

Privity

INTRODUCTION

- Only a person who is party to a contract can enforce the contract and incur obligations under it → *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847
- Aspects of the doctrine:
 - o Contract cannot confer an enforceable benefit on a non-party
 - o Cannot impose an enforceable burden on a non-party
- Separate from the rule that consideration must move from the promisee
 - o Person must: 1. Establish that they are a party to the contract,
 - 2. Provided consideration
- Idea that a contract cannot confer an enforceable benefit on a third party → generally seen as unsatisfactory. Illustrated by 3 examples below:
 - o 1. If A and B enter into a contract under which A promises B (for consideration) to pay \$1000 to C, and A fails to honour this promise, C has no right to sue A to recover the money
 - Relief: B may be able to obtain a decree of specific performance ordering A to pay C
 - o 2. If A and B enter into a contract under which A promises B (for consideration) to perform building work for C, and A fails to honour this promise, C cannot sue A for breach of contract
 - Relief: decree of specific performance will not be available, so B can only obtain damages
 - o 3. If A and B enter into a contract which includes a term that A cannot sue C if C incurs liability to A, C nonetheless has no defence if A sues C in respect of liability incurred

Number of ways C can obtain relief

- Look at relief above
- Might be possible to argue that the doctrine of privity has no application
 - o Non-party C may be able to claim that despite appearances, they were in fact a party to the contract by virtue of the doctrine of agency
 - E.g. B as an agent for C, entered the contract with A
- C may be able to establish that in respect of the contract between A and B, B was acting as a trustee for C
 - o If so, C can compel B to enforce the contract by proceedings in equity
- C may be able to establish an estoppel against B if B has led C to believe that:
 - o C would have enforceable rights against B; or
 - o B would perform a certain promise
 - o And C has relied on that assumption in such a way that C will suffer detriment if the promise is revoked
- If C can establish that B's conduct in making the contract was misleading or deceptive, C may be able to claim damages under the *Australian Consumer Law*

IDENTIFYING THE CONTRACTING PARTIES

Coulls v Bagot's Executor & Trustee Co Ltd (1967) 119 CLR 460

Facts	<ul style="list-style-type: none">- Agreement between Coulls and O'Neil Construction Proprietary Limited- In consideration of 5 pounds, Coulls gives O'Neil the sole right to quarry and remove stone from an area of approx. 50 acres situated around a nursery- O'Neil agrees to pay at the rate of 3d/tonne for all stone quarried and sold, and also a fixed minimum royalty of \$2/week for a period of 10 years, with an option of another 10 years at above the \$12/week minimum- Company to pay all the money to Coulls or Coulls' wife as joint tenants- Agreement prepared without professional assistance- Upon Coulls' death, question arose about whether the money would go
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	<p>to his wife or to his estate, and if his two children from a previous marriage stood to benefit if the royalties formed part of the estate</p> <ul style="list-style-type: none"> - His executors (Bagot's) sought the guidance of the Supreme Court on several questions:
Initial trial	<p>Questions were:</p> <ol style="list-style-type: none"> 1. Is O'Neil Construction Pty Ltd entitled or bound to pay the royalties payable under the said agreement to Bagot's? 2. Is O'Neil Construction Pty Ltd entitled or bound to pay the royalties payable under the said agreement to Doris Sophia Coulls, the deceased's widow? 3. If the said royalties are paid to Bagot's does it receive and hold the royalties as executor or trustee of the deceased's estate or for or on behalf of the said widow or for the widow and the deceased's estate jointly or in common? <ul style="list-style-type: none"> - Trial judge found: <ol style="list-style-type: none"> 1. O'Neil Construction was not entitled or bound to pay the royalties under the agreement to Bagot's 2. They were entitled and bound under the agreement to pay the royalties to Doris Sophia Coulls
Legal questions upon appeal	<ul style="list-style-type: none"> - Was Mrs Coulls only a third party beneficiary and not a party to the agreement? - As a beneficiary, she would only have interest under a recoverable mandate that lapsed on Mr. Coulls' death and was not binding on his executor <p>Judges split:</p> <ul style="list-style-type: none"> - Dissenting → the agreement was one between the company on the one hand and Mr and Mrs Coulls on the other
DISSENTING JUDGEMENT – BARWICK CJ	<ul style="list-style-type: none"> - Not only was the promise to pay, a promise to pay the deceased and Mrs Coulls during their joint lifetime and thereafter the survivor of them, but that it was a promise given to both of them to make both those payments - According to our law, a person not a party to a contract may not himself sue upon it so directly to enforce its obligations... but this does not mean that it is not possible for that person to obtain the benefit of a promise made with another for his benefit by steps other than enforcement by himself his own right - I agree with the conclusion that where A promises B for a consideration supplied by B to pay C, then B may obtain specific performance of A's promise, at least where the nature of the consideration given would have allowed the debtor to have obtained specific performance. I see no reason whatever why A in those circumstances should not be bound to perform his promise. That C provided no part of the consideration seems to me irrelevant - Questions of privity and consideration are not always kept distinct - In my opinion, we have a promise by A made to B and C for consideration to pay B and C. In such a case it cannot lie in the mouth of A. - The agreement was a promise in respect of which there was privity between A on the one hand and B and C on the other. Such a promise is clearly enforceable in the joint lifetime of B and C; but it is only enforceable if both B and C are parties to the action to enforce it. B, although he only supplied the consideration, could not sue alone. If C were unwilling to join the action as plaintiff, B no doubt could join C as a defendant.

