are, however, obviously closely related, because they both reflect the general principle that contracts should not concern external parties.⁵³

6-25. Whilst contracts for the benefit of another do not contravene privity, a secondary consideration is whether the concept is an exception to the rule that a contracting party can recover only for its own losses. This matter is relatively clear-cut in the context of financial loss. If, for example, a person books a holiday for four people, the person can recover the full value of the holiday, rather than simply a quarter of the price. The financial value of the holiday is affected by the number of people for whom the booking was made, in terms of the number of hotel rooms, flights, etc. The person who concludes the contract and has paid for the holiday is clearly the person who is out of pocket, and the financial loss falls entirely on that person. Where the person who made the contract receives damages in respect of all or part of its monetary value, they are therefore recovering their own financial loss.

6-26. In cases in which the contracting party is permitted to recover damages for *solatium*, as in *Jackson v Horizon Holidays*⁵⁴ and the similar cases discussed above, it is less clear that the contracting party is recovering its loss only. If a person has booked a holiday for four people and suffers a breach of contract, the person does not suffer four times as much disappointment as someone who booked a solo trip. Rather, the disappointment is felt by each member of the group individually. The emotional impact of the loss of enjoyment of a holiday cannot realistically be said to fall solely on the contracting party. The House of Lords, as noted above, determined that *Jackson* applies only where the contracting party’s disappointment is worsened because of its friends’ or family’s distress. It could therefore be argued that the contracting party

⁵¹ *Owners of Cargo Laden on Board the Albacruz v Owners of the Albazero (The Albazero)* [1977] AC 774 at 846 per Lord Diplock; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin’s Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85 at 114 per Lord Browne-Wilkinson. See also B Coote, “The performance interest, Panatown, and the problem of loss” (2001) 117 *LQR* 81 at 81; G H Treitel, “Damages in respect of a third party’s loss” (1998) 114 *LQR* 527.

⁵² In other words, a party should not be able to recover compensation when it itself has not suffered a loss: see *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 at 291 per Lord Salmon.

⁵³ See J Cartwright, “Damages, third parties, and common sense” (1996) 10 *JCL* 244, 244–45; A Burrows, “No damages for a third party’s loss” (2001) 1 *Oxford University Commonwealth Law Journal* 107, 107–08.

⁵⁴ [1975] 1 WLR 1468.

is simply recovering additional damages for its own disappointment. However, the contracting party's disappointment at the failure to deliver the joint experience for which it had contracted cannot be conflated with the disappointment suffered by the external parties themselves. In *Jackson*, Lord Denning expressly explained that the sum awarded encompassed damages in respect of disappointment experienced by Mr Jackson's wife and children.⁵⁵ The fact that the damages were awarded in respect of the distress of those parties, rather than the added distress suffered by Mr Jackson, demonstrates that the contracting party was permitted to recover damages on behalf of others. Contracts for the benefit of another are, therefore, an exception to the rule that a contracting party cannot recover another's losses, although the implications cannot be explored further here.⁵⁶

(3) Compatibility with contract theory

6-27. Whilst contracts for the benefit of another differ from third-party rights in that they do not constitute an exception to privity, both concepts are compatible with contract theory on the grounds of contractual intention. As noted above, enforcement of the right (in the case of third-party rights) and the benefit to the external party (in the case of contracts for the benefit of another) depend on the intentions of the contracting parties.⁵⁷

6-28. Contracts for the benefit of another are therefore easily framed in terms of voluntary obligations, because they involve benefits conferred on easily recognisable external parties whom both contracting parties agree should benefit from contractual performance. Additionally, the contracting parties agree that the party who contracts for the external party's benefit can recover damages in respect of defective contractual performance. Liability in respect of the external party's loss reflects the will of both contracting parties. This is compatible with will theory. It can also be said that the contracting parties have voluntarily assumed responsibility for the external party, in accordance with assumption theory.

6-29. In terms of promissory theory, Brownsword and Hutchison explain that this theory can account for situations involving both "direct" promises to third parties (in which contracting party A promises contracting party B that it will confer a benefit on third party C, and A promises C that it will confer a benefit on C) and "indirect" promises (A promises B that it will benefit C, but does not make such a promise to C).⁵⁸ The direct promises appear to describe third-party rights, and the indirect promises cohere with the Scots and English understanding of contracts for the benefit of another. The latter could be explained in terms of promissory theory because the promise made by one contracting party to perform in favour of the external party is upheld. In other words, the obligation to confer a benefit on the external party could

⁵⁵ [1975] 1 WLR 1468 at 1473.

⁵⁶ The potential for further research on this point is discussed at para 11-26 below.

⁵⁷ See paras 6-17, 3-08 and 3-13 above.

⁵⁸ R Brownsword and D Hutchison, "Beyond Promissory Principle and Protective Pragmatism", in Kincaid (ed), *Privity* 126, 130.

be framed as a promise made by the relevant contracting party to the party who made the contract for the external party.

6-30. In summary, contracts for the benefit of another are compatible with contract theory on the same grounds as third-party rights:⁵⁹ both concepts uphold contractual intention.

(4) Contracts for the benefit of another and delict

6-31. According to Hodgson, *Jackson v Horizon Holidays*⁶⁰ is a contractual anomaly which ought to have been decided according to the law of tort.⁶¹ However, he bases this argument on the privity doctrine, arguing that privity prevents enforceable rights on the part of third parties. Hodgson was correct, at the time his article was published, that privity in English law prevented third-party claims.⁶² However, as has been demonstrated in this chapter, the concept does not breach the privity doctrine. It is possible to frame contracts for the benefit of another in terms of voluntary obligations, and the concept need not be examined in terms of delictual liability.

6-32. Contracts for the benefit of another can be distinguished from the disappointed beneficiary cases considered in chapter 4.⁶³ In those cases, the relevant parties (the solicitor and the testator) did not intend to confer a benefit on the third party which was enforceable on the part of one of the contracting parties.

(5) Policy considerations justifying contracts for the benefit of another

6-33. As discussed in chapter 5, third-party rights reflect a policy aim of contractual efficiency.⁶⁴ Contracts for the benefit of another can also be justified on this basis. The concept allows the contracting party to enter into a single contract for all relevant parties, and allows also the benefits of the contract and right of redress to accrue to it in respect of all the parties for whom the contract was made. This is more efficient than requiring separate transactions in respect of each party whom the contracting party wishes to benefit. Both third-party rights and contracts for the benefit of another therefore offer an efficient means of contracting. The two concepts also reflect a policy aim of ensuring that the intentions of contracting parties are upheld.⁶⁵

6-34. The policy aim of protecting external parties does not apply where the contracting party recovers its own financial loss. However, contracts for the benefit

⁵⁹ Third-party rights are compatible with contract theory because they arise in accordance with the intentions of the contracting parties: paras 3-08 and 3-13 above.

⁶⁰ [1975] 1 WLR 1468.

⁶¹ J Hodgson, "Jackson v Horizon Holidays – a case of mistaken identity?" (1992) 1 *Nottingham Law Journal* 27, 29 and 34-35.

⁶² Hodgson wrote the article prior to the passage of the Contracts (Rights of Third Parties) Act 1999.

⁶³ See paras 4-15 to 4-16 above.

⁶⁴ This is discussed in para 5-32 above.

⁶⁵ See above at para 6-17.

of another permit recovery of loss for another's distress and disappointment, demonstrating a policy consideration of protecting external parties from this type of loss. For example, the clear policy objective behind the Package Travel and Linked Travel Arrangements Regulations 2018 is the protection of consumer holiday-makers, including those for whom package holiday contracts are concluded.⁶⁶ The other situations identified by Lord Denning to which the doctrine of contracts for the benefit of another may apply (for example, a substandard meal booked by one person on behalf of a group) may not involve the same level of disappointment as a ruined holiday. However, the underlying principle is the same: where a contract made by one person on behalf of one or more others is defectively performed, the contract-maker ought to be able to recover damages in respect of disappointment and distress. This upholds a policy consideration of protecting external parties from distress and disappointment suffered due to defective performance of a contract.

6-35. The concept also reflects a policy aim of encouraging efficient means of protecting external parties more generally. This chapter has mentioned the examples of a man who contracts with a builder for repairs to his uncle's home, and parents who make a child-support agreement providing for their child.⁶⁷ In both cases, the external party is unable to enforce a contractual obligation in its own right. Contracts for the benefit of another allow for their protection without requiring, in these examples, the nephew to obtain a power of attorney when he might wish simply to provide financial assistance to his uncle, or a parent to enforce the agreement in the child's name. As such, contracts for the benefit of another are a useful mechanism for adults with incapacity, children, and other vulnerable parties.

6-36. As discussed above, it is not entirely clear that Scots law would allow recovery of damages for distress and disappointment suffered by an external party.⁶⁸ In future cases, however, Scots law may follow *Jackson v Horizon Holidays*⁶⁹ and uphold claims for distress and disappointment suffered by external parties, in order to recognise this policy aim.

6-37. There is a lack of clarity in Scots and English law as to whether the contracting party who claims on behalf of the third party must account to the third party for the losses recovered. None of the cases discusses such a duty. In familial situations, such as *Jackson*, this issue would generally not be controversial. It is likely that a person who recovers damages on behalf of their family would distribute the damages to the relevant family members. However, issues may arise where the contracting party recovers on behalf of friends or colleagues. The contracting party may have been reimbursed proportionally by each person for whom the contract was made (for example, each of their travel companions paid their portion of the fares directly

⁶⁶ See the discussion on the Regulations at paras 5-29ff above.

⁶⁷ See para 6-17 above.

⁶⁸ See para 6-05 above.

⁶⁹ [1975] 1 WLR 1468.

to the contracting party). If the person who made the contract receives a sum of damages in respect of the ruined holiday, the damages should surely be returned, on a proportional basis, to the external parties. No doubt the person who made the contract should not always and automatically be required to distribute the damages in this way, because such distribution may not be problematic or even appropriate in all situations (particularly in familial contexts). However, where a third party does not receive damages in respect of their loss from the contracting party, they should be able to claim this from the contracting party. The person who makes the claim can be treated as acting as an agent on behalf of those who suffered the loss. It is not required that an agent and principal conclude a formal agency contract, and Scots law permits an agent to conclude a contract simultaneously on behalf of its principal and itself.⁷⁰

6-38. Contracts for the benefit of another can also be said to support a policy of ensuring that loss caused by breach of contract is recoverable. Recovery of damages for disappointment suffered by external parties in cases such as *Jackson* ensures that the contracting party in breach is held accountable for the extent of loss caused by their failure to fulfil their contractual obligations. Where a contracting party has agreed to provide a benefit to parties on whose behalf the contract is made, recovery of damages for the impact of defective performance on external parties ensures that the obligation to perform is upheld. This in turn ensures that the loss caused by the breach of contract is recoverable.

6-39. These considerations are not required to justify contracts for the benefit of another as an exception to privity, because they do not breach the privity doctrine. However, these policy justifications could potentially be used to explain the concept's deviation from the rule against recovery of another's losses.

D. CONCLUDING REMARKS

6-40. In this chapter, it has been shown that contracts for the benefit of another are a passive form of third-party rights, although the concept should be distinguished from third-party rights on the basis that the contracting parties do not confer an enforceable benefit on the third party. Contracts for the benefit of another are not an exception to the privity doctrine, and the concept is compatible with Scots contract theory on the same grounds as third-party rights. Further, contracts for the benefit of another are supported by sound policy considerations: contractual efficiency, upholding contractual intention, ensuring recovery for loss caused by breach of contract, and protecting external parties.

6-41. The concept of contracts for the benefit of another is wider in English law than in Scots law, in that English law permits the recovery of damages for distress and disappointment suffered by external parties. Scots law should follow *Jackson v*

⁷⁰ See paras 8-18 and 9-57 below.

*Horizon Holidays Ltd*⁷¹ in recognising the principle that contracting parties can recover damages for distress and disappointment as well as for financial and physical loss. In both Scots and English law, the law should be clarified to ensure that an external party can claim damages recovered on its behalf from the contracting party.

⁷¹ [1975] 1 WLR 1468.

7 Transferred Loss

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A. OVERVIEW OF CHAPTER 7

7-01. This chapter defines transferred loss and summarises its development in Scots and English law. It then addresses whether transferred loss is compatible with Scots contract and delict law, whether there are sound policy considerations supporting its existence, and whether it should continue to be recognised in Scots law.

B. TRANSFERRED LOSS IN SCOTS AND ENGLISH LAW

7-02. This section discusses the development of transferred loss in both Scots and English law, because the case law in the two jurisdictions is closely intertwined. Firstly, transferred loss is defined. The following subsections then focus on four contentious issues in the development of the transferred loss doctrine: whether the loss falls on the contracting party or the third party; the role of contractual intention; whether a transferred loss claim must be a last resort; and whether the contracting party or the third party should be able to claim in respect of the loss.

(1) Definition of transferred loss

7-03. Where loss results from a breach of a contract between A and B, but the loss has somehow (wholly or partly) “transferred” to C, there is a legal black hole. The transferred loss doctrine attempts to resolve this black hole by allowing contracting party A to advance a claim against B in respect of C’s loss.¹ In the English House of Lords case of *Panatown Ltd v Alfred McAlpine Construction Ltd*,² for example, McAlpine was employed by Panatown to build on land owned by UIPL. The work was defective. Although Panatown did not suffer loss, it sought to recover UIPL’s expenses incurred in repairing the building.

7-04. C cannot, under the rules of transferred loss, recover damages on its own behalf. Rather, A must sue on C’s behalf, and transfer any damages recovered to C.³ The term “legal black hole” was first used in this context in Scotland by Lord Stewart in *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd*.⁴

(2) The party on whom the loss falls

7-05. The relationship between transferred loss and the rule against recovery of another’s loss⁵ is relevant to the question of whether transferred loss contravenes the privity doctrine.⁶ Whilst privity prevents the external party from accruing contractual rights under the contract, and the external party in transferred loss situations does not claim in its own right, the fact that the third party’s loss is recoverable may indicate that transferred loss operates as a functional equivalent of an exception to privity. This subsection addresses the question of the party on whom the loss falls.

7-06. In both jurisdictions, transferred loss is viewed as an exception to the rule that a contracting party generally cannot recover for a third party’s loss.⁷ The initial Scots case from which the transferred loss doctrine can be sourced is *Dunlop v Lambert*, decided in 1839.⁸ The House of Lords held that where goods are lost at sea, a consignor can recover substantial damages even where the goods, when they are lost,

¹ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 33 per Lord Drummond Young; *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157 at 166 per Lord Stewart; *Axon Well Intervention Products Holdings v Craig* [2015] CSOH 4, 2015 GWD 5-96 at para 29 per Lord Doherty; *Marquess of Aberdeen and Temair v Messrs Turcan Connell* [2008] CSOH 183, 2009 SCLR 336 at para 45 per Lady Smith; Jackson, *SME* para 158; Hogg, *Obligations* para 3.174; J Thomson, “Restitutory and performance damages” 2001 *SLT (News)* 71, 73–74.

² [2001] 1 AC 518.

³ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 42 per Lord Drummond Young; *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157 at 177 per Lord Keith of Kinkel; *Marquess of Aberdeen and Temair v Messrs Turcan Connell* [2008] CSOH 183, 2009 SCLR 336 at para 46 per Lady Smith; Hogg, *Obligations* para 3.188.

⁴ 1982 SC (HL) 157 at 166. More detailed discussion of the various terms used in transferred loss cases is found in N Davidson, “The law of black holes?” (2006) 22 *Professional Negligence* 53, 53–55.

⁵ This rule is discussed at para 6-24 above.

⁶ The relationship between transferred loss and privity is discussed further below at paras 7-27ff.

⁷ A Mason, “Privity – A Rule in Search of Decent Burial?”, in Kincaid (ed), *Privity* 88, 96.

⁸ *Dunlop v Lambert* (1839) Macl & R 663.

are the property of the consignee. The case has since been applied in situations where the consignee has neither title nor risk, and does not have a right to possession of the goods.⁹

7-07. *Dunlop v Lambert* was affirmed by the House of Lords in modern times in *The Albazero*,¹⁰ which also concerned the carriage of goods. But the *Dunlop* exception was modified by saying that it ought not to apply to contracts which expressly state or imply that the carrier will enter into a separate contract (for example, a bill of lading) with the future owner.¹¹ Lord Diplock's speech emphasised that the parties must have contemplated that the breach will affect a third party, rather than the party which has the contractual right of recovery. Where the exception applied, the parties were accordingly "treated in law" as having entered into a contract "for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged".¹²

7-08. The rule developed in *Dunlop v Lambert* and *The Albazero* was initially recognised only in the context of carriage of goods. It was later applied to building contracts in the House of Lords case of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*; *St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd*¹³ and by the Court of Appeal in *Darlington Borough Council v Wiltshier Northern Ltd*.¹⁴

7-09. In *St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd*, *Darlington BC v Wiltshier Northern Ltd* and also in *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd*,¹⁵ the contracting parties were granted substantial damages for cost of repair in respect of losses suffered by third parties. In *St Martin's Property Corporation Ltd*, the House of Lords offered two possible grounds for the award of such damages: the so-called "broad" and "narrow" grounds. According to the narrow ground, the loss falls on the third party, and the contracting party recovers on the third party's behalf.¹⁶ In contrast, the broad ground provides that the loss ultimately falls on the contracting party, who recovers for its own loss.¹⁷

7-10. Judicial opinion diverges on whether the broad or narrow ground is the correct basis for the award of damages. The broad ground was first put forward by Lord Griffiths in *St Martin's Property Corporation Ltd*. The narrow ground was adopted and applied by the majorities in *Darlington BC v Wiltshier Northern Ltd*

⁹ B Coote, "More light on *Dunlop v. Lambert*" (1988) 57 *CLJ* 250. See also Mackenzie, *SME* para 42.

¹⁰ *Owners of Cargo Laden on Board the Albacruz v Owners of the Albazero (The Albazero)* [1977] AC 774.

¹¹ [1977] AC 774 at 823 per Ormrod LJ.

¹² [1977] AC 774 at 847.

¹³ [1994] 1 AC 85.

¹⁴ [1995] 1 WLR 68. For further discussion see M Furmston, "Damages for loss suffered by someone else" (1996) 6 *Construction Law* 201.

¹⁵ 1982 SC (HL) 157. In that case, the reason stated for the third party's lack of title to sue was that it was not the owner of the relevant property.

¹⁶ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 529 and 535 per Lord Clyde.

¹⁷ [2001] 1 AC 518 at 543–46 per Lord Goff of Chieveley and at 586–92 per Lord Millet.

and *Panatown Ltd v Alfred McAlpine Construction Ltd*.¹⁸ In *Panatown*, the majority favoured the narrow ground, but Lords Goff of Chieveley and Millet's dissenting speeches indicated agreement with Lord Griffith's broad ground.¹⁹ The broad ground has found favour with some academic commentators,²⁰ and the performance interest has been recognised in various cases.²¹

7-11. The broad ground was rejected in both *St Martin's Property Corporation Ltd* and *Panatown*²² on the ground that a breach of contract does not constitute loss in and of itself, and the loss was consequently viewed as falling on the third party.²³ Lords Clyde, Jauncey of Tullichettle and Browne-Wilkinson upheld the narrow ground in *St Martin's Property Corporation Ltd*. In a recent Supreme Court case, the court, hearing an English appeal, discussed the transferred loss doctrine but refrained from clarifying whether the narrow or broad ground was correct.²⁴ In a later case, Coulson LJ appeared to apply the Supreme Court decision in determining that the broad ground is "good law",²⁵ but it is submitted that this was incorrect.²⁶

7-12. In Scots law, the idea of a damages black hole was expressly accepted in the Outer House case of *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group*.²⁷ Lord Drummond Young's recognition of the transferred loss doctrine in that case has been affirmed in subsequent cases.²⁸ His acceptance of transferred loss in *McLaren Murdoch* was based on the English House of Lords case of *Panatown Ltd v Alfred McAlpine Construction Ltd*,²⁹ which Lord Drummond

¹⁸ [2001] 1 AC 518.

¹⁹ [2001] 1 AC 518 at 543–46 per Lord Goff of Chieveley and at 586–92 per Lord Millet. See further the analysis in G Hawkes, "Emerging from a black hole" 2003 *SLT* (News) 285.

²⁰ J Thomson, "Restitutionary and performance damages" 2001 *SLT* (News) 71; I N D Wallace, "Third party damages: no legal black hole?" (1999) 115 *LQR* 394; B Coote, *Contract as Assumption II* (2016) 50–51.

²¹ Earlier cases recognising the performance interest include: *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277; *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468; *Radford v De Froberville* [1977] 1 WLR 1262; and *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344.

²² See also Hawkes, "Emerging from a black hole".

²³ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 533–34 per Lord Clyde.

²⁴ *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313 at para 17 per Lord Sumption and paras 53–54 per Lord Mance. The case was not decided on the basis of transferred loss. For comment, see A Trotter, "Reconsidering transferred loss" (2019) 82 *MLR* 727.

²⁵ *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596, [2019] 1 Lloyd's Rep 491 at para 70 per Coulson LJ. See also *D R Jones Yeovil Ltd v The Stepping Stone Group Ltd* [2020] EWHC 2308 (TCC), [2020] TCLR 9 at para 139 per Judge Russen QC.

²⁶ See L MacFarlane, "Whose loss is it anyway? Transferred loss in the Court of Appeal" (2019) 23 *EdinLR* 401, 402.

²⁷ 2003 *SCLR* 323.

²⁸ *Marquess of Aberdeen and Temair v Messrs Turcan Connell* [2008] CSOH 183, 2009 *SCLR* 336 at para 45 per Lady Smith; *Axon Well Intervention Products Holdings v Craig* [2015] CSOH 4, 2015 *GWD* 5-96 at para 29 per Lord Doherty.

²⁹ [2001] 1 AC 518. See G Hawkes, "Emerging from a black hole" 2003 *SLT* (News) 285.

Young described as “wholly consistent with the principles of Scots law”.³⁰ He rejected the broad ground on the basis that a contracting party cannot seek substantial damages where it has not suffered a loss.³¹ The transferred loss claim is consistently referred to as a “*Panatown* claim” in *Axon Well Intervention Products Holdings v Craig*,³² demonstrating that *Panatown* remains the leading case in both Scots and English law.

7-13. The narrow ground is therefore dominant in Scots law. English judicial opinion is somewhat mixed, and so the question of whether the loss falls on the contracting party or the third party is not settled in English law.

(3) The role of contractual intention

7-14. Following *Axon Well Intervention Products Holdings v Craig*,³³ it is unclear whether the transferred loss doctrine operates in accordance with the intentions of the contracting parties in Scots law. In that case, Lord Doherty stated that the transferred loss doctrine provides that the law ought to permit redress despite the absence of privity where it can be ascertained from the “imputed intention of the contracting parties” that the contract should benefit the third party.³⁴ Lord Doherty indicated that the contracting parties’ intention that the third party’s loss is recoverable can be express or implied.³⁵ However, this appears to contradict Lord Drummond Young³⁶ and Lady Smith’s³⁷ previous judgments, in which they comment that damages in “black hole” cases are conferred as a matter of general legal policy regardless of the intentions of the contracting parties.³⁸

7-15. At the Court of Appeal stage in *Alfred McAlpine Construction Ltd v Panatown Ltd* the court took a contract-based approach. It found that a claim for damages in respect of a third party’s loss ought to be successful where the contracting parties intended or contemplated that the contracting party not in breach should have the right to make such a claim.³⁹ However, this was subject to academic

³⁰ 2003 SCLR 323 at para 42. See also J Thomson, “Restitutionary and performance damages” 2001 *SLT* (News) 71.

³¹ 2003 SCLR 323 at paras 40–41.

³² See, for example, *Axon Well Intervention Products Holdings v Craig* [2015] CSOH 4, 2015 GWD 5-96 at para 25 per Lord Doherty.

³³ [2015] CSOH 4, 2015 GWD 5-96.

³⁴ [2015] CSOH 4 at para 45. The interaction between transferred loss and the privity doctrine is discussed below at paras 7-27ff.

³⁵ [2015] CSOH 4 at para 45.

³⁶ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 42.

³⁷ *Marquess of Aberdeen and Temair v Messrs Turcan Connell* [2008] CSOH 183, 2009 SCLR 336 at para 45.

³⁸ See also Hogg, *Obligations* para 3.188. The contradiction between Lord Doherty’s judgment and earlier Scots cases on transferred loss is discussed in L MacFarlane, “Black holes and revelations on the transferred loss doctrine” (2015) 19 *EdinLR* 388.

³⁹ [1998] CLC 636 per Evans LJ. For discussion see G H Treitel, “Damages in respect of a third party’s loss” (1998) 114 *LQR* 527, 530; B Coote, “More light on *Dunlop v. Lambert*” (1988) 57 *CLJ* 250, 251.

criticism,⁴⁰ and English case law now recognises that contractual intention is not necessary for the transferred loss doctrine to apply. For example, Lord Clyde stated in *Panatown* in the House of Lords that transferred loss cannot be based on the contracting parties' intentions because they "may in reality not have applied their minds to the point" of whether the plaintiff contracting party should be able to recover for losses sustained by third parties.⁴¹

7-16. In one Scots case, *Clark Contracts Limited v The Burrell Company Construction Management Limited (No 2)*,⁴² Sheriff Taylor submitted that "black-hole" cases could, in Scots law, be resolved by imposition of a *jus quaesitum tertio*. This, however, was dismissed in *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group*, where Lord Drummond Young noted that, for a third-party right to apply, the contracting parties must intend to benefit the external party in question, and this is not the case in transferred loss situations.⁴³ This view is reflected in recent comment from the Scottish Law Commission. Their Discussion Paper on *Remedies for Breach of Contract* recognises that third-party rights may provide a solution where the contracting parties objectively intend to provide an enforceable right for the party on whom the loss falls.⁴⁴ However, the Commission's Report on *Third Party Rights* states that transferred loss operates in cases in which third-party rights could not apply.⁴⁵ "Black hole" situations can arise where the contracting parties do *not* intend the party who suffers the loss to have an enforceable remedy,⁴⁶ whereas a third-party right is conferred only where the contracting parties do so intend. Transferred loss is therefore distinct from third-party rights in both Scots and English law. The fact that transferred loss can apply in cases where the contracting parties could have conferred a third-party right reinforces the view that transferred loss does not operate according to the parties' intentions. If they intended to benefit the third party, they could have done so by conferring a third-party right. They chose not to do so, but the law nevertheless imposes a means of recovering the third party's loss.

7-17. The consensus in both Scots and English law is therefore that intention on the part of the contracting parties that third-party losses are recoverable is not required to apply the transferred loss doctrine.

⁴⁰ Treitel, "Damages in respect of a third party's loss" 530–32. Treitel states that such an approach offers an "unhelpful" general principle which can only be applied following construction of the contract, and argues that this is not in step with cases which have previously upheld the general rule that one may not recover damages for breach of contract in respect of another's losses (such as *Beswick v Beswick* [1968] AC 58; *White v Jones* [1995] 2 AC 207; and *Carr-Glynn v Frearsons* [1997] 2 All ER 614).

⁴¹ [2001] 1 AC 518 at 530.

⁴² 2003 SLT (Sh Ct) 73. Unberath has made similar comment regarding English law: H Unberath, "Third party losses and black holes: another view" (1999) 115 *LQR* 535, 536–37.

⁴³ 2003 SCLR 323 at para 39 per Lord Drummond Young.

⁴⁴ Scottish Law Commission, Discussion Paper on *Remedies for Breach of Contract* (Scot Law Com DP No 109, 1999) para 9.5.

⁴⁵ SLC, Report on *Third Party Rights* para 6.16.

⁴⁶ SLC, Report on *Third Party Rights* paras 1.22 and 6.16. This is discussed further below at paras 7-40ff.

(4) Transferred loss as a last resort

7-18. The transferred loss doctrine is a gap filler in Scots law. According to Lord Drummond Young, it does not apply where the third party has other means of redress.⁴⁷ Transferred loss is also viewed as a last resort in English law. For example, Lord Clyde recognises in *Panatown Ltd v Alfred McAlpine Construction Ltd* that third-party rights and agency are not always a fruitful means of redress in situations where a party suffers extra-contractual loss, and indicates that this was a factor in the justification for the development of the transferred loss doctrine.⁴⁸

7-19. However, it is not clear when exactly it can be said that the third party has no other means of redress and is therefore able to rely on a transferred loss claim. In *Panatown* itself, the transferred loss claim was unsuccessful because the third party had a right of action against the party in breach under a duty of care deed to which it was party.⁴⁹ More recent English authority confirms that courts will “not recognise the existence of a black hole (as between the contract-breaker and his counterparty) if the third party who benefits from contractual performance has his own, separate right of redress”.⁵⁰ Coote notes that the contract, if only the third party could have claimed on it, offered a far higher level of protection than the duty of care deed, raising the question of how great the difference in protection must be before transferred loss no longer applies.⁵¹

7-20. In *Axon Well Intervention Products Holdings v Craig*,⁵² the defender claimed that the third party in question had other, non-contractual but direct, means of redress. It could make a delictual claim, based on the defender causing unlawful loss,⁵³ or a claim based on the fact that the defender had acted as a *de facto* director of the third-party company and consequently owed it a fiduciary duty of care.⁵⁴ Lord Doherty recognised that where the contracting parties “provide for or contemplate the third party being given a distinct entitlement directly to sue a defender, the parties are likely to be taken to have intended to have excluded the option of a *Panatown* claim being made”.⁵⁵

⁴⁷ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 42 per Lord Drummond Young; *Axon Well Intervention Products Holdings v Craig* [2015] CSOH 4, 2015 GWD 5-96 at para 30 per Lord Doherty. See also MacQueen, *SME* para 863.

⁴⁸ [2001] 1 AC 518 at 523 per Lord Clyde. See also *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*; *St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85 at 115 per Lord Browne-Wilkinson; B Coote, “The performance interest, Panatown, and the problem of loss” (2001) 117 *LQR* 81, 88–89.

⁴⁹ [2001] 1 AC 518 at 531 per Lord Clyde; at 558 per Lord Goff of Chieveley; at 574 per Lord Jauncey of Tullichettle; at 577–78 per Lord Browne-Wilkinson; and at 582 per Lord Millet.

⁵⁰ *D R Jones Yeovil Ltd v The Stepping Stone Group Ltd* [2020] EWHC 2308 (TCC), [2020] TCLR 9 at para 130 per Russen QC. See also *Palmali Shipping SA v Litasco SA* [2020] EWHC 2581 (Comm) at para 54 per Foxton J.

⁵¹ Coote, “The performance interest, Panatown, and the problem of loss” 88.

⁵² [2015] CSOH 4, 2015 GWD 5-96.

⁵³ [2015] CSOH 4 at para 12 per Lord Doherty.

⁵⁴ [2015] CSOH 4 at para 14 per Lord Doherty.

⁵⁵ [2015] CSOH 4 at para 38, citing *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 530, 531–32, and 536 per Lord Clyde; at 567–68 per Lord Jauncey of Tullichettle; at 576–77 per Lord Browne-Wilkinson; and at 582–83 per Lord Millet.

7-21. Lord Doherty stressed that, in some circumstances, a non-contractual remedy may therefore exclude a transferred loss claim.⁵⁶ However, he also commented that, in situations where the contracting parties had made no provision for the third party, or had not contemplated potential remedies for the third party, a non-contractual remedy must provide “equivalent means of redress and equivalent prospects of success to an action for damages for breach of contract” in order to exclude a transferred loss claim.⁵⁷ On the particular facts, he considered that the third party would achieve more satisfactory redress through transferred loss than through the suggested non-contractual methods, because the latter would present the company with “greater difficulty and uncertainty”.⁵⁸ This view was based on the fact that it would prove challenging to show that the defender was acting as a *de facto* director of the third-party company.⁵⁹ Further, a delictual claim, unlike a contractual *Panatown* claim, would not be based on strict liability.⁶⁰ Lord Doherty’s reference to “equivalent” remedies is striking. This contrasts with Lord Drummond Young’s view of transferred loss as a remedy of last resort.⁶¹

7-22. It is therefore accepted in Scots and English law that transferred loss ought to be used as a last resort, where the third party does not have another means of recovering the loss. However, the scope of this principle is unclear and appears to be in the process of development. The question of when a third party cannot be said to have an alternative means of redress is not yet settled, at least in Scots law, given Lord Doherty’s judgment in *Axon Well*.

