5 Consideration and Form

It is clear that no legal system treats all agreements as enforceable contracts. In every legal system there exist rules which identify the types of agreement that are to be treated as enforceable contracts. The function of these rules is to give what we shall call the 'badge of enforceability' to certain agreements. In English law that function is performed principally by the doctrine of consideration and, to a lesser extent, by a doctrine of formalities. Of course, it could be argued that the rules relating to duress, misrepresentation and illegality play a role in identifying those agreements which are to be treated as enforceable contracts (see Atiyah, 1986c) and, to some extent, this is true. But English law has, historically, viewed the requirements of consideration and form as being separate and distinct from doctrines such as duress and this is the approach which we shall adopt in this chapter.

5.1 Requirements of Form

A legal system may grant the 'badge of enforceability' only to those agreements which are entered into in a certain form. Historically, English law has placed considerable reliance upon requirements of form. The Statute of Frauds 1677 required that certain classes of contracts be evidenced in writing, but most of its provisions were repealed in 1954. Requirements of form are therefore no longer a significant feature of English contract law, except in a residual category of contracts. For example, a lease for more than three years must be by deed (Law of Property Act 1925 ss.52, 54(2)) and a unilateral gratuitous promise is only enforceable if it is made by deed. Compliance with this requirement is relatively straightforward; a document bearing the word 'deed' or some other indication that it is intended to take effect as a deed must be signed by the individual maker of the deed, that signature must be attested by one witness if the deed is signed by the maker (there must be two witnesses if the deed is signed at his direction) and it must be delivered, that is to say, there must be some conduct on the part of the person executing the deed to show that he intends to be bound by it (Law of Property (Miscellaneous Provisions) Act 1989, s.1(2), (3)). The requirement that the deed be under seal was

abolished by section 1 of the Law Reform (Miscellaneous Provisions) Act 1989.

Bills of exchange (Bills of Exchange Act 1882 s.3(1)) and bills of sale (Bills of Sale Act 1878 (Amendment) Act 1882) must be in writing, while contracts for the sale or other disposition of an interest in land (Law of Property (Miscellaneous Provisions) Act 1989, s.2) can only be made in writing. Contracts of guarantee (Statute of Frauds Act 1677 s.4) must be *evidenced* in writing. However it is vital to note that, apart from the case of gratuitous promises made by deed, such formal requirements do not replace consideration; they are an additional requirement.

Professor Atiyah has argued that 'insistence on form is widely thought by lawyers to be characteristic of primitive and less well-developed legal systems' (1995, p.163). Yet many major legal systems in the world continue to place heavy reliance upon formal requirements. Many provinces in Canada (see Waddams, 1999) and states in Australia (see Greig and Davis, 1987) are still governed by the Statute of Frauds, either in its original or a modified form. Scotland, which does not have a doctrine of consideration, places great emphasis upon formal requirements. Until recently the law was archaic and therefore out of step with the needs of modern commerce. For example, a contract of loan of a sum of money in excess of £8.33 could be created informally but had to be proved by the writ or oath of the party alleged to be bound. These old rules have now been swept away by the Requirements of Writing (Scotland) Act 1995, which seeks to provide a coherent framework for the modern law. The old rules relating to proof by writ or oath have been abolished (s.11(1)). As far as the constitution of contracts is concerned, the general rule is that writing is not required for the constitution of a contract or unilateral obligation (s.1(1)). There are exceptions, but they are few. Thus a written document (defined in s.2) is required for the constitution of a contract or unilateral obligation for the creation, transfer, variation or extinction of an interest in land (s.1(2)(a)(i)) and for the constitution of a gratuitous unilateral obligation except an obligation undertaken in the course of a business (s.1(2)(a)(ii)).

What are the functions of such formal requirements? Professor Fuller (1941) has identified three functions. The first is the evidentiary function; in cases of dispute a formal requirement, such as writing, provides evidence of the existence and content of the contract. For this reason businessmen frequently reduce their contracts to writing, even though it is not mandatory to do so. Secondly, formalities have a cautionary function, 'by acting as a check against inconsiderate action'. A requirement that a contract be made by deed impresses upon the parties the importance of the agreement into which they are about to enter. This cautionary function

has been recognised by Parliament in sections 60 and 61 of the Consumer Credit Act 1974, which provide that a regulated consumer credit agreement is not 'properly executed' unless it complies with certain formal requirements which are designed to ensure, as far as possible, that the consumer is fully informed of the nature and consequences of the agreement before entering into it. Such formal, statutory paternalistic requirements may become an increasingly common feature of English contract law. The third function of formalities is the channelling function, that is to say, formalities provide a simple and external test of enforceability.

On the other hand, requirements of form are attended by considerable disadvantages. In the first place formalities tend to be cumbersome and time-consuming. It would be ridiculous and impractical to insist that every contract be reduced to writing, so that every time I bought my morning newspaper I had to sign a written contract. This leads to a second difficulty which is that, given that it is impractical to apply formal requirements to all contracts, which contracts should be governed by requirements of form? For example, in England contracts of guarantee must be evidenced in writing, but no such requirement applies to contracts of indemnity. Yet the two contracts are very similar and the cases have 'raised many hair-splitting distinctions of exactly that kind which bring the law into hatred, ridicule and contempt by the public' (*Yeoman Credit Ltd* v. *Latter* [1961] 1 WLR 828, 835). Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (above) threatens to be equally productive in litigation terms as the courts have already experienced some difficulty in deciding which terms have to be made in writing (see *Spiro* v. *Glencrown Properties Ltd* [1991] Ch 537; *Record* v. *Bell* [1991] 1 WLR 853; *Pitt* v. *PHH Asset Management Ltd* [1994] 1 WLR 327; *Commission for the New Towns* v. *Cooper (Great Britain) Ltd* [1995] Ch 259; *Firstpost Homes Ltd* v. *Johnson* [1995] 1 WLR 1567; and *McCausland* v. *Duncan Lawrie Ltd* [1997] 1 WLR 38). The Scots have also encountered the same problem. Until recently, Scotland had the anachronistic rule that contracts of loan of over £8.33 must be proved by the writ or oath of the party alleged to be bound. It is extremely difficult, if not impossible, to identify any rational theory which explains why certain contracts are subjected to requirements of form while others are not. It is equally difficult to explain why some contracts must actually be in writing, while others need only be evidenced in writing. Other difficult questions arise. What type of writing is required? Must the contract be signed? What constitutes a signature? These issues have all been the subject of extensive litigation under the Statute of Frauds 1677 (see Treitel, 1999, pp.165–9)

and are an inevitable concomitant of a system based upon requirements of form.

A final difficulty created by requirements of form arises where an 'innocent' party has acted to his detriment upon a 'contract' which did not comply with the relevant formalities (for a statutory attempt to strike a balance between the competing interests, see s.1(2)–(4) of the Requirements of Writing (Scotland) Act 1995). English law has not adopted a uniform approach to this problem. Prior to the enactment of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, the courts 'viewed with some disfavour those who made oral contracts but did not abide by them' and thus 'were prepared to interpret the statutory requirements generously to enable contracts to be enforced' (per Peter Gibson LJ in *Firstpost Homes Ltd* v. *Johnson* [1995] 1 WLR 1567, 1575). But the courts have adopted a much stricter approach when seeking to interpret section 2 of the 1989 Act. A good illustration of the former approach is provided by cases concerning the (now repealed) s.40(1) of the Law of Property Act 1925. In *Wakeham* v. *Mackenzie* [1968] 1 WLR 1175 the deceased orally promised the claimant that he would leave his house to her if she moved into his house and looked after him until his death. She complied with his request but he failed to leave the house to her on his death. Could the claimant enforce the oral contract despite the fact that it did not comply with the formal requirements of s.40(1) of the Law of Property Act 1925 (which, it must be remembered, re-enacted part of s.4 of the Statute of Frauds 1677)? At common law the answer was 'no' because the defect in form rendered the contract unenforceable (but not void). But it was held that the contract was enforceable in equity under the doctrine of part performance. The doctrine of part performance was developed by equity in response to the hardships created by a strict application of the Statute of Frauds. The doctrine came into play where the acts of the claimant were referable to the alleged contract, it was a fraud for the defendant to rely on the Statute, the contract was specifically enforceable and there was proper evidence of the agreement. All these requirements were satisfied on the facts of *Wakeham*. It was not easy to reconcile the existence of the doctrine of part performance with the Statute of Frauds; in truth, it was incompatible with the Statute but it mitigated the hardships which would otherwise have been caused by its rigorous application. Although s.40(1) of the 1925 Act has now been repealed by s.2(8) of the Law of Property (Miscellaneous Provisions) Act 1989, similar problems are likely to arise under the 1989 Act. But the courts are unlikely to take such a benevolent approach under the new Act. As we have noted, s.2(1) requires that a contract for the sale or other

disposition of an interest in land be 'made in writing'. An agreement which does not comply with the requirements is therefore a nullity. It follows from this that, where there is no writing, there is no contract and so nothing for part performance to bite on to. In *Firstpost Homes Ltd* v. *Johnson* [1995] 1 WLR 1567, 1576 Peter Gibson LJ observed that the 1989 Act has a

> 'new and different philosophy from that which the Statute of Frauds 1677 and section 40 of the Act of 1925 had. Oral contracts are no longer permitted. To my mind it is clear that Parliament intended that questions as to whether there was a contract and what were the terms of the contract, should be readily ascertained by looking at the single document said to constitute the contract.'

The courts have held that Parliament 'intended to introduce new and strict requirements as to the formalities to be observed for the creation of a valid disposition of an interest in land' (per Neill LJ in *McCausland* v. *Duncan Lawrie Ltd* [1997] 1 WLR 38, 44). Thus they have refused to give effect to agreements and variations of agreements which have not complied with the new rules. The legislation has been criticised for its 'propensity . . . to allow people to escape from concluded agreements' (Thompson, 1995) but that is the price of taking formalities seriously and refusing to admit extrinsic evidence. The party who relies to his detriment on there being an enforceable contract for the sale of land when there is, in fact, no contract because it was not 'made in writing' is now in a rather precarious position. But he is not without any hope of salvation. Section 2(5) expressly states that 'nothing in this section affects the creation or operation of resulting, implied or constructive trusts' and the constructive trust and, albeit with more hesitation, proprietary estoppel (see 5.27) have been called upon to play a role similar to, if less expansive than, that played by the doctrine of part performance in relation to s.40(1) of the 1925 Act. The reason for the hesitation in relation to proprietary estoppel is that it is not expressly mentioned in s.2(5) (albeit that it has a number of similarities with the constructive trust) and, if it is used too readily by the courts, it could undermine the policy behind section 2 (and, for this reason, estoppel by convention (see 5.26) has been held not to have any role to play in relation to section 2). But the proposition that section 2 is a 'no-go area' for estoppel has been held to be unsustainable (*Yaxley* v. *Gotts* [1999] 3 WLR 1217, 1226) and the courts are unlikely to be willing to allow section 2 to be used as a cloak to shield fraudulent conduct. As Beldam LJ stated in *Yaxley* (at p.1243) it is not 'inherent in a social policy of simplifying conveyancing by requiring the certainty of a

written document that unconscionable or equitable fraud should be allowed to prevail'.