	<ul style="list-style-type: none"> - Upon the death of one of the joint promises, the promise remains on foot and remains enforceable, but it is still the same promise given to B and C though, because of the death of one and the right of survivorship, the promise is now to pay the survivor. C, being the survivor, may enforce the promise by an action to which both B's estate and C are parties. - C cannot be the sole plaintiff against A because A's promise was not made to C alone. Consequently, B's personal representative would need to either be a co-plaintiff or joined as a defendant.
<p>LEADING – TAYLOR AND OWEN JJ</p>	<ul style="list-style-type: none"> - The question is whether the testator's wife was a party to the contract and whether, upon its true construction, the contract contains a promise by the company to pay to her royalties falling due under the contract after the testator's death - We observe that there is nothing whatever in the contract apart from the last paragraph upon which a conclusion could be based that she was a party to the contract - On the contrary, the contract purports expressly to be one made between Arthur Coulls and O'Neil Construction Pty Ltd - But it is said that the only promise to pay royalties made by the company is contained in the last paragraph and that this is a promise to pay "all the money connected with this agreement" to the testator and his wife jointly during their lives and, after the death of one of them, to the survivor → in our opinion this is not the effect of that paragraph; there is no express promise by the company to pay royalties to the wife nor is it possible to imply such a promise - One cannot doubt, of course, that the testator intended that the royalties should be paid to his wife after his death if she should survive him, but it seems that the method which he chose to carry this intention into effect miscarried in spite of the fact that his wife's signature appears at the foot of the contract following those of the testator and L O'Neil for the company. - The mere fact that her signature appears does not make her a party; this is a question to be resolved upon a consideration of the written instrument itself → the last terms of the paragraph do not prescribe the persons who are entitled to demand and receive the royalties payable under the agreement, and therefore, do not negative the certain implication which would otherwise arise that it was the testator who was to be so entitled - Whereas the testator authorised his wife to receive the royalties payable after his death, there is no corresponding authorisation by the wife in the event of her husband surviving her - We think it is clear that the only person entitled to demand royalties under the contract was the testator and that his wife was not a party to it. Accordingly, we are of the opinion that, since the last paragraph cannot operate as an equitable assignment, the authority which that paragraph gave came to an end on the testator's death - Appeal allowed
<p>McTIERNAN J:</p>	<ul style="list-style-type: none"> - The first part of the document purports to be a transaction only between AL Coulls and the company. The words of the document including its heading <i>Agreement between Arthur Leopold Coulls and O'Neil Construction Proprietary Limited</i> countervail against the inference that Mrs Coulls is a party - It is implied in the contract that the company is liable to pay to AL Coulls the royalties stipulated by the third and fourth memoranda in the document.

	<ul style="list-style-type: none"> - Accordingly, I hold that the provisions of the document do not impose on the company a contractual obligation to pay to Mrs Coulls any royalty which accrues due from it after the death of the testator or at all
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NON-APPLICATION OF THE PRIVITY RULE: AGENCY

- It may be possible to show that a party not directly involved in acts of contract formation is nevertheless a party to the contract
- Privity rule does not apply if a person promised a benefit under a contract can show that one of the parties involve in the contractual negotiations entered into the contract as his or her agent
 - o Agent = has the power to enter into a contract on behalf of another person
- Agency relationships can be created expressly or by implication