(5) The party which can recover the loss

7-23. As noted above, it is clear that a third party cannot recover its loss in its own name.⁶² Nonetheless, this is controversial. The Scottish Law Commission recently considered reform of the transferred loss doctrine.⁶³ They found that consultees generally agreed with their view that it is preferable for the third party to have a direct claim against the contracting party responsible for the loss.⁶⁴ However, it was concluded that the recommendations in their Report could not encompass “a satisfactory solution to the difficulties raised by [the third party’s] present inability to recover transferred loss directly without much further investigation of the various commercial and other contexts in which the issue may arise”.⁶⁵

⁵⁶ [2015] CSOH 4 at para 42.

⁵⁷ [2015] CSOH 4 at para 42.

⁵⁸ [2015] CSOH 4 at para 45.

⁵⁹ [2015] CSOH 4 at para 36.

⁶⁰ [2015] CSOH 4 at para 45.

⁶¹ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 42 per Lord Drummond Young.

⁶² See above at para 7-04.

⁶³ Scottish Law Commission, Report on *Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (Scot Law Com No 252, 2018) ch 18.

⁶⁴ Report on *Formation, Interpretation, Remedies for Breach, and Penalty Clauses* paras 18.36 to 18.41.

⁶⁵ Report on *Formation, Interpretation, Remedies for Breach, and Penalty Clauses* para 18.56.

7-24. The Scottish Law Commission did not, therefore, make any recommendations as to reform of the doctrine, but identified the need for further research.⁶⁶

7-25. Hawkes notes that families and companies in the same group “might have no hesitation in doing the decent thing” in terms of handing over damages recovered in respect of third-party losses, but he questions the practical implications of allowing the contracting party to recover where its relationship with the third party is at arm’s length.⁶⁷ He also comments on the risk of the contracting party’s insolvency prior to transferring the damages to the third party: “are we forced into a constructive trust situation with all the difficulties that entails?”⁶⁸ Sir Anthony Mason also notes that the third party is reliant on the promisee for damages to compensate for its loss.⁶⁹ Unberath observes that the common interest identified in the majority of transferred loss cases merely evidences why the contracting party with title to sue is willing to pursue the action on the part of the third party.⁷⁰ It is not satisfactory to allow the right of action as a matter of happenstance, when the interests of the contracting party and third party align – particularly as such a situation is likely to occur where both are commercial parties, and transferred loss situations may arise where the third party is in a much weaker position.⁷¹ It is clearly more practicable for the third party to have the ability to recover its own loss. The transferred loss doctrine can hardly be said to solve the problem of “black holes” if the third party’s recovery is dependent on the goodwill of the contracting party. It is thus submitted that the doctrine should be reformed to permit the external party to recover its losses in its own name. This would ensure that the transferred loss doctrine is logically coherent and results in consistent outcomes.

C. COMPATIBILITY WITH SCOTS LAW

7-26. This section considers whether transferred loss is compatible with privity, contract theory, and delict, and whether there are justifiable policy considerations in support of the concept.

(1) Compatibility with the privity doctrine

7-27. There are two approaches to the recovery of loss using the transferred loss doctrine. According to the narrow ground, the contracting party claims against the party in breach on the third party’s behalf.⁷² The broad ground provides that loss to

⁶⁶ Report on *Formation, Interpretation, Remedies for Breach, and Penalty Clauses* para 18.58.

⁶⁷ G Hawkes, “Emerging from a black hole” 2003 *SLT (News)* 285, 286.

⁶⁸ Hawkes, “Emerging from a black hole” 286. The difficulties of constructive trusts in Scots law are discussed in G L Gretton, “Constructive trusts: I” (1997) 1 *EdinLR* 281 and “Constructive trusts: II” (1997) 1 *EdinLR* 408. See also B Coote, *Contract as Assumption II* (2016) 42, in which Coote also briefly rules out an agency analysis of transferred loss.

⁶⁹ A Mason, “Privity – A Rule in Search of Decent Burial?”, in Kincaid (ed), *Privity* 88, 96.

⁷⁰ H Unberath, “Third party losses and black holes: another view” (1999) 115 *LQR* 535, 540.

⁷¹ The use of exceptions to privity in protecting weaker parties is discussed at paras 5-44ff above.

⁷² See para 7-09 above.

the third party caused by breach of contract falls on the contracting party, which recovers damages on its own behalf. As noted above, the narrow ground is firmly accepted in Scots law, whereas English judicial opinion is less clear.⁷³ The question of whether the broad or narrow ground is preferable in terms of policy and pragmatic considerations is discussed immediately below. This section then assesses the implications of both grounds for the compatibility of transferred loss with the privity doctrine.

(a) The broad and narrow grounds: policy and pragmatic reasoning

7-28. Wallace favours the broad ground because there is “ample authority” against allowing a third party to recover for losses stemming from breach of obligations for which it has provided no consideration.⁷⁴ However, consideration is not a requirement of formation of a contract under Scots law.⁷⁵ Further, even in England the law on third-party rights does not impose a requirement that the third party must have paid consideration to the contracting party due to perform in its favour.⁷⁶ Consideration is not therefore a convincing argument for the broad ground.

7-29. Others feel that the broad ground should be recognised because it gives effect to the contracting party’s performance interest,⁷⁷ i.e. “the interest of a promisee in obtaining performance”.⁷⁸ Lord Griffiths argues that the loss falls on the contracting party because it must, following the breach, make payment in order to gain the benefit of the contract (by meeting the cost of repair and by bringing the subject of the contract in line with its contractual standard).⁷⁹ This is supported by a paragraph in *Treitel’s Law of Contract*, in which it is stated that the promisee recovers for the loss it sustains in ensuring that the third party receives its benefit.⁸⁰ Various cases may demonstrate authority for the recognition of the performance interest.⁸¹ Thomson submits that this approach is consistent with Scots law, in which “the importance of performance has long been recognised”.⁸² He argues that the primacy of the performance obligation in

⁷³ See paras 7-05ff above.

⁷⁴ I N D Wallace, “Third party damages: no legal black hole?” (1999) 115 *LQR* 394, 403. See also *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*; *St Martin’s Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85 at 112 per Lord Browne-Wilkinson.

⁷⁵ See para 2-70 above.

⁷⁶ The formation requirements of Scots and English third-party rights are discussed at paras 3-08ff and paras 3-12ff respectively.

⁷⁷ B Coote, “The performance interest, Panatown, and the problem of loss” (2001) 117 *LQR* 81, 82.

⁷⁸ B Coote, *Contract as assumption: essays on a theme* (2010) 131.

⁷⁹ *Alfred McAlpine Construction Ltd v Panatown Ltd* [1998] CLC 636; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*; *St Martin’s Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85 at 96–98 per Lord Griffiths.

⁸⁰ G H Treitel, *The Law of Contract* (11th edn, 2003) 591. See also Coote, “The performance interest, Panatown, and the problem of loss” 82–83.

⁸¹ See, for example, *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344; *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 590–91 per Lord Millett and at 546 per Lord Goff of Chieveley; and further discussion in Coote, “The performance interest, Panatown, and the problem of loss” 83.

⁸² J Thomson, “Restitutionary and performance damages” 2001 *SLT (News)* 71, 74.

Scots contract law is evidenced by the weight given to specific implement, and the fact that damages are measured by the cost of alternative performance or the cure of defective performance where specific implement is impossible or refused.⁸³ Coote submits that the alternative approach of allowing the promisee to recover only nominal damages “offends common sense, and that usually signals a fallacy somewhere in the reasoning”.⁸⁴

7-30. Whilst, in light of Thomson’s comments, it is clear that Scots law recognises the performance interest as such, a contracting party cannot generally recover damages where it has not suffered a loss.⁸⁵ Recognition of the performance interest cannot therefore extend to awarding substantial damages where the loss falls on an external party, and so the performance interest could not justify the broad ground in Scots law. The analysis is also inadequate in explaining transferred loss in English law. The function of transferred loss is to prevent damages “black holes”,⁸⁶ which arise precisely because the third party suffers loss. There may be strong arguments for the recognition of the performance interest generally, but this does not resolve the fact that it is the third party, rather than the contracting party, who suffers loss. Giving effect to the performance interest recognises the interests of the contracting party, but the focus should be on the third party, because that is the party on whom the loss caused by defective performance falls. Additionally, a contracting party need not make good the loss suffered by a third party unless it is contractually obliged to do so by the third party. As such, it cannot be said that the loss falls on the contracting party simply because it does not receive the performance due under the contract.

7-31. Wallace notes that recovery under the broad ground can be extended only to defective or incomplete performance of contracts for the supply of work and materials, excluding forms of breach or loss arising due to “some affinity of interest” between the contracting party and the third party.⁸⁷ For example, the extent of loss resulting from delay in performance will depend on the circumstances of the party affected.⁸⁸ Similarly, Unberath notes that it is difficult to apply the broad ground in the recovery of consequential loss, because this is “not a necessary concomitant of the right to performance as such”.⁸⁹ If the loss is treated as that of the contracting party, then the value of the loss recoverable must be calculated from the perspective of that party. The broad ground does not permit the impact of the breach on the third party to be taken into account. Accordingly, an advantage of the narrow ground is that it allows a “more

⁸³ Thomson, “Restitutionary and performance damages” 72 (noting *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344).

⁸⁴ B Coote, “More light on *Dunlop v. Lambert*” (1988) 57 *CLJ* 250, 252.

⁸⁵ See paras 5-52 and 6-25 above.

⁸⁶ This is discussed at para 7-54 below.

⁸⁷ I N D Wallace, “Defects and third parties: no peace for the wicked?” (1999) 15 *Construction Law Journal* 245, 260.

⁸⁸ Wallace, “Defects and third parties: no peace for the wicked?” 261.

⁸⁹ Unberath, “Third party losses and black holes” 541; Coote, “The performance interest, Panatown, and the problem of loss” 95.

logical basis”⁹⁰ for the recovery of the actual loss suffered by the third party due to factors such as losses caused by delay.

7-32. Wallace suggests that the narrow ground demands a restrictive and “non-existent ‘contract basis’” for recovery of third-party losses in situations where this will not have been contemplated, citing the example that a transfer of a development project to a different entity in the company group could not have been anticipated in the construction contract in *St Martin’s*.⁹¹ He further comments that allowing a contracting party to recover for a third party’s loss in “black hole” situations “may open the floodgates in other areas of commerce to capricious or complicated damages claims of every kind”.⁹² However, as is discussed further below,⁹³ the operation of transferred loss does not depend on whether the contracting parties have contemplated the third party’s loss. Further, the floodgates argument is difficult to justify given that the contracting party in breach will not suffer any additional liability if the loss is treated as the third party’s. Rather, the party in breach must make good the loss only once: to the other contracting party, if it falls on it, or to the third party, if the loss has transferred.

7-33. The narrow ground is also demonstrated to be more logical on examination of the relevant case law. Coote points out that, in *Panatown*,⁹⁴ the relevant land at all material times belonged to UIPL, and so Panatown could not have been said to suffer from a loss recoverable in damages either at common law or in accordance with the *Dunlop* exception.⁹⁵ Additionally, Hawkes notes that the “very transaction which initiates [the third party’s] involvement – the transfer of the property – [is] at the hand of [the contracting party]”.⁹⁶ Accordingly, he argues that the third party sustains a “distinct but related loss” at the point at which it pays the contracting party a sum greater than the building’s value.⁹⁷ In transferred loss situations, it is simply unrealistic and illogical to describe the loss as the contracting party’s when the loss clearly falls on the third party. Treating the loss as the contracting party’s is a legal fiction, and this is unnecessary in light of the narrow ground.

7-34. Accordingly, it appears that the most logical and pragmatic view of the transferred loss doctrine is the narrow ground, because the loss clearly falls on the third party.

⁹⁰ Wallace, “Defects and third parties: no peace for the wicked?” 261. See also A Mason, “Privity – A Rule in Search of Decent Burial?”, in Kincaid (ed), *Privity* 88, 95.

⁹¹ I N D Wallace, “Third party damages: no legal black hole?” (1999) 115 *LQR* 394, 405 (citing *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*; *St Martin’s Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85).

⁹² Wallace, “Third party damages: no legal black hole?” 405.

⁹³ See paras 7–40ff below.

⁹⁴ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

⁹⁵ B Coote, “The performance interest, Panatown, and the problem of loss” (2001) 117 *LQR* 81, 89.

⁹⁶ G Hawkes, “Emerging from a black hole” 2003 *SLT (News)* 285, 286.

⁹⁷ Hawkes, “Emerging from a black hole” 286.

(b) The narrow ground: compatibility with privity

7-35. As already mentioned, it is the narrow ground that is accepted in Scots law.⁹⁸ Further, whilst there is a lack of consensus as to whether the broad or narrow ground is dominant in English law, it was shown in the immediately preceding subsection that the narrow ground provides the better explanation for the transferred loss doctrine.⁹⁹ It is clear that the broad ground does not contravene privity: the loss is treated as the contracting party's, and so there is no question of the third party benefiting under the contract.¹⁰⁰ The relevant issue here, however, is whether the narrow ground is compatible with the privity doctrine.

7-36. There has not been a great deal of express judicial discussion on the transferred loss doctrine and privity. Relevant judgments identify the potential tension between the privity doctrine and recovery of the third party's loss. Most recently, in *Axon Well Intervention Products Holdings v Craig*,¹⁰¹ Lord Doherty states that the "rationale" of *Panatown* is that "the law will not tolerate a loss caused by a breach of that provision to go uncompensated through an absence of privity between the party suffering the loss and the party causing it".¹⁰²

7-37. Elsewhere, Lord Drummond Young identifies "the significance of the doctrine of privity of contract to the problem of the legal black hole".¹⁰³ However, neither judgment expressly describes the operation of transferred loss in accordance with the narrow ground as an exception to the privity doctrine. Academic commentators have also noted that transferred loss potentially affects the English understanding of privity, but have refrained from describing the concept as an exception to privity. Coote, commenting on *Panatown*,¹⁰⁴ states that "placing the loss with UIPL meant that, while a claim for damages arose, the problem was at root one of privity and the rights of third parties".¹⁰⁵ Unberath mentions the Court of Appeal judgment in *Panatown* as a "focus of attention in the privity debate"¹⁰⁶ and Treitel makes similar comment.¹⁰⁷

7-38. Transferred loss is certainly a greater threat to privity than contracts for the benefit of another. As discussed in the previous chapter, the latter are not an exception to privity because both parties intend to confer a benefit on the third party, and one of the contracting parties can accordingly recover for the third party's loss.¹⁰⁸ In contrast,

⁹⁸ See para 7-12 above.

⁹⁹ See paras 7-28ff above.

¹⁰⁰ For further comment, see Coote, "The performance interest, Panatown, and the problem of loss" 90.

¹⁰¹ [2015] CSOH 4, 2015 GWD 5-96.

¹⁰² [2015] CSOH 4 at para 45, citing *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 535 per Lord Clyde.

¹⁰³ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 38. See also *Slemming v Ross* 2010 GWD 36-742 at paras 24–26 per Sheriff Principal Sir Stephen ST Young Bt QC.

¹⁰⁴ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

¹⁰⁵ Coote, "The performance interest, Panatown, and the problem of loss" 92; see also 81 and 83–84.

¹⁰⁶ Unberath, "Third party losses and black holes" 535.

¹⁰⁷ G H Treitel, "Damages in respect of a third party's loss" (1998) 114 *LQR* 527, 532.

¹⁰⁸ See paras 6-21ff above.

transferred loss involves the recovery of the third party's loss in circumstances where the contracting parties did not intend this to take place. This in turn appears to confer a benefit on the third party, in that its loss is accounted for and, if the contracting party agrees, damages are returned to the third party. Privity, however, only prevents the conferral of benefits enforceable *on the part of the third party* without the consent of the contracting parties.¹⁰⁹ It concerns the third party's rights and liabilities under a contract, rather than the contracting parties' ability to recover for the third party's loss. The narrow ground permits recovery of the third party's loss, but the third party cannot make a claim itself. The fact that only the contracting party can recover the loss therefore means that privity is not circumvented.

7-39. It was suggested above¹¹⁰ that the transferred loss doctrine should be reformed to allow the third party to recover the loss in its own name. If this was permitted, transferred loss would indeed operate as an exception to the privity doctrine, because the third party would have the right to make a contractual claim under a contract to which it was not party. The question of whether this would be a justifiable deviation from privity is discussed further below.¹¹¹

(2) Compatibility with contract theory

7-40. It is evident from both case law and commentary that transferred loss is applied regardless of (and sometimes contrary to) the intentions of the contracting parties.¹¹² The only contrary view is Lord Doherty's recent statement that transferred loss is based on the "imputed intention of the contracting parties ... that a third party should benefit from a provision of the contract".¹¹³ This view is not consistent with the previous body of case law. It remains to be seen whether Lord Doherty's view will be adopted by the Inner House or the Supreme Court. Further, his judgment does not attempt to justify his position. He does, however, appear to accept that transferred loss is not based on the *actual* intentions of the contracting parties. The present state of the law is that transferred loss stems from involuntary obligations. It cannot therefore be said to cohere with will theory.

7-41. In transferred loss cases, the party who has caused the third party's loss does not make a promise (to the other contracting party or the third party) that the party not in breach will have a claim to recover damages for the third party. The party in breach does not voluntarily assume liability in respect of the third party's loss. Transferred loss is therefore compatible with neither promissory nor assumption theories of contract.¹¹⁴

¹⁰⁹ This is discussed at paras 2-35ff above.

¹¹⁰ See para 7-25 above.

¹¹¹ See paras 7-53ff below.

¹¹² See above at paras 7-14ff.

¹¹³ *Axon Well Intervention Products Holdings v Craig* [2015] CSOH 4, 2015 GWD 5-96 at para 45.

¹¹⁴ Coote has argued that transferred loss is compatible with the assumption theory of contract. However, this is based on his acceptance of the broad ground, which, as discussed above (paras 7-28ff) is not a logical or realistic assessment of transferred loss. See B Coote, *Contract as Assumption II* (2016) 50-51.

7-42. If the transferred loss doctrine was reformed to allow the third party to recover its loss, the concept would continue to be incompatible with Scots contract theory. The contracting parties in transferred loss situations do not intend to allow the third party to recover its loss, and so the concept would not comply with will theory. Similarly, it could not be said that the contracting parties made a promise to the third party to allow it to recover damages for its losses, nor that the parties voluntarily assumed liability in respect of the third party. The reformed transferred loss doctrine would not therefore be compatible with promissory or assumption theory.

(3) Compatibility with delict

7-43. Transferred loss is generally treated in commentary as a contractual concept. For example, McBryde refers to contract law as delict's "older sibling" which can address defects in the law on delict, citing transferred loss cases as an example of beneficial contractual action.¹¹⁵ Unberath suggests that a contractual action may be preferable where the transferred loss claim deals with a delay in performance, or is based on the plaintiff's expectation interest.¹¹⁶ Whilst the standard of care is normally the same in contract and delict, contract is a consensual obligation, and it is therefore, in contract, possible to bind oneself to a higher standard of duty than that mandated by the delictual standard of reasonable care.¹¹⁷ Judicial opinion also reflects a contractual analysis. In Scots law, a transferred loss claim has been permitted where a delictual action could have been made but may not have been as lucrative as a contractual claim.¹¹⁸ Accordingly, the contracting party in breach has been forced to comply with a higher standard than that required in delict.

7-44. However, the benefits of a contractual claim do not justify treating the right to recover the third party's loss as a contractual action. Transferred loss applies, as has been discussed,¹¹⁹ regardless of the intentions of the contracting parties, and a contractual analysis is thus not necessarily suitable. Some commentators impliedly treat transferred loss as delictual – for example, Bussani and Vernon Palmer refer to the contracting party responsible for the loss as the "tortfeasor".¹²⁰ Jackson also argues that delict law should be expanded to permit recovery of the third party's loss in "black hole" situations.¹²¹ This subsection addresses whether transferred loss could

¹¹⁵ W W McBryde, "Contract law – a solution to delictual problems?" 2012 *SLT (News)* 45, 46.

¹¹⁶ Unberath, "Third party losses and black holes" 537.

¹¹⁷ F McManus and E Russell, *Delict: A Comprehensive Guide to the Law in Scotland* (2nd edn, 2011) para 9.5.

¹¹⁸ *Axon Well Intervention Products Holdings v Craig* [2015] CSOH 4, 2015 GWD 5-96 at para 36 per Lord Doherty.

¹¹⁹ See paras 7-14ff above.

¹²⁰ M Bussani and V V Palmer, "The notion of pure economic loss and its setting", in M Bussani and V V Palmer (eds), *Pure Economic Loss in Europe* (2003) 3, 10. See also R Stevens, *Torts and Rights* (2007) 595.

¹²¹ Jackson, *SME* para 158, citing the results of *Caparo Industries Plc v Dickman* [1990] 2 AC 605, *Murphy v Brentwood District Council* [1991] 1 AC 398, and *D & F Estates Ltd v Church Commissioners for England and Wales* [1989] AC 177 as evidence that claims in respect of third-party loss should be permitted where the loss is caused by a contracting party.

be accounted for within the law of delict, because a contractual analysis is clearly not wholly satisfactory.

7-45. An initial point is that a delictual claim would not bypass the contractual allocation of risk. Unberath states that, because tortious liability involves the imposition of original, as opposed to derivative, liability, this would appear to deviate from the parties' contractual framework in transferred loss situations.¹²² However, there is no need to construe the contract between the parties as including an automatic desire to exclude any subsequent liability stemming from a foreseeable transfer of property. Whilst an exclusion clause in the contract should be upheld,¹²³ the existence of the contract should not exclude the possibility of a delictual duty of care arising in respect of those to whom the loss is transferred. Essentially, in the words of Bussani and Vernon Palmer, transferred loss claims are "liability neutral":¹²⁴ the party responsible for the loss is liable only for the amount which would have been due had the relevant property remained in the patrimony of the other contracting party.

7-46. The initial hurdle to a delictual understanding of transferred loss is that pure economic loss is only exceptionally recoverable in delict or tort.¹²⁵ The means of recovering pure economic loss, outlined in chapter 4,¹²⁶ are now considered in turn.

7-47. Firstly, *Hedley Byrne* liability¹²⁷ cannot apply in transferred loss situations, because this form of liability allows for recovery of loss resulting from reliance on negligent misstatements, rather than the transfer of property. *Henderson v Merrett Syndicates Ltd* liability¹²⁸ is a similarly unsuitable analysis, because transferred loss cases do not involve the third party's reliance on the contracting party's performance of a particular service.

7-48. Additionally, it is not possible to treat transferred loss as an exception to the rules on bright-line liability.¹²⁹ The existing exceptions to this rule rest on the very narrow circumstance of the pursuer's possession or ownership of the property which is damaged. In some transferred loss cases, the damage occurs at a time at which the property is in the possession of the contracting party who is not responsible for the third party's loss, rather than the third party.¹³⁰

¹²² Unberath, "Third party losses and black holes" 537. See also *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 at 817–18 per Lord Brandon of Oakbrook.

¹²³ Unberath, "Third party losses and black holes" 537.

¹²⁴ Bussani and Palmer, "The notion of pure economic loss" 12.

¹²⁵ Unberath, "Third party losses and black holes" 537.

¹²⁶ See paras 4-09ff above.

¹²⁷ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

¹²⁸ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

¹²⁹ This form of liability is explained at para 4-13 above.

¹³⁰ This was the case in, for example, *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

7-49. An analysis of transferred loss based on *White v Jones* liability¹³¹ initially appears to be more promising. In both transferred loss and disappointed beneficiary cases, imposing liability is the only means of holding the contract-breaker to account.¹³² Additionally, it has been claimed that Lord Goff of Chieveley introduced a theory of transferred rights into English law in the case of *White v Jones*.¹³³ However, the transferred loss situations differ from those involving disappointed beneficiaries in that the contracting party in the former case does not contract with the objective of securing any benefits for another party. Whereas a testator contracts in order to benefit the beneficiary, and the loss results from the solicitor's failure to perform under the contract, in transferred loss cases the contracting party contracts for its own benefit even if the loss ultimately transfers to the third party. Further, a key policy objective of disappointed beneficiary cases is upholding the contractual intent of the testator,¹³⁴ whereas transferred loss claims do not stem from the lack of realisation of the will of the contracting party who can recover for the third party's loss.

7-50. The remaining option is to consider the principle of *Junior Books Ltd v Veitchi Co Ltd*,¹³⁵ the high point in the recoverability of pure economic loss.¹³⁶ For *Junior Books* liability to apply, the person who causes the loss and the person who suffers the loss must be connected by a series of contracts and it must be reasonably foreseeable that the loss will result from the careless act. Additionally, the party who causes the loss must know three things: the identity of the person who suffers the loss; that the person who has suffered the loss is in a contract with the person with whom they are also in a contract; and that economic loss on the pursuer's part will follow from careless performance of the contract.¹³⁷ When the contracting parties originally contract in transferred loss cases, the party responsible for the loss will likely be aware of the fact that the contract could be assigned, or that the property in question could at any stage be transferred to someone else, but it cannot know that its defective performance will result in loss to the particular person on whom the loss eventually falls. In other words, there is a lack of proximity. Accordingly, it does not appear that *Junior Books* liability could be imposed in transferred loss situations.

7-51. Extending *Junior Books* liability to cover transferred loss cases would be possible if the requirement that the contracting party is aware of the potential loss on the part of the third party was not applied where it is foreseeable that the loss may be transferred to another. Unberath states that there is no need in such cases for a contemplation requirement, because the debtor is protected by the remoteness rule, and the risk of liability is the same regardless of whether the debtor is subject to a

¹³¹ *White v Jones* [1995] 2 AC 207.

¹³² An overview of disappointed beneficiary cases is provided at paras 4-15ff above.

¹³³ R Stevens, *Torts and Rights* (2007) 177-78.

¹³⁴ See para 4-15 above.

¹³⁵ 1982 SC (HL) 244.

¹³⁶ See para 4-28 above.

¹³⁷ *D & F Estates Ltd v Church Commissioners for England and Wales* [1989] AC 177. For analysis see Thomson, *Delictual Liability* para 4.20.

claim by the promisee for its own loss or in the context of a transferred loss claim.¹³⁸ For example, a cost of cure rendered by the third party in a construction case would be recoverable in accordance with the remoteness rule, but it would not matter that the contracting parties had not contemplated whether a third party might suffer this loss instead of the promisee.¹³⁹ The primary policy argument for allowing delictual claims in transferred loss situations is that, as stated by Bussani and Vernon Palmer, refusing such claims allows the tortfeasor responsible for the loss to “benefit from the accidental operation of rules which by pure chance exclude him from liability” against those on whom the loss falls.¹⁴⁰ The principal reason for the development of transferred loss is to prevent black holes,¹⁴¹ and treating the concept as delictual could enable this policy objective to be upheld without violating contract theory.

7-52. As discussed earlier, however, *Junior Books*¹⁴² itself is not highly regarded.¹⁴³ The revival of the case, and particularly making it wider in scope, would be a controversial step. The general trend of the law of delict is that recovery of pure economic loss is permitted in circumstances where the pursuer is a “particular individual”, and their interests are “distinctly contemplated by the [defender] at close range”.¹⁴⁴ Imposing delictual liability in transferred loss situations would not reflect this focus. The immediately following subsection addresses whether transferred loss is supported by justifiable policy reasons, and whether a reformed transferred loss doctrine would be a justifiable exception to privity. If transferred loss could be treated as a contractual concept, this would avoid unnecessarily jeopardising the clarity and coherence of delictual liability by reviving *Junior Books*. If delict evolves in future to return to a more positive view of *Junior Books* liability, then this form of liability could provide an explanation for transferred loss. Regarding the current law, however, a delictual analysis is unsuitable, regardless of whether the contracting party or the third party can recover for the loss.

(4) Policy considerations justifying transferred loss

7-53. There are two dominant policy considerations reflected in the development of transferred loss: preventing third-party losses from falling into damages “black holes” and ensuring that the loss caused by breach of contract is recoverable, such that the contract-breaker does not escape liability. This subsection examines whether these policy considerations could support a reformed transferred loss doctrine as a justifiable exception to privity.

¹³⁸ Unberath, “Third party losses and black holes” 544.

¹³⁹ Unberath, “Third party losses and black holes” 545.

¹⁴⁰ M Bussani and V V Palmer, “The notion of pure economic loss and its setting”, in M Bussani and V V Palmer (eds), *Pure Economic Loss in Europe* (2003) 3, 12. See also C von Bar, *The Common European Law of Torts* vol 1 (2000) 510–11.

¹⁴¹ See para 7-54 above.

¹⁴² *Junior Books Ltd v Veitchi Co Ltd* 1982 SC (HL) 244.

¹⁴³ The case is discussed above at paras 4-28 and 4-31ff.

¹⁴⁴ M Bussani and V V Palmer, “The liability regimes of Europe – their façades and interiors”, in M Bussani and V V Palmer (eds), *Pure Economic Loss in Europe* (2003) 120, 141.

7-54. The first justification, that transferred loss prevents “black holes”, is emphasised in case law. Lord Drummond Young comments that these are “clearly undesirable; in a well-regulated legal universe black holes should not exist”.¹⁴⁵ This view was affirmed in *Axon Well Intervention Products Holdings v Craig*.¹⁴⁶ In the context of English law, Lord Clyde makes similar comment in *Panatown Ltd v Alfred McAlpine Construction Ltd*.¹⁴⁷ In terms of academic commentary, Jackson considers that transferred loss developed because “to do otherwise would leave a ‘black hole’ where the party suffering the loss would have no title to sue, but the party with title to sue would have suffered no loss”.¹⁴⁸

7-55. The second policy consideration supporting the transferred loss doctrine is ensuring recovery of loss caused by breach of contract, even where the loss does not fall on the person with whom the contract-breaker originally contracted.¹⁴⁹ In *Royal Insurance (UK) Ltd v Amec Construction Scotland Ltd*,¹⁵⁰ which was not decided on the basis of transferred loss, it was noted that *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd*,¹⁵¹ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*,¹⁵² and *Panatown Ltd v Alfred McAlpine Construction Ltd*¹⁵³ reflect a “hostility” of the common law to “black holes”, and that the policy of the law may be “moving in the direction of recognising that the day-to-day working out of ordinary family and commercial relationships should not, without good reason, be held to relieve a wrongdoer of an apparently justified liability”.¹⁵⁴

7-56. Academic commentators have adopted similar positions. Unberath points out that awarding damages for third-party loss in “black hole” situations is “justified in terms of substantive justice”.¹⁵⁵ Hawkes identifies the two main objectives of the courts in advancing the transferred loss doctrine: preserving an orderly legal universe in which those who breach contracts pay damages for their wrongdoing, and preserving the underlying fabric of contract law.¹⁵⁶ The Scottish Law Commission refers to the recognition of this policy in transferred loss contexts as “sound and rational”.¹⁵⁷ Todd

¹⁴⁵ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 33.

¹⁴⁶ [2015] CSOH 4, 2015 GWD 5-96 at para 29 per Lord Doherty. See also *Marquess of Aberdeen and Temair v Messrs Turcan Connell* [2008] CSOH 183, 2009 SCLR 336 at para 45 per Lady Smith.

¹⁴⁷ [2001] 1 AC 518 at 523.

¹⁴⁸ Jackson, *SME* para 158.

¹⁴⁹ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 587–88 and 591 per Lord Millet. See discussion in Unberath, *Transferred Loss* 144 and 192.

¹⁵⁰ [2005] CSOH 162, [2006] PNL 12.

¹⁵¹ 1982 SC (HL) 157.

¹⁵² *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85.

¹⁵³ [2001] 1 AC 518.

¹⁵⁴ *Royal Insurance (UK) Ltd v Amec Construction Scotland Ltd* [2005] CSOH 162, [2006] PNL 12 at para 20 per Lord Emslie.

¹⁵⁵ Unberath, “Third party losses and black holes” 543.

¹⁵⁶ G Hawkes, “Emerging from a black hole” 2003 *SLT (News)* 285, 288.

¹⁵⁷ Scottish Law Commission, *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (Scot Law Com No 252, 2018) para 18.28.

similarly notes that imposing liability in defective building cases promotes professional accountability on the part of builders, engineers, and architects.¹⁵⁸

7-57. However, as discussed in chapter 5, not all losses stemming from defective performance or non-performance should be accounted for in circumstances where the loss falls on a third party.¹⁵⁹ It is not accepted in Scots law that a loss stemming from defective performance ought always to be recoverable.¹⁶⁰ Accordingly, whilst ensuring recovery of losses caused by breach of contract is a valid consideration in the development of the transferred loss doctrine, this factor alone cannot provide a justification for the doctrine.