There is no doubt that there are genuine difficulties experienced by legal systems which place heavy reliance upon requirements of form. But, as we have seen, formalities do perform useful evidentiary and cautionary functions. Although it is highly unlikely that Parliament will ever re-enact the Statute of Frauds, Parliament can usefully continue its practice of imposing requirements of form where it is satisfied that such requirements will 'provide a check against inconsiderate action' (as in the case of ss.60 and 61 of the Consumer Credit Act 1974 (above)). When it does so it can also devise a solution which will protect those who are in need of protection, while ensuring that the formalities do not become a trap for the unwary (see s.127 of the Consumer Credit Act 1974 which, as against the debtor, places severe restrictions upon the enforceability of regulated consumer credit agreements which are not 'properly executed' but otherwise gives the court considerable discretion to reach an appropriate solution).

5.2 Consideration Defined

Having largely rejected formal requirements, English law has developed a doctrine of consideration to play the principal role in selecting those agreements to be given the 'badge of enforceability'. However the basis of the doctrine of consideration has been a battleground for leading contract scholars in recent years. The orthodox interpretation of consideration is that it is based upon the idea of 'reciprocity'; that a promisee should not be able to enforce a promise unless he has given or promised to give something in exchange for the promise or unless the promisor has obtained (or been promised) something in return. The classic definition was expressed in *Currie* v. *Misa* (1875) LR 10 Ex 153 in the following terms:

> 'a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'

However, this orthodox interpretation has been subjected to a powerful challenge by Professor Atiyah (1986c). Atiyah argues that there is no coherent doctrine of consideration based upon reciprocity. He states that

'the truth is that the courts have never set out to create a doctrine of consideration. They have been concerned with the much more practical problem of deciding in the course of litigation whether a particular promise in a particular case should be enforced. . . . When the courts found a sufficient reason for enforcing a promise they enforced it; and when they found that for one reason or another it was undesirable to enforce a promise, they did not enforce it. It seems highly probable that when the courts first used the word "consideration" they meant no more than there was a "reason" for the enforcement of a promise. If the consideration was "good", this meant that the court found sufficient reason for enforcing the promise.'

Professor Treitel has, in turn, launched a vigorous counterattack on Atiyah's thesis. Treitel argues (1999) that English law does, in fact, recognise the existence of a 'complex and multifarious body of rules known as "the doctrine of consideration" '. He rejects the argument that consideration means a reason for the enforcement of a promise and maintains (1976) that such a proposition is a 'negation of the existence of any applicable rules of law' because it does not tell us the circumstances in which the courts will find the existence of such a 'good reason'.

Yet even Treitel has to admit (1976) that in some cases the courts have 'invented' consideration, that is to say the courts 'have treated some act or forbearance as consideration quite irrespective of the question whether *the parties* have so regarded it'. This concession is necessary if the cases are to be reconciled with the traditional theory. Atiyah argues (1986c) that 'Professor Treitel has himself invented the concept of an invented consideration because he finds it the only way in which he is able to reconcile many decisions with what he takes to be the "true" or "real" doctrine'. Although Atiyah challenges the orthodox interpretation of consideration, he does recognise that the presence of 'benefit or detriment is normally a good reason for enforcing a promise'. But, he argues, '[it] does not in the least follow that the presence of benefit or detriment is always a sufficient reason for enforcing a promise; nor does it follow that there may not be other very good reasons for enforcing a promise'.

The difference between the two schools of thought is that Treitel adheres to the benefit/detriment analysis (suitably expanded to encompass cases of 'invented consideration') while Atiyah maintains that there are other 'good reasons' for the enforcement of a promise. In the remaining sections of this chapter we shall consider whether the cases can be accommodated within a 'benefit/detriment' analysis or whether there

are, as Atiyah argues, other reasons which support the enforcement of promises.

5.3 The Many Functions of Consideration

As the law of contract has developed, so it would appear that the functions of the doctrine of consideration have gradually changed. Professor Simpson has argued (1975) that at an early stage in its development consideration played a multi-functional role within the law of contract. He states that

> 'the old action for breach of promise catered for what we would call bilateral contracts – that is transactions involving both sides doing things – in terms of the doctrine of consideration and the concept of a condition.'

He then recounts how during the nineteenth century the doctrines of offer and acceptance and intention to create legal relations were 'superimposed upon the sixteenth century requirement of consideration and made to perform some of the same functions' and concludes (at p.263) that 'all this seems to me to have produced rather too many doctrines chasing a limited number of problems. To put my point differently there is something to be said for throwing out old doctrine when importing new'. The refusal of English law to 'throw out' the doctrine of consideration has given rise to considerable problems in the twentieth century as the courts have sought, largely without success, to ascertain the relationship between consideration and other emerging doctrines of the law of contract. This has proved to be a particularly pressing problem in relation to the rise of the doctrine of duress and the willingness of the courts and some academics to re-analyse some of the old consideration cases in terms of duress rather than consideration (see 5.13 and 17.2). This has led some of the judiciary to advocate a more 'flexible' approach to the doctrine of consideration. A good example of this process can be found in the judgment of Russell LJ in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 18 when he stated that:

> 'in the late twentieth century I do not believe that the rigid approach to the concept of consideration to be found in [the early nineteenth century case of] *Stilk* v. *Myrick* is either necessary or desirable.

> Consideration there must still be but, in my judgment, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect the true intention of the parties.'

This 'watering-down' of consideration makes it very difficult to ascertain the purpose behind the modern doctrine of consideration, or to locate its function within the law of contract. The approach of Russell LJ appears to be that its function should be to 'reflect the intention of the parties to the contract', which suggests that it should, perhaps, become an aspect of the doctrine of intention to create legal relations. This is a controversial suggestion and not one which reflects the traditional understanding of the relationship between consideration and intention to create legal relations (see 5.29) but it does reflect the uncertainty which currently surrounds the role and functions of consideration within modern contract law.

5.4 Consideration and Motive

Before we enter into a discussion of the substance of the doctrine of consideration, one further preliminary point must be made. That point relates to the distinction between consideration and motive. In *Thomas* v. *Thomas* (1842) 2 QB 851 a testator, shortly before he died, expressed the desire that his widow should have the house for the rest of her life. After his death, his executors promised to carry out the testator's desire provided that the widow paid £1 per annum towards the ground rent and kept the house in repair. Now, although the testator's desire was the motive for the transaction, that desire was not the consideration; rather, the consideration was the widow's promise to pay £1 and to keep the house in good repair. It was only the latter which was of value in the eyes of the law.

5.5 The Scope of the Doctrine

The rules which make up the doctrine of consideration may be divided into three categories. The first is that consideration must be sufficient but it need not be adequate (5.6–5.16), the second is that past consideration is not good consideration (5.18) and the third is that consideration must move from the promisee (5.19). Once we have ascertained the scope of the doctrine of consideration, we shall consider the extent to which the

law of contract protects those who rely to their detriment upon promises which are not supported by consideration (5.20–5.29).

5.6 Consideration Must Be Sufficient but It Need Not Be Adequate

The first rule of the doctrine of consideration is that consideration must be sufficient but it need not be adequate. That is to say, the courts will not enforce a promise unless something of value is given in return for the promise. This is what is meant by saying that consideration must be 'sufficient'. On the other hand, the courts do not, in general, ask whether adequate value has been given in return for the promise or whether the agreement is harsh or one-sided (although here a significant role is played by the doctrines of duress and undue influence, on which see generally Chapter 17). This is what is meant by saying that consideration need not be 'adequate'. So if a house worth £160,000 is sold for £1 that is sufficient consideration, even though it is manifestly inadequate. In the following sections (5.7–5.17) we shall discuss in greater detail the scope of the rule that consideration must be sufficient but that it need not be adequate.

5.7 Trivial Acts

The maxim that consideration must be sufficient but need not be adequate has resulted in very trivial acts being held to constitute consideration. The classic illustration is *Chappell & Co* v. *Nestlé* [1960] AC 87. Nestlé offered for sale gramophone records in return for 1s 6d and three wrappers from their chocolate bars. The House of Lords held that the wrappers themselves, although of very trivial economic value, were nevertheless part of the consideration. This was so even though Nestlé threw away the wrappers. As Lord Somervell said: 'a contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn'.

Atiyah has argued (1986c) that this case does not fit within the 'benefit/detriment' analysis because it would be 'ridiculous to assert that the sending or the receipt of the wrappers necessarily involved an actual detriment to the sender or a benefit to the defendants'. He argues that the receipt of the wrappers was not a benefit but was the motive which inspired the promise and that therefore this was a case in which a court would have enforced a promise despite the lack of benefit to the

promisee. Treitel has replied (1976) by asserting that Atiyah has failed to take account of the principle that the courts will not investigate the adequacy of the consideration and that, once it is realised that consideration need only be of *some* value, 'there is no doctrinal difficulty in holding that a piece of paper or some act or forbearance of very small value can constitute consideration'.

The crucial question which must now be asked is: what does the law of contract recognise as 'value'? Professor Treitel has stated (1999) that consideration must have 'some economic value', even though that value cannot be 'precisely quantified'. But, as we shall see, the courts have not adopted a consistent approach to the identification of 'value' or 'benefit'. In some cases (such as *Foakes* v. *Beer*, below 5.15), they have ignored a factual benefit obtained by the promisor and held that no consideration was provided because, as a matter of *law*, the promisor was not benefited. In other cases (such as *Cook* v. *Wright*, below 5.9), the courts have found the existence of consideration despite the apparent lack of either benefit to the promisor or detriment to the promisee. Some cases have adopted an extremely subjective interpretation of benefit (see, for example, *Bainbridge* v. *Firmstone* (1838) 8 A & E 743), but in other cases the courts have adopted an objective interpretation (see, for example, *White* v. *Bluett*, below 5.8). The emphasis in the important recent decision of the Court of Appeal in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (see further, 5.11–5.14) was on the need to identify a 'practical benefit' to the promisor rather than 'a benefit in the eyes of the law' but this approach has not been carried through into all aspects of the doctrine of consideration (see *In re Selectmove Ltd* [1995] 1 WLR 474, discussed further at 5.15). One of the most difficult tasks in analysing the doctrine of consideration is to stabilise the concept of value or benefit (see further 5.17).

5.8 Intangible Returns

It is clear that 'natural affection of itself is not a sufficient consideration' (*Bret* v. *JS* (1600) Cro Eliz 756). In *White* v. *Bluett* (1853) 23 LJ Ex 36, a son's promise not to bore his father with complaints about the father's distribution of his property among his children was held not to be good consideration for the father's promise not to sue the son on a debt owed by the son to the father. Pollock CB said that the son had not provided any consideration as he had 'no right to complain' to his father (because it was for the father to decide how he wanted to distribute his property) and so, in giving up his habit of complaining, he had not

provided any consideration. But the decision is open to attack on two possible grounds.