Establishing the existence of an agency relationship

- Show that the principal expressly or impliedly consented to the agent acting on his/her behalf so as to effect the principal’s relations with third parties
- Show that, with respect to the particular transaction under consideration, the agent was purporting to act on behalf of the principal and not solely on his or her own behalf, unless the contract is subsequently ratified
 - o Ratification = the adoption or confirmation of a contract by a person who is not originally bound by it → consider *Port Jackson Stevedoring v Salmond & Spraggon (Aust) (The “New York Star”) (1978) 139 CLR 231*

Facts	<ul style="list-style-type: none"> - The Schick Razor Company of Canada shipped a consignment of 37 cartons of razor blades from New Brunswick (Canada) to Sydney on the “New York Star” (a ship owned by the Blue Star Line) - The bill of lading was issued by the Blue Star Line to the consignor (Schick) and was transmitted to and accepted by the consignee (the respondent) - The appellant was a stevedoring company operating in Sydney. A was 49% owned by the Blue Star Line, commonly acted as its carrier and was aware of the terms of the bill of lading - Razor blades were unloaded and stored in Sydney, and then 33 of the 37 cartons were stolen, having been misdelivered by the appellant stevedores. - Respondent consignee sued the appellant stevedore in tort. Cl 17 of contract said that the carrier was discharged from liability if suit was not brought within one year after the date on which the goods should have been delivered. Cl 2 was a Himalaya clause, extended the benefit of defences to every independent contractor employed by the carrier - Stevedore relied on the provisions above as a defence to the consignee’s action on the basis that the carrier had entered into the contract as agent for the stevedore
Legal Issue	- Could the stevedore reasonably rely upon the exclusion of liability clause in the bill of ladings
Judgement	<ul style="list-style-type: none"> - The court found for the stevedore - Viewing that, generally speaking, stevedores were entitled to rely on the same protections granted to their principle agents, as per the principle established by the Privy Court in <i>New Zealand Shipping v Satterthwaite [1975] AC 154</i> - Whilst the Court would give due regard to all circumstances, there ought not be excessive emphasis on minor technical distinctions regarding contract type in considering whether the <i>Satterthwaite</i> principle ought to apply

CIRCUMVENTING THE PRIVITY RULE

Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107

<p>Facts</p>	<ul style="list-style-type: none"> - Blue Circle Southern Cement Ltd entered into a contract of insurance with Trident General Insurance Co Ltd in respect of Blue Circle's limestone crushing operation - Trident agreed to indemnify "the Assured against all sums which the Assured shall become legally liable to pay in respect of... bodily injury to... any person" - McNiece Bros Pty Ltd was engaged by Blue Circle as principal contractor for construction work being carried out at the limestone crushing plant. - Gary Hammond was then seriously injured while driving a crane at the construction site. McNiece was held liable to pay damages to Hammond. McNiece sought indemnity from Trident under the insurance policy which Blue Circle had taken out
<p>Judgement</p>	<ul style="list-style-type: none"> - Courts have responsibility to reform rules which operate unsatisfactorily and unjustly - Old rules do not apply to insurance cases - Privity rule and consideration moving away from promise rule should not prevent enforcements of insurance contracts - McNiece has a right to claim instance <p><i>Circumvention (Trust)</i></p> <ul style="list-style-type: none"> - It should be inferred if it clearly appears that the Promisee intended the third party to insist on the performance of the promise and if trust appears to be the appropriate legal mechanism to this intention - Blue Circle held the contractual right of indemnification on trust for McNiece <p><i>Retention of the Privity Doctrine</i></p> <ul style="list-style-type: none"> - If both the Promisee and the beneficiary can enforce the contract, double recovery from the Promisor is possible - Privity doctrine protects the promisor from being sued by a large amount of potential plaintiffs - Allowing beneficiaries to sue would constrain the freedom of action of the involved parties <p><i>Consideration – joint promises</i></p> <ul style="list-style-type: none"> - If A, B and C are parties to a contract, and A promises B and C that he will pay C \$1000 if B were to erect a gate for him, C cannot compel A to carry out the promise, because, though a party to the contract, C is a stranger to the consideration - A person must be a joint Promisee to benefit from another party's consideration
<p>Notes</p>	<p>Three reasons for the privity rule:</p> <ol style="list-style-type: none"> 1. The rule precludes the risk of double recovery from the promisor by the third party as well as the promisee 2. The rule imposes an effective barrier to liability on the part of a contracting party to a vast range of potential plaintiffs; This may be significant in the case of government contracts intended to benefit a class of persons; and 3. The recognition of an entitlement in a third party to sue on the contract would circumscribe the parties' freedom of action, especially the promisee <p>Two ways to get around the privity rule:</p> <ol style="list-style-type: none"> 1. TRUST <ul style="list-style-type: none"> - To have a trust relationship, have to appreciate that it is possible to separate legal ownership of property from equitable ownership - Under a trust, the legal interest is held by trustee & equitable interest held by beneficiary, who will not be a party to the contract but the Trustee