7-58. The commentary and case law on the avoidance of “black holes” do not focus on the protection of the third party from financial loss. Whilst the narrow approach to transferred loss is accepted in Scots law, such that the contracting party can recover the third party’s loss, the protection of external parties does not appear to have played a significant role in the development of the doctrine. The judicial focus seems to have been more on avoiding the injustice of the situation as a whole rather than protecting the affected third parties. This is surprising, because the recovery of damages in many transferred loss situations could have been based on the protection of, for example, consumer home-buyers affected by a breach of the contract between the builder and initial land-owner. A particularly close parallel could be drawn between a transferred loss doctrine based on consumer protection and the latent damages and defective premises legislation discussed in chapter 5.¹⁶¹ On the other hand, the majority of transferred loss cases are between commercial parties, including many involving transfers of property within, for example, company groups,¹⁶² and so consumer protection cannot provide a wholesale justification for a reformed doctrine. Additionally, consumer home-buyers will often have protection under the National House Building Council warranty scheme.¹⁶³ However, the protection of external parties is a relevant policy consideration, and the reform of transferred loss to permit third-party claims could be justified on this basis. Those who are not protected by NHBC warranties ought, generally, to be able to make a claim against the party who caused their loss.

7-59. Arguably, however, transferred loss situations tend to arise where the third party ought to have protected itself from the risk of loss. We must therefore consider whether transferred loss could be replaced with more widespread use of collateral warranties. These operate as contracts between the granter and grantee, and may serve the same purpose as transferred loss, i.e. evading “black holes” by imposing

¹⁵⁸ S Todd, “Policy Issues in Defective Property Cases”, in J W Neyers, E Chamberlain and S G A Pitel (eds), *Emerging Issues in Tort Law* (2007) 199, 214.

¹⁵⁹ See para 5-52 above. This is noted in reference to the development of transferred loss in N Davidson, “The law of black holes?” (2006) 22 *Professional Negligence* 53, 58.

¹⁶⁰ This is discussed at para 6-24 above.

¹⁶¹ See paras 5-17ff above.

¹⁶² *Axon Well Intervention Products Holdings v Craig* [2015] CSOH 4, 2015 GWD 5-96.

¹⁶³ For further information on these schemes, see NHBC warranty and insurance cover, available at: <http://www.nhbc.co.uk/Warrantiesandcover/>.

contractual duties on the grantor of the warranty.¹⁶⁴ Whilst there is some uncertainty as to the exact definition of a collateral warranty in Scots law,¹⁶⁵ these are “an important feature of modern practice in the construction industry”.¹⁶⁶ Collateral warranties allow for a right of action between parties who, due to their choice of legal structure, are not in a contractual relationship.¹⁶⁷ When building works are performed defectively, the party on whom the loss falls will not generally be the employer in the building contract. This is because the employer will usually have passed on its interest in the building to the party on whom the loss falls, or the building will have belonged to that party throughout the development.¹⁶⁸ *Murphy v Brentwood District Council*¹⁶⁹ curtailed the prospect of delictual liability in such situations, and privity prevents the party on whom the loss falls from pursuing a direct contractual action.¹⁷⁰ Consequently, according to Lord Drummond Young, “in order to ensure that the party who suffers actual loss has a right of action against any party who has provided defective work or against any member of the professional team who has acted negligently, the practice has grown up of taking collateral warranties from all of those who carry out work under the project”.¹⁷¹

7-60. It certainly seems that parties would be well advised to use collateral warranties to prevent “black hole” situations.¹⁷² However, contracting parties do not always use

¹⁶⁴ *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd (in liquidation)* [2010] CSOH 42, 2010 SLT 1102 at paras 1 and 17 per Lord Drummond Young. For discussion of the law from an English perspective, see J L Powell and R Stewart, *Jackson & Powell on Professional Liability* (8th edn, 2017) para 9.049.

¹⁶⁵ SLC, Report on *Third Party Rights* para 1.28, citing *Royal Bank of Scotland Plc v Carlyle* [2013] CSIH 75, 2014 SC 188 (overturned [2015] UKSC 13, 2015 SC (UKSC) 93).

¹⁶⁶ *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd (in liquidation)* [2010] CSOH 42, 2010 SLT 1102 at para 1 per Lord Drummond Young. See also *British Overseas Bank Nominees Ltd v Stewart Milne Group Ltd* [2019] CSIH 47, 2019 SLT 1253 at paras 9–12 per Lord Drummond Young.

¹⁶⁷ *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd (in liquidation)* [2010] CSOH 42, 2010 SLT 1102 at para 17 per Lord Drummond Young. See also *Glasgow Airport Ltd v Kirkman & Bradford* [2007] CSIH 47, 2007 SC 742 at para 7 per Lord Kingarth.

¹⁶⁸ *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd (in liquidation)* [2010] CSOH 42, 2010 SLT 1102 at para 1 per Lord Drummond Young. In *Macdonald Estates Plc v Regenesys (2005) Dunfermline Ltd* [2007] CSOH 123, 2007 SLT 791, for example, tenants in units of a shopping centre initially had a direct contractual claim only against the owner of the centre, and so collateral warranties were granted to allow the tenants to claim against the developer of the site for any defects in their units.

¹⁶⁹ [1991] 1 AC 398.

¹⁷⁰ *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd (in liquidation)* [2010] CSOH 42, 2010 SLT 1102 at para 1 per Lord Drummond Young.

¹⁷¹ *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd (in liquidation)* [2010] CSOH 42, 2010 SLT 1102 at para 1.

¹⁷² Collateral warranties may themselves be construed as exceptions to the privity doctrine: see further discussion in R Merkin, “The Enforcement of Promises made for the Benefit of a Third Party”, in Merkin (ed), *Privity* 21, para 2.3; J Jenkins and J Duckworth, “The Construction Industry”, in Merkin (ed), *Privity* 185, paras 8.69–8.73; *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854. Collateral warranties arise where the third party has been granted a right to enforce contractual obligations, in accordance with the contracting parties’ intentions, and so are justifiable on the same basis as third-party rights more generally (see paras 3-14ff above).

collateral warranties in situations where they could provide a useful right of action,¹⁷³ and the transferred loss doctrine may be applied when they have not done so.

7-61. It is easier to justify the imposition of liability on the contract-breaker in some situations than in others, depending on the position of the third party. Where the parties are closely related companies (for example, where the party who suffers the loss is a subsidiary of the original party to the contract), they ought to have considered their financial and legal obligations together, and, because they were in a position to obtain legal advice, they arguably should have had the foresight to secure a collateral warranty. Additionally, where all three parties involved in a transferred loss situation are commercial entities, it is difficult to identify any particular party as the weaker one who needs or deserves the law's protection. In contrast, where the third party buys a home in a personal capacity and discovers a defect, it is easier to draw a parallel between this situation and the statutory exceptions aimed at preventing loss on the part of consumers. The Carriage of Goods by Sea Act 1992 does, however, provide protection for commercial parties even where the party in question could have protected itself through insurance. Sometimes, perhaps, third parties should be protected even where they could have protected themselves. In a transferred loss context, the protection could extend to parties unconnected to the original contracting parties, even if the third party was also a commercial entity. Wallace argues that transferred loss can be explained on the basis of a close affinity of interest between the contracting party seeking to recover the loss and the third party.¹⁷⁴ However, it appears that the opposite is true: the recovery of the loss is more easily justified where it falls on a party who could not easily have protected itself. Indeed, as Unberath points out, the common interest of the parties identifiable in the relevant cases is coincidental.¹⁷⁵

7-62. In terms of the requirement that the loss recovered must be reasonably foreseeable,¹⁷⁶ Unberath notes that "the type and possibility and also the extent [of loss] actually suffered must be within the contemplation of the parties".¹⁷⁷ Further, given that the loss is essentially suffered by the third party instead of the promisee,¹⁷⁸ it should not be outwith the contemplation of the contracting parties that the third party might suffer the loss which would have fallen on the promisee had it not been transferred. The recoverability requirement would not therefore be problematic.

7-63. In terms of the other policy justifications considered in chapter 4, transferred loss cannot be justified on the basis that it upholds the intentions of the contracting parties, because it operates regardless of their intentions.

¹⁷³ In *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518, for example, the parties did not grant a collateral warranty to the third party.

¹⁷⁴ I N D Wallace, "Defects and third parties: no peace for the wicked?" (1999) 15 *Construction Law Journal* 245, 260.

¹⁷⁵ Unberath, "Third party losses and black holes" 540.

¹⁷⁶ See para 5-49 above.

¹⁷⁷ Unberath, *Transferred Loss* 210. See also S Todd, "Policy Issues in Defective Property Cases", in J W Neyers, E Chamberlain and S G A Pitel (eds), *Emerging Issues in Tort Law* (2007) 199, 225–29.

¹⁷⁸ Unberath, *Transferred Loss* 210–11.

7-64. If the third party could claim against the contracting party in breach, transferred loss would be supported by the policy considerations of protecting external parties, preventing “black holes”, and ensuring recovery of loss caused by breach of contract. As such, reforming transferred loss to permit the third party to recover in its own right allows the doctrine to be recognised as a justifiable exception to privity. This would also avoid the current conceptual difficulties¹⁷⁹ regarding whether the contracting party who recovers the loss holds the funds for the third party in trust, and whether it has a duty to transfer the damages to the third party.

7-65. This book examines the privity doctrine and accordingly cannot consider in detail the rule providing that a contracting party cannot recover for another’s losses. Nonetheless, it may be noted that allowing the third party to recover in its own right would also remove the tension between transferred loss and this rule. If transferred loss continues to be recognised in its current form (i.e. allowing a means for the contracting party to recover the third party’s loss), the policy consideration of ensuring that loss caused by breach of contract is recoverable might offer a justification for the deviation from this rule. However, the fact that the third party cannot currently recover the loss in its own right clearly does not reflect a policy consideration of protecting third parties.

D. CONCLUDING REMARKS

7-66. Transferred loss in its current form is not an exception to privity. Whilst it is compatible with the privity doctrine, it operates regardless of the intentions of the contracting parties and is therefore incompatible with the main theories of Scots contract law. Classifying transferred loss as a delictual remedy would account for the fact that the contracting parties do not consent to transferred loss liability. However, such classification would require transferred loss to be framed in terms of *Junior Books* liability. This would not be desirable, because *Junior Books* liability is controversial and no longer fully accepted by the judiciary or in academic commentary.

7-67. The transferred loss doctrine would be more logical and practicable if the third party could recover its loss in its own name. If transferred loss was reformed in this manner, it would be supported by sound policy considerations, namely, the protection of weaker parties and ensuring recovery of loss caused by breach of contract. These reasons justify deviation from the privity doctrine. The current law on transferred loss cannot be justified by reference to a policy consideration of protecting external parties. Transferred loss should therefore continue to be recognised as a contractual remedy in Scots (and English) law, but should be reformed so that the third party can claim directly against the contracting party for losses suffered due to defective performance of the contract.

¹⁷⁹ See, for example, discussion in N Palmer and G Tolhurst, “Compensatory and extra-compensatory damages: Linden Gardens and the ‘Lord Griffiths’ principle” (1998) 13 *JCL* 143, 149–51.

7-68. A statutory regime applying to situations which are currently resolved through the transferred loss doctrine would provide greater certainty to the contracting parties. This would also provide the opportunity to reform the current law, which is unnecessarily restrictive in terms of allowing recovery only where the contracting party is willing to raise proceedings and return the damages recovered to the third party.

8 *Ad Hoc* Agency

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A. OVERVIEW OF CHAPTER 8

8-01. This chapter considers *ad hoc* agency, which was developed relatively recently in Scots law in decisions by Lord Drummond Young in the Court of Session. The chapter begins by defining *ad hoc* agency and outlining its development. The chapter then assesses whether *ad hoc* agency is compatible with Scots contract law (in terms of its interaction with privity and contract theory), delict, and the law of agency more generally. The final sections consider the policy justifications for and against the recognition of *ad hoc* agency, and whether it should continue to be recognised in Scots law.

B. DEFINITION AND DEVELOPMENT OF *AD HOC* AGENCY

8-02. The concept of *ad hoc* agency was introduced into Scots law by Lord Drummond Young in three cases: *Whitbread Group Plc v Goldapple Ltd (No 2)*,¹ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited*,² and *Laurence McIntosh Ltd v Balfour Beatty Group Ltd*.³ This section describes the development of the law in

¹ 2005 SLT 281.

² [2007] CSOH 117, 2007 GWD 24-396.

³ [2006] CSOH 197.

these three cases. It then discusses the reception of the doctrine in more recent cases, and comments on the extent to which the doctrine is accepted in Scots law. The section also makes brief comment on English law.

(1) Lord Drummond Young's introduction of ad hoc agency

8-03. In *Whitbread Group Plc*,⁴ Lord Drummond Young defined *ad hoc* agency as “an agency relationship that comes into existence for the purpose of a single transaction only”.⁵ This can be illustrated by reference to the facts of the case. Whitbread was the tenant of a pub in Edinburgh. Fairbar paid Whitbread's rent to the landlord, Goldapple. The issue arose as to whether this payment was a valid transaction which prevented the operation of an irritancy of the lease for non-payment of the rent. At the time of the payment, Fairbar was occupying the pub, but the obligation to pay the rent remained Whitbread's. Whilst Whitbread and Fairbar had concluded a Business Transfer Agreement to transfer Whitbread's goodwill and assets to Fairbar, this expressly recognised that Whitbread remained obliged to pay the rent. This was because the lease had not been assigned (and could not be assigned without Goldapple's consent). It was accepted that a cheque sent to Fairbar, which was credited to Goldapple's account, was intended to discharge Whitbread's obligation to pay the rent, but Goldapple sought to return the cheque. Lord Drummond Young found that Goldapple should have accepted the cheque, because Fairbar was acting as an *ad hoc* agent for Whitbread and its cheque was a valid payment of Whitbread's rent.⁶ As such, Goldapple was not permitted to refuse payment on the grounds that it was tendered by Fairbar rather than Whitbread.⁷

8-04. According to Lord Drummond Young, the fact that Whitbread debts were paid using Fairbar funds and with Fairbar cheques in accordance with the Business Transfer Agreement was consistent with Fairbar acting as Whitbread's agent for such payments. It was also relevant that the payment was clearly intended to discharge Whitbread's obligation to pay the rent. He clarified that *ad hoc* agency may not have been a suitable remedy had Fairbar attached any conditions to the payment of the cheque but, because it did not do so, the payment of the cheque should be viewed in isolation.⁸ In other words, the straightforward payment of Whitbread's rent indicated that Fairbar was acting as Whitbread's agent for the purpose of satisfying Whitbread's obligations under the lease with Goldapple.

8-05. *Whitbread Group Plc* applied *ad hoc* agency to a situation in which one party had paid another's debt. In two later cases, *Laurence McIntosh Limited v Balfour Beatty Group Limited*⁹ and *John Stirling t/a M & S Contracts v Westminster Properties*

⁴ *Whitbread Group Plc v Goldapple Ltd (No 2)* 2005 SLT 281.

⁵ 2005 SLT 281 at para 13.

⁶ 2005 SLT 281 at paras 19 and 48.

⁷ 2005 SLT 281 at para 19 per Lord Drummond Young.

⁸ 2005 SLT 281 at para 19.

⁹ [2006] CSOH 197.

Scotland Limited,¹⁰ Lord Drummond Young applied the doctrine to situations unrelated to such a payment.

8-06. In *Laurence McIntosh Limited* the pursuer was a joinery company which had originally traded as a partnership (Laurence McIntosh and Sons). In 1998 the partnership entered into a works contract with Balfour Beatty concerning the refurbishment of the National Library of Scotland. In 2000, the pursuer company was incorporated, and it was intended that the company would take over the business of the partnership. However, the partnership's rights and obligations were not validly transferred. The company simply sent letters concerning debts arising from the partnership's contracts in its own name and with its bank details. When the company raised an action in respect of the works contract, Balfour Beatty argued that the company did not have title to sue under that contract. Accordingly, an assignation was effected which transferred the partnership's rights and interests under the works contract to the company. This was intimated to Balfour Beatty and backdated to post-date the company's action. However, it was found that the assignation did not retrospectively cure the company's lack of title to sue, because title to sue must usually exist at the date at which the action is raised.¹¹

8-07. According to Lord Drummond Young, the fact that letters were sent in the company's name in respect of money owed to the partnership, and that a fax in respect of the Works Contract was sent on the partnership's writing paper but signed on behalf of the company, could "readily be explained through the principle of *ad hoc* agency".¹² Furthermore, he went on to explain that *ad hoc* agency could be used in situations other than remedying a lack of title to sue following the incorporation of a company, partnership, or sole trader, demonstrating his flexible view as to the applicability of the doctrine. He stated that:

Within groups of companies, it is relatively common to find one company performing tasks for another company within the group. This may take many different forms; for present purposes, an example that is relevant is that one company may perform debt collection functions on behalf of other companies within the group. In such a case, the debts do not become due to the debt-collecting company; they remain due to the original contracting party, but the debt-collecting company acts as agent for the contracting party in obtaining payment of the debts ... Arrangements of this nature are found not only within groups of companies ... at the level of natural persons, they are frequently encountered within a family. Nor are *ad hoc* agency relationships confined to routine tasks such as the collection of debts; they may also extend to more complex matters such as conducting negotiations over the performance of a contract.¹³

8-08. The third case in which Lord Drummond Young developed *ad hoc* agency is *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited*. The

¹⁰ [2007] CSOH 117, 2007 GWD 24-396.

¹¹ [2006] CSOH 197 at para 14 per Lord Drummond Young.

¹² [2006] CSOH 197 at para 15. Lord Drummond Young went on to say (para 17) that "all of the tasks that the present pursuers, the company, appear to have performed on behalf of the partnership can most readily be explained through the concept of *ad hoc* agency". See also para 19.

¹³ [2006] CSOH 197 at para 16.

facts are similar to *Laurence McIntosh Ltd*. Mr Stirling, a sole trader, had entered into a construction contract with the defenders in respect of refurbishment works at the defenders' property in St Annes. After the contract was concluded, Mr Stirling formed a new company, M & S Contracts, which he intended would take over the contracts he had concluded as a sole trader. However, the sole trader's rights and liabilities were not validly assigned to the company. When the company attempted to refer a dispute connected with the contract to adjudication, Westminster Properties argued that the company was not party to the contract and lacked title to sue.¹⁴ Lord Drummond Young used *ad hoc* agency to allow the actions of the company (writing letters, sending invoices, etc) to be treated as acts performed by the company as an *ad hoc* agent for the sole trader. In the case, he reiterated that the doctrine could be applied to situations involving company groups.¹⁵

(2) Subsequent judicial comment

8-09. Following these three cases, the concept of *ad hoc* agency has not been subject to further development and, as is discussed further below,¹⁶ it has not been wholly welcomed by commentators. The doctrine has been mentioned only three times in subsequent cases. In *Hill v Hunter*,¹⁷ Lord Stewart stated that the petitioner "easily persuades me that the concept of *ad hoc* agency explains how payments by a third party, typically a company in the same group or a spouse, go to discharge another's debt".¹⁸

8-10. However, he found that the concept did not resolve the facts of the case at hand.¹⁹ Whilst Lord Stewart did not expressly criticise the doctrine, these brief comments cannot be said wholly to endorse it either. In the earlier case of *Fleming Builders Ltd v Forrest*,²⁰ Lord Menzies made brief reference to *ad hoc* agency, but again did not offer substantive comment on the doctrine's merits, and the case was not decided on the basis of the concept.²¹ More recently, Lord McEwan allowed a proof before answer to ascertain whether one of the parties to the action before him was acting as an *ad hoc* agent in the same manner as in *Whitbread Group Plc v Goldapple Ltd (No 2)*,²² although he did not give his views on the doctrine.²³ There appears to be

¹⁴ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Ltd* [2007] CSOH 117, 2007 GWD 24-396 at paras 1-7 per Lord Drummond Young.

¹⁵ [2007] CSOH 117 at para 16.

¹⁶ See paras 8-51 to 8-55.

¹⁷ [2015] CSOH 36, 2015 GWD 14-247.

¹⁸ [2015] CSOH 36 at para 17.

¹⁹ [2015] CSOH 36 at para 17. In the case, the pursuer sought suspension of two charges for payments served by his ex-wife in respect of child maintenance and spousal support.

²⁰ [2008] CSOH 103, 2008 GWD 26-408.

²¹ [2008] CSOH 103 at paras 102 and 106. The points of the defender's argument dealing with *ad hoc* agency are found at para 86. *Ad hoc* agency was not discussed because Lord Menzies was not satisfied that the pursuers had received the letter which had purportedly been delivered by an *ad hoc* agent.

²² 2005 SLT 281.

²³ *Scobie Farms v Greenyards Garden Centre Ltd* [2016] CSOH 75, 2016 GWD 17-307.

willingness on the part of other members of the judiciary to acknowledge and discuss *ad hoc* agency, but it is not a deeply entrenched and universally recognised doctrine. Other judges have not, to date, commented on it.

8-11. Indeed, it appears that the concept of *ad hoc* agency has not been used in cases in which it could have allowed title to sue. In *Rodewald v Taylor*,²⁴ the defenders received rental payments for a property, known as “The Corshellach”, which was owned by the pursuer. The pursuer asserted that the defender was acting as her agent in receiving the payments. However, the defender claimed that she was not an agent, and was instead letting out and collecting rent for Corshellach in return for rent-free occupation of another property. Lord Bannatyne found that the pursuer had failed to prove that there was an agency contract between the two parties.²⁵ Arguably, the case could have been addressed in terms of *ad hoc* agency, but this was raised by neither of the parties to the dispute nor by Lord Bannatyne.

8-12. Macgregor argues that Lord Drummond Young was clearly “using agency as a concept to achieve justice on the facts of the case”²⁶ in *Whitbread*. She observes that, despite the “compelling facts”²⁷ of *Rodewald v Taylor*, *ad hoc* agency was not discussed, and the case therefore indicates that the concept is “stuck on the starting blocks”.²⁸ Macgregor has also drawn attention to the lack of discussion of *ad hoc* agency in *Cramaso LLP v Ogilvie-Grant, Earl of Seafield* (in which an individual, Mr Erskine entered into a contract in his own name, then formed Cramaso LLP, which did not have title to sue on that contract).²⁹ She notes that Lord Reed’s decision not to use *ad hoc* agency meant that there was “no ... concern here that agency principles have been manipulated”.³⁰ The fact that the judges (and counsel) in these cases refrained from discussing the applicability of *ad hoc* agency does indeed indicate that the doctrine has not caught on in Scots law.

8-13. In English law, the term “*ad hoc* agency” has been used to refer to situations in which an agent is employed on a short-term basis.³¹ For example, Sedley LJ mentions in *Shogun Finance v Hudson* that a dealer was not a finance company’s “general”

²⁴ [2011] CSOH 5, 2011 GWD 3-108.

²⁵ [2011] CSOH 5 at paras 33 and 34 per Lord Bannatyne.

²⁶ L Macgregor, “Agency”, in G Black, D Cabrelli, M Hogg, and L Macgregor, *Contract Law Update, 2010–2012* (2012) 129, 130.

²⁷ *Contract Law Update, 2010–2012* 130–31.

²⁸ *Contract Law Update, 2010–2012* 132.

²⁹ *Cramaso LLP v Ogilvie-Grant, Earl of Seafield* [2014] UKSC 9, 2014 SC (UKSC) 121. For full discussion of the case, see L Macgregor, “Moors the pity: the case of the missing grouse: *Cramaso LLP v Ogilvie-Grant, Earl of Seafield and others*” (2015) 19 *EdinLR* 112.

³⁰ Macgregor, “Moors the pity” 118. See further discussion below at para 8-55.

³¹ See, for example, *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567, [2017] Lloyd’s Rep 621 at para 88 per Lord Briggs of Westbourne; *Gaydamak v Leviev* [2012] EWHC 1740 (Ch) at para 244 per Vos J; *Osteopathic Education and Research Ltd v Purfleet Office Systems Ltd* [2010] EWHC 1801 (QB) at para 29 per Judge Richard Seymour QC; *MBNA Europe Bank v Thorius* [2010] ECC 8 at para 39 per Judge Smart; *Zedra Trust Company (Jersey) Ltd v The Hut Group Ltd* [2019] EWHC 2191 (Comm) at para 35 per Judge Eyre QC.

agent, but may have been the agent for “some ad hoc purpose”.³² These cases make no reference to Lord Drummond Young’s *dicta* and simply appear to refer to cases involving agency for a single transaction or for a very short time period. Both of these types of agency are permissible in Scots law and are dealt with under the law of agency generally.³³ There does not appear to be an English equivalent of *ad hoc* agency as developed in Lord Drummond Young’s judgments.

8-14. In summary, *ad hoc* agency enjoys only a very limited degree of recognition in Scots law. Lord Drummond Young’s three Outer House judgments are not binding, and so it cannot currently be said that the doctrine is accepted in Scots law. *Ad hoc* agency has been briefly acknowledged in other cases, although it has not been subject to a great deal of judicial discussion. On the other hand, the Outer House judgments by Lord Drummond Young have not been overruled. It is therefore relevant to consider whether the doctrine ought to continue to develop in Scots law, potentially as a recognised exception to the privity doctrine.

C. WHETHER AGENCY IS CONTRACTUAL AND/OR CONSENSUAL

8-15. The question of whether *ad hoc* agency is compatible with the Scots law of agency more generally is discussed later in this chapter.³⁴ In order to address that issue, this subsection examines whether agency is contractual and/or consensual. A contractual conceptualisation of agency requires that the relationship between principal and agent was constituted in contract. According to a consensual definition of agency, the relationship must be consensual but does not require a written or oral contract.

(1) Contractual and consensual views of agency

8-16. It is likely that the drafters of the Commercial Agents (Council Directive) Regulations 1993³⁵ viewed agency as contractual. Macgregor notes that, whilst there is no express statement in the Regulations on the nature of the agency contract, individual regulations indicate a contractual analysis.³⁶ The contractual nature of

³² *Shogun Finance v Hudson* [2002] QB 834 at para 16 per Sedley J (citing *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552 at 573 per Lord Morris of Borth-y-Gest and *Mercantile Credit Co Ltd v Hamblin* [1965] 2 QB 242 at 269 per Pearson LJ). See also Sedley J at para 17, where he explains that the dealer was not the agent for the purpose of the whole hire-purchase agreement, but he was the “ad hoc agent” in respect of specific acts connected with the agreement (for example, ascertaining the hirer’s identity and sending copies of the hirer’s driving licence to provide proof of identity).

³³ Macgregor, *Agency* para 3.05.

³⁴ See para 8-52 below.

³⁵ SI 1993/3053.

³⁶ Macgregor, *Agency* para 2.16. She cites, for example, reg 13, which provides that both the agent and principal are “entitled to receive from the other, on request, a signed written document setting out the terms of the agency contract”.

agency in Scots law is discussed by Bell³⁷ and T B Smith.³⁸ There are also clear judicial statements supporting the contractual nature of agency,³⁹ for example, Lords Salvesen and Ormidale in *Graham & Co v United Turkey Red Co*,⁴⁰ Lord Milligan in *Lothian v Jenolite Ltd*,⁴¹ Lord McCluskey in *Trans Barwil Agencies (UK) Ltd v John S Braid & Co Ltd*,⁴² and Lady Dorrian in *Connolly v Brown*.⁴³

8-17. More recently, in the case of *Rodewald v Taylor*,⁴⁴ the pursuer based her claim on the establishment of an agency contract. Lord Bannatyne responded with discussion of the requirements of such a contract,⁴⁵ and decided that the pursuer had failed to prove its existence. However, Macgregor notes that the case may appear unremarkable in the context of the debate on whether agency is contractual, given that Lord Bannatyne's discussion of agency contracts reflected the pursuer's argument.⁴⁶ Accordingly, Lord Bannatyne's *dicta* do not directly support a contractual conception of agency, but they certainly do not contradict a contractual analysis.

8-18. Macgregor further comments that there has been insufficient development in Scots law on the question of whether agency might arise in terms of a unilateral grant of authority from the principal to the agent, as opposed to a bilateral contract.⁴⁷ Her own definition of agency does not rule out the possibility that agency might be constituted by means other than contract: a "relationship, *usually* created by contract, in terms of which the principal instructs the agent to act on his behalf in order to produce legally binding effects for the principal".⁴⁸ She concludes that, in Scots law, agency is generally but not always contractual.⁴⁹ Gow, another Scottish commentator, asserts that a contract is not required for the formation of an agency relationship. He offers the example of a father asking a young child to shop for him. The child lacks legal capacity to enter into a relationship which could be termed an "agency contract" with his father, but the child does consent to acting as an agent.⁵⁰ The fact that those without contractual capacity can act as agents appears to contradict a purely contractual theory of agency. Further, the modern Scots law of agency was based on mandate, which was

³⁷ Bell, *Commentaries* I, 506. See discussion in L J Macgregor, "Defining Agency and Its Scope (I)", in L DiMatteo and M Hogg (eds), *Comparative Contract Law: British and American Perspectives* (2015) 381, 383 on the development of a contractual approach to agency in Bell's works.

³⁸ Smith, *Short Commentary* 774.

³⁹ These cases are cited and discussed in Macgregor, *Agency* para 2.07.

⁴⁰ 1922 SC 533 at 546 per Lord Salvesen and at 549 per Lord Ormidale.

⁴¹ 1969 SC 111 at 120 per Lord Milligan.

⁴² 1988 SC 222 at 230 per Lord McCluskey.

⁴³ [2006] CSOH 187, 2007 SLT 778 at para 54 per Lady Dorrian.

⁴⁴ [2011] CSOH 5, 2011 GWD 3-108, discussed above at paras 8-11 to 8-12.

⁴⁵ [2011] CSOH 5 at para 33.

⁴⁶ L Macgregor, "Agency", in G Black, D Cabrelli, M Hogg, and L Macgregor, *Contract Law Update, 2010-2012* (2012) 129, 130.

⁴⁷ Macgregor, *Agency* para 2.19.

⁴⁸ Macgregor, *Agency* para 2.01 (emphasis added).

⁴⁹ Macgregor, *Agency* para 2.19.

⁵⁰ J J Gow, *The Mercantile and Industrial law of Scotland* (1964) 516.

consensual in nature but not contractual.⁵¹ The views of these commentators, and the historical context of mandate, cast doubt on a purely contractual conception of agency in Scots law.

8-19. The definition in the leading English text on agency does not provide that agency must be contractual:

Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation.⁵²

8-20. Macgregor points out that this definition emphasises consent, rather than contract, stating that “although it is usual for agency to be created by contract in English law, a contract is not necessary”.⁵³ McKendrick further indicates that, in English law, the principal’s consent to the exercise of authority by the agent is sufficient.⁵⁴ It has also been acknowledged in an English House of Lords case that the “relationship of principal and agent can only be established by the consent of the principal and the agent”.⁵⁵ The consent theory is accepted by McMeel,⁵⁶ although noting that it is likely subject to a qualification: the question is not whether the agent and principal consent to their agency relationship, but whether there is an objective appearance of consent (in line with recent cases on the objective interpretation of contracts).⁵⁷ McMeel suggests that agency has historically been viewed as consensual in English law because agency did not develop as a stand-alone doctrine but, rather, evolved “hand-in-hand with the elaboration of [consensual] contractual doctrine”.⁵⁸

8-21. It is thus clear in English law that agency need not be contractual, but must be consensual. This is accepted both judicially and in academic commentary. In Scots law, the accepted view is that agency is always contractual, although various commentators and judges appear to permit a consensual definition of agency. Macgregor has indicated that the Scots position could change in future,⁵⁹ and it may

⁵¹ Macgregor, *Agency* para 2.07. Stair, *Institutions* 1.12.1 wrote that mandate was perfected by sole consent on the part of the mandant (matched by the mandatar’s consent or acceptance).

⁵² P G Watts (ed), *Bowstead & Reynolds on Agency* (22nd edn, 2020) para 1.001.

⁵³ Macgregor, *Agency* para 2.09. See also L J Macgregor, “Defining Agency and Its Scope (I)” 384.