The first is that it ignored the 'practical benefit' which the father obtained in being freed from the complaints of his son. The emphasis on practical benefit in recent cases such as *Williams* v. *Roffey Bros* (above) suggests that this aspect of *White* may be open to criticism. That this is so can be demonstrated by reference to the case of *Pitt* v. *PHH Asset Management Ltd* [1994] 1 WLR 327. The defendants, acting as undisclosed agents of mortgagees, put a cottage on the market for £205,000. Both the claimant and a Miss Buckle were interested in purchasing the property and made competing bids. The claimant made a bid of £200,000 which the defendants accepted 'subject to contract'. The next day Miss Buckle increased her offer to £210,000 and the acceptance of the claimant's offer was withdrawn. Discussions then took place between the claimant and the defendants' agent. The claimant threatened to seek an injunction to halt the sale to Miss Buckle and also said that he would inform her of his loss of interest in the property so that she would be free to lower her offer in the absence of a rival bidder. The outcome of these negotiations was that it was agreed that the property should be sold to the claimant for £200,000 and that the vendors would not consider any further offers for the property provided that the claimant agreed to exchange contracts within two weeks of receipt of the contract. But in breach of the agreement the cottage was sold to Miss Buckle for £210,000. The claimant sued the defendants for damages for breach of contract. One of the defences which was invoked by the defendants was that the claimant did not provide any consideration for the promise not to consider other offers because he had only promised to be ready, willing and able to proceed to exchange of contracts, which he was already obliged to do. But the Court of Appeal held that the claimant had supplied consideration for the promise. In the first place, the claimant agreed not to apply for an injunction to restrain the sale to Miss Buckle. Peter Gibson LJ said that he could not see how the claimant could have succeeded with this claim but he held that the defendants were nevertheless freed from the 'nuisance value' of having to defend such a claim. Secondly, consideration was provided by the claimant agreeing not to carry out his threat to make trouble with Miss Buckle; once again, the removal of that 'nuisance' provided 'some consideration'. Finally, the promise of the claimant to proceed to exchange within two weeks was also held to amount to consideration. The court therefore held that 'these three items constituted valuable consideration sufficient to support the . . . agreement' and upheld the claimant's claim. The difficulty with the case is not so much in the result (as the third item seems clearly to constitute consideration) but the emphasis which

the court placed upon the benefit which the defendants obtained by being free of 'nuisance claims'. This does not sit very easily with the refusal of the court to find consideration on the facts of *White* (although it must be said that, where the 'nuisance' consists of a threat of litigation (as in the case of the injunction), the courts have been particularly willing to find the existence of consideration, see further 5.9).

The second ground on which *White* is open to attack is that the son did act to his detriment in refraining from making complaints. He was doing nothing wrong in complaining to his father, so in that sense he did have a 'right' to complain, and in giving up that right he provided consideration. This aspect of *White* should be contrasted with the American case of *Hamer* v. *Sidway* (1891) 27 NE 256. An uncle promised to pay his nephew £5000 if the nephew refrained from 'drinking liquor, using tobacco, swearing and playing cards or billiards for money' until he (the nephew) was 21. This promise was held to be enforceable because the nephew had a legal right to engage in such activities, and in giving up his rights he had provided consideration for the promise. Professor Atiyah has argued (1986c) that *Hamer* is a case which does not fit within the 'benefit/detriment' analysis because there was no benefit to the uncle (apart from the fact that he wanted his nephew to abstain from such practices, but that is a matter of motive, not benefit), nor was there a detriment to the nephew (on the ground that giving up smoking is a benefit rather than a detriment). Rather, Atiyah argues, this is a case in which the nephew was induced to act on the promise and the court thought it just to enforce the promise. But the court did not perceive matters in this way. It was of the opinion that the nephew had incurred a detriment because he had 'restricted his lawful freedom of action within certain prescribed limits upon the faith of the uncle's agreement' (see, too, Treitel, 1976).

Hamer is not at all easy to reconcile with *White*. It might be said that it is not necessary to reconcile them because *Hamer* is an American case and so not binding on an English court. While this is true, it is often assumed that *Hamer* does represent English law (see, for example, Beale, Bishop and Furmston, 1995, p.97). It may be that the cases can be reconciled on the ground that the promise of the son in *White* was too uncertain to constitute consideration for the father's promise (Anson, 1998, p.99) or on the ground that the activities of the son in *White* were thought to be less socially valuable (bordering on duress?) and therefore less deserving of protection than the conduct of the nephew in *Hamer*. Even if *Hamer* does represent English law, it must be noted that there is a limit to the principle which it establishes, namely that, if the nephew had never intended to drink, smoke, swear or gamble because, for example, he had

a religious objection to engaging in such practices, then he could not have enforced his uncle's promise. This is because 'it is not consideration to refrain from a course of conduct which it was never intended to pursue' (*Arrale* v. *Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep 98, 106).

5.9 Compromise and Forbearance to Sue

A promise not to enforce a valid claim is good consideration for a promise given in return, as is a promise not to enforce a claim which is doubtful in law. On the other hand, it is clear that a promise not to enforce a claim which is known to be invalid is not good consideration for a promise given in return (*Wade* v. *Simeon* (1846) 2 CB 548). The difficulty lies in the case where the claim is clearly bad in law but is believed by the promisee to be good. In *Cook* v. *Wright* (1861) 1 B & S 559 the claimants honestly believed that the defendant was under a statutory obligation to reimburse them in respect of certain expenditure which they had incurred in work on a street adjoining the house in which the defendant was residing. The defendant denied that he was under such an obligation, but he eventually promised to pay a reduced sum after he was threatened with litigation if he did not pay. When the defendant discovered that he was not in fact under a statutory obligation to pay, he refused to honour his promise. He maintained that his promise was not supported by consideration because the claimants had given nothing in return for it. But the court held that the promise was supported by consideration and that he was liable to pay the sum promised. Nevertheless, it is difficult to find the consideration supplied by the claimants. They had given up an invalid claim and in so doing they had suffered no detriment and the defendant was not benefited in any way by their promise to accept the reduced sum in full satisfaction of their invalid claim. It could be argued that the claimants' honest belief in the validity of their claim provided the consideration. But consideration must actually be of value in the eyes of the law and not merely something believed to be of value by the parties. Alternatively, it could be argued that the defendant benefited because he escaped the vexation which is inherent in litigation. Such a rationale proves too much because it would apply equally where the claim was known to be bad and yet we know from *Wade* v. *Simeon* (above) that a promise not to enforce a claim which is known to be bad is not good consideration for a promise given in return (unless it is possible to confine *Wade* v. *Simeon* on public policy grounds, namely that proceedings should not be instituted where the claim is known to be a bad one). *Cook* is therefore a case which is very

difficult to accommodate within the 'benefit/detriment' analysis (although it should be noted that Treitel (1976) includes the case within his category of 'invented' consideration).

5.10 Performance of a Duty Imposed by Law

The question whether performance of a duty (or a promise to perform a duty) which one is already under an obligation to perform can constitute consideration for a promise given in return is currently a very controversial one in English contract law. The orthodox position is clear: performance of an existing duty imposed by law and performance of a contractual duty owed to the promisor do not constitute consideration, while performance of a duty imposed by a contract with a third party does constitute consideration. But today the position is not so clear. The source of the problem is the decision of the Court of Appeal in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, in which it was held that performance of an existing contractual duty owed to the promisor could constitute good consideration. Having reached this conclusion, the question which now arises is whether this approach can also be applied to performance of a duty imposed by law.

Prior to *Williams* v. *Roffey Bros*, the law was relatively clear: performance of (or a promise to perform) a duty imposed by law was not good consideration for a promise given in return (*Collins* v. *Godefroy* (1831) 1 B & Ad 950). The rule was generally supported on the ground that it prevented public officials extorting money in return for the performance of their existing legal duties. But in other cases the rule could give rise to hardship because it ignored real benefits obtained by the promisor or real detriments incurred by the promisee. So it is no surprise to learn that the rule has come under some scrutiny.

The leading case is *Ward* v. *Byham* [1956] 1 WLR 496. The father of an illegitimate child promised to pay the mother of the child £1 per week provided that the child was well looked after and happy. The mother was under a legal duty to look after the child. The mother sued the father when he stopped making the payments. The father argued that the mother had not provided any consideration for his promise because, by looking after the child, she was simply carrying out her existing legal duty. Denning LJ rejected this argument and launched a direct assault on the general rule. He held that the mother provided consideration by performing her legal duty to support the child. He stated that the father was benefited by the mother's promise to look after the child, just as he would

have been benefited if a neighbour had promised to look after the child for reward. Lord Denning returned to this theme in *Williams* v. *Williams* [1957] 1 WLR 148 when he said 'a promise to perform an existing duty is, I think, sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest'.

Although this statement of principle has much to commend it, the other judges in the Court of Appeal in *Ward* did not expressly approve it. They were content simply to find that there was 'ample' consideration on the facts of the case. They attached significance to the letter written by the father in which he promised to pay the mother the weekly allowance 'provided you can prove that [the child] will be well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you'. It is not entirely easy to locate the consideration here. The letter could be interpreted as a waiver of the strict legal position between the parties (see 5.24) but a finding that there has been a waiver is not the same as a conclusion that consideration has been supplied. Alternatively it could be said that the consideration is to be found in the fact that the mother promised to do more than her legal duty by promising to keep the child 'happy' and by promising to allow the child to decide for herself where she should live. The latter may be capable of constituting consideration but there is more doubt about the former. While a promise to do more than one is legally obliged to do is good consideration (*Glasbrook Ltd* v. *Glamorgan CC* [1925] AC 270), there is some doubt about the application of this rule to the mother's promise to keep the child 'happy' because, as we have already noted, natural affection of itself is not a sufficient consideration (*Bret* v. *JS*, discussed at 5.8). Whatever doubts we may harbour about the validity of this approach, it should be noted that its focus is upon detriment to the mother in that it is argued that she did *more* than she was legally obliged to do. An alternative analysis of the case is to look at it in terms of benefit to the father. Thus in *Williams* v. *Roffey Bros* (above) Glidewell LJ (at p.13) interpreted *Ward* as a case in which the father obtained a '*practical benefit*' as a result of the mother's promise that the child would be well looked after and happy (although contrast the view of Purchas LJ at p.20). Whatever might be said about this emphasis on practical benefit as a matter of principle (see 5.12) it is clear that it is not the approach which the court actually adopted on the facts of *Ward*. So, as a matter of authority, the rule that performance of a duty imposed by law does not constitute consideration remains intact, at least for now. But it may not be able to withstand the onslaught on the existing duty rule commenced by the Court of Appeal in *Williams* v. *Roffey Bros* (see 5.11).

5.11 Performance of a Contractual Duty Owed to the Promisor

Until recently the rule which English law adopted was that performance of an existing contractual duty owed to a promisor was no consideration for a fresh promise given by that promisor. The rule was not a popular one: indeed, it was once stated that it has done the 'most to give consideration a bad name' (Patterson, 1958). The origin of the rule can be traced back to the old case of *Stilk* v. *Myrick* (1809) 2 Camp 317 and 6 Esp 129. Stilk was a seaman who agreed with the defendants to sail to the Baltic and back at a rate of pay of £5 per month. Originally, there were eleven men in the crew, but two men deserted during the voyage. The master was unable to find replacements for the deserters and so he agreed with the remainder of the crew that he would share the wages of the two deserters between them if they would work the ship back to London. The crew members agreed. When they returned to London, Stilk demanded his share of the money but the master refused to pay. Stilk sued for the money. He was unsuccessful in his claim. The case was reported twice and, unfortunately, the two reports differ as to the reason for the failure of Stilk's claim (on which see generally Luther, 1999).

In the Espinasse report Stilk was unsuccessful on grounds of policy; the policy ground being that a successful claim would open up the prospect of sailors on the high seas making unreasonable and extortionate demands upon their masters as the price for performing their contractual duty to bring the ship back to the home port. In Campbell's report Stilk's claim failed, not on grounds of policy, but because he had provided no consideration for the master's promise as he had only done what he was already contractually obliged to do.