	<p>will have obligation to enforce contract on Beneficiary's behalf</p> <ul style="list-style-type: none"> - Difficulty with using trust = need words that evince intention to create a trust e.g. "I hold this contractual promise in trust for X" <p>2. AGENCY</p> <ul style="list-style-type: none"> - Under an agency relationship, the principal authorises the agent to make a contract on behalf of the principle. Under such circumstances, it is the principal rather than the agent that is the contracting party - Applies: if the person who has promised a benefit under the contract can show one of the parties entered into the contract as their agent - A relationship can be created expressly or by implication: to show, need to prove principal or expressly impliedly consented to the agent acting so as to effect the principal's relations with third parties - Also necessary for principal to show in relation to transaction that agent acting on behalf of principal, UNLESS contract is later ratified by principal (adoption of contract by person not originally bound. Has been used as way of getting around Privity rule in relation to exclusion clauses in contract of carriage)
Tests	<ul style="list-style-type: none"> - Whether a trust is created will depend on a true construction of the terms of the contract and the intention of the parties. In deriving intention from the language that the parties have employed the courts may look to the nature of the transaction and the circumstances, including the commercial necessity of the arrangement - The intention required to create a trust need not be held by both parties, it is sufficient if the promise alone holds the intention

MORE EXCEPTIONS

1. Stevedoring cases in general → *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446
 - a. Courts will seek to give effect to Himalaya clause. Usually an exclusion clause
 - b. 4-part test
 - i. 1. The bill of lading makes clear that the stevedore was intended to be protected
 - ii. 2. The bill of lading makes clear that the carrier was contracting as agent for the stevedore as well as on its own behalf
 - iii. 3. Either carrier was authorised to make the contact on behalf of the stevedore, or the stevedore later ratified the carriers' actions
 - iv. 4. The stevedore provided consideration to the promisor
2. Common law and statute for insurance
 - a. *Insurance Contracts Act 1984 (Cth) s 48(1)*: "A third party beneficiary under a contract of general insurance has a right to recover from the insurer, in accordance with the contract, the amount of any loss suffered by the third party beneficiary even though the third party beneficiary is not a party to the contract"

Summary

- Only a person who is party to a contract can enforce the contract, and incur obligations under it
 - 1. Identify the contracting parties
 - a. *Coulls v Bagot's Executor* →
 - 2. Can privity be circumvented? → *Trident General Insurance v McNiece Bros Ltd*
 - a. Agency → acting on behalf of another
 - i. Consider: nature of relationship (director/company, employer/employee)
 - b. Trust
 - 1. One person holds property on trust for another.
 - 2. A right under a contract is a form of property. Since a contractual right is a form of property, it is capable of being held on trust
 - 3. One might therefore circumvent privity by arguing that the contracting party holds the relevant contractual right on trust for the third party
 - ii. Determining if rights are held in trust:
 - 1. Objective manifestation of intention
 - c. Estoppel
 - d. Misleading/deceptive conduct
 - e. Tort
 - f. Special cases
 - i. Stevedoring: *Scruttons Ltd v Midland Silicones Ltd*. Consider
 - 1. The bill of lading makes clear that the stevedore was intended to be protected
 - 2. The bill of lading makes clear that the carrier was contracting as agent for the stevedore as well as on its own behalf
 - 3. Either the carrier was authorised to make the contract on behalf of the stevedore, or the stevedore later ratified in the carrier's actions
 - 4. The stevedore provided consideration to the promisor (the person having the goods transported)
 - ii. Cases under statute for insurance → *Insurance Contracts Act 1984 s48(1)*
 - 1. "A third party beneficiary under a contract of general insurance has a right to recover from the insurer, in accordance with the contract, the amount of any loss suffered by the third party beneficiary even though the third party beneficiary is not a party to the contract"
 - iii. Insurance?? → *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*
 - 1. HCA recognises a limited exception to enable a third party, referred to in an insurance contract, to maintain an action against the insurer
3. Remedies
 - a. Damages
 - b. Specific performance