⁵⁴ E McKendrick, *Goode and McKendrick on Commercial Law* (6th edn, 2020) para 5-08 n 16, relying on *Yasuda Fire and Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174 at 185 and 186 per Colman J. In that case, Colman J also states (at 185) that, whilst “in modern commercial transactions agencies are almost invariably founded upon a contract between principal and agent, there is no necessity for such a contract to exist”. He also refers to *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130 at 1137 per Lord Pearson. See further Powell, *The Law of Agency* 7.

⁵⁵ *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130 at 1137 per Lord Pearson.

⁵⁶ G McMeel, “Philosophical foundations of the law of agency” (2000) 116 *LQR* 387, 388.

⁵⁷ McMeel, “Philosophical foundations of the law of agency” 389. McMeel acknowledges that in “the vast majority of cases, the principal’s actual intention and the appearance of his intention will coincide”.

⁵⁸ McMeel, “Philosophical foundations of the law of agency” 402.

⁵⁹ Macgregor, *Agency* para 2.13.

be that Scots law will come to accept that agency does not necessarily need to be based on contract. The current state of the law, however, is that consent is required in both legal systems.

(2) Non-consensual views of agency

8-22. There is a limited body of commentary supporting the view that agency is non-consensual. This is argued by Forte and Van Niekerk,⁶⁰ who submit that consent in agency contracts is a “fiction”.⁶¹ Their argument focuses on South African law, but they have also applied their comments to Scots law.⁶² However, Macgregor notes that Forte and Van Niekerk cite only one Scottish case in support.⁶³ In that case, it was found that the parties had formed an implied agency contract, although it was noted that, had the court been unable to find a contract, the purported agent’s fee may have been claimed back through unjustified enrichment.⁶⁴ Macgregor comments that, whilst unjustified enrichment may have been a potential means of recovery, it “is surely unusual to use a case where the court so clearly found that a contract existed to support a non-consensual analysis of agency”.⁶⁵ She concludes that a non-consensual view of agency “reflects neither historical development nor business practice in Scotland”.⁶⁶ Indeed, Forte and Van Niekerk’s views do not represent the majority view even in South Africa. Kerr, for example, writes that, in most cases, the agent’s authority will be “obtained ... as a result of entry into a contract with the principal”.⁶⁷ Whilst he does not state categorically that agency relationships must be governed by contract, Kerr views consent on the part of both parties as necessary for the grant of actual authority.⁶⁸

8-23. McMeel submits that the key competitor to the consent theory of agency law is the power-liability theory.⁶⁹ This theory is sourced in Hohfeld’s premise that:

The creation of an agency relation involves, *inter alia*, the grant of legal powers to the so-called agent, and the creation of correlative liabilities in the principal. That is to say, one party P has the power to create agency powers in another party, A – for example, the power to convey P’s property, the power to impose (so-called) contractual obligations on P, the power to ‘receive’ title to property so that it shall vest in P, and so forth.⁷⁰

⁶⁰ A D M Forte and J P van Niekerk, “Agency”, in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 240, 245–46.

⁶¹ Forte and Van Niekerk, “Agency” 246.

⁶² Forte and Van Niekerk, “Agency” 240.

⁶³ Macgregor, *Agency* para 3.03. The case cited is *Barnetson v Petersen Bros* (1902) 5 F 86.

⁶⁴ *Barnetson v Petersen Bros* (1902) 5 F 86 at 90 per Lord Trayner.

⁶⁵ Macgregor, *Agency* para 3.03.

⁶⁶ Macgregor, *Agency* para 2.21.

⁶⁷ A J Kerr, *Law of Agency* (4th edn, 2007) 4–5, citing *Joel Malamed v Cleveland Estate Melamed* [1984] 2 All SA 110 at 166 per Corbett JA: “An act of representation needs to be authorized by the principal. Such authorization is usually contained in a contract”.

⁶⁸ Kerr, *Law of Agency* 6.

⁶⁹ McMeel, “Philosophical foundations of the law of agency” 388.

⁷⁰ W N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 52.

8-24. Dowrick surmises that this refers to an agent's invested power to alter the principal's legal ties with third parties, and the principal's corresponding liability to fulfil these ties.⁷¹ McMeel comments that this neat analysis encompasses all types of agency, whereas the consensual theory struggles to account for agency by necessity and agency by operation of law.⁷² However, he argues that the question of whether the agent is empowered to act for the principal is one of public policy, and "once it is admitted that evidence of the principal's consent to the agent wielding power on his behalf is a sufficient public policy reason to recognise agency, there is serious danger of the 'power-liability' model collapsing into the qualified consensual approach".⁷³

8-25. This is entirely logical. The power-liability theory alone does not account for why the agent is empowered by the principal, and, in the majority of cases, the agent has the power to bind the principal in legal relationships with third parties because the principal consents to being bound. Indeed, McMeel notes that the two theories may not contradict one another: the qualified consensual theory explains the normative bedrock of agency (i.e. consent), and the power-liability theory explains the triangular relationship between the principal, agent, and third party.⁷⁴ The theory identified as a competitor to the consent theory is in fact compatible with a consensual account of agency, because the power-liability model does not expressly provide that the agent's power is not sourced in the principal's consent.

8-26. Admittedly, apparent authority can operate to bind a principal where the principal did not consent to liability to the third party. However, Macgregor explains that this simply illustrates that the generally consensual perception of Scots agency has yielded in the case of apparent authority to the interests of third-party protection.⁷⁵ Accordingly, apparent authority is an exception to the general rule that agency contracts are consensual.

(3) Summary

8-27. Whilst there is ongoing debate as to whether agency must necessarily be contractual, the view of the majority is that agency is contractual in nature. There is a limited body of Scots commentary which indicates that agency relationships must be consensual in nature, but need not necessarily be contractual. In English law, the consensual theory is dominant. Neither jurisdiction accepts a non-consensual view of agency. The conclusions of this section can be used to address the question of whether *ad hoc* agency is compatible with the Scots law of agency as a whole,⁷⁶ which in turn informs the issue of whether the doctrine should be recognised in Scots law.

⁷¹ F E Dowrick, "The relationship of principal and agent" (1954) 17 *MLR* 24, 36. McMeel, "Philosophical foundations of the law of agency" 393 lists other commentators who subscribe to this theory, including B S Markesinis and R J C Munday, *An Outline of the Law of Agency* (4th edn, 1998) 8–11.

⁷² McMeel, "Philosophical foundations of the law of agency" 392 and 395.

⁷³ McMeel, "Philosophical foundations of the law of agency" 396.

⁷⁴ McMeel, "Philosophical foundations of the law of agency" 396–99 and 410.

⁷⁵ Macgregor, *Agency* para 2.21.

⁷⁶ See para 8-52 below.

D. COMPATIBILITY OF *AD HOC* AGENCY WITH SCOTS LAW

8-28. This section examines the compatibility of *ad hoc* agency with privity, contract theory, and delict. It also examines the policy considerations for and against the recognition of *ad hoc* agency.

(1) Compatibility with the privity doctrine

8-29. Neither case law nor commentary considering *ad hoc* agency has commented on its interaction with privity. However, it clearly operates in certain situations as an exception to the privity doctrine.

8-30. Whilst Lord Drummond Young argues that the *ad hoc* agent is making a claim for the principal, this is a legal fiction. In reality, the *ad hoc* agents in the two later cases, *Laurence McIntosh Limited v Balfour Beatty Group Limited*⁷⁷ and *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited*,⁷⁸ are enforcing the contracts between the so-called principals and third parties for their own benefit. In *John Stirling t/a M & S Contracts*, for example, the new company was able to enforce the contract between the sole trader and the defender, despite the fact that the new company was not party to the contract. In *Laurence McIntosh Limited*, it is similarly clear that the company could enforce the contract made by the partnership. If *ad hoc* agency is to be recognised in Scots law, there must be valid policy reasons for its deviation from the privity doctrine.

8-31. The earliest *ad hoc* agency case, *Whitbread Group Plc v Goldapple Ltd*,⁷⁹ did not deviate from privity. Fairbar was not attempting to enforce a clause in the contract between Goldapple and Whitbread, nor did Fairbar benefit under the contract between them. However, Lord Drummond Young has developed *ad hoc* agency in a manner which contravenes privity in the later cases. By creating the *ad hoc* agency doctrine, Lord Drummond Young has therefore also developed a new exception to privity. This was not acknowledged in his judgments in the later cases.

(2) Compatibility with contract theory

8-32. There is also a lack of commentary on the interaction between *ad hoc* agency and contract theory. However, Macgregor and Whitty question whether the concept complies with the requirements of agency more generally, in terms of whether the principal and *ad hoc* agent consent to the formation of an agency contract.⁸⁰ They describe Lord Drummond Young's views on consent in *Whitbread Group Plc* as "unusual", because he appears to treat the payment of the debt as sufficient to create the agency contract between Whitbread and Fairbar without considering whether the

⁷⁷ [2006] CSOH 197.

⁷⁸ [2007] CSOH 117, 2007 GWD 24-396.

⁷⁹ 2005 SLT 281.

⁸⁰ At paras 8-15ff above, the question of whether agency more generally is contractual or consensual was discussed; it was concluded that agency in Scots law must be consensual but need not be contractual.

two parties consent to forming such a contract.⁸¹ They observe that payment “in itself does not create a contract of agency – it simply acts as evidence from which inferences of intention can be made”.⁸² They also note that the directors of Laurence McIntosh Limited would have been “surprised” had they been told, prior to the case, that they were acting as agents for the inactive partnership.⁸³

8-33. Essentially, in each of the cases, it is not clear that the party deemed to have acted as an *ad hoc* agent intended to do so, nor that it entered into an agency contract with the purported principals. Macgregor and Whitty note that agency can be inferred on the basis of the parties’ conduct, and Scots law recognises agency relationships created for one-off or limited purposes. However, they stress that there was no conduct, or agency contract, in the *ad hoc* agency cases which could be said to give rise to an agency relationship. There is no presumption in favour of agency, and, where the agency relationship is implied, a high standard of proof is imposed.⁸⁴ They comment that the approach to the requisite standard of proof seems, in the cases they cite, to be “much stricter than Lord Drummond Young’s approach”.⁸⁵ Indeed, Lord Drummond Young recognised in *Whitbread* that there was “no actual intention on the part of the persons who issued the cheque that Fairbar should act as agent for Whitbread”.⁸⁶ In *Laurence McIntosh* it was similarly accepted that the claim document was prepared by a party who had not considered whether the company had title to sue. Lord Drummond Young indicated that this “reinforces the inferences that no assignation was intended and that the claim document was presented by the company as an *ad hoc* agent for the partnership”.⁸⁷

8-34. Neither the partnership nor the company could be said to have intended to conclude an assignation, and it is doubtful that either can be said to have intended to enter into an agency agreement. There is no reason to bypass the requirement that agency in Scots law is consensual, but protect the formalities of assignation. In *John Stirling*, Lord Drummond Young justified his *ad hoc* agency analysis on the basis that it allowed the original contracting party to remain in place as the subject of the contractual rights and obligations, whilst the correspondence bears the meaning that was obviously intended by the parties regarding the rights and obligations arising under the contract.⁸⁸

⁸¹ L J Macgregor and N R Whitty, “Payment of another’s debt, unjustified enrichment and *ad hoc* agency” (2011) 15 *EdinLR* 57, 79.

⁸² Macgregor and Whitty, “Payment of another’s debt” 79.

⁸³ Macgregor and Whitty, “Payment of another’s debt” 80.

⁸⁴ Macgregor and Whitty, “Payment of another’s debt” 77–78, citing a number of cases including *Eastern Marine Services (and Supplies) Ltd v Dickson Motors Ltd* 1981 SC 355 at 357–59 per Lord Grieve.

⁸⁵ Macgregor and Whitty, “Payment of another’s debt” 78.

⁸⁶ *Whitbread Group Plc v Goldapple Ltd (No 2)* 2005 SLT 281 at para 19 per Lord Drummond Young. See also Macgregor and Whitty, “Payment of another’s debt” 80.

⁸⁷ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd* [2006] CSOH 197 at para 18.

⁸⁸ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Ltd* [2007] CSOH 117, 2007 GWD 24-396 at paras 16 and 20, where Lord Drummond Young distinguished between the parties’ general correspondence and a letter of intention to refer the dispute to adjudication.

8-35. Whilst both the company and sole trader in the case can be said to have intended to transfer the rights and liabilities of the latter to the former, neither intended to enter into an agency relationship. Any such intention is artificially implied. Rather, they intended to transfer the rights and liabilities under the contract and failed to do so properly.

8-36. Macgregor and Whitty recognise that the manipulation of the requirement that the principal and agent must consent, through contract or otherwise, to an agency relationship might threaten the role of consent in the formation of agency relationships more generally.⁸⁹ It thus appears that the development of the doctrine has created a new exception to the formation requirements of agency law,⁹⁰ and cannot be explained on the basis of the intentions of the parties to the so-called agency contract.

8-37. The lack of consent to form an agency contract has implications for the compatibility of *ad hoc* agency with will theory. The theory requires consent on the part of the contracting parties, and it is clear that the principal and *ad hoc* agent do not consent to form an agency contract, or for the *ad hoc* agent to act as an agent for the principal. The lack of consent means that there is no theoretically valid basis for forcing the third party to perform in favour of the *ad hoc* agent, and so *ad hoc* agency is not compatible with will theory. Similarly, it cannot be said that the *ad hoc* agent promised to conclude any transactions for the principal, or that it voluntarily assumed the responsibilities of an agent in respect of the principal. *Ad hoc* agency cannot therefore be explained in terms of promissory or assumption theory.

8-38. The interaction between *ad hoc* agency and contract theory is also problematic from the perspective of the third party. The third party initially intended to contract with the principal only, and *ad hoc* agency forces the third party to perform in favour of the agent, with whom it has not consented to contract. This contravenes will theory. In terms of promissory theory, it cannot be said that the third party has made a promise to the *ad hoc* agent, because it did not have knowledge of the agent's existence at the time at which it entered into the contract with the principal. For the same reason, it cannot be argued that the third party has voluntarily assumed an obligation to perform in favour of the principal. The concept is not therefore compatible with assumption theory.

8-39. In summary, *ad hoc* agency is incompatible with contract theory as well as with the requirements of agency law more generally. *Ad hoc* agency cannot therefore, in the contexts in which it contradicts privity, be justified on the basis that it upholds the intentions of the contracting parties.

(3) Compatibility with delict

8-40. The third party's liability to the *ad hoc* agent cannot stem from an agency contract meeting the consent requirement of agency law, or the third party's own consent to contract with the agent. The liability on the part of the third party is

⁸⁹ Macgregor and Whitty, "Payment of another's debt" 80.

⁹⁰ The implications of this are discussed further below at para 8-52.

involuntary, and it is therefore relevant to ascertain whether the third party's liability could be classed as delictual.

8-41. A delictual classification would require that there is a duty of care on the part of the third party in respect of the *ad hoc* agent. There is no legal basis for such a duty of care. When the third party contracts with the principal, it does not assume responsibility for the *ad hoc* agent in terms of *Hedley Byrne* liability.⁹¹ This is because the third party had no reason to believe at the point it contracted with the principal that its performance under the contract might affect the *ad hoc* agent, and so there can be neither an assumption of responsibility nor a “special relationship” as required under *Hedley Byrne* liability.

8-42. In chapter 7,⁹² it was submitted that *Junior Books* liability⁹³ could potentially be imposed in transferred loss situations, if that form of liability was extended to allow for recovery where the contracting party was not aware of the specific third party. This could not be done for *ad hoc* agency. In each of the *ad hoc* agency cases, the third party was engaged to provide a particular service to the principal. It was not foreseeable to the third party that the entire contract could be transferred to the *ad hoc* agent. The concept is not therefore compatible with delictual liability.

(4) Policy considerations justifying *ad hoc* agency

8-43. The development of *ad hoc* agency has been justified on the basis that this reflects commercial reality. According to Lord Drummond Young, the facts of *Whitbread* demonstrate that:

the acts of large companies are frequently performed by relatively junior employees acting under corporate structures that have been set up to govern a multiplicity of transactions, with no regard to any particular transaction. In those circumstances it is in my opinion quite unrealistic to attempt to attribute a specific intention to any individual or group of individuals. The corporate intention must be determined objectively, by examining both the individual transaction and the corporate structures under which it was effected.⁹⁴

8-44. This led Lord Drummond Young to conclude that there was a “clear corporate intention” that Fairbar would act for Whitbread for the purposes of paying Whitbread's debt.⁹⁵ In *Laurence McIntosh*, he stated that a reasonable person would construe the claim document in that case as:

being presented through the company but acting as agent for the true contracting party, the partnership. As a matter of commercial reality, that would plainly be a sensible way to proceed, avoiding the need for a formal assignation but permitting the active trading entity, the company, to progress matters on behalf of the true contracting party.⁹⁶

⁹¹ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; see paras 4-11ff above.

⁹² See paras 7-50ff above.

⁹³ *Junior Books Ltd v Veitchi Co Ltd* 1982 SC (HL) 244.

⁹⁴ *Whitbread Group Plc v Goldapple Ltd (No 2)* 2005 SLT 281 at para 19.

⁹⁵ 2005 SLT 281 at para 19.

⁹⁶ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd* [2006] CSOH 197 at para 18.

8-45. In *John Stirling*, he similarly commented that commercial contracts must be given a “commercially sensible construction”.⁹⁷ Lord Drummond Young’s motivation for developing *ad hoc* agency is, accordingly, ensuring a commercially sensible and fair outcome.

8-46. This is reflected in the views of other commentators. Warrender, for example, notes that Lord Drummond Young’s finding of *ad hoc* agency in *John Stirling* reflected the fact that the arrangement between the parties “constituted normal commercial practice”.⁹⁸ This would adhere to the justification of commercial necessity underpinning some of the statutory exceptions.

8-47. However, it is not clear that *ad hoc* agency is commercially convenient for all parties concerned. In the cases which contravened privity, the operation of *ad hoc* agency was certainly convenient for the new companies in *Laurence McIntosh* and *John Stirling*. However, the benefits of *ad hoc* agency to the respective defenders are unclear. In both cases, the defenders would not have expected to owe liability to the new entities, and the operation of *ad hoc* agency results in an adverse outcome for these parties, as they are forced to uphold contracts with the new entities. Indeed, it cannot be said that *ad hoc* agency is of benefit to the original partnership and sole trader (in *Laurence McIntosh* and *John Stirling* respectively), because these parties were no longer in existence at the time at which the case was decided. On examination of the operation of *ad hoc* agency in the relevant cases, therefore, it is not possible to justify the concept’s deviation from privity on the grounds of commercial convenience.

8-48. Whilst it is not relevant to the question of whether the concept is justifiable as an exception to privity, it is also submitted that *Whitbread*⁹⁹ fails to reflect a policy of fairness and commercial convenience. In the case, Goldapple sought to return the cheque because it was concerned that acceptance of payment from Fairbar would be construed as consent to Whitbread’s assignation of the lease.¹⁰⁰ Lord Drummond Young recognised that this was a reasonable concern, but stated that this could have been addressed by writing to either Fairbar or Whitbread to clarify that payment could not be treated as acceptance that the lease had been assigned.¹⁰¹

⁹⁷ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Ltd* [2007] CSOH 117, 2007 GWD 24-396 at para 17.

⁹⁸ A Warrender, “The name of the game”, *Contract Journal*, 19 September 2007, 47. See also T Bingham, “It ain’t necessarily so” (2007) 41 *Building* 82 and “‘Dispute or difference’ and corporate personality” (2007) *Building Law Monthly* 1, which discuss *John Stirling* and *ad hoc* agency in neutral terms, seemingly accepting the doctrine without comment or criticism as a justifiable part of Scots law.

⁹⁹ *Whitbread Group Plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹⁰⁰ 2005 SLT 281 at para 17 per Lord Drummond Young. Goldapple did not wish to permit assignation because it had little information on Fairbar’s financial position and suitability as a tenant, whereas Whitbread was a large, well-known company which Goldapple felt it could trust. Accordingly, the Managing Director of Goldapple instructed his employees not to do anything which could be perceived as acceptance of Fairbar as a new tenant.

¹⁰¹ 2005 SLT 281 at para 19.

Goldapple was seeking to protect its own interests, and, given that *Whitbread* was the first case in which *ad hoc* agency was introduced, it could not have foreseen that it would be perceived by Lord Drummond Young as refusing to interact with an agent. The outcome seems neither fair¹⁰² nor commercially convenient from Goldapple's perspective.

8-49. It is true that Scottish courts have, in recent years, recognised interpretations of contracts reflecting commercial common sense.¹⁰³ However, as noted by Lorna Richardson,¹⁰⁴ the meaning of commercial common sense in the context of contractual interpretation reflects Lord Neuberger's *dictum* in *Arnold v Britton* that the meaning of any contractual clause must be assessed in light of "the facts and circumstances known or assumed by the parties at the time that the document was executed".¹⁰⁵ The parties to the relevant contracts in the *ad hoc* agency cases would not have known that the contracts would later be relied upon by a different party seeking to step into the shoes of the original contracting party. The construction favoured by Lord Drummond Young does not therefore reflect a principle of commercial common sense but, rather, an unrealistic manipulation of the facts at hand.

(5) Policy considerations against the recognition of *ad hoc* agency

8-50. This subsection examines the interaction between *ad hoc* agency and the law of agency more generally, as well as addressing the doctrine's impact on the laws of assignation and separate legal personality. It also examines whether *ad hoc* agency was in fact a necessary development to achieve the result in *Whitbread*. These issues are considered in turn.

8-51. As discussed above,¹⁰⁶ *ad hoc* agency is an exception to the general rules of agency as well as an exception to privity, because the *ad hoc* agent and the principal cannot be said to consent to an agency contract. Macgregor cautions against the manipulation of agency in this respect, stating that whilst agency can be inferred from relevant facts and circumstances, it would be:

dangerous ... to over-emphasise the ease with which agency can be created in a modern context ... The litigation involving *ad hoc* agency illustrates that the ease with which agency can be established leaves it open to abuse for wider policy aims. This is unfortunate, and will inevitably add confusion to the legal rules governing the creation of agency.¹⁰⁷

¹⁰² It is acknowledged that the outcome would have been fair if the decision had been based on the law relating to payment of another's debt. The case did not consider this issue. See below at para 8-57.

¹⁰³ L Richardson, "Commercial common sense revisited: further developments in contract interpretation and commercial leasing" (2016) 20 *EdinLR* 348; L Richardson, "Commercial common sense in contract interpretation: further views from the Inner House" (2017) 21 *EdinLR* 423.

¹⁰⁴ Richardson, "Commercial common sense revisited" 344.

¹⁰⁵ [2015] UKSC 36, [2015] AC 1619 at para 15.

¹⁰⁶ See paras 8-32ff above.

¹⁰⁷ Macgregor, *Agency* para 3.05. See also L J Macgregor, "Defining Agency and Its Scope (I)", in L DiMatteo and M Hogg, *Comparative Contract Law: British and American Perspectives* (2015) 381, 381–82.

8-52. It is correct that *ad hoc* agency's disregard for the general principles of consent in agency law creates confusion and jeopardises the theoretical clarity of agency law. Further, the concept contradicts other aspects of the law of agency. Lord Drummond Young indicates in *John Stirling* that *ad hoc* agency could only apply to legal acts which did not require formality (such as entering into correspondence, delivering invoices, and giving contractual notice). According to Lord Drummond Young, the correct party would be required to participate in matters involving formal processes including litigation and adjudication.¹⁰⁸ It is not clear why there should be such a distinction. Agents are normally restricted within the confines of their authority, rather than whether the acts they undertake require legal formality. Macgregor and Whitty note that this "formality limitation" means that an *ad hoc* agent's authority is more restricted than that of a normal agent, with the result that *ad hoc* agency is a "new and different species of agency".¹⁰⁹ This limitation does not therefore reflect the normal rules of agency law. This high degree of judicial creativity further jeopardises the clarity of the law of agency. The law should be accessible to contractual parties and doctrinally clear. *Ad hoc* agency contradicts these policy aims because it casts confusion on the law of agency as a whole.

8-53. *Ad hoc* agency also sits badly with the law on assignation and separate legal personality. In *Laurence McIntosh*, Lord Drummond Young expressly refrained from taking a "liberal view" of the law on assignation, because the question of whether assignation was successful affected the parties' rights of retention and set-off.¹¹⁰ However, the operation of *ad hoc* agency in *Laurence McIntosh* and *John Stirling* allows a person the right to claim on a contract to which it is not a party despite the fact that it has failed to comply with the requirements of assignation. Macgregor and Whitty comment that assignation is "an important part of the law of obligations, [and so this] is highly questionable".¹¹¹ As such, Lord Drummond Young has created confusion in the law of assignation. Further, it is illogical to justify what amounts to a deviation from the requirements of assignation on the grounds that doing so by other means (*ad hoc* agency) does not involve contravention of the law of assignation.

8-54. Regarding the interaction between *ad hoc* agency and the law on separate legal personality, Lord Drummond Young accepts in *John Stirling* that if the "doctrine of separate corporate personality is applied with its full rigour, the defenders' argument is clearly correct".¹¹² He justifies the imposition of *ad hoc* agency on the grounds that in "commercial practice, it is not unusual to discover that the niceties of the doctrine of separate corporate personality are ignored".¹¹³

¹⁰⁸ [2007] CSOH 117 at para 16.

¹⁰⁹ L J Macgregor and N R Whitty, "Payment of another's debt, unjustified enrichment and *ad hoc* agency" (2011) 15 *EdinLR* 57, 82.

¹¹⁰ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd* [2006] CSOH 197 at para 17.

¹¹¹ Macgregor and Whitty, "Payment of another's debt" 80.

¹¹² [2007] CSOH 117 at para 16.

¹¹³ [2007] CSOH 117 at para 16.

This doctrine has indeed been circumvented in accordance with, for example, the well-established law on piercing the corporate veil,¹¹⁴ and parties may indeed choose to ignore the technicalities of separate legal personality in commercial practice. However, this does not justify circumventing the law on separate legal personality more generally, particularly when doing so also contravenes the law on agency. The “common thread” unifying Lord Drummond Young’s three cases is the effect of the separate legal personality of the companies.¹¹⁵ *Whitbread*¹¹⁶ is unproblematic in this respect. Fairbar was not seeking to act as an agent for Whitbread; it simply wished to discharge the company’s rent which is, as discussed further below,¹¹⁷ permissible in Scots law. In *John Stirling* and *Laurence McIntosh*, on the other hand, there existed no legal means by which the relevant parties ought to have been entitled to claim debt or raise legal proceedings related to another entity. Accordingly, the imposition of *ad hoc* agency necessarily involved deviation from the laws on separate legal personality.

8-55. Applying the law of agency to bypass the separate legal personality of companies is not uncontroversial. Macgregor notes, in relation to the reasoning in *Cramaso LLP*,¹¹⁸ that Mr Erskine’s creation of the company prevented him from obtaining a remedy in the company’s name.¹¹⁹ She comments that, whilst strict application of the law on separate legal personality may seem unfair, “arguably Mr Erskine should not have been able to pursue rights which he held individually”.¹²⁰ Macgregor and Whitty comment that, in both *Laurence McIntosh* and *John Stirling*, the relevant parties were either ignorant of the importance of proper incorporation, or they were aware that they technically ought to ensure that the proper legal procedures were completed, in order correctly to transfer the rights and liabilities, but they chose not to spend time and money dealing with this issue. As such, the doctrine of *ad hoc* agency “operates in these cases as a ‘get out of jail free’ card, available to parties who have failed properly to regulate their legal affairs”.¹²¹ Macgregor and Whitty question whether the “distortion” of the law on agency and the doctrine of separate legal personality is justified on the grounds of providing remedies to those who do not properly protect their own legal interests.¹²² As they point out, if the relevant parties had not properly incorporated the new company or

¹¹⁴ Macgregor and Whitty, “Payment of another’s debt” 74, note that a solution based on this analysis could not have applied in the *ad hoc* agency cases.

¹¹⁵ Macgregor and Whitty, “Payment of another’s debt” 74.

¹¹⁶ *Whitbread Group Plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹¹⁷ This is discussed later in this subsection.

¹¹⁸ *Cramaso LLP v Ogilvie-Grant, Earl of Seafield* [2014] UKSC 9, 2014 SC (UKSC) 121. The facts of this case are discussed above at para 8-12.

¹¹⁹ The case was, however, resolved in Mr Erskine’s favour in terms of continuing liability for a negligent misstatement.

¹²⁰ L Macgregor, “Moors the pity: the case of the missing grouse: *Cramaso LLP v Ogilvie-Grant, Earl of Seafield and others*” (2015) 19 *EdinLR* 112, 117.

¹²¹ Macgregor and Whitty, “Payment of another’s debt” 80.

¹²² Macgregor and Whitty, “Payment of another’s debt” 80–81.

partnership due to legal advice to the effect that this was unnecessary, they could potentially have claimed against their solicitors, given that such advice would have been negligently wrong.¹²³

8-56. The doctrine of *ad hoc* agency accordingly seems to exist to protect only those who have either failed to follow legal advice properly to assign their contracts or incorporate new legal entities, or have failed to seek such advice. *Ad hoc* agency could arguably support the policy aim of protecting extra-contractual parties. However, as discussed in chapter 5, such protection ought only to arise where the extra-contractual party did not have the means to protect itself, or where the party could not reasonably be expected to protect itself.¹²⁴ Commercial parties ought to manage their own legal affairs properly. *Ad hoc* agency cannot therefore be justified on the basis of the protection of weaker parties.

8-57. Whilst the case did not contravene privity, the development of *ad hoc* agency was not in fact necessary to achieve the outcome in *Whitbread*. As Macgregor and Whitty point out, the development of *ad hoc* agency may have resulted from the failure of counsel in the case to cite the main Scots authorities dealing with payment of another's debt. The key question was whether payment of another's debt distinguishes the debt, and it was not the case, as counsel assumed, that Scots law did not have a position on this matter.¹²⁵ A full discussion of the relevant law is found in Macgregor and Whitty's article on the case.¹²⁶ Essentially, the case could and should have been resolved using existing law on the payment of another's debt.¹²⁷ Accordingly, the development of a new exception to agency law in *Whitbread* cannot be justified, because there was no reason to deviate from the normal principles governing the payment of another's debt. The existence of a current body of law on the payment of another's debt would not, however, have aided Lord Drummond Young in *Laurence McIntosh*¹²⁸ or *John Stirling*,¹²⁹ both of which concern the recovery of debt due under another's contract rather than the payment of debt. Nonetheless, these cases unjustifiably breach privity, contract theory, the principles of agency, and the law of assignation and separate legal personality. The cases are therefore also incorrectly decided.

¹²³ Macgregor and Whitty, "Payment of another's debt" 86. In *Laurence McIntosh Ltd v Balfour Beatty Group Ltd* [2006] CSOH 197, there had been no formal transfer of the partnership's assets and liabilities to the company because the partners had been told that this was unnecessary (para 15). Lord Drummond Young indicates (para 17) that this advice was unsurprising given the formalities required for assignation, but it is submitted that this is illogical given that the case itself illustrates the problems which can arise when a new company does not ensure that it has title to sue in respect of contracts for which it takes responsibility.

¹²⁴ See paras 5-46 to 5-48 above.

¹²⁵ Macgregor and Whitty, "Payment of another's debt" at 59-60.

¹²⁶ Macgregor and Whitty, "Payment of another's debt" at 62-74.

¹²⁷ Macgregor and Whitty, "Payment of another's debt" at 79-80.

¹²⁸ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd* [2006] CSOH 197.

¹²⁹ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Ltd* [2007] CSOH 117, 2007 GWD 24-396.

E. CONCLUDING REMARKS

8-58. *Ad hoc* agency is doubtless an interesting legal development, but it is compatible with neither Scots contract nor delict law. Its operation in cases involving the transfer of obligations between separate legal entities contravenes the privity doctrine, and this cannot be justified on the basis of the contracting parties' intentions. Further, it violates the law of agency, assignation, and separate legal personality. In light of the lack of sound policy considerations in support of *ad hoc* agency, the uncertainty in agency law created by the concept, and the impact it has on the doctrinal clarity of assignation and separate legal personality, it cannot be justified as an exception to privity. Therefore, Macgregor and Whitty are correct in their conclusion that the doctrine should be "nipped in the bud".¹³⁰ *Ad hoc* agency should not continue to be recognised in Scots law.