The difference between these two reports is crucial. If the former report is correct, it is possible to confine the rule to cases where there is a possibility of duress being exercised. Where such fear is absent, there is no objection to the enforcement of the promise. However, Espinasse is not highly regarded as a law reporter (although it might be pointed out that Campbell was not without his faults either: for a discussion of the problems of law reporting at this time see Luther, 1999, pp.528–37) and it was the second, wider rule derived from Campbell's report which was later accepted into English law (see *North Ocean Shipping Co* v. *Hyundai Construction Co* [1979] QB 705).

But the existing duty rule laid down in Campbell's report of *Stilk* has always been controversial. Thus Professor Atiyah has argued that cases such as *Stilk* and *Ward* v. *Byham* (above, 5.10) cannot be accommodated within the 'benefit/detriment' analysis because, as a matter of fact, there

was a benefit to the promisor and a detriment to the promisee but nevertheless there was held to be no consideration. In *Stilk* there is little doubt that, as a matter of fact, the master of the ship was benefited by Stilk's promise to work the ship back home, yet the court concluded that no consideration had been provided. The defenders of the orthodox interpretation of consideration attempt to meet this argument by asserting that it is *legal* benefit or *legal* detriment which is important and not factual benefit or factual detriment. But, as Corbin has pointed out (1963), this does not explain *why* the courts have resorted to the concepts of legal benefit and detriment.

Given these criticisms of *Stilk* it is perhaps surprising that it stood unchallenged for as long as it did. There are two possible reasons for this. The first is that the one case which appeared to be flatly inconsistent with *Stilk* remained buried in the Law Reports, rarely being cited in the books or in the courts. That case is *Raggow* v. *Scougall & Co* (1915) 31 TLR 564. The claimant was employed by the defendants for a period of two years at a certain salary. During the period of the contract war broke out and the defendants' business was detrimentally affected. Rather than close the business the parties entered into a new agreement under which the claimant agreed to accept a lower salary until the end of the war, when the original agreement would be revived. The claimant accepted the reduced salary for a period of time but then brought an action claiming his salary at the old rate, arguing that the defendants had provided no consideration for his promise to accept a lower salary. Darling J held that the agreement was supported by consideration and that the action therefore failed. He held that the parties had in fact torn up the old agreement and made a new one by mutual consent and stated that he was glad to be able to arrive at this conclusion because the claimant was seeking to do a 'very dishonest thing'. The case has been rarely cited since and it has never been used as the basis for an attack on the decision in *Stilk* itself.

The second factor which contributed to the fact that *Stilk* survived serious judicial assault is the two exceptions which exist to the original rule. The first arises where the promisee has done, or has promised to do, more than he was obliged to do under his contract. In *Hanson* v. *Royden* (1867) LR 3 CP 47, the claimant was promoted from able seaman to second mate and it was held that, in carrying out the job of second mate, he had done more than he was obliged to do under his contract and so had provided consideration for the promise of extra pay. The second situation arises where, before the new promise was made, circumstances had arisen which entitled the promisee to refuse to carry out his obligations under his contract. In *Hartley* v. *Ponsonby* (1857) 7 E & B 872, seventeen

of a crew of thirty-six deserted and only four or five of the remaining crew were able seamen. The desertion of such a large proportion of the crew rendered it unsafe to continue the voyage and would have entitled the remaining seamen to abandon the voyage. The seamen agreed to continue the voyage on being promised extra pay on its completion. The master refused to fulfil his promise on their return to the home port but it was held that the seamen were entitled to enforce the master's promise because, in agreeing to continue with the voyage when they were not obliged by the terms of their contract to do so, they had provided consideration.

However, a more wide-ranging attack on *Stilk* was launched by the Court of Appeal in what is now the seminal case of *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1. The defendant contractors entered into a contract to refurbish a block of flats. They subcontracted the carpentry work to the claimant for a price of £20,000. The claimant ran into financial difficulties after having completed part of the work. The cause of his difficulties was partly attributable to the fact that he had underpriced the job and partly because of his own inability to supervise his workforce. It was in the interest of the defendants to ensure that the claimant completed the work on time because if, as a result of delay or non-performance by the claimant, the defendants were late in completing the work they would incur liability to their employers under the terms of a 'penalty' clause contained in the main contract. So the defendants called a meeting with the claimant in order to discuss the situation. At that meeting it was agreed that the defendants would pay to the claimant an extra £10,300 at the rate of £575 per flat on completion to ensure that the work was completed on time. The claimant subsequently finished eight more flats but the defendants paid him only a further £1500. The claimant then ceased work on the flats and brought a claim against the defendants for the £10,300 promised. One of the grounds on which the defendants denied the existence of a liability to pay was that the claimant had provided no consideration for the promise of extra payment: he had simply promised to perform his existing contractual duties and that, according to *Stilk* v. *Myrick*, did not constitute good consideration. The Court of Appeal rejected the defendants' argument and held that the claimant had provided consideration and that he was entitled to bring an action for damages (although it should be noted that the claimant was not awarded full expectation damages but only damages of £3500, see Chen-Wishart, 1995).

The Court of Appeal adopted a very pragmatic approach to the issue. They held that the defendants had obtained a *practical benefit* as a result

of the claimant's promise to complete the work on time and that practical benefit was, for this purpose at least, sufficient to constitute consideration. The proposition for which *Williams* stands as authority was summed up by Glidewell LJ in the following words:

> '(i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time and (iv) as a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit, and (v) B's promise is not given as a result of economic duress or fraud on the part of A, then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.'

Two immediate problems arise. The first is: what exactly was the practical benefit which the defendants obtained? The second is: how can this conclusion be reconciled with *Stilk* v. *Myrick*? These issues must be examined with some care.

5.12 Practical Benefit

There was no one practical benefit which the defendants were held to have obtained as a result of the claimant's promise. The court relied upon a number of factors in identifying the practical benefit obtained. The first was that the claimant continued with the work and did not breach his subcontract. The second was that the defendants were spared the 'trouble and expense of engaging other people to complete the carpentry work'. The third was that they avoided incurring a penalty under the main contract for delay in completion of the work. The fourth factor was that a 'rather haphazard method of payment' was replaced by a 'more formalised scheme involving the payment of a specified sum on the completion of each flat'. Finally, by directing the claimant to complete one flat at a time, the defendants 'were able to direct their other trades to do work in the completed flats which otherwise would have been held up until the claimant had completed his work'.

The first three factors are controversial. The first adopts a Holmesian conception of contract law so that 'the duty to keep a contract at common

law means a prediction that you must pay damages if you do not keep it – and nothing else'. Thus Purchas LJ stated (at p.23) that, although in 'normal circumstances the suggestion that a contracting party can rely on his own breach to establish consideration is distinctly unattractive' on the facts of the case the claimant had given up his right to 'cut his losses' by deliberately breaching the contract with the defendants. To adopt such an approach is to refuse to recognise that the defendants under the original contract had bought not simply the right to damages in the event of non-performance, but the right to performance itself. The same approach can be adopted in relation to the second factor. The benefit of not having to look for alternative carpenters was a benefit which the defendants paid for under the original contract and were entitled to receive. The third factor is scarcely more convincing. If the defendants had been compelled to pay out under the 'penalty' clause because of the claimant's failure to complete on time they would have been entitled to recover that sum from the claimant by way of damages (although there was, admittedly, a risk that the claimant would not have been in a financial position to pay damages). The fourth and fifth factors do appear to be capable of constituting consideration (even on orthodox grounds) if the claimant did actually accept a new obligation to complete the flats one by one. Unfortunately, it is not clear from the judgments whether any new obligation was assumed because elsewhere in the judgments it is stated that the claimant simply performed his existing contractual duties. So the fourth and fifth factors are at best equivocal and it is not at all easy to pinpoint exactly what the practical benefit was on the facts. Are the factors cumulative or not? Does a promise to complete the work in itself confer a practical benefit or must one show 'something more', such as the avoidance of liability under a 'penalty' clause?

Williams has been applauded as a pragmatic decision, giving effect to the 'realities' of the situation. Modifications of contracts, it is argued, are in the public interest; both parties should be encouraged to bargain their way out of an unanticipated difficulty and this can best be done by giving effect to the variations which the parties have agreed. But this is to tell only half of the story. Modifications are not necessarily in the public interest. There is a competing interest in holding parties to their original bargain. When I employ a sub-contractor to do work for me for £20,000, I do not mean £20,000 plus whatever else he can extract from me by conduct short of duress. The deal is £20,000; not a penny more, not a penny less. In jumping on the practical benefit bandwagon, the Court of Appeal has not only failed to identify practical benefit with sufficient precision, it has also failed to place sufficient weight on the need to hold contracting parties to the terms of their original bargain.

5.13 Consideration and Duress

Even if the practical benefit hurdle can be overcome, we are left with our second problem. How can *Williams* be reconciled with *Stilk* v. *Myrick*? The Court of Appeal in *Williams* were adamant that *Stilk* had not been overruled: rather, it had been 'refined' and 'limited'. Yet the two cases are very similar. If the defendants in *Williams* received a practical benefit, can the same not be said of the master of the ship in *Stilk*? He was practically benefited by the promise of Stilk to work the ship back home, yet that benefit was held not to constitute consideration. The Court of Appeal attempted to resolve this problem by explaining *Stilk* as a duress case. This could have been done relatively easily. After all, Espinasse's report was explicitly based upon considerations of public policy and there were other cases in which public policy had been relied upon by the courts (see, for example, *Harris* v. *Watson* (1791) Peake 102; contrast Luther, 1999, who points out that Espinasse's report was not solely about duress and that account must be taken of the range of distinctive policy concerns which led the courts and Parliament to develop special rules both to protect and to regulate the conduct of merchant seamen). But this relatively straightforward approach was not for the Court of Appeal. The court chose to cite Campbell's report but in substance they followed Espinasse. Thus Purchas LJ stated (at p.21) that *Stilk* was a case arising out of

> 'the extraordinary conditions existing at the turn of the 18th century under which seamen had to serve their contracts of employment on the high seas. There were strong public policy grounds at that time to protect the master and owners of a ship from being held to ransom by disaffected crews.'

But where is the evidence for this on the facts of *Stilk*? As Gilmore (1974) has pointed out, the contract in *Stilk* was concluded on shore, not the high seas. We have no evidence that Stilk applied any pressure upon the master. The only real evidence of duress can be found in the Espinasse report but the Court of Appeal chose not to rely upon that evidence.

But even if *Stilk* is now a duress case, what does this tell us about the case? Here we encounter the problem which we noted above (5.3) of working out the relationship between consideration and duress. In *The Alev* [1989] 1 Lloyd's Rep 138, 147, Hobhouse J said that

> 'now that there is a properly developed doctrine of the avoidance of contracts on the grounds of economic duress, there is no warrant for

> the Court to fail to recognise the existence of some consideration even though it may be insignificant and even though there may have been no mutual bargain in any realistic use of that phrase.'

This approach advocates a more liberal approach to consideration, maintaining that the courts should be readier to find consideration now that they know that they can always set aside the contract on the ground of duress. On this analysis, there was consideration on the facts of *Stilk* (because the master was practically benefited by Stilk's promise to work the ship back home). So a contract was initially concluded but that contract was then set aside on the ground of duress exerted by Stilk which prevented him from enforcing the contract.

Some commentators have gone even further than advocating a more liberal approach to the identification of consideration and argued that there are

> 'good reasons why the doctrine of economic duress ought to *displace*, and not be in addition to, the doctrine of consideration in "extortion situations", provided, of course, that it can be rationalized' (Phang, 1990).

This is difficult to understand. Duress cannot 'displace' consideration because the two doctrines perform different functions. Consideration is relevant to the question whether or not a contract has been concluded. But duress is a vitiating factor; that is to say, it is a ground upon which an otherwise valid and subsisting contract can be set aside. The two issues cannot be collapsed into one.

So it is suggested that, after *Williams* v. *Roffey Bros*, *Stilk* should be interpreted as a case in which there was consideration but that the contract was set aside on the ground of duress. This view does not yet command universal support. For example, in *Anangel Atlas Compania Naviera SA* v. *Ishikawajima-Harima Heavy Industries Co Ltd (No. 2)* [1990] 2 Lloyd's Rep 526, 544–545 Hirst J, after expressing his approval of the emphasis upon practical benefit on the facts of *Williams* v. *Roffey*, stated that *Stilk* still applied where there is 'a wholly gratuitous promise'. This is difficult to follow. Why was Stilk's promise wholly gratuitous, when the promise of the claimant in *Williams* was not? As has already been stated, there is very little to distinguish between the two cases. This failure to provide a coherent, fresh analysis of *Stilk* in the light of *Williams* v. *Roffey* further underlines the confusion which currently exists in this area of the law.

5.14 Alternative Analyses

We have now discussed the principal difficulties with, and analyses of, *Williams* v. *Roffey* and *Stilk* v. *Myrick*. There are, however, two other theories which are worthy of brief mention. The first was adopted by the Supreme Court of New Hampshire in *Watkin & Son Inc* v. *Carrig* (1941) 21 A 2d 591. The parties entered into a written contract under which the claimant agreed to excavate a cellar for the defendant for a fixed price. Shortly after commencing the work the claimant discovered the presence of solid rock in the area which he had agreed to excavate. Discussions took place between the parties and the defendant agreed to pay a price which was approximately nine times the amount of the original contract price. The claimant did the work and then sued to recover the promised sum. The defendant argued that there was no consideration to support the promise to pay the additional sum. The argument was rejected. The trial judge found that the written contract between the parties had been superseded by a new agreement which was enforceable. In giving up their rights to sue each other under the original written contract, the parties provided consideration for their agreement to abandon that contract. The second contract was then supported by consideration. Applying this type of reasoning to *Stilk* we can say that, if Stilk had been able to show that the original contract had been abandoned by the mutual agreement of the parties, then that abandonment would have been supported by consideration and the agreement to pay the higher rate would then have been enforceable. But this is a very difficult test to apply in practice because how do the courts decide whether there is a variation of one contract or a replacement of one contract by another? Yet the answer to this question is vital because if it is a variation there is no consideration to support it, while if a second contract has been concluded then it is, in fact, supported by consideration and so is enforceable. Purchas LJ in *Williams* stated (at p.20) that he was unable to accept 'the attractive invitation' to follow *Watkin* and it is suggested that he was right to do so because of the difficulties which arise in putting it into practice.

The final analysis which can be offered of *Williams* is that it is moving English law in the direction of the conclusion that consideration should only be a requirement for the formation of a contract and that it should not be required for the modification of a contract. This point is not a new one. Sir Frederick Pollock stated (1950) that 'the doctrine of consideration has been extended, with not very happy results, beyond its proper scope, which is to govern the formation of contracts, and has been made to regulate the discharge of contracts'. The distinction between formation

and modification has been recognised in America where s.2–209(1) of the Uniform Commercial Code dispenses with the requirement of consideration in the case of agreements to modify an existing contract. To some extent this view is based on the idea that variations of contracts are in the public interest (see Halson, 1990 and 1991) and therefore it is open to the criticism that it does not place sufficient weight on the need to hold parties to the terms of their original bargain. If that bargain is subsequently altered by a fresh bargain then there is obviously no objection to the enforcement of the fresh bargain. But if that bargain is purportedly changed by what is no more than a gift, then there is a lot to be said for the argument that such a gift should be treated like any other gift and only enforced if it is in the form of a deed.

5.15 Part Payment of a Debt

A close relation of the old rule that performance of an existing contractual duty owed to the promisor does not constitute consideration is the rule that a promise to accept part payment of a debt in discharge of the entire debt is not supported by consideration. The debtor is already contractually obliged to repay the entire debt and so provides no consideration for the creditor's promise to accept part payment (unless, for example, the debtor agrees to repay the debt at an earlier date, in which case he does provide consideration). This rule can be traced back to *Pinnel's case* (1602) 5 Co Rep 117a and was upheld by the House of Lords in *Foakes* v. *Beer* (1884) 9 App Cas 605 (although it should be noted that the rule is the subject of numerous common law limitations, see Treitel, 1999, pp.115–19, and for the equitable evasions of this rule, see 5.25).

In *Foakes* a creditor promised to abandon her claim to interest on the debt but it was held that her promise to forbear was unsupported by consideration. Although such an agreement is not supported by consideration, in many cases a creditor will, as a matter of fact, be benefited by receipt of part payment because, in the words of Corbin (1963) 'a bird in the hand is worth much more than a bird in the bush'. So how can this refusal to recognise the efficacy of a practical benefit in *Foakes* be reconciled with *Williams* v. *Roffey*? Curiously, *Foakes* was not cited to the court in *Williams* v. *Roffey* and, given that *Foakes* is a decision of the House of Lords, to the extent that the two cases cannot be reconciled it is *Williams* which should give way (see O'Sullivan, 1996). It is interesting to note that in *Foakes* Lord Blackburn registered his disagreement with the rule in *Pinnel's case* on the basis of his

> 'conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this is often so. Where the credit of the debtor is doubtful it must be more so.'

This is the same emphasis on practical benefit which was adopted by the Court of Appeal in *Williams*, yet it did not win the day in the House of Lords in *Foakes*. The majority of their Lordships decided that such a practical benefit did not constitute good consideration in law.

This creates acute difficulties in distinguishing between *Foakes* v. *Beer* and *Williams* v. *Roffey Bros*. It has been argued that a promise to release part of a debt is different from a promise to pay more for the performance of an existing contractual obligation. But it is hard to see the difference: in both cases less than full performance is accepted as full performance. The fact that in one it is by receiving less and in the other it is by paying more should not be allowed to detract from that essential point.

The relationship between *Foakes* v. *Beer* and *Williams* v. *Roffey* was recently considered by the Court of Appeal in *In re Selectmove Ltd* [1995] 1 WLR 474. Peter Gibson LJ refused to extend *Williams* v. *Roffey* to the *Foakes* v. *Beer* situation on the ground that

> 'it would in effect leave the principle in *Foakes* v. *Beer* without any application. When a creditor and a debtor who are at arm's length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in so doing.'

He continued:

> '*Foakes* v. *Beer* was not even referred to in *Williams* v. *Roffey Bros*, and it is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of the *Williams*'s case to any circumstances governed by the principle of *Foakes* v. *Beer*. If that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately, by Parliament after consideration by the Law Commission.'

This approach does not deny the inconsistency between the two rules: it simply leaves it to the House of Lords or Parliament to sort out the mess. A choice must be made between the two cases: we cannot have practical

benefit operating in one case and legal benefit in the other case with no rational explanation for the continued existence of such inconsistent rules.

5.16 Performance of a Duty Imposed by Contract with a Third Party

Despite the difficulty which English law has experienced in recognising that performance of an existing contractual duty owed to a promisor is good consideration, performance of a contractual duty owed to a third party has been clearly recognised as good consideration for a long period of time. In *Shadwell* v. *Shadwell* (1860) 9 CB (NS) 159, the claimant, who was engaged to Ellen Nicholl, received a letter from his uncle, in which the uncle promised to pay the claimant £150 per year after he was married. The claimant sued to enforce the promise and it was held that he could do so because he had provided consideration for his uncle's promise by marrying Ellen (the nephew was at the time contractually bound to marry her). The proposition that performance of a contractual duty owed to a third party can constitute consideration has more recently been affirmed by the House of Lords in *The Eurymedon* [1975] AC 154 (see 7.2 for a full discussion of this case).

In *Jones* v. *Waite* (1839) 5 Bing NC 341 it was held that a promise to perform (as opposed to actual performance of) a contractual duty owed to a third party did not constitute consideration. But in *Scotson* v. *Pegg* (1861) 6 H & N 295 and *Pao On* v. *Lau Yiu Long* [1980] AC 614 it was held that such a promise could constitute consideration and the latter view is the one which is accepted by most scholars. It has always been difficult to explain why performance of an existing contractual duty owed to a third party can constitute consideration when the law has had such difficulty in recognising that performance of an existing contractual duty owed to a promisor does constitute consideration (although it should be noted that both *Shadwell* v. *Shadwell* and *Scotson* v. *Pegg* are treated by Treitel (1976) as examples of 'invented' consideration). It is here that the duress analysis may provide us with the key (and note, in this context, that the Court of Appeal in *Williams* derived some assistance from one of the three party cases, namely *Pao On* (above)). In the three party cases such as *Shadwell* v. *Shadwell*, there is not even a hint of duress. Indeed, it is difficult to see how the nephew in *Shadwell* could ever use the situation to apply pressure on the uncle. The fear of duress being absent, the courts saw no objection to the enforcement of a promise to pay in return for the performance of a duty imposed by contract with a third party

(although it must be conceded that it is not easy to explain *Shadwell* even on the practical benefit test: in what sense did the uncle receive a practical benefit as a result of the marriage of his nephew to Ellen Nicholl?).

5.17 Conceptions of Value

It can readily be seen from the cases which we have discussed that the courts adopt an inconsistent approach to the identification of a benefit or detriment. In *Foakes* v. *Beer* the court ignored an obvious factual benefit to the creditor. Yet in *Cook* v. *Wright*, *Shadwell* v. *Shadwell* and *Scotson* v. *Pegg* the court found the existence of consideration upon the flimsiest of evidence. It will not do to say, as does Professor Treitel, that in some cases the courts have 'invented' consideration because that does not tell us why they have invented consideration, nor does it tell us when they are likely to invent it again in the future. Nevertheless, it must be conceded that the courts do tend to employ the language of 'benefit' and 'detriment'. But their use of 'benefit' and 'detriment' is inconsistent, which suggests that, on occasions, the courts do, as Professor Atiyah argues, enforce a promise because there was a 'good reason' so to do. The most recent emphasis in *Williams* v. *Roffey Bros* (above) is upon 'practical benefit' but we have seen that it is not at all easy to identify what the court actually means by this phrase and we have also seen that the Court of Appeal in *Re Selectmove* felt unable to extend that approach to the *Foakes* v. *Beer* situation. The inconsistency therefore remains unresolved and the conclusion which must be reached is that the English courts have built a theory of consideration upon the foundations of benefit and detriment without subjecting to stringent analysis the coherence of their conceptions of benefit and detriment (see further Atiyah, 1986c).

5.18 Past Consideration

If I promise to reward you for acts which you have already performed prior to my promise, the general rule is that you cannot enforce my promise because the consideration which you have provided is past. By 'past consideration' lawyers mean that your consideration was already completed before I made my promise, so that you have not given anything new in return for my promise. The rule that past consideration is not good consideration is closely linked to the bargain theory of consideration. The fatal objection is that there is no reciprocity; the promisee does not give anything in return for the promise of the promisor. Thus it

would appear that the past consideration rule is unaffected by the recent upheavals caused by *Williams* v. *Roffey Bros* (above) because the point in the past consideration cases hinges, not on the distinction between legal benefit and practical benefit, but on the need to show that the promise was made as part of the bargain. The focus is upon the identification of a bargain, not upon the type of benefit received.