8-59. Fortunately, the concept is in its relative infancy, and does not require statutory abolition, because it has only thus far been recognised in the Outer House. Ideally, the development of the doctrine should be halted by the Inner House (or Supreme Court) should a case arise with similar facts to the *ad hoc* agency cases.

¹³⁰ Macgregor and Whitty, "Payment of another's debt" 86.

9 Undisclosed Agency

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A. OVERVIEW OF CHAPTER 9

9-01. This chapter defines undisclosed agency and provides an overview of its development in Scots and English law. It addresses undisclosed agency's compatibility with the privity doctrine, comparing the direct-contract thesis and the intervention thesis, examines its relationship with the main theories of contract law, and determines whether undisclosed agency can be explained in terms of delictual liability. The final subsections analyse whether the policy considerations put forward in commentary justify the continued existence of undisclosed agency, offer arguments against the recognition of undisclosed agency, and discuss whether undisclosed agency ought to be abolished in Scots law.

B. UNDISCLOSED AGENCY IN SCOTS AND ENGLISH LAW

9-02. This section defines undisclosed agency and outlines its development in Scots and English law.

(1) Definition of undisclosed agency in Scots law

9-03. Ordinarily, an agent will negotiate with the third party on behalf of its principal, in order to facilitate transactions between the principal and the third party, and the third party will know that the agent is acting in a representative capacity.¹ Such “disclosed” agency is the norm in agency transactions. In contrast, “undisclosed” agency applies where the agent is instructed by the principal not to disclose to the third party that it is acting in a representative capacity.² The existence and identity of the principal is not revealed to the third party.³ In *Lockhart v Moodie*,⁴ for example, the defender, D Moodie and Company, entered into a joint venture with a merchant based in Dundee. The company authorised the merchant to purchase yarn from Lockhart for the purposes of the joint venture, and the merchant did so without disclosing that he was working on behalf of the company. It was found that there was an undisclosed agency contract between the company (the principal) and the merchant (the agent). Lockhart, the third party, could thus sue the company directly when he became aware of the joint venture.

9-04. Assuming that the agent has acted within the limits of its authority, the undisclosed principal can, after the third party is made aware of the principal’s existence, “sue or be sued by the third party as if the principal had been bound in a contract with the third party from the outset”.⁵ The agent can also sue or be sued. This contrasts with disclosed agency transactions, in which the agent is generally not party to the contract between the principal and third party (although the agent can be liable if the contracting parties so intend).⁶

9-05. The liability of the principal and agent is alternative, not joint and several.⁷ The third party chooses which to sue by expressly informing the agent and principal of its choice,⁸ or the third party’s selection may be inferred from its conduct.⁹ Lord Young states in *Meier & Co v Küchenmeister* that a third party “cannot have two principals

¹ Macgregor, *SME* para 1.

² Macgregor, *Agency* para 12.25; Gloag, *Contract* 127; J J H Pearson, “Agency”, in A D M Forte (ed), *Scots Commercial Law* (1997) 272, 289.

³ Macgregor, *Agency* para 12.25.

⁴ (1877) 4 R 859.

⁵ Macgregor, *SME* para 147, citing *Hutton v Bulloch* (1874) LR 9 QB 572. See also Macgregor, *Agency* para 12.34; Bell, *Principles* (1899) § 224A; Smith, *Short Commentary* 777; Gloag, *Contract* 128 and 133; *Thomson v Davenport* (1829) 9 B & C 78; *Bennett v Inveresk Paper Co* (1891) 18 R 975.

⁶ Bell, *Principles* (1899) § 224A.

⁷ Macgregor, *Agency* para 12.34; Gloag, *Contract* 140; Pearson, “Agency” 289.

⁸ Macgregor, *SME* para 155; Macgregor, *Agency* para 12.34; *Meier & Co v Küchenmeister* (1881) 8 R 642.

⁹ Macgregor, *Agency* paras 12.40–12.42.

to deal with, and no double remedy is allowed”.¹⁰ The third party is treated as having chosen between suing the principal and agent only after the principal is disclosed, and must be in possession of the knowledge necessary to make the choice.¹¹ The third party can claim against the principal regardless of whether the principal has paid the agent.¹² Gloag rationalises this on the basis that “if [the principal] chooses to trust to his agent, [he] must bear the loss if his trust prove misplaced”.¹³ Once the third party elects to sue either the principal or the agent, the other is liberated and cannot be sued if the third party changes its mind.¹⁴ Following disclosure of the principal, the agent remains capable of suing the third party.¹⁵

9-06. If the principal discloses itself and attempts to make a claim against the third party, it is subject to any defences which the third party could have used against the agent.¹⁶ This is because the third party “cannot be deprived of the benefit of the securities which he could fairly contemplate as resulting from the contract”.¹⁷ Further, the third party can, if sued by the principal, claim compensation on any debt owed to it by the agent where the debt was incurred prior to the third party receiving notice of the existence of the undisclosed principal.¹⁸ Macgregor explains that this rule is because the third party was under the impression that its contract was with the agent, and so the entirety of the third party’s claim against the agent must be upheld regardless of the principal’s disclosure.¹⁹ This protects the third party from being prejudiced by the disclosure of the principal. Similarly, the third party cannot be forced to make a payment to the principal if it has already settled the debt due under the contract with the agent.²⁰ The third party cannot, however, use defences which the agent has against the principal, or assert compensation on debt owed by the principal to the agent.²¹

9-07. Generally, the undisclosed agent cannot act as such where the contract between the agent and third party provides that the party with whom the third

¹⁰ (1881) 8 R 642 at 646.

¹¹ *Stevenson v Campbell* (1836) 14 S 562; *A F Craig & Co v Blackater* 1923 SC 472; Gloag, *Contract* 140.

¹² Bell, *Principles* (1899) § 224A.

¹³ Gloag, *Contract* 129–30.

¹⁴ Bell, *Principles* (1899) § 224A; Macgregor, *SME* para 147. See also para 152: “If the third party elects to claim against the principal, he or she effectively indicates to the agent that the agent is released from the obligation. Having elected, the third party cannot change his mind and choose instead to claim against the agent”.

¹⁵ *A F Craig & Co v Blackater* 1923 SC 472; Macgregor, *SME* para 157; Smith, *Short Commentary* 777.

¹⁶ Macgregor, *Agency* para 12.46, citing *Bennett v Inveresk Paper Co* (1891) 18 R 975. See also Bell, *Principles* (1899) § 224A.

¹⁷ Bell, *Commentaries* I, 528. See more generally I, 527–29 and also I, 537.

¹⁸ Macgregor, *Agency* para 12.46; Bell, *Commentaries* I, 527–29 and 537; Bell, *Principles* (1899) § 224A; *Gall v Murdoch* (1821) 1 S 77; *Bennett v Inveresk Paper Co* (1891) 18 R 975 at 985 per Lord McLaren; *Wester Moffat Colliery Co Ltd v A Jeffrey & Co* 1911 SC 346.

¹⁹ Macgregor, *Agency* para 12.46.

²⁰ Macgregor, *SME* para 162; *International Sponge Importers Ltd v Andrew Watt & Sons* 1911 SC (HL) 57.

²¹ Macgregor, *Agency* para 12.46.

party contracts is not acting for an undisclosed principal.²² Such provision can be express²³ or implied.²⁴ Further, undisclosed agency cannot operate in respect of contracts where *delectus personae* applies.²⁵

(2) Development of undisclosed agency in Scots law

9-08. Scots law has recognised undisclosed agency from at least the late seventeenth century.²⁶ English law influenced the development of the Scots law on undisclosed agency.²⁷ Bell, for example, cites the English case of *Paterson v Gandasequi*²⁸ in his writing on the topic.²⁹ Macgregor notes, however, that it is uncertain whether undisclosed agency is a “native development” or wholly sourced from English law.³⁰ There is a dearth of Scottish case law on undisclosed agency, perhaps due to the fact that there is no incentive for the principal to disclose itself when the third party makes a claim against the agent.³¹

9-09. Articles 56 and 153 of the Council Directive 2006/112/EC on the common system of value added tax applies to “intermediaries” including undisclosed agents,³² and section 47 of the Value Added Tax Act 1994 specifically applies to undisclosed agents. There are no other statutory provisions which recognise the existence of undisclosed agency. The Commercial Agents (Council Directive) Regulations 1993³³ apply only where the commercial agent acts in the principal’s name, on a disclosed basis.³⁴ Consequently, these Regulations do not cover the actions of an undisclosed agent. Macgregor explains that undisclosed agency was omitted because, unlike Scots and English law, continental systems do not distinguish between internal and external agency relationships.³⁵

²² Macgregor, *SME* para 153.

²³ Macgregor, *SME* para 153.

²⁴ *J A Salton & Co v Clydesdale Bank Ltd* (1898) 1 F 110. The Court of Appeal has held that the inclusion of an entire agreement clause tends to imply that none of the parties to the contract act on behalf of an undisclosed principal: *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] 1 WLR 3514.

²⁵ Macgregor, *Agency* para 12.37.

²⁶ See *Street v Hume* (1699) Mor 15122; *Sterly v Spence* (1687) Mor 15127. These cases do not use the term “undisclosed principal”, but the factual matrixes match the present-day undisclosed agency doctrine. See also C G H Paton (ed), *Baron David Hume’s lectures, 1786–1822* vol II (Stair Society vol 13, 1949) 160.

²⁷ Macgregor, *Agency* para 12.28.

²⁸ (1812) 15 East 62.

²⁹ Bell, *Principles* (1899) § 224A; Bell, *Commentaries* I, 537.

³⁰ Macgregor, *Agency* para 12.26. She cites Smith, *Short Commentary* 775, noting Smith’s conclusion that the concept of undisclosed agency was likely adopted from England. English law is discussed further below at paras 9-10ff.

³¹ Macgregor, *SME* para 160.

³² J Paterson, “International services” (2014) 104 *VAT Digest* 4, 23. The Directive remains relevant to UK tax law in accordance with the Taxation (Cross-border) Trade Act 2018 s 42.

³³ SI 1993/3053.

³⁴ Commercial Agents (Council Directive) Regulations 1993 reg 2.

³⁵ Macgregor, *SME* para 164.

(3) Undisclosed agency in English law

9-10. English law has recognised the doctrine of undisclosed agency since at least the eighteenth century.³⁶ It operates as an exception to the rule in English law that, as in Scots law, agents are not generally bound in agency structures but, rather, only the principal is bound.³⁷

9-11. According to Munday³⁸ and Whittaker,³⁹ factors may have influenced the development of undisclosed agency. The term “factor” has had various meanings in English law. The original factors, a type of mercantile agent defined under the Factors Act 1889, are “now practically extinct”.⁴⁰ It was, however, the development of the function of these factors which affected undisclosed agency. These factors sold goods for owners who did not reside at the place of sale,⁴¹ usually selling in their own names without disclosing that they were working on behalf of principals.⁴² In the context of factoring, the use of undisclosed agency structures appears to have arisen due to changes in trading methods which led to greater financial demands on the factor. This was recognised in the law by allowing greater flexibility as to the factor’s authority.⁴³ The courts recognised the ability of factors to sell their principals’ goods in their own names (i.e. as undisclosed agents), for reasons of commercial convenience on the part of the factors and principals, despite the fact that “persons with whom goods were pledged by a factor might suffer great hardship when it subsequently emerged that he was not the true owner of the goods”.⁴⁴ The development of undisclosed agency in this context was thus a response to greater demands on the factor which resulted in the law allowing greater flexibility in its and the principal’s powers.

9-12. In accordance with Lord Lloyd’s summary of the relevant English law in *Siu Yin Kwan v Eastern Insurance Co Ltd*, both the undisclosed principal and agent acting within the scope of its actual authority can sue and be sued on the

³⁶ Tan, “Undisclosed principals and contract” 481. See also S Whittaker, “Reciprocity Beyond Privity”, in Kincaid (ed), *Privity* 259, 269; Powell, *The Law of Agency* 34; *Scrimshire v Alderton* (1743) 2 Stra 1192; *Duke of Norfolk v Worthy* (1808) 1 Camp 227; *Skinner v Stocks* (1821) 4 B & Ald 437; *Armstrong v Stokes* (1871–1872) LR 7 QB 598; *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199; *Greer v Downs Supply Co* [1927] 2 KB 28.

³⁷ M Conaglen and R Nolan, “Contracts and knowing receipt: principles and application” (2013) 129 *LQR* 359, 363; P G Watts (ed), *Bowstead & Reynolds on Agency* (22nd edn, 2020) paras 8.069 and 9.012.

³⁸ R Munday, “A legal history of the factor” (1977) 6 *Anglo-American Law Review* 221, 244.

³⁹ S Whittaker, “Reciprocity Beyond Privity”, in Kincaid (ed), *Privity* 259, 271. See also G Fridman, “Undisclosed Principals and the Sale of Goods”, in D Busch, L Macgregor, and P Watts (eds), *Agency Law in Commercial Practice* (2016) 70, 70–71.

⁴⁰ Munday, “A legal history of the factor” 221, where Munday also explains the difference between these factors and more modern commercial financiers, who sometimes refer to themselves as factors. He describes the function of modern factors at 221–22.

⁴¹ Munday, “A legal history of the factor” 244.

⁴² *Baring v Corrie* (1818) 106 ER 317 at 320 per Abbott CJ.

⁴³ Munday, “A legal history of the factor” 243.

⁴⁴ Munday, “A legal history of the factor” 244. See also *Baring v Corrie* (1818) 106 ER 317; *Montagu v Forwood* [1893] 2 QB 350.

contract.⁴⁵ As in Scots law, the third party can only be treated as having chosen to sue the agent or principal after the latter's disclosure.⁴⁶ The third party does not have a duty to ascertain whether the agent is acting as such.⁴⁷ This also correlates with Scots law. Undisclosed agency cannot operate in personal contracts.⁴⁸ Additionally, *Said v Butt*⁴⁹ provides that an undisclosed principal may not sue the third party where the identity of the contracting party was a material factor in the formation of the contract between the agent and third party.⁵⁰ Undisclosed agency can, as in Scots law, be excluded by express or implied contractual provision.⁵¹

9-13. The third party has a wider range of defences available in English law than in Scots law when sued by the principal. It can use any defences against the principal which it would have had if the principal had formed the contract.⁵² Macgregor notes that the contrast between Scots and English law can be explained by the fact that, in English law, the initial contract in the undisclosed agency transaction is thought to be between the principal and third party, despite it being made by the agent.⁵³ Like Scots law, however, the principal may not use the defences which it has against the agent in a claim against the third party,⁵⁴ nor can it apply set-off to a debt owed by the agent in respect of the third party.⁵⁵ The principal can, however, use the agent's non-personal defences against the third party.⁵⁶ The liability of the agent and principal is, as in Scots law, alternative rather than joint and several.⁵⁷

⁴⁵ [1994] 2 AC 199 at 207 per Lord Lloyd. See further T Krebs, "Some Thoughts on Undisclosed Agency", in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (2014) 161, 165; Powell, *The Law of Agency* 27; R Munday, *Agency: Law and Principles* (3rd edn, 2016) para 10.27.

⁴⁶ *Kendall v Hamilton* (1879) 4 App Cas 504 at 542 per Lord Blackburn; Munday, *Agency: Law and Principles* para 10.28.

⁴⁷ Powell, *The Law of Agency* 176. See also *Greer v Downs Supply Co* [1927] 2 KB 28.

⁴⁸ Munday, *Agency: Law and Principles* para 10.50, citing *Barrett v Universal-Island Records Ltd* [2006] EWHC 1009 (Ch), [2006] EMLR 21 at para 233 per Lewison J.

⁴⁹ *Said v Butt* [1920] 3 KB 497.

⁵⁰ The case is discussed further below at para 9-73. See also *Rolls-Royce Power Engineering v Ricardo* [2003] EWHC 2871 (TCC), [2004] 2 All ER (Comm) 129 at paras 50 and 56 per Judge Richard Seymour QC; *Collins v Associated Greyhound Racecourses Ltd* [1930] 1 Ch 1 at 18 per Luxmoore J; *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545 at 555 per Lord Diplock; Unnamed author, "Agency, 'no loss' and legal black holes" (2004) 21(7) *Building Law Monthly* 1, 2–3. Macgregor, *Agency* para 12.38 notes the lack of Scots authority on this point.

⁵¹ *Mutual Steamship Assurance Association v Nevill* (1887) 19 QBD 110; *J A Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 516 per Lord Oliver of Aylmerton; Munday, *Agency: Law and Principles* paras 10.39–10.48.

⁵² P G Watts (ed), *Bowstead & Reynolds on Agency* (22nd edn, 2020) para 8.069; Powell, *The Law of Agency* 175; Munday, *Agency: Law and Principles* para 10.65.

⁵³ Macgregor, *Agency* para 12.46. The question of whether it can be said that the contracting parties are the principal and agent at the point of conclusion of the contract is discussed further below at paras 9-20 to 9-32.

⁵⁴ *Waring v Favenck* (1807) 1 Camp 85; *Kymer v Suwercropp* (1807) 1 Camp 109.

⁵⁵ Macgregor, *Agency* para 12.46.

⁵⁶ Powell, *The Law of Agency* 173.

⁵⁷ *Morel v Earl of Westmoreland* [1904] AC 11 at 14 per Lord Halsbury LC.

9-14. Although undisclosed agency does not appear to have been judicially discussed before the eighteenth century,⁵⁸ Lord Mansfield comments in *Rabone v Williams*⁵⁹ that the rules on the doctrine “are long settled”. Ames remarks that undisclosed agency is “so firmly established” in England that it would be “quixotic to attack it in the courts”.⁶⁰

(4) Classification of undisclosed agency

9-15. Whilst the general attitude towards the law on undisclosed agency in England is “liberal”,⁶¹ it is viewed as “an anomaly ... out of harmony with basic legal principles”.⁶² Tettenborn describes it as “tricky and unpredictable ... embodying as it does a volatile cocktail of legal anomaly and commercial expediency”.⁶³ Commentators have attempted to explain undisclosed agency in terms of third-party rights, assignation, trust, and equity.⁶⁴ These attempts have been unsuccessful. Undisclosed agency cannot be treated as a form of assignation because the principal does not, at the point of its disclosure or otherwise, become the agent’s assignee. An assignor cannot be sued on a contract once it has been validly assigned, whereas the third party in an undisclosed agency transaction can (at the point of disclosure) elect to sue either the principal or agent.⁶⁵ An explanation in terms of third-party rights, such that the principal is the recipient of a third-party right under the contract between the agent and third party, is also unsound. The formation of a third-party right requires that both contracting parties intend to benefit the third

⁵⁸ W Müller-Freienfels, “The undisclosed principal” (1953) 16 *MLR* 299, 302; R Powell, “Contractual agency in Roman law and English law” 1956 *South African Law Review* 41, 49. See also above at para 9-08.

⁵⁹ (1785) 7 TR 360.

⁶⁰ J B Ames, “The undisclosed principal – his rights and liabilities” (1909) 18 *Yale Law Journal* 443. See also Powell, *The Law of Agency* 152.

⁶¹ K C F Loi, “Quistclose trusts and Romalpa clauses: substance and nemo dat in corporate insolvency” (2012) 128 *LQR* 412, 437.

⁶² Müller-Freienfels, “The undisclosed principal” 299. See also Lord Lindley and Lord Davey’s speeches in *Keighley, Maxsted & Co v Durant* [1901] AC 240; *Durant v Roberts* [1901] 1 QB 629 at 635 per Smith LJ.

⁶³ A Tettenborn, “Insurers and undisclosed agency – rough justice and commercial expediency” (1994) 53 *CLJ* 223, 223. See also Smith, *Short Commentary* 777; R Barnett, “Squaring undisclosed agency law with contract theory” (1987) 75 *California Law Review* 1969, 1970; D J Hill, “Some problems of the undisclosed principal” [1967] *Journal of Business Law* 122, 124; Ames, “The undisclosed principal – his rights and liabilities” 443. Lord Lindley noted at 261 in *Keighley, Maxsted & Co v Durant* [1901] AC 240 that “there is an anomaly in holding one person bound to another of whom he knows nothing and with whom he did not, in fact, intend to contract”.

⁶⁴ See generally Ames, “The undisclosed principal – his rights and liabilities” 443; Lang, “Unexpected contracts versus unexpected remedies” 120–23. Goodhart and Hamsom claimed that undisclosed agency could be explained in terms of assignment, and was therefore compatible with privity: see A L Goodhart and C J Hamsom, “Undisclosed principals in contract” (1932) 4 *CLJ* 320, 378. However, this analysis was ruled out in Tan, “Undisclosed principals and contract” 496. See also *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199.

⁶⁵ Macgregor, *Agency* para 12.29.

party,⁶⁶ and it cannot be said that the third party intends to confer an enforceable benefit on the principal.⁶⁷ In light of the lack of coherent doctrinal classification for undisclosed agency, the doctrine can best be classified as *sui generis*.⁶⁸

C. COMPATIBILITY OF UNDISCLOSED AGENCY WITH SCOTS LAW

9-16. This section considers the interaction between undisclosed agency and privity, contract theory, and delict.

(1) Compatibility with the privity doctrine

9-17. There is no potential conflict with the privity doctrine in the internal relationship of undisclosed agency, i.e., the contract between the principal and agent. This relationship is established by the principal and agent, and the agency contract itself, in the sense of the mutual rights and obligations of agent and principal, has no bearing on any third parties.⁶⁹ The privity problem, such as it is, lies in the external aspect: whether the contract is between the third party and undisclosed principal, or third party and agent.

9-18. In terms of the relationship between the principal and third party, various commentators have suggested that undisclosed agency does not operate as an exception to the privity doctrine.⁷⁰ However, it is accepted by others that undisclosed agency is an exception to privity. Macgregor states that the fact that the “concept should be developed in English law is particularly surprising” in light of the traditionally strict approach to privity.⁷¹ She further comments that it is:

contrary to the central role of consent in contract that the third party may find that he has contractual rights and duties in a contract with a stranger. Normally, privity of contract dictates that individuals, through agreement, cannot affect third parties.⁷²

9-19. Similarly, Whittaker stresses that undisclosed agency is a “clear exception at common law to both aspects of privity of contract”,⁷³ and Merkin comments that the

⁶⁶ See above, paras 3-08 (Scots law) and 3-13 (English law).

⁶⁷ Macgregor, *Agency* para 12.29. The relevance of the third party’s (lack of) intention to benefit the principal is discussed further below at paras 9-33ff.

⁶⁸ Macgregor, *Agency* para 12.29, citing Smith, *Short Commentary* 777.

⁶⁹ Lang, “Unexpected contracts versus unexpected remedies” 117; *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130 at 1137 per Lord Pearson.

⁷⁰ W Müller-Freienfels, “The undisclosed principal” (1953) 16 *MLR* 299, 300; C H Tan, “Undisclosed agency and damages” [2013] *Journal of Business Law* 799, 816.

⁷¹ Macgregor, *Agency* para 12.29. See also A Burrows, *A Restatement of the English Law of Contract* (2016) para 48.

⁷² Macgregor, *SME* para 148.

⁷³ S Whittaker, “Reciprocity Beyond Privity”, in Kincaid (ed), *Privity* 259, 269. See also Müller-Freienfels, “The undisclosed principal” 300; Tan, “Undisclosed agency and damages” 799.

doctrine of undisclosed agency is “[p]erhaps the greatest challenge to privity from the rules of agency”.⁷⁴

9-20. Lang advances two principal theories of undisclosed agency.⁷⁵ According to the “intervention” thesis, the parties to the contract formed by the agent with the third party are the agent and third party. In contrast, the “direct-contract” thesis says that the true contracting parties are the third party and principal. Barnett claims that the difference between the two is merely academic.⁷⁶ Lang disagrees, arguing that the failure of the judiciary and contract theorists to distinguish between the two has prevented the clear and consistent application of the undisclosed principal doctrine.⁷⁷ Lang’s view appears the more persuasive, because the question of with whom the third party contracts determines matters such as the party against whom it should bring a claim if the principal refuses to perform under the contract.

9-21. Regardless, however, of the practical consequences of the appropriate categorisation, the distinction has considerable bearing on whether undisclosed agency is compatible with the privity doctrine. If the contract is between the undisclosed principal and third party from the point at which the contract is concluded, then there is no breach of privity. If, however, the contract is between the third party and the agent, and the principal can benefit from this contract by suing the third party, undisclosed agency breaches the privity doctrine.

9-22. The intervention thesis and the direct-contract thesis are now considered in turn in order to ascertain which is the more persuasive theory of undisclosed agency. This finding is then applied to the question of whether undisclosed agency contravenes privity.

(a) The direct-contract thesis

9-23. The direct-contract thesis (i.e. that the contracting parties are the third party and the principal) is supported in academic commentary. Müller-Freienfels argues that the doctrine of undisclosed agency may be compatible with privity because the undisclosed principal is not truly in the position of a stranger to the contract, because it receives the benefits and burdens of the contract.⁷⁸ Similarly, Lord Lindley asserts that a contract between an undisclosed agent and third party is “in truth, although not in form, that of the undisclosed principal himself”.⁷⁹ Goodhart and Hamson comment

⁷⁴ R Merkin, “The Enforcement of Promises made for the Benefit of a Third Party”, in Merkin (ed), *Privity* 21, para 2.33. He writes that: “if the law is not prepared to grant rights to third parties, it seems inconsistent to allow a third party to jump in and assert that he was always the intended beneficiary of the contract”.

⁷⁵ Lang, “Unexpected contracts versus unexpected remedies” 115.

⁷⁶ R Barnett, “Squaring undisclosed agency law with contract theory” (1987) 75 *California Law Review* 1969, 1983

⁷⁷ Lang, “Unexpected contracts versus unexpected remedies” 115.

⁷⁸ Müller-Freienfels, “The undisclosed principal” 300; Tan, “Undisclosed agency and damages” 802–03.

⁷⁹ *Keighley, Maxsted & Co v Durant* [1901] AC 240 at 261 per Lord Lindley. See also J B Ames, “The undisclosed principal – his rights and liabilities” (1909) 18 *Yale Law Journal* 443, 447.

that the undisclosed principal has privity of contract because it can sue and be sued.⁸⁰ The difficulty with this view, however, is that the undisclosed principal receives the benefits and burdens precisely *because* of the doctrine of undisclosed agency. These statements simply point out that the principal is benefited and burdened by the contract. They do not explain why the principal is the true contracting party. Further, these statements alone do not adequately exclude the possibility that the contracting parties are the third party and agent, and that the principal can sue and be sued despite this.

9-24. A more vociferous proponent of the direct-contract thesis is Tan.⁸¹ His position is that the general rule of damages (that one can sue only for one's own loss)⁸² is not violated by undisclosed agency, because the agent does not recover its own loss, but instead recovers on the principal's behalf. The agent's right to claim against the third party is "implicit in the relationship between the undisclosed principal, the agent, and the third party".⁸³ Tan acknowledges that the agent always contracts in a personal capacity, because the third party is unaware of the existence of the principal, but argues that the agent intends at all times to conclude the contract for the principal, and does so only on the principal's authority. Tan argues that, when the principal is revealed, the third party should be viewed as having contracted directly with the principal, rather than with the agent.⁸⁴ This, he submits, avoids doctrinal inconsistency with the principles of disclosed agency, and recognises that the agent is subordinate to the principal. Tan suggests that the fact that the contract is between the undisclosed principal and third party is recognised judicially.⁸⁵ He also cites in his favour Diplock LJ's statement that:

although the agent is entitled to enforce the contract in his own name, at least until the principal intervenes, he nevertheless does so on behalf of the principal and is accountable to the principal for the fruits of the action.⁸⁶

9-25. Lang, disagreeing with Tan, claims that the third party's ability to choose whether to sue the agent or principal significantly minimises "the anomalous consequences of the undisclosed principal doctrine against the rules of agency law".⁸⁷

⁸⁰ A L Goodhart and C J Hamson, "Undisclosed principals in contract" (1932) 4 *CLJ* 320, 352.

⁸¹ Tan, "Undisclosed agency and damages"; C H Tan, "Implied terms in undisclosed agency" (2021) 84 *MLR* 532, 535. Tan arrived at the opposite conclusion in an earlier article: Tan, "Undisclosed principals and contract" 509. This chapter focuses on his more recent work on the assumption that this represents his current views.

⁸² See discussion on this rule at para 6-24 above.

⁸³ Tan, "Undisclosed agency and damages" 800.

⁸⁴ Tan, "Undisclosed agency and damages" 802. Tan also discounts the possibility that the third party concluded two contracts – one with the agent, and one with the principal.

⁸⁵ Tan, "Undisclosed agency and damages" 802, citing *Keighley, Maxsted & Co v Durant* [1901] AC 240 at 261 per Lord Robertson. See also *Gardiner v Heading* [1928] 2 KB 284 at 290 per Scrutton LJ and *Said v Butt* [1920] 3 KB 497 at 503 per McCardie J.

⁸⁶ *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1966] 1 QB 650 at 685 per Diplock LJ. See also *A F Craig & Co v Blackater* 1923 SC 472; *James Laidlaw & Sons v Griffin* 1968 SLT 278.

⁸⁷ Lang, "Unexpected contracts versus unexpected remedies" 118. In other words, this rule protects the third party, rather than reflecting which party is the "true" party to the contract.

She points out that offering the third party the choice to sue either the agent or the principal does not make the contract any less that of the agent than the principal. It is submitted that Lang is correct. The fact that the agent was engaged by the principal does not mean that contracts concluded between the agent and the third party must be those of the principal. This ignores the perspective of the third party. The agent and the principal's alternative liability, at the election of the third party, indicates that either can be treated as full contracting parties, depending on the third party's choice of contracting partner. In other words, the agent's rights and liabilities continue following disclosure of the principal, and this clearly demonstrates that the agent is a party to the contract with the third party.

9-26. Lang also notes that there can only be an objective manifestation of intention to enter into a contract on the part of the agent and of the third party.⁸⁸ Krebs views undisclosed agency as "a glaring exception to privity" because it cannot realistically be said that the principal and third party objectively intend to be contractually bound.⁸⁹ These commentators are correct: the third party cannot realistically be said to intend to contract with a person of whom it is not aware. The implications of the third party's intention to contract with the agent, rather than the undisclosed principal, are further discussed below.⁹⁰ However, the third party's contractual intentions further demonstrate that the contracting parties (at least at the point at which the contract is concluded) are the third party and agent.

9-27. In summary, the direct-contract thesis does not explain the third party's lack of intention to contract with the principal or reflect the fact that the third party is still able to sue the agent even after the principal's disclosure. It is not therefore a sound view of undisclosed agency.

(b) The intervention thesis

9-28. Lang argues that the rules governing the operation of undisclosed agency reflect the intervention thesis (i.e. that the contracting parties are the third party and the agent). For example, she notes that the fact that the third party may use any defences against the principal that it has against the agent is the logical consequence of the contract being concluded by the agent.⁹¹ In similar vein, the most recent edition of *Bowstead & Reynolds on Agency* suggests that it "is difficult to deny that the undisclosed principal is really a third party intervening on a contract which the principal did not make".⁹²

⁸⁸ Lang, "Unexpected contracts versus unexpected remedies" 118.

⁸⁹ T Krebs, "Some Thoughts on Undisclosed Agency", in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (2014) 161, 161. See also *Armstrong v Stokes* (1871–1872) LR 7 QB 598 per Blackburn J. At 604, he comments that his doubts as to whether an undisclosed principal should be liable to the third party were too late, because the doctrine of undisclosed agency was already well-settled. See also Müller-Freienfels, "The undisclosed principal" 301; Macgregor, *Agency* para 12.29.

⁹⁰ See paras 9-33ff below.

⁹¹ Lang, "Unexpected contracts versus unexpected remedies" 132.

⁹² P G Watts (ed), *Bowstead & Reynolds on Agency* (22nd edn, 2020) para 8.069.

9-29. The intervention thesis also accounts for the fact that, from the third party's perspective, it intends to contract with the agent only. At the point at which the contract is concluded, it cannot be said that there is an objective contract between the principal and the third party. The principal should therefore be viewed as a third party to contracts concluded by the agent.⁹³ It is accepted that the agent will at all times intend to contract for the principal, and, if it sues the third party, it does so in order to return the proceeds of the claim to the principal. However, the third party's perspective is of equal relevance and, in accordance with the intervention thesis, the agent must be viewed as the party who concluded the contract with the third party.

9-30. Confusingly, Lang states that undisclosed agency requires that the agent is able to "create privity" between the principal and third party without disclosing to the third party that it is doing so.⁹⁴ However, she also comments that it is not clear whether privity ought to exist between the principal and third party as a result of the agent's actions, noting that privity in this context could arise without, or contrary to, the intention of the third party. Essentially, she acknowledges that allowing the principal to sue "means that privity of contract and certainty of parties cede to commercial convenience".⁹⁵ The intervention thesis leads to the conclusion that there is no privity between principal and third party until the principal's existence is known to the third party. As such, Lang's comments regarding the creation of privity between the principal and third party are perhaps, to a minor extent, a misuse of the term "privity".

(c) Summary

9-31. The justifications for the direct-contract thesis are insufficient, whereas the intervention thesis is logically coherent. It is submitted that the intervention thesis is, therefore, an accurate account of undisclosed agency. This means that the parties to the contract are the agent and third party. As the principal can sue and be sued under this contract, undisclosed agency thus operates as an exception to privity.

9-32. Admittedly, a limited body of commentary supports the view that the agent creates privity between the principal and the third party from the outset.⁹⁶ However, this analysis can be swiftly ruled out as a means of explaining undisclosed agency's compatibility with the privity doctrine. This is because privity operates subject to the intentions of the contracting parties, and in this case the third party clearly does not consent to the creation of privity (i.e. the creation of a contractual relationship) between itself and the undisclosed principal.⁹⁷

⁹³ Law Commission, Report on *Privity of Contract* para 2.15.

⁹⁴ Lang, "Unexpected contracts versus unexpected remedies" 119.

⁹⁵ Lang, "Unexpected contracts versus unexpected remedies" 119.

⁹⁶ R Munday, "A legal history of the factor" (1977) 6 *Anglo-American Law Review* 221; A L Goodhart and C J Hamson, "Undisclosed principals in contract" (1932) 4 *CLJ* 320.

⁹⁷ See paras 3-45ff above.

(2) Compatibility with contract theory

9-33. As discussed above, it cannot be said that the third party intends to contract with the principal.⁹⁸ This subsection explores the implications of this for the compatibility of undisclosed agency with contract theory.

9-34. Müller-Freienfels notes that: “Undoubtedly no theory of contract based on the liberal idea of mutual assent can explain how the third party can make a contract with a person of whose existence he does not even know”.⁹⁹

9-35. He explains that undisclosed agency’s lack of coherence with contract theory is due to the fact that the doctrine developed before the current dominant theories of contract. Reynolds similarly comments that the doctrine is “anomalous, in that a person intervenes on a contract who was not at the time of contracting in the contemplation of one of the parties at all”.¹⁰⁰ Lang,¹⁰¹ Tan,¹⁰² Merkin,¹⁰³ and Lord Blackburn¹⁰⁴ take a similar view. Krebs further comments that undisclosed agency “has nothing to do with consent”.¹⁰⁵ Macgregor writes that it is not possible to base the concept on third-party rights, because the agent and third party cannot be said to intend, expressly or impliedly, that the principal is to acquire a right to enforce the contract.¹⁰⁶ She writes that the claim that the contract is “formed from the outset between principal and third party strains the principle of consent in contract to an unacceptable degree”.¹⁰⁷ Even if the undisclosed principal only becomes a full contracting party upon disclosure, the third party cannot be viewed as consenting to the contract with the principal at this point, because it has no advance warning that it has contracted with the principal rather than the agent. As such, consent on the part of the third party can at best only be implied artificially. Gloag states that the question of whether an individual has the right to enforce a contract, or a term of a contract, is determined by the intention of the contracting parties, other than one “special case”: undisclosed agency.¹⁰⁸ These statements lead to the conclusion that undisclosed agency is not compatible with will theory, because the third party does not intend to benefit the principal in its contract with the agent, and it does not intend the principal to accrue an enforceable contractual benefit under this contract.

⁹⁸ See paras 9-20ff above.

⁹⁹ W Müller-Freienfels, “The undisclosed principal” (1953) 16 *MLR* 299, 301.

¹⁰⁰ F M B Reynolds, “Agency: theory and practice” (1978) 94 *LQR* 224, 225.

¹⁰¹ Lang, “Unexpected contracts versus unexpected remedies” 119.

¹⁰² C H Tan, “Undisclosed agency and damages” [2013] *Journal of Business Law* 799; Tan, “Undisclosed principals and contract” 481.

¹⁰³ R Merkin, “The Enforcement of Promises made for the Benefit of a Third Party”, in Merkin (ed), *Privity* 21, para 2.1.

¹⁰⁴ *Armstrong v Stokes* (1871–1872) LR 7 QB 598 at 603–04 per Lord Blackburn.

¹⁰⁵ T Krebs, “Some Thoughts on Undisclosed Agency”, in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (2014) 161, 180; see also 161 and 169.

¹⁰⁶ Macgregor, *Agency* para 12.29. See also Müller-Freienfels, “The undisclosed principal” 308; S Whittaker, “Reciprocity Beyond Privity”, in Kincaid (ed), *Privity* 259, 270–71.

¹⁰⁷ Macgregor, *SME* para 149. See also Macgregor, *Agency* para 12.29.

¹⁰⁸ Gloag, *Contract* 218–19.

9-36. It is potentially arguable that undisclosed agency is compatible with will theory if it is accepted that the third party consents to the risk that the person with whom it contracts is acting for an undisclosed principal.¹⁰⁹ Barnett argues that undisclosed agency is in fact best explained in terms of will theory. He suggests that, whilst the third party does not actively consent to contract with a particular undisclosed principal, it accepts the risk that anyone with whom it might deal may be an agent acting for another. There is no difference, he asserts, between this situation and circumstances in which a buyer has exclusive knowledge of the resale value of a particular item. As such, undisclosed agency does not “undermine the normal moral significance of consent”.¹¹⁰ This view is also reflected in a number of English cases.¹¹¹

9-37. These comments are to some extent convincing. The third party may not consent to contracting with the undisclosed principal in question, but could be viewed as impliedly consenting to contract with any undisclosed principal. This is because, in an ordinary commercial contract, it runs the risk of doing so if this is not excluded in the contract. However, this appears to misuse the concept of contractual consent, especially in cases where the third party would have negotiated differently had it been aware of the identity of the undisclosed principal.¹¹² The contract cannot truly be said to be for the benefit of the undisclosed principal because the third party’s consent and intention to benefit the principal does not exist. Regarding Barnett’s comparison with situations in which a buyer has knowledge of the resale value of an item which the seller does not, the parties to a sales transaction will be fully aware that they are operating in a competitive economy which does not (generally) require disclosure of the seller’s intended purpose and profits from the transaction. Parties to sales transactions run the risk that they will make a bad bargain, and they have full knowledge of this. However, they will generally assume that the person with whom they deal is in fact the person with whom they are entering into a contractual agreement. Consequently, in line with the commentary discussed immediately above, it appears that undisclosed agency cannot be explained by will theory.

9-38. Nor can undisclosed agency be justified by analogy with assignation. Gloag notes that where A and B contract, and the contract is assignable, A can become liable to B’s assignee with whom it has not contracted, and this is justified on the basis that, by entering into an assignable contract, A undertakes to be bound to an assignee if

¹⁰⁹ This would apply subject to the restrictions on the operation of undisclosed agency discussed above at paras 9-06 and 9-07 (Scots law) and paras 9-12 and 9-13 (English law). See also Tan, “Undisclosed principals and contract” 486.

¹¹⁰ R Barnett, “Squaring undisclosed agency law with contract theory” (1987) 75 *California Law Review* 1969, 1989–92. See also A Tettenborn, “Insurers and undisclosed agency – rough justice and commercial expediency” (1994) 53 *CLJ* 223, 224–25.

¹¹¹ It was said, for example, in *Talbot Underwriting Ltd v Nausch, Hogan & Murray Inc* [2006] EWCA Civ 889, [2006] 2 All ER (Comm) 751 at para 27 per Moore-Bick LJ that: “The mere identification, whether by name or description, of certain persons as assureds cannot be sufficient of itself to demonstrate an unwillingness on the part of the insurer to contract with any other person”. See also *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545 at 555 per Lord Diplock.

¹¹² Such cases are discussed further below at para 9-55 and paras 9-73ff.

and when the contract is assigned.¹¹³ Similarly, undisclosed agency may involve the implied acceptance of the risk of contracting with an undisclosed agent. However, a contract which is assigned does not initially involve the limitation of a party's ability to exercise its contractual intention in full simply on the grounds of the commercial convenience of another party.¹¹⁴ If the agent was bound to reveal that it was acting as such, this would allow the third party to decide whether it wished to enter into the contract without knowing the identity of its contractual partner. Undisclosed agency, however, denies this choice, and is not therefore compatible with consensual theories of contract law.

9-39. In terms of promissory theory, there is a limited body of commentary which argues that undisclosed agency is compatible with the privity doctrine because undisclosed agency enforces promises made by one party to another. Müller-Freienfels comments, for example, that the undisclosed principal should be bound to perform to the third party, because it authorised the agent to bind it by promise to the third party.¹¹⁵ This is plausible, and compatible with promissory theory – allowing the third party to sue the principal upholds the principal's promise to fulfil contracts concluded by the agent. It is less clear, however, that the third party can be said to have made a promise in favour of the principal. In *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board*, Lord Denning states that the privity doctrine ought not to overcome the principle that:

a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it, subject always, of course, to any defences that may be open on the merits. It is upon this principle, implicit if not expressed ... that Lord Mansfield held [in *Rabone v Williams*¹¹⁶] that an undisclosed principal is entitled to sue on a contract made by his agent for his benefit, even though nothing was said about agency in the contract.¹¹⁷

9-40. Undisclosed agency could, according to this view, be justified as an exception to privity on the grounds that it gives effect to the intentions of the contracting parties by enforcing the promise made by the third party to the principal. However, this does not counter the argument that the third party does not intend to be bound to perform in favour of the undisclosed principal. The third party cannot therefore be said to have voluntarily promised to perform in favour of the principal. The third party can only be said to have promised to uphold its obligations in respect of the agent.

9-41. Undisclosed agency is also incompatible with assumption theory. It is unrealistic to argue that the third party voluntarily assumes liability in respect of an

¹¹³ Gloag, *Contract* 257.

¹¹⁴ The rules of assignation are discussed at paras 5-59ff.

¹¹⁵ W Müller-Freienfels, "The undisclosed principal" (1953) 16 *MLR* 299, 307.

¹¹⁶ (1785) 7 TR 360.

¹¹⁷ [1949] 2 KB 500 at 514-15.

undisclosed principal of whose existence it was unaware until the point of disclosure. The third party has not intentionally assumed any liability in respect of the undisclosed principal.

9-42. In summary, undisclosed agency is incompatible with will theory, promissory theory, and assumption theory.

(3) Compatibility with delict

9-43. An explanation of undisclosed agency in terms of delictual liability would require the imposition of a duty of care on the part of the third party in respect of the undisclosed principal. In other words, the third party would be liable to the principal in respect of loss stemming from its failure to fulfil the obligations entered into in the contract concluded with the agent. It is not immediately obvious why this should be the case because there is, in Scots law, no delictual duty of care to fulfil contractual obligations entered into with undisclosed principals. The undisclosed principal and third party are subject to contractual obligations to one another based on the contract made between the agent and third party, and the liability of the third party ought therefore to be contractual. Further, it would be unsatisfactory to require undisclosed principals to sue the third party in delict whilst their agents are able to sue in contract. The scope of their respective claims would be different. For example, the principal would need to prove fault on the part of the third party to make a delictual claim, whereas this would not be necessary for the agent's contractual claim.¹¹⁸

9-44. Regarding *Hedley Byrne* liability,¹¹⁹ the operation of this form of liability requires that the relevant party has a specific individual in mind, in that it must know the identity of the person on whom the loss will fall.¹²⁰ In the case of undisclosed agency, the third party is, for obvious reasons, unaware of the identity of the undisclosed principal. Indeed, it was confirmed in the recent Supreme Court case of *Banca Nazionale del Lavoro SPA v Playboy Club London Limited*¹²¹ that an undisclosed agent could not rely on a credit reference supplied by a bank which was addressed to the agent's principal. Lord Sumption distinguished the case at hand from *Hedley Byrne* on the grounds that the bank could not have known that the reference would be relied on by any party other than the principal, whereas in *Hedley Byrne* it was known that the statement would be relied on by an unidentified client on whose behalf the statement was requested.¹²² *Hedley Byrne* liability cannot therefore apply.

9-45. In chapter 7,¹²³ it was submitted that *Junior Books* liability¹²⁴ could potentially be imposed in transferred loss situations if that form of liability was extended to allow

¹¹⁸ Hogg, *Obligations* para 3.66.

¹¹⁹ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

¹²⁰ See para 4-11 above.

¹²¹ [2018] UKSC 43, [2018] 1 WLR 4041.

¹²² [2018] UKSC 43 at para 10.

¹²³ See paras 7-50ff above.

¹²⁴ *Junior Books Ltd v Veitchi Co Ltd* 1982 SC (HL) 244. *Junior Books* liability is discussed at para 4-28 above.

for recovery where the contracting party was not aware of the specific third party. This would be justified on the basis that the contracting party responsible for the breach could reasonably foresee that the loss may be transferred to another. This could not, however, apply in the context of undisclosed agency. The third party in such cases has been led to believe that it has contracted with the agent, and has no reason to consider otherwise. Finding such “contemplation” on the part of the third party would be entirely artificial. Even if the third party was specifically asked to consider the scope of those who may be affected by its defective performance of the contract, it would name only the agent.

9-46. The application of *Henderson v Merrett Syndicates*¹²⁵ or *White v Jones*¹²⁶ liability to undisclosed agency cases is also unsatisfactory. In terms of the former, this form of liability requires that the person claiming damages has relied on an undertaking on the part of the person who caused the loss. The principal can indeed be said to have relied on the third party’s undertaking to perform under the contract concluded with the agent. However, *Henderson v Merrett Syndicates* liability also requires an assumption of responsibility on the part of the person who owes the duty of care in respect of the person who has suffered a loss. There is no such assumption of responsibility on the part of the third party in respect of the undisclosed principal, because the third party was not aware of the principal’s existence. As such, the third party cannot realistically be said to have assumed responsibility for the principal. A possible counter-argument is that the third party can be deemed to have assumed responsibility for any undisclosed principals with whom it may contract. However, the assumption of responsibility must be actual, not deemed.¹²⁷ This means that *Henderson v Merrett Syndicates* liability cannot be imposed in undisclosed agency transactions.

9-47. In terms of *White v Jones* liability, it is arguable that, in undisclosed agency cases, the agent contracts with the intention of creating a benefit in favour of the principal, just as the testator contracts with the aim of securing the conferral of an inheritance upon the intended legatee. However, the third party in the context of undisclosed agency does not, unlike the careless solicitors, have any knowledge of this purpose of the contract. Imposing *White v Jones* liability in such cases forces the third party to uphold and protect the interests of parties of which it had no knowledge at the time of formation of contract. An analysis of undisclosed agency based on this form of liability is therefore unsuitable.

9-48. It is not therefore possible to explain undisclosed agency in terms of delictual liability.

¹²⁵ [1995] 2 AC 145. A description of this form of liability is provided at para 4-14 above.

¹²⁶ [1995] 2 AC 207. *White v Jones* liability is explained at para 4-15 above.

¹²⁷ *HM Commissioners of Customs and Excise v Barclays Bank Plc* [2006] UKHL 28, [2007] 1 AC 181.

D. POLICY CONSIDERATIONS JUSTIFYING UNDISCLOSED AGENCY

9-49. This section first provides an overview of relevant commentary on undisclosed agency to identify the key arguments justifying the existence of the doctrine. These justifications are assessed to determine whether they do in fact offer sound policy considerations in support of undisclosed agency. The section then examines whether the policy considerations supporting statutory exceptions to privity can be applied to undisclosed agency.

9-50. Policy considerations in favour of recognising undisclosed agency which have not been considered in commentary are also presented in this section. These arguments highlight a narrow set of circumstances in which undisclosed agency can be supported. The final part of this section considers policy arguments against the recognition of undisclosed agency.

(1) Justifications offered in commentary

9-51. Whilst the doctrine of undisclosed agency developed due to concerns regarding the insolvency of intermediaries acting in their own names on behalf of others, it is said to be “useful, and commercially convenient” in other contexts.¹²⁸ Commentary on undisclosed agency generally casts the concept in a positive light. It is said, for example, that the law represents “a compromise between the commercial convenience of allowing an undisclosed principal to intervene in a contract made by an undisclosed agent, and the interest of the third party not to be prejudiced in any way by such intervention”.¹²⁹

9-52. This subsection examines whether the reasons why undisclosed agency is said to be commercially convenient are in fact correct.

9-53. Müller-Freienfels comments that undisclosed agency valuably allows for bipartite relationships to be transformed into multi-party relationships.¹³⁰ Yet this point does not justify undisclosed agency. Tri- or multi-party contractual situations can be effectuated in disclosed agency transactions. This is not, as Müller-Freienfels seems to suggest, a benefit solely associated with undisclosed agency. Similarly, Tan argues that “efficient channels of distribution” involving “specialist middlemen” are “essential to a modern economy”.¹³¹ However, he does not identify any benefits in terms

¹²⁸ T Krebs, “Some Thoughts on Undisclosed Agency”, in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (2014) 161, 164. See also S Whittaker, “Reciprocity Beyond Privity”, in Kincaid (ed), *Privity* 259, 271; Lang, “Unexpected contracts versus unexpected remedies”.

¹²⁹ Krebs, “Some Thoughts on Undisclosed Agency” 165. See also P G Watts (ed), *Bowstead & Reynolds on Agency* (22nd edn, 2020) para 8.069; C H Tan, “Undisclosed agency and damages” [2013] *Journal of Business Law* 799, 800–01; E J Weinrib, “The undisclosed principle of undisclosed principals” (1975) 21 *McGill Law Journal* 298.

¹³⁰ W Müller-Freienfels, “The undisclosed principal” (1953) 16 *MLR* 299, 300.

¹³¹ Tan, “Undisclosed principals and contract” 482. See also *Keighley, Maxsted & Co v Durant* [1901] AC 240 at 261 per Lord Lindley.

of the commercial efficiency of undisclosed agency as opposed to disclosed agency. Whilst he is correct that using middlemen allows, for example, producers to delegate distribution activities so that they can dedicate greater resources to production,¹³² this benefit arises through disclosed as well as undisclosed agency.

9-54. Undisclosed agency is also thought of as useful because it protects principals where the agent becomes bankrupt, allowing the principal to claim property or money due to it by circumventing the bankruptcy proceedings.¹³³ Krebs explains that undisclosed agency protects the principal and third party from the impact of the agent's insolvency, in situations in which the agent would otherwise be liable to the third party.¹³⁴ Similarly, Tan notes that the earliest English cases on undisclosed agency concern the bankruptcy of factors, and the principal's consequent need to intervene.¹³⁵ It is unclear in the modern law why such protection against the agent's bankruptcy or insolvency should be necessary. The principal and agent have separate patrimonies, meaning that sums transferred from the principal to the agent and intended for the third party should not be included in the agent's patrimony during bankruptcy proceedings. This would also be the case if the principal's existence and identity were disclosed.

9-55. Another justification is that undisclosed agency allows the principal to avoid adverse conditions and higher prices which it would face if the third parties knew with whom they were dealing.¹³⁶ For example, the purchase of the land for the site of Walt Disney World in Florida was completed by undisclosed agents working for Walt Disney Productions.¹³⁷ The agents were employed to ensure that the landowners did not ask for a higher price for their land in light of its intended purpose. Undisclosed agency does indeed allow a principal to avoid adverse conditions it might face if it contracts in its own name. Similarly, undisclosed agency allows a principal to contract with a third party who would not have entered the contract had it known the principal's identity (provided that the contract is an ordinary commercial contract).¹³⁸ It is submitted that these factors alone are insufficient to justify the continued recognition of undisclosed agency. Undisclosed agency in both situations offers commercial benefit to the principal.

¹³² Tan, "Undisclosed principals and contract" 482.

¹³³ A L Goodhart and C J Hamson, "Undisclosed principals in contract" (1932) 4 *CLJ* 320, 352; H Bennett, *Principles of the Law of Agency* (2013) para 9.20.

¹³⁴ T Krebs, "Agency Law for Muggles: Why There is no Magic in Agency", in A Burrows and E Peel (eds), *Contract Formation and Parties* (2010) 205, 212; Bennett, *Principles of the Law of Agency* para 9.23.

¹³⁵ Tan, "Undisclosed principals and contract" 482; C H Tan, "Implied terms in undisclosed agency" (2021) 84 *MLR* 532, 533.

¹³⁶ Lang, "Unexpected contracts versus unexpected remedies" 115; A Barak, "On the nature of undisclosed agency" (1976) 8 *Tel Aviv University Studies in Law* 45, 47; Tan, "Undisclosed principals and contract" 483; R Barnett, "Squaring undisclosed agency law with contract theory" (1987) 75 *California Law Review* 1969, 1976–77; G Fridman, "Undisclosed Principals and the Sale of Goods", in D Busch, L Macgregor, and P Watts (eds), *Agency Law in Commercial Practice* (2016) 70, 79.

¹³⁷ R A Mann and B S Roberts, *Business Law and the Regulation of Business* (13th edn, 2020) 613.

¹³⁸ Macgregor, *Agency* para 12.31.

However, the third party's interests are not taken into account. The third party ought to be able to make an informed choice regarding the identity of its contracting partners, or at least voluntarily to assume the risk of contracting with someone with whom it may not wish to contract where the principal's existence is disclosed (and identity hidden). In cases where undisclosed agency is used to circumvent a third party's unwillingness to contract with the principal in question, this is undoubtedly inconsistent with a will-based account of contract law. The third party is forced to fulfil a contract to which it would not have consented, had it known the identity of the other contracting party. A principal could seek to avoid adverse conditions by instructing the agent to reveal its existence but conceal its identity. Where the identity of the contracting party does not matter to the third party, this arrangement would be mutually satisfactory. The third party may refuse to proceed unless the principal's identity is revealed, in which case the principal may indeed encounter adverse conditions. This is, however, simply the consequence of the third party having an opportunity to contract on an informed basis. Allowing this choice provides a fairer balance between the interests of the third party and the principal.

9-56. Additionally, an agent might wish to hide the fact that it is working for a principal to avoid the third party bypassing it to negotiate directly with the principal in future dealings, which may cause inconvenience to both agent and principal.¹³⁹ It is true that a principal may have engaged an agent to save time and expense in managing its transactions directly, and may wish to remain undisclosed to avoid the inconvenience of being contacted by the third party. However, this is not a strong argument for the recognition of undisclosed agency. It is not burdensome for the agent to refuse to pass on the contact details of a principal, nor for the principal, if contacted directly, to refer the third party to its agent and refuse to deal with the third party. The inconvenience of a third party seeking to bypass the agency structure chosen by the parties does not justify circumventing contractual doctrine and theory. Further, practical convenience is not a significant policy consideration compared with those discussed in chapter 5.¹⁴⁰

9-57. From the agent's perspective, Tan also argues that the agent might distribute goods which it owns as well as those of its principal, and it may not wish third parties to distinguish transactions involving the agent's goods from those of the principal.¹⁴¹ Whilst this may be advantageous for the agent in some circumstances, this factor alone does not outweigh the disadvantages to the third party. It is not particularly onerous for the agent to indicate whether the third party is transacting with itself or a principal, nor is a commercial third party likely to become confused by the fact that it has made certain transactions directly with the agent, and others with a principal.

¹³⁹ Lang, "Unexpected contracts versus unexpected remedies" 115; Tan, "Undisclosed principals and contract" 482–83.

¹⁴⁰ The policy considerations which justify deviation from privity in the case of certain statutory exceptions are summarised at paras 5–43ff above.

¹⁴¹ Tan, "Undisclosed principals and contract" 482–83.

9-58. Macgregor notes that a principal might be motivated by the protection of personal information.¹⁴² She cites *MacPhail & Son v Maclean's Trustee*,¹⁴³ in which a creditor (Mr Scott) appointed his debtor (Mr Maclean) as the manager on his farm without disclosing to the pursuer that he was the owner. Mr Maclean had previously owned the farm, but had conveyed it to Mr Scott, as his trustee, to meet his debts. The pursuer, MacPhail & Son, had entered into a contract with Mr Maclean for the supply of goods, believing that Mr Maclean was the owner of the farm. It was found that Mr Scott was liable on the contract, because Mr Maclean was acting as his undisclosed agent. It was recognised that Mr Scott did not communicate that Mr Maclean was no longer the owner, and did not reveal himself as the principal, due to “considerations of delicacy towards his client and debtor”.¹⁴⁴ Whilst this consideration is understandable, permitting the operation of undisclosed agency in this circumstance does not account for the interests of the third party, MacPhail & Sons, which did not have the opportunity to assess whether it wished to contract with Mr Scott.

9-59. As discussed above, the third party must, at the point of disclosure, elect to sue either the agent or the principal.¹⁴⁵ It could be said that undisclosed agency offers the third party the option of suing two people, when it thought, at the point of contracting with the agent, that it could sue only one person (i.e. the agent). This “possible advantage” is noted by Fridman.¹⁴⁶ However, as undisclosed agency is used as a means of engaging a third party in a contractual relationship with a party with whom it may not otherwise have contracted, this is not a realistic benefit to the third party. The third party was content to contract with the agent only, and, where the principal has used an undisclosed agent to contract with a third party who would not otherwise have contracted with it, the third party is unlikely to view the ability to sue the principal positively. In other words, the “benefit” of having the option of suing the principal is cancelled out by the third party’s liability towards the principal, with whom it may not have chosen to contract.

9-60. Tan identifies that higher prices encountered by the principal, if it had to be disclosed, may affect third parties such as consumers.¹⁴⁷ There may be a degree of truth in this. However, empirical research is required to demonstrate whether abolishing undisclosed agency would in fact have adverse consequences for consumers. It is also possible that a price adjustment would not be necessary if the principal’s existence was disclosed, but its identity remained confidential. Disclosure of unnamed principals may offer a compromise between deceiving the third party and ensuring that particular principals, and their customers, are not unnecessarily penalised. Accordingly, it cannot

¹⁴² Macgregor, *Agency* para 12.31. The potential value of undisclosed agency in protecting anonymity is discussed further below at para 9-69.

¹⁴³ (1887) 15 R 47.

¹⁴⁴ (1887) 15 R 47 at 54 per Lord Young.

¹⁴⁵ See above, paras 9-05 (Scots law) and 9-12 (English law).

¹⁴⁶ Fridman, “Undisclosed Principals and the Sale of Goods” 79. See also H Bennett, *Principles of the Law of Agency* (2013) para 9.21.

¹⁴⁷ Tan, “Undisclosed principals and contract” 483.

be said that the potential impact on external parties currently justifies the continued recognition of undisclosed agency.

9-61. In summary, undisclosed agency is viewed as commercially convenient for various reasons. However, none of these justifications stands up to scrutiny, primarily because they generally consider only the perspective of the agent and principal. As such, none of reasons offered in commentary provides a satisfactory justification for the continued existence of undisclosed agency.

(2) Policy considerations supporting the statutory exceptions

9-62. Undisclosed agency is difficult to justify on the grounds of protecting weaker parties. The party who benefits from bypassing the privity doctrine in undisclosed agency situations is the principal, which is not protected from any adverse circumstances, but rather is able to circumvent the doctrine to achieve commercial gain. It is unrealistic to argue that undisclosed agency ought to be recognised to protect the principal from having to contract in its own name.

9-63. Undisclosed agency cannot be justified on the basis that it ensures recovery of damages for loss caused by breach of contract. The only reason the contract is not initially concluded between the principal and the third party is because the principal does not wish to disclose its identity. Justifying the imposition of liability on the third party's part on the grounds that this ensures its contractual obligations are upheld allows the principal to have its cake and eat it: the principal circumvents the privity doctrine purely for its own convenience, and then ensures that it can enforce the resulting contract because the third party ought to uphold its obligations.

9-64. In terms of upholding the intentions of the contracting parties, undisclosed agency allows the principal's chosen contractual structure to be upheld. However, it is difficult to support the undisclosed agency doctrine on this ground, because the third party who finds itself contractually bound to the principal does not intend to participate in an undisclosed agency transaction. There is no reason to assume that the principal's contractual freedom should outweigh that of the third party.

9-65. In summary, undisclosed agency cannot be justified in accordance with any of the considerations underpinning the statutory exceptions to privity.¹⁴⁸

(3) Other potential justifications

9-66. Undisclosed agency is not justified by the arguments offered in commentary, and it cannot be explained in line with any of the policy considerations upholding the statutory exceptions to privity. This subsection considers whether there are other justifications which may provide good reason for continuing to uphold the concept in Scots law.

¹⁴⁸ As to which see paras 5-43ff above.

9-67. One potential argument for the recognition of undisclosed agency is that it protects against discrimination. It is understandable that a person may wish to employ an undisclosed agent to enter into a contract on its behalf if it knows that it will face adverse conditions if it contracts in its own name. If undisclosed agency was to be permitted in cases where the principal had used an undisclosed agency structure to protect itself against discrimination, any such potential discrimination considered in ascertaining the permissibility of the structure ought to fall within the scope of protection under the Equality Act 2010. This Act prevents discrimination against a closed list of protected characteristics.¹⁴⁹ Those who have experienced discrimination based on a protected characteristic, such that they have been unable to access goods or services, or access goods or services at a fair price, may wish to contract through an undisclosed agent. For example, it has been shown in a US study that car dealers tend to quote lower prices to white males than to female and black purchasers.¹⁵⁰ The founder of Innclusive, a home-sharing platform providing rented accommodation primarily to people of colour, created the website after he struggled to secure Airbnb bookings in his own name, but found that hosts immediately accepted bookings for the same property on the same dates from a profile with a picture of a white man.¹⁵¹ Whilst those who have experienced discrimination should not be forced to contract through agents, undisclosed agency arguably offers a useful means of avoiding discrimination without spending time and money on a claim under the Equality Act 2010. If undisclosed agency were to be abolished, an exception could exist to allow the doctrine to be used to avoid discrimination. This would only apply to characteristics protected under the Equality Act 2010. The Walt Disney Company,¹⁵² for example, was protecting itself from being subject to unfavourable prices, and was arguably therefore using undisclosed agents to protect against discrimination. Corporate identity is not, however, a protected characteristic under equalities legislation, and so this would not be classified as a justified use of undisclosed agency. If, however, a woman asked a male acquaintance to purchase a car for her in order to secure favourable rates at a dealership, this ought to be a permissible undisclosed agency transaction because the woman was protecting herself from being discriminated against on the grounds of a protected class (sex). Whilst the acquaintance could purchase the car in his own name and then resell it to the woman, undisclosed agency provides a more efficient solution.

9-68. If undisclosed agency was to be recognised in such cases, this would be subject to the current law on situations in which undisclosed agency is not permissible, namely,

¹⁴⁹ These characteristics are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation: see the Equality Act 2010 s 4.

¹⁵⁰ The study, and difficulties in reconciling the market economy with anti-discrimination policies more generally, are discussed in I Ayres, "Fair driving: gender and race discrimination in retail car negotiations" (1991) 104 *Harvard Law Review* 817. The results of the study are detailed at 819 – most strikingly, black women were asked to pay three times the mark-up of white males.

¹⁵¹ Y Callahan, "Innclusive and Noirbnb Hope Black People Will Never Need to Share Another #AirbnbWhileBlack Story", *The Root*, 17 June 2016, available at: <https://thegrapevine.theroot.com/innclusive-and-noirbnb-hope-black-people-will-never-nee-1790888574>.

¹⁵² See para 9-55 above.

unassignable contracts,¹⁵³ as well as the rule from *Said v Butt*¹⁵⁴ that undisclosed agency cannot apply where the identity of the contracting parties is a material factor.¹⁵⁵ A simple consumer contract for the exchange of goods and services (such as the sale of a car) would not fall within either category.