It follows from this that, as a general rule, if two parties have already made a binding contract and one of them subsequently promises to confer an additional benefit on the other party to the contract, that promise is not binding because the promisee's consideration, which is his entry into the original contract, is past. In *Roscorla* v. *Thomas* (1842) 3 QB 234, the defendant agreed to sell a horse to the claimant. Shortly afterwards the defendant added a promise that he would give a warranty as to the soundness of the horse. It was held that the defendant's promise was unenforceable because the only consideration which the claimant had provided was his entry into the original contract of sale and that consideration was past. The courts do, however, have some degree of latitude in applying this rule and do not always take a strictly chronological view of the sequence of events. If the court is satisfied that the new promise and the act of the promisee which is alleged to be the past consideration are, in fact, part of the same overall transaction, the exact order in which the events occurred will not be decisive (*Thornton* v. *Jenkyns* (1840) 1 Man & G 166). In identifying whether consideration is actually past or not, the courts look, not to the wording of the contract, but to the actual sequence of events. Thus, in *Re McArdle* [1951] Ch 669, a promise made 'in consideration of your carrying out' certain work was held to be unenforceable as the consideration for it was past. Although the wording of the contract suggested that the work was to be done at some future time it had, as a matter of fact, been done prior to the making of the contract and was therefore past.

The rule as to past consideration is a harsh one. In *Eastwood* v. *Kenyon* (1840) 11 A & E 438, the guardian of a young girl raised a loan to educate the girl and to improve her marriage prospects. After her marriage, her husband promised to pay off the loan. It was held that the guardian was unable to enforce this promise because the consideration which he had provided, which was bringing up and financing the girl, was past. The court conceded that the husband might have been under a moral obligation to pay, but that moral obligation could not be converted into a legal obligation because of the absence of consideration.

The harshness of the past consideration rule has been mitigated to some extent by the doctrine of implied assumpsit. Where the act of the promisee was performed at the request of the promisor and, subsequent

to the performance of the act by the promisee, the promisor promises to pay for it, then such a promise may be enforceable. An early example is *Lampleigh* v. *Brathwait* (1615) Hob 105. The defendant, who was under sentence of death, requested the claimant to ride to Newark to obtain a pardon from King James I. The claimant did so. The defendant then promised to pay the claimant £1000. It was held that the claimant could enforce the contract. But the doctrine of implied assumpsit operates within narrow confines. The Privy Council in *Pau On* v. *Lau Yiu Long* [1980] AC 614 held that three conditions must be satisfied by a promisee who wishes to invoke the doctrine. The first is that he must have performed the original act at the *request* of the promisor. The second is that it must have been clearly understood or implied between the parties when the act was originally requested that the promisee would be rewarded for doing the act. The third is that the eventual promise of payment after the act was completed must be one which, had it been made prior to or at the time of the act, would have been enforceable.

Parliament has also intervened to mitigate the hardships caused by the past consideration rule by providing that an antecedent debt or liability is good consideration for a bill of exchange (Bills of Exchange Act 1882 s.27(1)(b)) and by providing that a written acknowledgement of a debt by a debtor shall be deemed to have accrued on and not before the date of acknowledgement (Limitation Act 1980 s.27(5)).

5.19 Consideration Must Move from the Promisee

At first sight the maxim that 'consideration must move from the promisee' can appear ambiguous. It could mean simply that a promise can only be enforced by a promisee if there is consideration for the promise (so that, on this view, the consideration need not be provided by the promisee himself). The objection to this view is that it is only another way of restating the basic requirement that a promise must be supported by consideration; it does not justify a separate maxim. The alternative understanding of the maxim, and the one which is generally shared, is that it means that a person to whom a promise is made can only enforce the promise if he himself provides consideration for that promise.

It should be noted that, while consideration must move from the promisee, there is no requirement that it must move to the promisor; thus the promisee can provide consideration by conferring a benefit on a third party at the request of the promisor (*Bolton* v. *Madden* (1873) LR 9 QB 55). But the promisee himself must provide the consideration either by incurring some detriment or by conferring a practical benefit on the

promisor (or a third party at the promisor's request) without himself incurring any detriment (as in *Williams* v. *Roffey Bros* (above)).

The requirement that the promisee must himself provide consideration can give rise to problems where A makes a promise to B which is for the benefit of C. Can C sue A if A fails to confer the promised benefit on C? The traditional answer which English law gave was that C could not sue because he was not a party to the contract between A and B. However, as a result of the enactment of the Contracts (Rights of Third Parties) Act 1999 (see 7.5–7.13), English law now confers on third parties a much wider right to sue to enforce a term of a contract which has been concluded between two other parties. Assume that C comes within the scope of the new third party right of action. Must C also comply with the rule that consideration must move from the promisee? The issue is a real one because on our facts C does not appear to have given anything in return for the promise made by A. The Act itself makes no formal change to the requirement that consideration must move from the promisee but the fact that section 1 of the Act states in express terms that the third party, here C, 'may in his own right enforce a term of the contract' means that C can sue to enforce the term of the contract even where he has not provided any consideration. To the extent that C, as a gratuitous beneficiary, can sue to enforce a term of the contract, the rule that consideration must move from the promisee appears to have been reformed. But technically it can be argued that the rule has not been altered. C is not, in the language of the Act, made a party to the contract; he is simply given a right to sue to enforce a term of the contract. The promisee remains B and he must provide consideration for A's promise before C can acquire a right to enforce a term of the contract against A. In this sense the rule that consideration must move from the promisee has not been reformed; but the substance of the matter is that the rule has been revised in that a third party who exercises his right to sue under the 1999 Act is not required to show that he has provided any consideration before he can enforce the third party right which he has acquired.

5.20 Reliance Upon Non-bargain Promises

A claimant who is able to establish the existence of consideration can, absent any other vitiating factor, bring an action on the contract to enforce the defendant's promise. But what of the claimant who relies to his detriment upon a promise of the defendant which is not supported by consideration? Can he enforce that promise or recover compensation for

the extent to which he has detrimentally relied upon it? Once again the debate between Treitel and Atiyah assumes enormous significance. If Treitel is correct, and consideration is built upon reciprocity, then such a promise cannot be enforced because of the lack of consideration (although more limited effect may be given to the promise). But, if Atiyah is correct and consideration means a reason for the enforcement of a promise, then such a promise may be enforceable where the court can find a 'good reason' for its enforcement.

A factual situation which will provide a useful backdrop to our discussion of these issues is provided by the American case of *Ricketts* v. *Scothorn* 57 Neb 51 (1898). Scothorn was at work when her grandfather gave her a promissory note under which he promised to pay her $2000 at 6 per cent per annum. On giving her the promissory note he told her that none of his other grandchildren worked and now 'you don't have to'. Scothorn gave up work in reliance upon his promise but, when her grandfather died, his executors refused to honour his promise. Could she enforce the promise? Her claim does appear to be a just one because she acted to her detriment in reliance upon the promise. But how do we reconcile such a claim with the doctrine of consideration which, as we have seen, requires that something of value be given in return for the promise? Two possible arguments suggest themselves. The first is that Scothorn did, in fact, provide consideration by giving up her work. The second is to challenge the rule that a promise is unenforceable if it is unsupported by consideration.

It may seem rather odd to canvass the first argument when purporting to discuss reliance upon promises which are unsupported by consideration. But claimants do, as a matter of practice, attempt to bring themselves within the fold of the doctrine of consideration before embarking upon the more hazardous task of seeking to persuade a court to enforce a promise which is unsupported by consideration. The issues are also related because, the wider the scope of the doctrine of consideration, the less need there is to find a substitute for consideration. So it is here that the liberal approach to consideration in *Williams* v. *Roffey Bros* (above, 5.11) becomes important because it minimises the need for claimants to have resort to estoppel and hence diminishes the practical significance of the limitations from which estoppel presently suffers (such as the fact that it cannot be used to create a cause of action, see 5.22). In *Williams* itself Russell LJ stated (at p.17) that he

> 'would have welcomed the development of argument . . . on the basis that there was . . . an estoppel and that the defendants, in the

circumstances prevailing, were precluded from raising the defence that their undertaking to pay the extra £10,300 was not binding.'

But it is not at all clear that the estoppel argument would have succeeded on the facts of *Williams* (see 5.22) and, for present purposes, that point is irrelevant (although it might have explained the measure of recovery, which was not the full expectation measure). The point which is being made here is that there was no need for the claimant to resort to estoppel because he won on the consideration point. Why should a claimant make life difficult for himself by pleading estoppel (and possibly recovering less by way of compensation, see 5.28) when he can take the easy route and invoke the doctrine of consideration? It is sometimes argued that estoppel should be developed to play a much wider role, similar to that played by estoppel in America in s.90 of the Restatement (Second) Contracts. But it is important to note that in America consideration operates within relatively narrow confines and so the need for a more developed doctrine of estoppel is apparent. *Williams* v. *Roffey Bros* has chosen to develop English law in a different direction by expanding the doctrine of consideration and hence diminishing the practical need for a more elaborate doctrine of estoppel. On the other hand, should the more restrictive approach to consideration adopted in *Foakes* v. *Beer* (5.15) prevail, then the need for a broader doctrine of estoppel will become apparent (and note in this context the extent to which estoppel has already operated to limit the scope of the rule in *Foakes* v. *Beer*, see 5.25). The relationship between the scope of consideration and the role of estoppel is therefore a close one.

5.21 The Role of Consideration

We have already seen that consideration is a rather elastic doctrine and that the courts have scope to 'invent' consideration. Could a court not find or invent consideration in a case such as *Ricketts*? The difficulty is that the grandfather did not request Scothorn to give up her work and so there does not appear to be any bargain under which she promised to give up work in return for the promised sum of money. But could we not imply such a bargain? After all, the grandfather must have known that Scothorn would be likely to give up work as a result of his promise. Should a court not imply that, where it is foreseeable to a promisor that a promisee will act to her detriment in reliance upon his promise, the reliance of the promisee is at the request of the promisor and so constitutes consideration?

Such an approach was, however, rejected by the English Court of Appeal in *Combe* v. *Combe* [1951] 2 KB 215. A husband promised to pay his wife £100 per annum on their separation. The husband did not make any of the payments and six years later the wife brought an action to recover the arrears. She argued that she had supplied consideration for her husband's promise because she had refrained from applying to court for a permanent maintenance order. But the Court of Appeal held that there was no request, express or implied, by the husband that the wife should refrain from applying to the court for maintenance. Therefore no consideration was provided for the husband's promise and it was unenforceable.