9-69. It could also be argued that undisclosed agency protects a contracting party's privacy. However, this is not a strong argument. Whilst the principal can sue only at the point at which its identity is revealed, the anonymity provided by undisclosed agency is not necessarily temporary. The lack of relevant case law¹⁵⁶ indicates that principals rarely need to enforce the contract against the third party, who may therefore remain unaware of the principal's existence. However, there is no reason to assume that the principal's interest in anonymity should outweigh the third party's interest in exercising its ability to make informed choices as to the identity of its contracting partners.

9-70. It may be suggested that abolishing undisclosed agency will not improve the third party's position, because the principal can simply engage someone to purchase property in its own name and then resell it to the principal. In *Nash v Dix*,¹⁵⁷ a Roman Catholic committee had tried unsuccessfully to purchase a Congregationalist chapel to use for Catholic worship. Realising that the vendor did not wish to sell to them, the committee engaged the plaintiff to purchase the chapel and resell it to them at a profit. It was found that the plaintiff was not acting as an agent, but, rather, had purchased in his own name for the purpose of re-sale. The fact that the plaintiff was aware that the defendants would not have wished to negotiate with a person acting as an agent for the Roman Catholics, "did not touch the case if he were buying ... on his own account".¹⁵⁸ If, on the facts of the case, the purchaser was not acting as an agent, then the law of agency ought not to prevent resale. However, the fact that cases such as *Nash v Dix* are correctly decided does not mean that the abolition of undisclosed agency would have no effect. Rather, this would prevent cases in which the third party was forced to perform in favour of the principal, and/or enter into a continuing contractual relationship with the principal. Additionally, transaction costs associated with resale are likely to be higher than those incurred through agency, particularly in cases concerning immoveable property. If a principal is faced with a choice between operating as a disclosed but unnamed principal or asking someone to buy property and resell the property to it, it may be disinclined to incur the transaction costs of the second sale.

9-71. A final potential advantage is that, although it is clearly difficult to justify undisclosed agency from a doctrinal, theoretical, or policy perspective, the doctrine

¹⁵³ This restriction on the operation of undisclosed agency is noted above at paras 9-07 (Scots law) and 9-12 (English law).

¹⁵⁴ [1920] 3 KB 497.

¹⁵⁵ See para 9-12 above.

¹⁵⁶ See para 9-08 above.

¹⁵⁷ (1898) 78 LT 445.

¹⁵⁸ (1898) 78 LT 445 at 488 per North J.

ought to remain in Scots law for reasons of commercial competitiveness of the jurisdiction as a whole. In general terms, Continental jurisprudence “esteems the institution of undisclosed agency very highly”,¹⁵⁹ and undisclosed agency is recognised in both the DCFR¹⁶⁰ (in a limited form) and in PECL.¹⁶¹ In order for Scots law to be viewed as a modern, commercial, and competitive legal system, it arguably must continue to recognise a concept deemed sufficiently important to merit inclusion in the DCFR and PECL. That said, however, Reynolds has praised the absence of undisclosed agency from the UNIDROIT Principles.¹⁶² According to Article 2.2.4(1), an agent acting with authority but without the third party’s knowledge that it is acting as an agent (essentially, an undisclosed agent) can sue and be sued under the contract, but the principal cannot make a claim against the third party. Reynolds describes the provision as “a specific rejection” of the doctrine of undisclosed agency.¹⁶³ Commenting on the UNIDROIT Principles Working Group’s potential omission of undisclosed agency in 1999, DeMott noted that “I do not think that deleting this aspect of the doctrine represents a major loss”.¹⁶⁴ Lord Sumption recently commented that, in English law, undisclosed agency “survives in the modern law on account of its antiquity rather than its coherence”.¹⁶⁵ Further, civilian systems do not generally recognise undisclosed agency.¹⁶⁶ Thus, undisclosed agency is recognised in some jurisdictions and cross-border instruments, but it enjoys neither widespread recognition nor full academic support. Such limited recognition in proposed harmonisation measures does not justify its continued recognition in Scots or English law.

¹⁵⁹ W Müller-Freienfels, “The undisclosed principal” (1953) 16 *MLR* 299, 300. See also H Verhagen and L Macgregor, “Agency and representation”, in J M Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2nd edn, 2012) 37, 54–56.

¹⁶⁰ DCFR Book IV.D.-1:101–105 allows for agency transactions generally (referred to as “mandate contracts”). Book IV.D.-1:102(e) specifically mentions that “a mandate for indirect representation is a mandate under which the agent is to act in the agent’s own name or otherwise in such a way as not to indicate an intention to affect the principal’s legal position”.

¹⁶¹ PECL Article 3:102(2) provides that where an agent acts on behalf of the principal, but not in the name of the principal, the rules on indirect representation apply.

¹⁶² F M B Reynolds, “Authority of Agents”, in *ICC International Court of Arbitration Bulletin*, Special Supplement on UNIDROIT Principles: New Developments and Applications (2005) 9, 10. See also F Reynolds, Letter dated 12 December 1999, in D DeMott and F Reynolds, *Comments on the Revised draft Chapter on Authority of Agents (Study L – Doc. 63)* (International Institute for the Unification of Private Law, Rome, 1999) para 4, available at: <https://www.unidroit.org/preparatory-work-principles-1994>.

¹⁶³ Reynolds, “Authority of Agents” 11.

¹⁶⁴ D DeMott, Letter dated September 23 1999, in D DeMott and F Reynolds, *Comments on the Revised draft Chapter on Authority of Agents*.

¹⁶⁵ *Banca Nazionale del Lavoro SPA v Playboy Club London Ltd* [2018] UKSC 43, [2018] 1 WLR 4041 at para 12.

¹⁶⁶ Verhagen and Macgregor, “Agency and representation” 54–55 and 58–61. Many civilian systems do, however, recognise the similar concept of undisclosed indirect representation, which is discussed in S Kortmann and J Kortmann, “Undisclosed Indirect Representation – Protecting the Principal, the Third Party, or Both?”, in D Busch, L Macgregor, and P Watts (eds), *Agency Law in Commercial Practice* (2016) 83, 85–87.

9-72. In essence, there are no convincing policy reasons justifying the continued recognition of undisclosed agency. Its abolition ought to be seriously considered. If undisclosed agency was to be abolished, an exception could, however, be made to allow undisclosed agency to be used to protect against discriminatory practices, this being justified by reference to the policy consideration of protecting weaker parties.

(4) Arguments against the recognition of undisclosed agency

9-73. A number of arguments can be made against the recognition of undisclosed agency. Firstly, undisclosed agency does not offer an adequate balance between the principal's convenience and protection of the third party. *Said v Butt*¹⁶⁷ holds that an undisclosed principal may not sue the third party where the identity of the contracting parties was a material factor in the formation of the contract. In that case, the plaintiff wished to attend the opening night of a play, but he had had a personal disagreement with the owner of the theatre and knew that he would be unable to purchase a ticket in his own name. He thus instructed a friend to buy his ticket for him, but was refused admission on the night of the play. It was determined that the identity of ticketholders is a material factor in contracting for the purchase of tickets for a play's opening night, because this is a special occasion. The purchaser's identity was therefore material in determining whether a contract between the undisclosed principal and the third-party theatre owner should be upheld. It was found that the theatre was entitled to refuse entry to the plaintiff because the management would not have contracted with the plaintiff or his representative had they known his true identity. This is a somewhat narrow judgment, resting upon the importance of the identity of ticketholders in the particular circumstance of the opening night of a play. However, the Disney Land example above illustrates the consequences of the loss of the third party's bargaining position, and in land transactions the identity of the buyer is not generally considered to be a material factor. In other words, the requirement of materiality of identity is unjustifiably weighted more heavily than the third party's freedom not to contract with those with whom it does not wish to enter a contractual relationship. The principle of *Said v Butt* is accordingly too narrow properly to protect the third party from the principal's deception.

9-74. A further policy consideration against the recognition of undisclosed agency is that it allows parties to act in a deliberately deceptive manner. In *Dyster v Randall and Sons*,¹⁶⁸ for example, a plaintiff sought to contract through an undisclosed agent to purchase two plots of land. The plaintiff had formerly worked for the defendant landowner, and had been discharged "from his office ... under circumstances which to his knowledge caused the defendants profoundly to distrust him".¹⁶⁹ The contract was upheld. This case provides an example of the use of undisclosed agency for the purposes of deception. Whilst the position of good faith in Scots contract law

¹⁶⁷ [1920] 3 KB 497: see para 9-12 above.

¹⁶⁸ [1926] Ch 932.

¹⁶⁹ [1926] Ch 932 at 933 (Witness Action).

is tenuous,¹⁷⁰ a doctrine which achieves little other than allowing parties to act in a deceptive manner is difficult to justify. The law ought not to facilitate deception at the expense of the interests of other contracting parties. If a stronger concept of good faith is to be recognised in Scots law, undisclosed agency will undoubtedly breach this principle.

9-75. As noted above, allowing principals to use undisclosed agents interferes with a third party's ability to inform itself fully as to its contractual partner.¹⁷¹ Collins submits that the right to choose a contractual partner reflects individual liberty and personal autonomy ("values that lie at the core of a liberal society") and allows individuals to achieve their aims through contractual transactions.¹⁷² He submits that the exceptions to a general freedom to choose one's contractual partner reflect the public policy considerations of equal opportunities and preventing social exclusion. For example, Collins accepts that the right to choose a contractual partner should be restricted such that a party operating in the public market ought not to refuse to contract with another on grounds of (for example) sex, race, or religion.¹⁷³ In the case of undisclosed agency, however, the third party's ability to choose a contractual partner is restricted by the principal's ability to bypass its wishes by using an undisclosed agent. Collins notes that "in general the law invalidates agreements when there has not been consent to the choice of contractual partner ... Exceptions to the principle such as ... the doctrine of undisclosed agency are strictly confined and treated as anomalous".¹⁷⁴

9-76. Courts, according to Collins, tend to explain this on the basis that the contract has been "agreed and relied upon", and this outweighs the infringement of the third party's ability to choose its contractual partner.¹⁷⁵ Collins does not indicate whether he agrees with this reasoning, and it is submitted that this justification is inadequate. Contracts concluded by undisclosed agency are only agreed upon following deception on the part of the agent and principal, which is not an adequate reason to usurp the third party's right to choose a contractual partner. This reasoning certainly does not cohere with the other existing restrictions on the right to choose a contractual partner, which are aimed at promoting a more equal market-society, with the exception of situations in which the agent is used to bypass discrimination which would otherwise be experienced by the principal, as discussed above.¹⁷⁶ Undisclosed agency is thus incompatible with the right to choose a contractual partner, particularly in light of the fact that exceptions to this right reflect considerations of equal opportunities. Bennett

¹⁷⁰ Whilst Scots law does not expressly recognise an obligation to contract in good faith, the concept is arguably reflected in a number of contractual rules: see further H L MacQueen, "Good Faith in the Scots Law of Contract: An Undisclosed Principle?", in A D M Forte (ed), *Good Faith in Contract and Property Law* (1999) 5.

¹⁷¹ See paras 9-33ff above.

¹⁷² H Collins, "The vanishing freedom to choose a contractual partner" (2013) 76 *Law and Contemporary Problems* Spring 71; see also 77.

¹⁷³ Collins, "The vanishing freedom to choose a contractual partner" 71-74.

¹⁷⁴ Collins, "The vanishing freedom to choose a contractual partner" 80.

¹⁷⁵ Collins, "The vanishing freedom to choose a contractual partner" 78.

¹⁷⁶ See paras 9-67 and 9-68 above.

justifies undisclosed agency by reference to a general policy that “personal scruples should not outweigh efficient business”.¹⁷⁷ However, this choice of language belittles what could be significant issues of morals or conscience on the part of the third party, and the law certainly does not actively prevent any party, commercial or consumer, from making informed decisions about their transactions. This further supports the conclusion that undisclosed agency should be abolished, save for its use in protecting against discrimination.

E. CONCLUDING REMARKS

9-77. Undisclosed agency is an exception to the privity doctrine. It is not compatible with Scots contract theory because it cannot be explained on the basis of the intentions of the contracting parties. The concept cannot be accounted for in terms of delictual liability. Whilst Tan submits that undisclosed agency is a “well recognised” exception to the privity doctrine which needs “no further justification”,¹⁷⁸ it is shown in previous chapters that exceptions to privity must be clear, well-defined, and based on sound policy considerations.

9-78. The justifications offered for the existence of undisclosed agency in commentary are inadequate, and undisclosed agency is not supported by any of the policy considerations underlying the statutory exceptions to privity. Whilst the justifications for the statutory exceptions ought not to be viewed as the only possible benchmarks for satisfactory exceptions to privity, there are no other defensible arguments in favour of the recognition of undisclosed agency. The only exception is situations in which undisclosed agency is used to avoid discrimination. Undisclosed agency ought to be permitted in such contexts, subject to restrictions where undisclosed agency is expressly or impliedly excluded, and the identity of the contracting party is a material factor in the formation of the contract.

¹⁷⁷ H Bennett, *Principles of the Law of Agency* (2013) para 9.22.

¹⁷⁸ Tan, “Undisclosed principals and contract” 481.

10 External Network Liability

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A. OVERVIEW OF CHAPTER 10

10-01. The previous four chapters have examined whether various existing concepts ought to continue to exist in Scots contract law. This chapter examines whether a normative concept, external network liability, should be doctrinally recognised in Scots contract law.

10-02. The chapter defines network theory and the concepts of internal and external network liability. The latter forms the focus of the chapter. Network theory is not currently recognised in Scots or English law. However, a brief discussion of the recognition of networks in other jurisdictions is provided. The chapter then explains how external network liability departs from the privacy doctrine, and examines its relationship with contract theory and delictual liability. The final subsections assess whether there are justifiable policy reasons for the recognition of external network liability as a new exception to privacy.

B. NETWORK THEORY

10-03. This section defines network theory, explains the difference between internal and external network liability, and provides brief comment on relevant comparative law.

(1) Defining network theory

10-04. According to network theorists, a business network arises where a number of independent economic entities enter into a series of interrelated contracts.¹ In other words, a network is “a cluster of contracts set up to serve a principal organising purpose”.² The definitions of networks reflect the co-operation of network actors and mutual pursuit of common goals within a network. For example, Walter Powell describes “lateral or horizontal patterns of exchange, interdependent flows of resources, and reciprocal lines of communication”,³ and Sydow refers to networks as methods of organising economic activities which bind formally independent firms who depend on one another economically and form stable relationships in a complex and co-operative reciprocity.⁴

10-05. In Teubner’s words, “business networks pursue common projects making use of co-operation between autonomous firms”.⁵ A further important element of networks is the trust between the various network members – Teubner draws a comparison between commercial networks and the Mafia.⁶

10-06. Networks take numerous forms, ranging from “stars” in the case of franchises (with the franchisor as the central figure, surrounded by numerous franchisees which constitute the spokes), to hubs with “arms” of contractual chains (for example, large construction projects).⁷ Indeed, Brownsword has commented that “once we start thinking about networks ... we see them everywhere”.⁸ Network structures arise primarily in commercial situations.⁹ Teubner notes their use in contexts including energy and telecommunications markets, banking structures, and transport networks.¹⁰ He also refers to “information networks”, of which the internet is the most prominent.¹¹ “Business networks” include supply networks, innovation networks, producer networks, and distribution networks.¹²

¹ H Collins, “Introduction”, in Teubner, *Networks* 1.

² J N Adams and R Brownsword, “Privity of contract – that pestilential nuisance” (1993) 56 *MLR* 722, 727.

³ W W Powell, “Neither market nor hierarchy: network forms or organization” (1990) 12 *Research in Organizational Behaviour* 295, 296.

⁴ J Sydow, *Strategische Netzwerke: Evolution und Organisation* (1992) 82.

⁵ Teubner, *Networks* 92.

⁶ Teubner, *Networks* 91–92.

⁷ M Wellenhofer, “Third Party Effects of Bilateral Contracts within the Network”, in Amstutz and Teubner (eds), *Networks* 119; A Schwartz and R E Scott, “Third-party beneficiaries and contractual networks” (2015) 7 *Journal of Legal Analysis* 325, 336–38; B Lomfeld and D Wielsch, “The public dimension of contract: contractual pluralism beyond privity” (2013) 76 *Law & Contemporary Problems* 1, 11.

⁸ R Brownsword, “Review: Networks as Connected Contracts” (2012) 75 *MLR* 455, 455.

⁹ R Brownsword, “Network Contracts Revisited”, in Amstutz and Teubner (eds), *Networks* 31, 48; Adams and Brownsword, “Privity of contract – that pestilential nuisance” 727–28.

¹⁰ G Teubner, “‘And if I by Beelzebub cast out devils, ...’: an essay on the diabolics of network failure” (2009) 10 *German Law Journal* 395, 398; Teubner, *Networks* 90.

¹¹ Teubner, *Networks* 90–91.

¹² Teubner, *Networks* 98–99.

10-07. Networks are not easily explained in terms of currently recognised legal concepts. Whilst they share similarities with traditional companies, Walter Powell outlines three competitive advantages which networks have over these forms: they possess collective know-how, enjoy mutual trust, and facilitate relatively fast transactions.¹³ Additionally, George Richardson points out that networks are distinguishable from other business entities because the latter do not reflect “the dense network of co-operation and affiliation by which firms are inter-related”.¹⁴ It is also thought that networks are multilateral, whereas firms are unilateral.¹⁵ Teubner writes that networks are “extraordinarily confusing phenomena” which cannot be accounted for by existing definitions of markets or organisations.¹⁶ Whilst he acknowledges the parallels between networks and corporate groups (both involve elements of co-operation and competition), he feels that the complex regulatory context of corporate groups provides an unsuitable doctrinal framework for networks.¹⁷

10-08. Prior to Teubner’s seminal work on network theory,¹⁸ legal discussion of networks was sparse.¹⁹ There were only pockets of commentary, such as Buxbaum’s remark that “network” is a “fashionable” term denoting a “construct in autopoietic theory”.²⁰ However, networks have recently been increasingly discussed and recognised. Teubner (writing in 2009) comments that, “[t]he last thirty years have seen a network revolution that resulted in a thorough erosion of organizational hierarchies in both the private and the public sector”.²¹

10-09. Brownsword notes that the popularity of networks in the early twenty-first century is due in part to the trend of increased consumer activity in networked electronic environments.²² There is a “growing European interest in the regulation of contractual networks”,²³ and some say that the world is now a “network society”.²⁴

¹³ W W Powell, “Neither market nor hierarchy: network forms or organization” (1990) 12 *Research in Organizational Behaviour* 295, 324.

¹⁴ G B Richardson, “The organisation of industry” (1972) 82 *The Economic Journal* 883, 883.

¹⁵ R M Buxbaum, “Is ‘network’ a legal concept?” (1993) 149 *Journal of Institutional and Theoretical Economics* 698, 703.

¹⁶ Teubner, *Networks* 73.

¹⁷ Teubner, *Networks* 133–36.

¹⁸ In English as G Teubner, *Networks as Connected Contracts* (2011) (referred to in this chapter as “Teubner, *Networks*”); the German original was published in 2004.

¹⁹ H Collins, “Introduction”, in Teubner, *Networks* 2.

²⁰ Buxbaum, “Is ‘network’ a legal concept?” 698. Buxbaum recognises the prevalence of networks in many situations, although his analysis in this article is limited to production networks.

²¹ Teubner, “‘And if I by Beelzebub cast out devils, ...’” 396.

²² R Brownsword, “Contracts in a Networked World”, in LA DiMatteo and Q Zhou (eds), *Commercial Contract Law: Transatlantic Perspectives* (2013) 116. See also H Collins, “Introduction”, in Teubner, *Networks* 71; M Amstutz, V Karavas, and G Teubner, “Preface”, in Amstutz and Teubner (eds), *Networks* vii.

²³ R Brownsword, “Review: Networks as Connected Contracts” (2012) 75 *MLR* 455, 455.

²⁴ Teubner, “‘And if I by Beelzebub cast out devils, ...’” 396. Castells similarly comments that networks “are the fundamental stuff of which new organizations are and will be made”: M Castells, *The Rise of the Network Society: Economy, Society and Culture* vol 1 (2000) 180.

Accordingly, networks are likely to become an increasingly prominent topic in private law, and research on whether the concept should be recognised in Scots law is timely.

(2) Distinguishing “internal” and “external” network liability

10-10. Network liability allows for the recovery of damages for losses suffered by both those within a network (“internal” network liability) and those outwith a network (“external” network liability), regardless of whether the relevant parties are connected by contract.²⁵

10-11. Collins illustrates the difference between these two forms of liability through an example. If a customer at a fast-food restaurant falls seriously ill after eating an improperly prepared hamburger, this will have a negative impact on the reputation of the restaurant franchise as a whole.²⁶ The individual franchisees are unlikely to be in direct contractual relationships with one another. However, the franchisees and the central franchisor might be in a business network. “Internal” network liability allows for network parties to sue one another to recover losses caused when one party breaches the network purpose. In this example, the network purpose is the maximisation of the franchise’s profits, and other franchisees could sue the franchisee responsible for the customer’s illness for profits lost as a result of the damage to the franchise’s reputation.²⁷

10-12. The customer, on the other hand, may have recourse through “external” network liability. This applies where a third party suffers loss as a result of the actions of a network party, but cannot sufficiently recover for its loss in an action against that particular party. The customer is a party external to the network, and may wish to sue the franchisor directly, despite not being in a contractual relationship with it. External network liability allows third parties to bypass the contractual structure of the network in order to recover losses caused by a member of the network.²⁸

(3) Comparative law

10-13. Neither Scots nor English law explicitly recognises networks. This contrasts with the USA, where courts have enforced credit card networks,²⁹ networks involving hospitals, hospital service providers, patients, and insurers,³⁰ and franchise networks.³¹

²⁵ Teubner, *Networks* ch 5 (internal network liability) and ch 6 (external network liability).

²⁶ This example is given in H Collins, “Introduction”, in Teubner, *Networks* 14.

²⁷ Teubner, *Networks* 235.

²⁸ Teubner, *Networks* 207–09.

²⁹ *Sovereign Bank v BJs Wholesale* 533 F 3d 162 (2008); A Schwartz and R E Scott, “Third-party beneficiaries and contractual networks” (2015) 7 *Journal of Legal Analysis* 325, 336.

³⁰ *Joseph v Hospital Service District No 2 of Parish of St Mary* 939 So 2d 1206 (2006); Schwartz and Scott, “Third-party beneficiaries and contractual networks” 337.

³¹ *Chu v Dunkin’ Donuts Inc* 27 F Supp 2d 171 (1998); Schwartz and Scott, “Third-party beneficiaries and contractual networks” 338.

The German notion of connected contracts,³² which is similar to network theory, was developed in response to the specific problem of finance purchasing, and was later applied to other forms of financed property transactions.³³ Italy has recently adopted new legislation on business networks.³⁴

10-14. Networks are analogous to the concept of “linked” contracts, defined as “a plurality of separately concluded contracts that are somehow interrelated”.³⁵ Linked contracts are recognised in Dutch law,³⁶ and Van Dongen explains that the concept encompasses “all situations in which several contracts are not independent, but rather form part of a ‘larger whole’”.³⁷ Linked contracts arise in a wide variety of contexts, such as purchase financing, contracts linked in large construction projects, chains of contracts between producers and consumers, and cartel agreements.³⁸ In order for the linked contracts to be legally recognised, the contracts within the group must be “factually and economically connected”.³⁹ In the present work, the concepts of linked contracts and contract networks are treated as equivalents. Linked contracts are not explicitly recognised in Scots or English contract law.

10-15. As noted above,⁴⁰ network theory is likely to be of increasing prominence in future academic research. Reform in Scots and English law could usefully draw upon doctrinal developments and commentary in Germany, the Netherlands, Italy, and the USA in enacting laws on networks which are suitable for modern commerce.

C. A NORMATIVE EXCEPTION TO PRIVACY IN SCOTS LAW?

10-16. This section examines whether external network liability, if recognised in Scots law, would constitute an exception to the privity doctrine and whether it would be compatible with Scots contract theory. The section also considers whether external

³² Connected contracts are recognised in § 358 BGB in the context of revocation of consumer contracts. See further G Teubner, “Coincidentia Oppositorum: Hybrid Networks Beyond Contract and Organisation”, in Amstutz and Teubner (eds), *Networks* 3, 20.

³³ Teubner, *Networks* 74, in which Teubner considers whether networks can be explained in terms of connected contracts. This is outwith the scope of the book, because Scots law does not recognise this concept. See further Teubner, *Networks* ch 3.

³⁴ C Ferrari, “The Italian ‘network contract’: a new tool for the growth of enterprises within the framework of the ‘Small Business Act’?; brief comments on the Italian law” (2010) 16 *Columbia Journal of European Law* 77. Ferrari is critical of the new Italian law, but comments that doctrinal recognition of networks is to be “welcomed positively” (81–82).

³⁵ I Samoy and M B M Loos, “Introduction”, in Samoy and Loos (eds), *Linked Contracts* 1.

³⁶ S van Dongen, “Groups of contracts. An exploration of types and the archetype from a Dutch legal perspective”, in Samoy and Loos (eds), *Linked Contracts* 9.

³⁷ Van Dongen, “Groups of contracts” 10.

³⁸ Van Dongen, “Groups of contracts” 11. See also R Momberg Uribe, “Linked contracts: Elements for a general regulation”, in Samoy and Loos (eds), *Linked Contracts* 153, 155.

³⁹ Van Dongen, “Groups of contracts” 10.

⁴⁰ See paras 10-08 and 10-09 above.

network liability ought instead to be explained in terms of delict, or as a form of hybrid liability. The final subsection examines whether there are compelling policy reasons for the doctrinal recognition of external network liability.

(1) External network liability and the privity doctrine

10-17. External network liability would, if it was recognised in Scots law, operate as an exception to the privity doctrine. In the example concerning the improperly prepared hamburger discussed above,⁴¹ for example, the customer can make a claim to recover its losses in reliance on the contract between the franchisee and the franchisor, to which it is not a party.

10-18. The tension between external network liability and privity is also recognised in commentary. In the USA, MacDonald has identified that consumers are unable to bring successful claims against the manufacturers of foods falsely labelled as “all natural” due to a lack of privity between them. She argues that consumers should have the ability to bypass privity by applying network liability in such cases, so that they can recover damages in respect of harm suffered (such as unintentionally ingesting high amounts of artificial ingredients).⁴² Samoy and Loos assert that Europe’s traditional civil codes were produced in a far less complex economic and social context than today’s society, at a time when great weight was placed on the “traditional pillars” of contract law such as freedom of contract and privity of contract.⁴³ They suggest that private law has not adequately adapted to modern commerce or network trends.⁴⁴ Similarly, Momberg Uribe argues that the traditional understanding of privity prevents recognition of the multi-party contexts in which bilateral agreements are concluded. He suggests that the multi-party context of transactions ought to be reflected in the obligations and expectations between parties to a bilateral agreement. In particular, he stresses that current contract doctrine, including privity, is outdated because linked contracts “are products of contemporary economic external requirements such as the division of labour, specialisation, supply chains, technological complexity and high flexibility of the production process”.⁴⁵

10-19. Teubner suggests that legal doctrine must ultimately be reformed to allow for a “social model” of networks which takes into account their risks and provides a “normative perspective within which they may be combated”.⁴⁶ It is thus accepted in commentary that external network liability would be an exception to privity, and this

⁴¹ See para 10-11 above.

⁴² C MacDonald, “Not ‘all natural’: modernizing privity to allow breach of contract claims for mislabeled food products” (2018) 103 *Iowa Law Review* 785, 786 and 793–801.

⁴³ I Samoy and M B M Loos, “Introduction”, in Samoy and Loos (eds), *Linked Contracts* 1, 2. For example, in France the *Code civil* provides, in Articles 1134 and 1165, that separate contracts cannot be treated as interlinked.

⁴⁴ I Samoy and M B M Loos, “Introduction”, in Samoy and Loos (eds), *Linked Contracts* 1, 2.

⁴⁵ R Momberg Uribe, “Linked contracts: Elements for a general regulation”, in Samoy and Loos (eds), *Linked Contracts* 153, 154.

⁴⁶ Teubner, *Networks* 107–08.

is undoubtedly correct. The question of whether it would be a justifiable exception is discussed further below.⁴⁷

(2) External network liability and contract theory

10-20. Network parties might expressly agree to confer rights on third parties. For example, a franchisor and franchisee might agree that those who contract with the franchisee can claim against the franchisor in the event of breach of contract by the franchisee. In such a case, the liability of the franchisor to the external party would be based on third-party rights.⁴⁸ However, network parties will sometimes have chosen network structures to limit potential means of redress for those external to the network. In such cases, the imposition of external network liability will directly contradict the intentions of the relevant network parties. External network liability cannot therefore be explained in terms of will theory.

10-21. According to Hogg, the view that contractual structures are always adopted for the purpose of distancing particular contracting parties from external parties superimposes on to network actors a “sophistication of intention which may hardly, if ever, be present”.⁴⁹ Rather, networks may be adopted simply for reasons of convenience.⁵⁰ However, even where the network has not been set up with the aim of evading external liability, the relevant parties do not intend to allow external parties to bypass the network structure to recover for losses they suffer because of network activity. External network liability is not compatible with will theory because the network parties are liable to external parties with whom they have not contracted, regardless of whether they consent to such liability.

10-22. External network liability is also incompatible with promissory theory because the network actors have not voluntarily promised any benefits to external parties. Assumption theory does not account for external network liability, because this form of network liability does not involve network actors’ voluntary assumption of liability towards external parties.

(3) Theoretical classification of external network liability

10-23. This subsection explores whether external network liability should be classed as a contractual, delictual, or as a hybrid form of liability.

10-24. Whilst, as discussed above,⁵¹ external network theory is not compatible with will-based theories of contract law, it is possible that the concept could be justified as an exception to privity based on justifiable policy considerations. Potential

⁴⁷ See paras 10-30ff below.

⁴⁸ See paras 3-08 to 3-11 above.

⁴⁹ Hogg, *Obligations* para 3.133. See also S Whittaker, “Privity of contract and the tort of negligence: future directions” (1996) 16 *Oxford Journal of Legal Studies* 191, 199.

⁵⁰ Hogg, *Obligations* para 3.133.

⁵¹ See paras 10-20 to 10-22 above.

policy justifications are discussed below.⁵² It is noted at this stage that a contractual analysis of external network liability is adopted by commentators including Teubner and Wellenhofer. Contract, according to Teubner, is the “correct systematic arena”, although he comments that contract law requires reform in order fully to recognise the benefits and burdens of networks.⁵³ Wellenhofer remarks that networks can be placed schematically between contract law and the law of corporations.⁵⁴ There is no immediate barrier to the classification of external network liability as an exception to privity, provided that it reflects justifiable policy considerations. If external network liability is to be recognised in Scots law, its boundaries must be defined such that not all network parties are liable for the impact of one party’s behaviour on an external party.⁵⁵ Permitting the external party’s ability to sue only network parties which are in a contractual relationship with the party who caused the loss (for example, the franchisor in a direct contractual relationship with the franchisee) would assist in limiting the liability of those within the network. This would be a key benefit of a contractual analysis of external network liability.

10-25. Given that the imposition of external network liability is ultimately involuntary, it is also relevant to consider whether a delictual analysis is suitable. An initial point is that the external party may have a direct delictual claim against the party who caused the loss. However, whilst the customer in Collins’ “snail in a burger” scenario may be able to sue the franchisee in delict, the franchisee may be bankrupt or insolvent, or lack liability insurance.⁵⁶ External parties are not therefore necessarily fully protected by the fact that they may in some circumstances have a delictual claim against the party with whom they contract, because the network may have been set up so as to ensure that network members which form external contractual relationships have no funds to meet claims by external parties. Accordingly, it may be necessary for the external party to consider a claim against another network party. The current law does not provide scope for a delictual claim against a network actor connected to the party who caused the loss. In the case of franchising, a delictual claim against the franchisor is unlikely to be successful,⁵⁷ because franchisors are not usually liable for the negligence of franchisees in respect of the latter’s customers.⁵⁸ Vicarious liability cannot generally be applied to “pierce through contracts between independent businesses”.⁵⁹ This would prevent a claim against a separate legal entity in a network

⁵² See paras 10-30ff below.

⁵³ G Teubner, “Coincidentia Oppositorum: Hybrid Networks Beyond Contract and Organisation”, in Amstutz and Teubner (eds), *Networks* 3, 14. See also J N Druey, “The Path to the Law – The Difficult Legal Access of Networks”, in Amstutz and Teubner (eds), *Networks* 87.

⁵⁴ M Wellenhofer, “Third Party Effects of Bilateral Contracts within the Network”, in Amstutz and Teubner (eds), *Networks* 119, 120. Wellenhofer notes (at 120) that corporate law alone does not adequately account for networks.

⁵⁵ This is also discussed at para 10-38 below.

⁵⁶ H Collins, “Introduction”, in Teubner, *Networks* 1, 16–18.

⁵⁷ Collins, “Introduction” 14–17; Wellenhofer, “Third Party Effects of Bilateral Contracts within the Network” 124.

⁵⁸ Collins, “Introduction” 18.

⁵⁹ Collins, “Introduction” 17.

structure. A delictual classification of external network liability would therefore require significant reform of the law of delict to permit recovery by the external party.

10-26. Some commentators have specifically argued that delictual claims ought not to subvert network structures. Hutchison and Van Heerden state that where there is a contractual web or matrix, delictual claims which undermine the deliberate arrangements chosen by the contracting parties ought not to be permitted. They assert that imposing delictual duties on the agreements of network actors unjustifiably disturbs their business activities.⁶⁰ However, as discussed in chapter 4,⁶¹ parties ought not to have the ability deliberately to evade delictual liability in respect of third parties if the requirements of a delictual claim are present. The expectations of the external party should not be altered by the network structure chosen by the network parties.

10-27. Prior to *Murphy v Brentwood District Council*,⁶² Brownsword suggested that the perceived confusion between contract and tort could be resolved by viewing groups of cognate contracts as networks, and that such contracts could be subject to a “focused relaxation” of privity.⁶³ The literature on this issue is scarce, and does not specifically address the use of network theory in cases in which the boundary between contract and delict is unclear. Brownsword does not explain whether the network liability imposed would be in terms of contract or delict. As discussed in chapter 4,⁶⁴ privity is a contractual concept which should not be used to prevent the imposition of delictual liability. We can perhaps therefore assume that Brownsword meant for privity to be relaxed to allow network liability to operate as a contractual exception to the privity doctrine.

10-28. A delictual classification of external network liability would require significant reform to the current rules of delictual liability, whereas a contractual analysis would require only the creation of an isolated exception to privity. A contractual classification of external network liability is therefore preferable.

10-29. It is of course possible that external network liability could be classified as a *sui generis* form of liability. Teubner questions whether networks are “*sui generis* legal institutions sailing in the Bermuda-triangle between contracts, torts and corporations”.⁶⁵ He rules out company law, because the systematised and centralised

⁶⁰ D Hutchison and B van Heerden, “The tort/contract divide seen from the South African perspective” 1997 *Acta Juridica* 97, 110 and 114 (see also D Visser (ed), *The Limits of the Law of Obligations* (1997) 97, 114).

⁶¹ See para 4-52 above.

⁶² [1991] 1 AC 398.

⁶³ R Brownsword, “Network Contracts Revisited”, in Amstutz and Teubner (eds), *Networks* 31, 32. Brownsword submits that similar reasoning can be seen in *Marc Rich and Co AG v Bishop Rock Marine Co Ltd* (*The Nicholas H*) [1996] AC 211, although in that case the judges ultimately relied on contractual liability to prevent a tortious claim.

⁶⁴ See paras 4-36 and 4-37 above.

⁶⁵ G Teubner, “Coincidentia Oppositorum: Hybrid Networks Beyond Contract and Organisation”, in Amstutz and Teubner (eds), *Networks* 3, 13–14. See also Teubner, *Networks* 130–31 and 139.

process of decision-making in corporations is not compatible with decentralised networks, and he states that agency is an unsuitable analysis due to its similar inability to recognise the decision-making processes in networks.⁶⁶ Future research must examine further whether external network liability ought to be classed as *sui generis*.⁶⁷ As has been discussed above, however, a contractual analysis is potentially feasible, and is preferable to a delictual analysis. The remainder of this chapter addresses whether an external network would be a justifiable exception to the privity doctrine in Scots law.

(4) Policy considerations justifying the recognition of external network liability

10-30. Numerous commentators suggest that the law ought explicitly to recognise networks.⁶⁸ This section explores whether external network liability could be recognised as a justifiable exception to the privity doctrine in Scots contract law.

10-31. The first policy justification to consider is the protection of weaker parties.⁶⁹ If an external party is injured by the actions of a network party, it may not be able to account fully for its losses by pursuing that network party in delict.⁷⁰ In such cases, enabling the external party to bypass the network structure and pursue a claim against a network party who is able to compensate for the losses is undoubtedly practically useful from the external party's perspective. For example, in cases where the franchisee does not have sufficient funds to compensate the customer for its injuries, external network liability protects the external party in the event of loss caused by the franchisee by allowing it to claim against the franchisor.

10-32. Amstutz, Karavas, and Teubner have specifically recommended that the law is reformed to minimise the risks of network activity to third parties.⁷¹ Collins has also argued that the lack of recognition of network responsibility causes hardship to external parties.⁷² He notes that firms are able to exert a great deal of freedom as to how they structure themselves, such that they can precisely determine the limits of their liabilities towards external parties.⁷³ Teubner recognises that networks generate profit, because they are highly organised and efficient entities, with a strong sense of corporate identity and continuity between branches or offices. He contrasts this with the fact that networks can “self-dissolve” into bilateral contracts, and this

⁶⁶ Teubner, “Coincidentia Oppositorum” 14.

⁶⁷ This is further discussed in para 11-25 below.

⁶⁸ See above at paras 10-04ff.

⁶⁹ This is discussed in depth at paras 5-44 to 5-49 above.

⁷⁰ This is noted above at para 10-25. Similarly, if the external party is in a contractual relationship with the network party, a claim in contract is of little use if the network party does not have the funds to meet this claim.

⁷¹ M Amstutz, V Karavas, and G Teubner, “Preface”, in Amstutz and Teubner (eds), *Networks* vii, viii.

⁷² H Collins, “Ascription of legal responsibility to groups in complex patterns of economic integration” (1990) 53 *MLR* 731, 734.

⁷³ Collins, “Ascription of legal responsibility to groups in complex patterns of economic integration” 736; see also 732. Collins refers to this as the “capital boundary problem” (736).

dissolution means that external parties may be prevented from recovering damages from appropriate network members.⁷⁴ This “room for manoeuvre” allows networks to act irresponsibly, with little regard for external parties.⁷⁵ External network liability could redistribute liability in transactions with external parties, so as to limit the ability of networks to escape external liability through network structures. This would reflect a policy consideration of protecting external parties.

10-33. In chapter 5,⁷⁶ it was suggested that this policy justification should be upheld, and the external party’s loss should be recoverable, where the third party could not have reasonably been expected to protect itself, and the loss was reasonably foreseeable to the relevant contracting party.

10-34. Dealing firstly with the question of whether the loss was reasonably foreseeable, it is possible to view the activities of the entire network as the actions of the network party or parties in control of the network purpose. For example, the franchisees are ultimately acting for the benefit of the franchisor and can be viewed as carrying out the actions of the franchisor. Collins stresses that, where a defective product is the result of teamwork, “it should be the responsibility of the group to establish an organisation which prevents such defects”.⁷⁷ Similarly, Schwartz and Scott comment that, where network goals are furthered by the participation of third parties, the interests of those third parties should be recognised through network liability.⁷⁸ In the instances of both franchise networks and production networks, it is foreseeable to parties other than the particular party which transacts with the consumer that the consumer will be harmed by, for example, improperly prepared food or a defective product. The foreseeability requirement is met, because the network parties which share responsibility for the experience of the consumer can foresee the impact of defective network behaviour on the consumer. Further, in cases where the network is set up with the deliberate aim of restricting liability to third parties, the effects on the third party are foreseeable, because the network parties have contemplated the harm which the third party might suffer and they have actively chosen to evade this.

10-35. In terms of whether the third party should have protected itself, the relevant factors are: whether the party is a consumer or commercial entity; the third party’s bargaining position; whether the third party expected the loss to be recoverable; and whether the third party had access to legal advice.⁷⁹ Parties external to networks are diverse, and so the question of whether a third party should be expected to protect

⁷⁴ Teubner, *Networks* 100.

⁷⁵ Teubner, *Networks* 108.

⁷⁶ See paras 5-44ff above.

⁷⁷ Collins, “Ascription of legal responsibility to groups in complex patterns of economic integration” 731. See also C MacDonald, “Not ‘all natural’: modernizing privity to allow breach of contract claims for mislabeled food products” (2018) 103 *Iowa Law Review* 785, 806.

⁷⁸ A Schwartz and R E Scott, “Third-party beneficiaries and contractual networks” (2015) 7 *Journal of Legal Analysis* 325, 355.

⁷⁹ See para 5-47 above.

itself would be dealt with on a case-by-case basis. Where the third party is a consumer, this will greatly increase the likelihood that he or she should be protected. A consumer, such as a customer of a franchise, will have a weak bargaining position. Everyday consumers do not have the power to negotiate the distribution of liability for any loss they might suffer at the point at which they contract with a franchisee. The average consumer would lack both the time and legal knowledge to do so. It is, however, likely that a consumer would expect to obtain full legal redress against the network party with which it contracted. A consumer will have an impression of the size and reputation of any business with which he or she interacts. In the case of a franchisee, the customer would, it is suggested,⁸⁰ assume that the responsibility for any loss suffered lies with the franchisor. Finally, a consumer is extremely unlikely to obtain legal advice prior to interacting with network entities. It is unrealistic to expect a consumer to ascertain the intended liability distribution across a business network with which the consumer will interact. Accordingly, the requirements for protecting the third party will be met in some cases, particularly where the third party is a consumer.

10-36. Of course, network parties will not necessarily have structured the network so as to limit liability towards external parties. The difficulties faced by external parties in recovering for their losses or injuries may be an incidental consequence of a network structure set up for other reasons. Nonetheless, network structures may result in unjust consequences for external parties regardless of the intentions of the relevant network actors, and external network liability avoids these unfair consequences. The third party's worthiness of protection should not be determined according to whether the network parties intended to limit a customer's means of redress against a particular network party.

10-37. Alongside the policy justification of third-party protection, recognition of external network liability would help adjust the image problem currently encountered by networks. Amstutz, Karavas, and Teubner suggest that networks do not enjoy a positive reputation, due to their "organised irresponsibility" and the risks their "chameleon-like character" pose to third parties.⁸¹ If we are truly living in a network society, it is worth pursuing a set of legal rules which enable consumers to have fair redress against networks when they suffer harm at the hands of network actors. This would ensure that consumers have sufficient trust in networks to transact with them, and do not feel they are taken advantage of by large network structures. If Amstutz, Karavas, and Teubner are correct that networks are not viewed positively, then proper recognition of the effects of networks would perhaps lead to an adjustment in public, academic, and legal perception. Doctrinal recognition of networks would thus achieve the policy justification of ensuring that the law reflects developments in how businesses are structured, and would lead to workable laws on networks. Brownsword comments that we must "set limits to self-governance; business networks cannot be

⁸⁰ The need for empirical research on this point is discussed at para 11-25 below.

⁸¹ M Amstutz, V Karavas, and G Teubner, "Preface", in Amstutz and Teubner (eds), *Networks* vii, viii.

permitted to rule the world”.⁸² The current situation is that networks operate without legal recognition in numerous jurisdictions, and the activities of networks are therefore not properly kept in check. For Teubner, the law’s failure to recognise network liability for the negative impact of network behaviour on third parties is a “major hang-up, as a consequence of which private law is co-responsible for the failure of networks”.⁸³ Whilst the prevalence of networks in today’s society⁸⁴ demonstrates that networks have not yet failed, doctrinal recognition of networks, and coherent laws determining their liabilities in respect of external parties, are necessary to ensure that they are properly regulated.

10-38. Once it is accepted that the external party should be protected, the next question is to narrow down the scope of network parties who might be liable to the external party under the principles of external network liability. A franchise network, for example, might encompass hundreds of franchisees across an international business. External network liability ought not to allow the external party to sue *any* of the franchisees who happen to have funds. Rather, any statutory or judicial reform should distinguish between network actors “vertical” to the party responsible for the loss, and those who are “horizontal” to that party. For example, a fellow franchisee is at the same level of the network structure and has no authority over the restaurant which served the improperly prepared hamburger in Collins’ example. The customer ought not to be able to sue parties horizontal to the restaurant, such as other franchisees. However, the franchisor is a network party vertical or senior to the restaurant, with authority over the franchisees. The customer should be able to use external network liability to sue such vertical network actors, but not those who are horizontal to the party with whom it is in a contractual relationship. This would ensure that only the network actors who are directly benefiting from the actions of the network party responsible for the loss are forced to bear the burdens of that party’s wrongful actions, whilst those in the network who are merely contributing to the overall purpose are not obliged to compensate for the actions of those at the same “level”.

10-39. A contractual analysis of external network liability would assist in narrowing the range of network parties liable in accordance with external network liability. Doctrinal rules could allow the third party to sue network actors vertical to the entity which caused the loss, and with which the entity causing the loss is connected by contract.

10-40. It is therefore possible to justify the imposition of external network liability in certain situations. Brownsword stresses that a regulatory environment sensitive to the public interest is necessary where networks interface with clients.⁸⁵ Accordingly, external network liability could be a useful tool in balancing the freedom of

⁸² R Brownsword, “Review: Networks as Connected Contracts” (2012) 75 *MLR* 455, 460.

⁸³ G Teubner, “‘And if I by Beelzebub cast out devils, ...’: an essay on the diabolics of network failure” (2009) 10 *German Law Journal* 395, 413.

⁸⁴ See above at paras 10-08 and 10-09.

⁸⁵ Brownsword, “Review: Networks as Connected Contracts” 460.

commercial actors with the need to protect external parties (usually consumers and other economically weaker individuals and entities).

D. CONCLUDING REMARKS

10-41. Networks are increasingly prevalent in today's commercial landscape. Legal systems need to recognise networks if they are to remain efficient and commercially competitive. Whilst networks raise questions regarding both internal and external liability, this chapter has focused on the latter. It has been shown that external liability could be explained in terms of contract or delict, or, it may be, as a form of hybrid liability. A delictual classification is not desirable, because this would necessitate significant reform of the law of delict. If external network liability was to be treated as a contractual concept, it would operate as an exception to privity. External network liability cannot be explained on the basis of the intentions of the contracting parties and is therefore incompatible with Scots contract theory. The concept is, however, supported by justifiable policy considerations, namely, protecting weaker parties, ensuring that the law is fair, and ensuring that private law adequately reflects developments in commercial practice. Doctrinal recognition of networks would also increase trust in networks, such that further regulation and legal recognition would be well-received. The current law allows networks full flexibility to evade responsibility for their wrongful actions which affect external parties. Doctrinal recognition of external network liability could allow losses and injuries caused by network actors to be fully accounted for, by overcoming obstacles created by artificial network structures, and would avoid unfair outcomes.

11 Conclusions

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A. OVERVIEW OF CHAPTER 11

11-01. This chapter provides a summary of the book’s conclusions and discusses potential areas for future research leading on from this work.

B. SUMMARY OF FINDINGS

11-02. This section summarises the findings on the privity doctrine, the concepts examined in the book (contracts for the benefit of another, transferred loss, *ad hoc* agency, and undisclosed agency), and potential future exceptions to privity, including external network liability.

(1) The privity doctrine

11-03. An examination of historic case law revealed that Scots law has recognised the privity doctrine from at least the nineteenth century, although there is a dearth of judicial comment on the precise scope and meaning of the doctrine. It is, however, clear that Scots law recognises both aspects of privity: preventing third parties from accruing enforceable contractual rights under contracts to which they are not party, and preventing contracting parties from imposing burdens on extra-contractual parties. The “benefits” aspect of privity does not prevent the conferral of merely incidental benefits on third parties.

11-04. Scots law has historically upheld privity alongside its recognition of the *jus quaesitum tertio*. The continued recognition of third-party rights demonstrates that privity operates subject to the intentions of the contracting parties. Privity is compatible with will-based theories of contract, which are dominant in Scots law, because it applies in accordance with the intentions of the contracting parties. The

doctrine is also compatible with freedom to contract, because privity upholds the parties' freedom to choose not to become liable to those with whom they do not intend to contract. Third-party rights are a voluntary curtailment of freedom of contract, and so privity is also compatible with freedom of contract.

11-05. Regarding the relationship between privity and delictual liability, a claim in delict is sometimes successful where a contractual claim is not possible due to the privity doctrine. This is a natural consequence of the permissibility of concurrent liability in Scots law. Various commentators and judges have viewed this as problematic and have asserted that delictual liability in such cases contravenes privity. However, delict and contract are different types of liability. The fact that particular conduct on the part of a contracting party might constitute a breach of contract does not, and should not, prevent a third party from making a delictual claim against the contracting party if the third party suffers loss as a result of the conduct. Delict does not operate as an exception to privity.

11-06. There are numerous statutory exceptions to privity. Their number and range demonstrate that privity is a porous doctrine. However, rather than abolishing privity in light of its exceptions, the doctrine should generally continue to be upheld. If privity was abolished, third parties could enforce contracts as they chose, and could always recover for losses sustained as a result of breach of contract. This would result in an unacceptable degree of uncertainty for contracting parties. Privity should therefore be upheld, subject to exceptions justified by sound policy reasons.

11-07. There are two classes of exceptions to privity. The first are those justified by contractual intention (for example, third-party rights). The second are those justified by legal policy. The protection of weaker parties justifies deviation from privity where the third party could not reasonably have been expected to protect itself, and where the loss was reasonably foreseeable to the contracting parties. Ensuring recovery for loss caused by breach of contract is a desirable policy objective, which can support exceptions to privity. However, this consideration alone would not justify the development of a new exception. Finally, an exception can be justified on the grounds that it is commercially convenient for both the contracting parties and the third party.

11-08. The "no burdens" rule (i.e. the second aspect of privity) should also continue to be enforced. Exceptions to this aspect of privity are justified where the burden is commercially convenient for the contracting parties without causing undue hardship for the third party.

(2) The concepts which permit recovery of extra-contractual loss

11-09. The book provides an in-depth examination of four legal concepts: contracts for the benefit of another, transferred loss, *ad hoc* agency, and undisclosed agency.

11-10. Contracts for the benefit of another are not an exception to privity, because the external party cannot enforce the benefit conferred on it in its own name. The

concept is also compatible with contract theory, because it operates in accordance with the intentions of the contracting parties. Both (or all) parties to the contract intend the contract to confer a benefit on the external party, and they intend the party who contracts on the external party's behalf to have the ability to recover in respect of the external party's loss if the contract is not properly performed. These contracts are compatible with will-based contract theories, because the contracting parties' intentions are upheld. Accordingly, a contract for the benefit of another can be treated as a passive form of third-party rights. The key distinction between a contract conferring a third-party right and a contract for the benefit of another is that the recipient of a third-party right can enforce the contractual benefit in its own name, whereas the beneficiary under a contract for the benefit of another cannot. In terms of policy considerations, contracts for the benefit of another can, depending on the situations in which they are used, protect external parties from financial and physical harm. Such contracts also ensure recovery of loss caused by breach of contract. It is suggested that, for these reasons, contracts for the benefit of another should continue to be recognised. In particular, these policy considerations may justify such contracts as an exception to the rule against recovery of damages in respect of another's loss. In Scots law, expansion of the concept should be permitted to encompass the recovery of damages for distress and disappointment experienced by the external party in the event of defective contractual performance. Commentators examining this concept in future should view contracts for the benefit of another as a distinct form of third-party rights, rather than treating authorities on such contracts (for example, *Jackson v Horizon Holidays Ltd*)¹ as cases about third-party rights. In both Scotland and England, the law should be clarified to allow the external party to claim damages recovered on its behalf from the contracting party.

11-11. According to the current law on transferred loss, the third party cannot make a claim in its own right against the party in breach. As such, transferred loss does not currently operate as an exception to privity. However, preventing the third party from recovering its loss is illogical, and transferred loss should be reformed to permit such recovery. A reformed transferred loss doctrine would depart from the privity doctrine by allowing the third party to recover under the contract between the original contracting parties.

11-12. Transferred loss allows for the recovery of third-party losses regardless of the intentions of the contracting parties. It is therefore not compatible with Scots contract theory (and would not be compatible if it was reformed in line with the suggestions in this work). Transferred loss could potentially be explained as an extended form of *Junior Books*² liability. However, this form of liability is controversial. Consequently, recognition of transferred loss in delictual terms would not aid doctrinal clarity. Transferred loss is also said to protect third parties, but this policy objective is not consistently recognised in the operation of the doctrine. This is because the

¹ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

² *Junior Books Ltd v Veitchi Co Ltd* 1982 SC (HL) 244.

contracting party which did not cause the loss must pursue a claim against the contracting party responsible for the loss on the third party's behalf. In order for the transferred loss doctrine to be justified by reference to the protection of weaker parties, it must be reformed such that the third party is able to bring a claim against the relevant contracting party in its own name. This would allow for transferred loss to be recognised as a justifiable exception to privity. Transferred loss should also be reformed so that the third party is protected only where it could not reasonably have been expected to protect itself. This means that the transferred loss doctrine will mainly be applicable where the third party is a consumer – for example, an individual purchaser of a residential property – and where it was not feasible to obtain a collateral warranty. Transferred loss also reflects a policy consideration of ensuring recovery of loss caused by breach of contract. However, this factor alone does not justify deviation from privity. The book recommends that transferred loss continues to be recognised subject to reform allowing the third party to recover its loss in a direct contractual claim against the contracting party which caused the loss.

11-13. *Ad hoc* agency does not generally contravene privity in the cases in which it has been recognised. However, it does operate as an exception where it is used to transfer rights and obligations between separate legal entities, such that a new entity can enforce a contract previously concluded between two other parties. Typically, the original entity is no longer in existence, and so cannot consent to the new party's claim under the contract. As such, *ad hoc* agency cannot be justified as an exception to privity based on contractual intention. It cannot be explained in terms of delictual liability. There are no policy objectives which can support it as a justifiable exception to privity, and its existence also creates uncertainty within the laws of agency, assignation, and separate legal personality. Additionally, the case in which the concept did not violate privity was incorrectly decided. Therefore, there is no reason to continue to recognise the concept in Scots law. It is recommended that *ad hoc* agency be abolished.

11-14. Undisclosed agency is also problematic. It is an exception to the privity doctrine, because the principal can enforce contractual rights under the contract between the third party and the undisclosed agent. The principal can sue the third party despite the fact that the third party did not intend to contract with it, and so undisclosed agency is incompatible with contract theory. Undisclosed agency is not a form of delictual liability. It cannot be justified by reference to the standard considerations behind the recognition of statutory exceptions to privity. Whilst the doctrine is commercially convenient from the perspective of the principal and agent, this justification does not extend to the third party, who may be detrimentally affected by the undisclosed agency transaction. The principal is not generally a weaker party which the law should protect. In terms of ensuring recovery for breach of contract, it is the principal's choice of contractual structure which leads to the contract between the third party and agent, rather than the third party's choice, and so this justification is also inadequate. Recognition of undisclosed agency also contravenes the principles of good faith and freedom of contract. However, in cases where undisclosed agency is used to protect the principal against discrimination based on characteristics recognised

under equalities legislation, undisclosed agency does uphold the justifiable policy consideration of protecting weaker parties. It is therefore suggested that undisclosed agency is abolished, other than in situations in which is it used to protect against discrimination.

11-15. In summary, contracts for the benefit of another can be recognised in Scots law as a passive form of third-party rights. A reformed transferred loss doctrine should, where this protects weaker third parties, be recognised as a policy-based exception to privity. Undisclosed agency can be justified in very narrow circumstances but should otherwise be abolished. *Ad hoc* agency should not continue to be recognised in Scots law.

(3) Future exceptions to the privity doctrine

11-16. It is possible to justify new exceptions to privity. For example, Chapter 10 demonstrated that doctrinal recognition of external network liability would protect third parties and ensure that Scots law was sufficiently modernised to account for the increasing prevalence of business networks. However, the manner in which external network liability, or any other new exception to privity, is introduced must protect and uphold the privity doctrine, contract theory, and justifiable policy considerations. If the law on the privity doctrine and its exceptions is to be clear and intelligible, the creation of new exceptions must align with well-defined policy objectives.

11-17. In England and Wales, the Law Commission has stated that, despite its contribution to the Contracts (Rights of Third Parties) Act 1999, it has “no desire to hamper judicial creativity” regarding the privity doctrine.³ However, the creativity which has occurred in Scotland in the creation of *ad hoc* agency has not fully taken account of the privity doctrine or contract theory. The development of this concept has further failed to reflect adequate policy considerations which justify deviation from privity and contract theory. This demonstrates the importance of ensuring that new exceptions to privity uphold sound policy justifications, in order to protect underlying contract doctrine and to ensure that the law is clear and workable.

11-18. Judge Richard Seymour QC warns that:

Although the law is always capable of development, it is, in my judgment, necessary to proceed with particular caution in the area of developing novel ways of providing remedies. The implications of the proposed new way of permitting a recovery to be made are unlikely to be readily apparent beyond the circumstances of the particular case. Moreover, unless the law is moving to a stage in which there is to be a remedy for every perceived wrong, there must be some justification in policy for developing the law in favour of a particular claimant beyond that he contends that he has suffered a loss which will otherwise go uncompensated unless the law is developed.⁴

³ Law Commission, Report on *Privity of Contract* para 1.10.

⁴ *Rolls-Royce Power Engineering v Ricardo* [2003] EWHC 2871 (TCC), [2004] 2 All ER (Comm) 129 at para 103 per Judge Richard Seymour QC.

11-19. This view can be applied to the expansion of common law exceptions to privity. *Ad hoc* agency was developed with good intentions, and Lord Drummond Young was no doubt seeking to ensure a fair outcome in the case at hand. However, it is not possible to regard this concept as a justifiable exception to privity. The creation of new exceptions should not arise in individual cases as sticking plasters to prevent losses in particular situations. Scots law does not reflect a principle that all losses should be compensated. Implementing such a principle would result in an unacceptable degree of uncertainty and make it impossible for contracting parties to predict their liabilities accurately. Sometimes, cases will arise in which losses should be recoverable. However, those responsible for deciding such cases should not create new legal concepts which are not grounded in contract doctrine and sound policy considerations. The creation of new exceptions should instead be the result of extensive deliberation on whether the exception reflects justifiable policy considerations. This may have allowed for the creation of a transferred loss doctrine as a justifiable exception to privity which protects third parties in a consistent manner.⁵ It would also have curtailed the development of *ad hoc* agency, which is not supported by any reasonable justifications.

11-20. The simplest way to ensure that new exceptions to privity are sufficiently clear and well-supported by policy reasoning is for reform to be left in the hands of the legislature and Law Commissions. If the exceptions are enshrined in statute, then the intentions of the contracting parties are not violated when the third party's entitlements are upheld.⁶ *Ad hoc* judicial reform of privity has jeopardised doctrinal and commercial certainty. However, if privity is to be reformed by the common law, new exceptions should only be recognised following full discussion of privity itself, of contract theory, and of policy considerations. Whittaker observed, prior to the enactment of the Contracts (Rights of Third Parties) Act 1999, that "any creation of exceptions to privity of contract requires clear justification by the courts, taking into account all the relevant factors which apply in the particular context".⁷

11-21. This sentiment ought to continue to apply to the development of any further exceptions. MacQueen argues that the progress of Scots common law relies on judicial development "as principle and pragmatism suggest".⁸ The concepts considered in this book provide clear examples of legal doctrine justified by pragmatism, but which do not reflect underlying principles of Scots contract law. They are a useful illustration of the need for judicial reform to reflect both pragmatism and doctrinal principle, as MacQueen suggests.

⁵ According to the current law on transferred loss, the third party's ability to recover the loss depends on whether the relevant contracting party is willing to make a claim on the third party's behalf. This results in inconsistent outcomes for third parties. See paras 7-23 to 7-25 above.

⁶ This is because the contracting parties impliedly consent to contracting in accordance with the law, as discussed in para 3-22 above.

⁷ S Whittaker, "Privity of contract and the tort of negligence: future directions" (1996) 16 *Oxford Journal of Legal Studies* 191, 216.

⁸ H L MacQueen, "Judicial reform of private law" (1998) 3 *Scottish Law & Practice Quarterly* 134 (Edinburgh School of Law Research Paper No 2017/16).

C. AREAS FOR FURTHER RESEARCH

11-22. Various issues raised in this book would benefit from further examination and research. These are: the potential positive impact of undisclosed agency on consumers; the rationale for the use of undisclosed agency in legal practice; developing clear and workable law on networks; the rule against the recovery of another's loss; and the "no burdens" aspect of privity. The remainder of this section considers these issues in turn.

11-23. Chapter 9 mentioned Tan's view that higher prices encountered by a principal if it must contract in its own name will affect third parties such as consumers.⁹ Empirical research on the use of undisclosed agency would be beneficial in clarifying whether this view is correct. One such avenue of research may be the use of undisclosed agency in the purchase of ransom strips, i.e. of small pieces of land that are crucial to the completion of a proposed development.¹⁰ For example, a ransom strip might constitute part of an area of land on which a road must be built to access a supermarket development.¹¹ Analysing the difference in price between the sale of ransom strips to undisclosed agents as opposed to entities which contract in their own names, and any consequent impact on consumers, may confirm or disprove Tan's claims. This research may influence the question of whether limited forms of undisclosed agency should continue to exist in Scots law.

11-24. The dearth of case law on undisclosed agency perhaps reflects the fact that the principal's existence is often not revealed. This means that examining case law and commentary cannot offer a complete perspective of the reasons why undisclosed agency is used in practice. Further empirical research on undisclosed agency more generally would therefore be beneficial in ascertaining the reasons behind the use of undisclosed agency structures in legal practice. This in turn may identify policy considerations that could justify undisclosed agency.

11-25. Chapter 10 discussed the increasing prevalence of networks. It is imperative that the phenomenon of legal networks is subject to both doctrinal and empirical study. This will ensure that networks are properly understood by policymakers, and that the law on networks is workable and up-to-date. In particular, doctrinal research on networks could usefully ascertain whether networks ought to be treated as contractual or legal obligations *sui generis*. Empirical research on consumer perspectives of

⁹ See para 9-60 above.

¹⁰ The key English case is *Stokes v Cambridge Corp* (1962) 13 P & C R 77. Relevant Scottish cases include: *Morton Whitecross Ltd v Falkirk Council* [2012] CSOH 97, 2012 SLT 899; *Elmford Limited for Judicial Review of Actings by Glasgow City Council (No 2)*, Court of Session Outer House, 12 September 2000, unreported; and *Wyness v Scottish Hydro Electric Power Distribution plc* 2020 GWD 17-247. These cases do not discuss undisclosed agency, but they provide an overview of the law on ransom strips and the practical problems associated with their sale. In Scotland, there is an ongoing dispute concerning the building of a wall on a ransom strip owned by one party but over which another party has the right to control development: *Trustees of the Grange Trust v City of Edinburgh Council* [2017] CSOH 102, 2017 GWD 23-387, and *Leafrealm Land Ltd v City of Edinburgh Council* [2021] CSIH 24, 2021 GWD 15-225.

¹¹ See further J Sidders, "A small piece of real estate in the right place can make its owner millions" *Estates Gazette*, 7 June 2014, 754.

networks could influence potential reforms aimed at protecting consumers from the impact of network behaviour.

11-26. The book has briefly addressed the interaction between the privity doctrine and the rule that a contracting party cannot recover for another's loss.¹² This rule is, like privity, subject to a number of exceptions – for example, transferred loss and contracts for the benefit of another. Examination of the development of this rule and the policy rationale behind its exceptions would ensure that the law on cases where contracting parties can recover for another's losses is doctrinally coherent. Both rules concern the interaction between contracting parties and external parties, and so future work on the intersection of these two rules would contribute to doctrinal clarity.

11-27. Finally, whilst this book has focused on the “benefits” aspect of the privity doctrine, it has also argued that exceptions to the “no burdens” rule are permissible where the contractual arrangement is commercially convenient for the contracting parties as well as the third party.¹³ The exceptions to this aspect of privity are limited in comparison to the “benefits” aspect of the doctrine, and the “no burdens” rule is relatively uncontroversial. Nonetheless, future research on further potential exceptions to this rule would allow for a fuller understanding of this aspect of privity.

¹² See paras 6-25 and 6-26 above.

¹³ See para 5-68 above.

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