But there were facts in *Combe* upon which the court could have implied a request by the husband that the wife forbear from applying for maintenance (see Goodhart, 1951 and 1953, but contrast the alternative explanation of the case put forward by Denning, 1952, p.2). Indeed, cases can be found in which a court has been prepared to make such an implication. For example, in *Alliance Bank* v. *Broom* (1864) 2 Dr & Sm 289, the defendant owed £22,000 to the claimant bank. The bank demanded some security for the loan and this was promised by the defendant. The defendant failed to honour his promise and, when the bank sought to enforce it, he argued that his promise was not supported by consideration and was therefore unenforceable. The court held that the promise was enforceable because, as a result of the defendant's promise, the claimants had refrained from suing him to recover the debt and the defendant had therefore received 'the benefit of some degree of forbearance' (contrast *Miles* v. *New Zealand Alford Estate Co* (1886) 32 Ch D 267). Although the defendant had not expressly requested the claimants to forbear, the court felt able to imply such a request. But why did the court imply a request on the facts of *Alliance Bank* but not in *Combe*? The answer to that question is unclear. It could be argued that the bank in *Alliance Bank* was much more likely to institute proceedings than was the wife in *Combe* and therefore it was easier for the court to imply such a request. Alternatively, it could be argued that the reason for the court's refusal to imply a request on the facts of *Combe* was that the 'justice of the case [did] not require that it should be' implied because the wife had an income in excess of that of her husband and she had delayed for six years in bringing her action (see Atiyah, 1986c). Whatever the precise ground of distinction between the two cases, it is clear that the courts do have considerable discretion in implying such a request. The readier they are to find a request, the wider will be the scope of the doctrine of consideration and hence the need to find a substitute for consideration will be radically diminished.

5.22 Estoppel

Where, as in *Ricketts* and *Combe*, the court is unable to find the existence of consideration, can the promise be enforced despite the absence of consideration? The orthodox answer is that such a promise will not be enforced. But limited effects may be given to the promise under the doctrine of estoppel. The essential ingredients of estoppel were defined by Lord Birkenhead in *Maclaine* v. *Gatty* [1921] 1 AC 376, 386, in the following terms:

> 'where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time.'

But the picture is in fact more complicated than this quotation from the judgment of Lord Birkenhead would suggest. In the first place Lord Birkenhead was referring to estoppel by representation but, under the umbrella of 'estoppel', there are, in fact, many distinct doctrines: estoppel by representation, promissory estoppel, proprietary estoppel, estoppel by convention and related doctrines such as waiver and variation. It is not easy to identify the relationship between these different types of estoppel. The second difficulty lies in ascertaining whether there is a single unifying principle which unites these different estoppels (see Jackson, 1982 and Lunney, 1992). The final difficulty lies in discerning the relationship between estoppel and the doctrine of consideration.

The latter point needs some amplification before we embark upon an analysis of the leading cases. If the courts were to hold that a promise was enforceable simply because a promisee had acted upon it to his detriment, then a great hole would arguably be blown in the doctrine of consideration (see 5.28). But, as Denning LJ stated in *Combe* v. *Combe* (above), 'the doctrine of consideration is too firmly fixed to be overthrown by a sidewind'. So estoppel must be reconciled with consideration. The reconciliation achieved by the courts is a rather uneasy one and is summed up in the well-worn maxim that estoppel can be used as a 'shield but not as a sword'. The use of this metaphor has recently been criticised (Halson, 1999) on the ground that it 'can be confusing' and 'it conceals subtle shades of meaning'. The sword/shield dichotomy suggests that a distinction need only be drawn between two cases when in fact the reality is that 'the use that can be made of an estoppel can be represented by a spectrum ranging from a defence to the creation of a new cause of action'.

At each end of this spectrum the position is clear. Estoppel can be used as a shield to defend a claim (see, for example, *Avon County Council* v. *Howlett* [1983] 1 WLR 603, below 5.23) but it cannot be used to create a cause of action where none existed apart from the estoppel (as was the case in *Combe* v. *Combe* where the wife had no basis for asserting a right against her husband other than the fact that she alleged that she had acted to her detriment in reliance upon his promise which was unsupported by consideration). Thus it is commonly stated that the estoppel must relate to the existing legal rights of the promisor; in other words, there must be a pre-existing legal relationship between the parties under which the promisor promises to give up some of his rights under that relationship. The effect of the estoppel is then to prevent the promisor going back on his promise where the promisee has acted upon it to his detriment. But where there is no pre-existing legal relationship between the parties, as in *Combe* v. *Combe*, then the promisee cannot invoke estoppel because such an estoppel would create a completely new cause of action. To permit an estoppel to create a new cause of action would, on traditional analysis, undermine the doctrine of consideration.

In-between these two extremes the position is less than clear-cut. It is relatively clear that estoppel can be used by a claimant who can establish a recognised cause of action against the defendant in order to defeat a defence or a counterclaim which has been raised by the defendant. For example, a claimant brings a claim for breach of contract against the defendant. The claimant can establish the contract and the breach but the claim is time-barred. However the defendant had previously represented to the claimant, within the limitation period, that he would not rely on any limitation defence. The claimant can rely on estoppel for the purpose of defeating the limitation defence (see *The Ion* [1980] 2 Lloyd's Rep 245). In this type of case the estoppel is being used actively by a claimant but the vital point to note is that it is not being used to establish a cause of action (the breach of contract has already been established) but to defeat a defence which would otherwise have succeeded. It is where the claimant relies on the estoppel for the purpose of establishing some or all of the elements of a recognised cause of action that we really encounter significant difficulties. Cases can be found in which estoppel appears to have been used in this way (see *The Henrik Sif* [1982] 1 Lloyd's Rep 456, 466–468) but the extent to which estoppel can be used to establish elements of a cause of action has never been finally resolved in English law. A good example of the problem is provided by the fact situation in *Stilk* v. *Myrick* (5.11). How would estoppel apply on such facts? The answer is not entirely clear. There was a pre-existing contractual relationship between the parties. So, if estoppel had been invoked, would it have been

used to create the cause of action or not? It is suggested that it would and so an argument based upon estoppel would have been rejected on the facts of the case. The original contract did not give Stilk the right to the promised extra pay. He could only establish the right to that money by relying upon the separate promise of the master to share the wages. The promise of the master to accept a more onerous obligation was not supported by consideration and so could not be enforced simply by proof that Stilk had relied upon it to his detriment (see also *Williams* v. *Roffey Bros* [1991] 1 QB 1, 13, cf. pp.17–18). On the other hand, it could be argued that there was a contractual relationship between the parties so that it was not necessary to rely on the estoppel to create the cause of action; it was established by the contract. The resolution of this issue hinges ultimately on the answer to the question whether the modification of contracts should be treated differently from the formation of contacts. If it is right that they should be treated differently (see Halson, 1999) then estoppel should be allowed to operate on the facts of a case such as *Stilk* because we are not creating a legal relationship where none existed before; we are simply recognising that that relationship has been modified. On the other hand, if it is the case that modification and formation should be treated in the same way (see 5.12) then the claimants in *Stilk* should no more be entitled to rely on estoppel than the claimant in *Combe*. Note, however, that the essence of the latter argument is that both claimants must be treated in the same way; either both claims should succeed (if English law were to change course and decide that estoppel can, after all, create a cause of action) or they should both fail (as is suggested would happen in an English court applying the current law).

In the remaining sections of this chapter we shall consider the orthodox cases in which estoppel has been used other than in an attempt to create a new cause of action. We shall then discuss some cases in which it has been sought to use estoppel in order to create a new cause of action before we conclude by analysing the relationship between these cases and the doctrine of consideration.

5.23 Estoppel by Representation

Estoppel clearly acts as a shield in the case of estoppel by representation. The basic principle is that a person who makes a representation of existing fact which induces the other party to act to his detriment in reliance on the representation will not be permitted subsequently to act inconsistently with that representation. It is a rule of evidence which *permanently* prevents a representor from averring or proving facts which are contrary

to his own representation (see *Avon County Council* v. *Howlett* [1983] 1 WLR 603, 622, per Slade LJ). There are two particular features of this estoppel. First, the representation must be one of fact. This limitation was initially established at common law, but was extended to its equitable counterpart in the controversial decision of the House of Lords in *Jorden* v. *Money* (1854) 5 HL Cas 185. Therefore the doctrine does not apply to representations of intention. Although the courts have shown some inclination to construe a representation of fact from what appears to be a statement of intention (see Thompson, 1983), a promise is clearly beyond the scope of the doctrine. The second feature of this type of estoppel is that it operates as a defence; it does not create a cause of action. In *Avon County Council* v. *Howlett* (above) the defendant was overpaid by his employers, the claimants. They sought to recover the money as paid under a mistake of fact. The defendant argued that the claimants were estopped from pursuing their claim because they had made a representation of fact to him that he was entitled to the money and he had spent some of the money in reliance upon their representation. The Court of Appeal upheld the defendant's argument. The effect of the estoppel was to act as a 'shield' and to defeat a claim which would otherwise have succeeded.

5.24 Waiver and Variation

The role of estoppel as a shield can also be seen in cases where contracting parties agree to modify or abandon an existing contract. A preliminary point must be made here, which is that consideration applies to the discharge or variation of a contract as well as to its formation (although, as we have noted (5.14), the extension of consideration to the discharge or variation of a contract is a controversial one and, after the decision of the Court of Appeal in *Williams* v. *Roffey Bros* (above), it is arguable that consideration should no longer be applied to the modification of a contract). Where the discharge or variation is capable of benefiting either contracting party then the variation or discharge is supported by consideration and is enforceable (*WJ Alan & Co Ltd* v. *El Nasr Export and Import Co* [1972] 2 QB 189). But where the variation or discharge can confer a benefit upon only one contracting party then the agreement is not supported by consideration. The classic example is the creditor who agrees to accept part payment of a debt in discharge of the entire debt (5.15). In such a case the variation can only operate to the benefit of the debtor and so is unsupported by consideration.

A variation which is unsupported by consideration has no contractual

effect. But effect may be given to a promise to forego rights under the doctrine of waiver. A variety of meanings has been attributed to the word waiver (see *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 397–399 and Dugdale and Yates, 1976) and the present scope of the doctrine is a matter of some uncertainty. It is essential that a distinction be drawn between 'waiver by election' and 'waiver by estoppel' (see further 19.8). Waiver by election arises where a contracting party has to choose between the exercise of two inconsistent rights (such as the right to affirm the contract or the right to terminate performance for breach, see 19.8) and has nothing to do with our present inquiry. Waiver by estoppel, on the other hand, is of relevance in this context but it seems to be virtually indistinguishable from equitable estoppel and appears to have been subsumed within the larger doctrine of equitable or promissory estoppel (see, for example, *Prosper Homes* v. *Hambro's Bank Executor & Trustee Co* (1979) 39 P & CR 395, 401). So we shall consider the elements of waiver within our discussion of promissory estoppel. Here it is sufficient to give one example of the operation of the doctrine of waiver.

In *Hickman* v. *Haynes* (1875) LR 10 CP 598, the parties entered into a contract for the sale of goods. The buyer subsequently requested the seller to delay the delivery of the goods. The seller agreed and tendered delivery on the later date, but the buyer refused to accept delivery. The seller brought an action for damages against the buyer, who argued that the seller could not succeed because he was in breach of contract in failing to deliver on time. The court held that the buyer had waived his right to demand delivery on time and that he could not subsequently reassert it without the giving of reasonable notice (see on the giving of reasonable notice *Charles Rickard Ltd* v. *Oppenhaim* [1950] 1 KB 616). It should be noted that, in contrast to *Avon County Council* v. *Howlett* (above), the estoppel in *Hickman* was invoked by the claimant and the effect of the waiver was to enable a claim to succeed which otherwise would have failed.

5.25 Promissory Estoppel

As we have already noted, there is a very close relationship between the doctrines of waiver and promissory (or equitable) estoppel. The leading case on promissory estoppel is *Hughes* v. *Metropolitan Railway Co* (1877) 2 App Cas 439. A landlord gave six months' notice to a tenant, requiring him to carry out certain repairs. The tenant responded by inquiring whether the landlord wished to purchase his interest in the premises for £3000. The landlord entered into negotiations for the purchase of the

lease but, when these negotiations broke down, he sought to forfeit the lease because the tenant had not carried out the repairs within six months of his original notice. The House of Lords held that the tenant was entitled to equitable relief against forfeiture of the lease on the ground that the running of the six month period was suspended during the negotiations to purchase the lease and did not recommence until the negotiations broke down.

Hughes lay in obscurity for many years until it was resurrected by Denning J in the famous case of *Central London Property Ltd* v. *High Trees House Ltd* [1947] KB 130. In 1937 claimants let a block of flats in London to the defendants on a 99-year lease at an annual rent of £2500. In 1940 the defendants discovered that, as a result of the outbreak of war and the evacuation of people from London, they were unable to let many of the flats. So the claimants agreed to reduce the rent to £1250. This promise to accept a reduced rent was unsupported by consideration. At the end of the war in 1945 the property market had returned to normal and the flats were fully let. The claimants demanded that the defendants resume payment of the entire rent from 1945, but the defendants refused to pay. Denning J held that the claimants were entitled to demand the entire rent from the date when the flat became fully let early in 1945. The interest of this case lies in the new life which it breathed into promissory estoppel which, for present purposes, may be defined as follows:

> 'where, by words or conduct, a person makes an unambiguous representation as to his future conduct, intending the representation to be relied on and to affect the legal relations between the parties, and the representee alters his position in reliance on it, the representor will be unable to act inconsistently with the representation if by so doing the representee would be prejudiced.'

This definition of promissory estoppel can be divided into five elements.

The first is that there must be a promise or a representation as to future conduct which is intended to affect the legal relations between the parties and which indicates that the promisor will not insist on his strict legal rights against the promisee. The promise or representation must be clear and unequivocal so that the promisor does not lose his rights simply because he has failed throughout to insist upon strict performance of the contract by the promisee. Although this requirement originated in estoppel by representation, it has since been extended to cases of promissory estoppel and waiver.

The second element is that the promise or representation must have been relied upon by the promisee. There are dicta which suggest that the

promisee must have acted to his 'detriment' in reliance upon the promise but the better view is that it is sufficient to show that the promisee committed himself to a course of action which he would not otherwise have adopted. The third requirement is that it must be 'inequitable' for the promisor to go back upon his promise. This will usually be satisfied by demonstrating that the promisee has acted in reliance upon the promise (although see *The Post Chaser* [1981] 2 Lloyd's Rep 693, where the promisee acted in reliance upon the promise but could not show that it was 'inequitable' for the promisor to go back upon his promise).

The fourth element is that the effect of promissory estoppel is generally suspensory; it does not extinguish the promisor's rights. In *Hughes* v. *Metropolitan Railway Co* (above) the landlord's right to enforce the repairing covenant was not extinguished. It was suspended and could be resurrected by his giving reasonable notice. But in *High Trees* the estoppel had permanent effects because Denning J was of the view that the lessors would not have been entitled to demand the rent waived between 1940 and 1945. Such a proposition is difficult to reconcile with *Foakes* v. *Beer* (see 5.15) and has been criticised (see Treitel, 1999). But the better view is that, in cases of post-breach representations or where it is not possible or practicable to return the parties to their original position, then promissory estoppel may have permanent effects (see Dugdale and Yates, 1976 and Thompson, 1983).

The final point is that promissory estoppel cannot act as a cause of action; in the words of the old metaphor, it acts as a shield but not as a sword (see *Combe* v. *Combe* (above)).

5.26 Estoppel by Convention

So far we have been dealing with cases in which estoppel acted as a shield and did not create a new cause of action. But the effect of estoppel by convention may be to create a cause of action. The leading authority is *Amalgamated Investment and Property Co* v. *Texas Commerce International Bank Ltd* [1982] QB 84, where estoppel by convention was defined in the following terms:

> 'when the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed.'

In the *Texas Bank* case the common assumption of the parties was that they had entered into a contract of guarantee under which the claimants had promised to guarantee loans made by a subsidiary of the defendants to a subsidiary of the claimants. In fact, the wording of the guarantee covered loans made by the defendants, but not loans made by the defendants' subsidiary. When the claimants went into liquidation the defendants applied money which they owed to the claimants in discharge of the claimants' alleged liability under the guarantee. The claimants sought a declaration that the defendants were not entitled to apply the money in such a way because the guarantee was not effective to cover the loans made by the subsidiary. But the court held that the parties had entered into the guarantee under the shared assumption that the guarantee did cover such loans and the effect of the estoppel was to prevent the claimants from denying the efficacy of the guarantee. So the defendants used the estoppel as a shield to the claimants' claim for a declaration. But could they have sued on the guarantee to recover the sums which they alleged were due? The majority (Brandon LJ and Lord Denning) held that they could have done so, but Brandon LJ held that, in such a case, it would be the contract and not the estoppel which created the cause of action. This point is difficult to understand. The contract of guarantee was not enforceable. Only the estoppel could validate the contract and thereby render the guarantee enforceable. Thus stated, is it not the estoppel which creates the cause of action?

5.27 Proprietary Estoppel

Whatever doubts we may harbour about the ability of estoppel by convention to create a cause of action, there can be no doubt that proprietary estoppel can be used to found a cause of action. Cases of proprietary estoppel can be divided into two broad categories. The first group of cases relate to the situation in which a landowner 'stands by' while another person improves his land in the mistaken belief that he is the owner of the land. In the second group of cases the promisee relies to his detriment upon the landowner's promise that he has or will be given an interest in the land (for a useful summary of the ingredients of proprietary estoppel see the judgment of Nourse LJ in *Brinnand* v. *Ewens* (1987) 19 HLR 415).

The operation of proprietary estoppel can be illustrated by reference to the case of *Pascoe* v. *Turner* [1979] 1 WLR 431. The claimant and the defendant lived together for a number of years. The claimant left the defendant and went to live with another woman, but he told the defendant that the house and everything in it was hers. In reliance upon this

assurance, the defendant spent some £230 in repairs upon the house. The claimant subsequently decided that he wanted the house and he sued for possession. The defendant counterclaimed for a declaration that the house and everything in it was hers and her counterclaim succeeded in the Court of Appeal. Although she had not provided any consideration for the claimant's promise, the defendant had acted to her detriment in reliance upon his promise. This created an equity in her favour and that equity could only be satisfied by an order that the claimant convey to her the fee simple in the house. The effect of the estoppel in *Pascoe* was clearly to create a new cause of action. There was no pre-existing legal relationship between the parties and yet the promise of the claimant was enforced, despite the absence of consideration.

According to orthodox analysis, proprietary estoppel may be triggered by detrimental reliance by a promisee upon a promise, express or implied, that he will acquire rights in or over the promisor's land (*Dillwyn* v. *Llewelyn* (1862) D, F & G 517, *Inwards* v. *Baker* [1965] 2 QB 29). It should not, however, be thought that the courts will in all cases order the promisor to convey the fee simple to the promisee. More limited forms of relief may be granted (see *Inwards* v. *Baker* (above)). The remedy granted depends upon all the circumstances of the case and it is difficult to discern any principled basis upon which the courts decide what is the most appropriate remedy (but see the useful analysis by Moriarty, 1984).

Thus far, proprietary estoppel has been confined to cases in which a promisee has been induced to believe that he will acquire an interest in the promisor's land, although Megaw LJ recognised in *Western Fish Products* v. *Penwith DC* [1981] 2 All ER 204, 218 that it may extend to the case where the promisee is induced to believe that he will acquire an interest in other forms of property. There is, as yet, no clear English authority which suggests that proprietary estoppel extends beyond such cases (but see *Pacol Ltd* v. *Trade Lines Ltd* [1982] 1 Lloyd's Rep 456).

However there are some dicta which suggest a more expansive role for proprietary estoppel. In *Crabb* v. *Arun DC* [1976] Ch 179 Scarman LJ said he did not find the distinction between 'promissory and proprietary estoppel' helpful and in *Amalgamated Investment and Property Co Ltd* v. *Texas Commerce International Bank Ltd* (above) Robert Goff J called proprietary estoppel an 'amalgam of doubtful utility'. Oliver J identified a much broader base for proprietary estoppel in *Taylor Fashions Ltd* v. *Liverpool Victoria Trustees Co Ltd* [1982] QB 133. The focus of his inquiry was upon

> 'whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his

detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.'

This type of approach has been labelled 'unhelpful' by Treitel (1999, p.135) on the ground that it provides 'no basis on which a legal doctrine capable of yielding predictable results can be developed'. On the other hand, the present restriction upon the scope of proprietary estoppel cannot be justified. Why is it that detrimental reliance upon a promise to create an interest in property can create a cause of action, but that detrimental reliance upon any other promise cannot create a cause of action? No answer has been provided to this question. The only possible objection is that such a wide-ranging jurisdiction of the type advocated by Oliver J would be irreconcilable with the doctrine of consideration. And that is the issue which we must now consider.

5.28 The Relationship between Estoppel and Consideration

The relationship between estoppel and consideration has been exhaustively analysed by the High Court of Australia in *Walton Stores (Interstate) Ltd* v. *Maher* (1988) 164 CLR 387. The parties were involved in the negotiation of a major leasing and construction project. The claimant was the owner of land which he hoped to lease to the defendants. It was also intended that the claimant would demolish the existing building on the site and erect a new building to the defendants' specifications. The negotiations reached an advanced stage and solicitors were instructed to prepare the formal documents. The claimant signed the requisite documents and they were forwarded to the defendants' solicitors for execution and exchange. He was informed by his solicitors that the contracts had been sent to the defendants and he believed that they would shortly exchange and complete. Because of this belief and because the project was one of extreme urgency, the claimant began to demolish the building on his land. Meanwhile, the defendants were beginning to have second thoughts about the deal and they instructed their solicitors to 'go slow', even though they knew that the claimant had commenced work on the site. After the claimant had completed a substantial amount of the work, the defendants informed him that they had decided to withdraw from the project. The claimant sought a declaration that a binding agreement existed between the parties and consequential relief. His difficulty was that no exchange had ever taken place. However he argued that the

defendants were estopped from withdrawing from their implied promise to complete the contract.

The defendants argued that the claimant could not use estoppel to create a cause of action. There was no pre-existing legal relationship between the parties and therefore nothing to which an estoppel could apply. The defendants' argument was rejected by the High Court who, by a majority, held that promissory estoppel could, in an appropriate case, create a cause of action; it could act as a sword as well as a shield. They held that such a proposition was not irreconcilable with the doctrine of consideration because the function of the estoppel was not 'to make a promise binding' or to make good the expectations engendered by a promise, but to 'avoid the detriment' which the promisee would suffer as a result of the unconscionable conduct of the promisor in departing from the terms of his promise (the differences between a contract and an equity created by an estoppel are fully set out in the judgment of Brennan J). A simple example will illustrate the distinction. Let us suppose that someone promises to pay me £500 and I act on that promise to my detriment by spending £300 which I would not otherwise have spent. Enforcement of the promise would give me £500 (and hence protect my expectation interest), whereas 'avoiding a detriment' would give me only £300 (thus protecting my reliance interest). The former is the province of the law of contract and hence demands consideration, the latter is the province of estoppel and so does not require consideration. To protect my reliance interest in this way does not necessarily undermine the doctrine of consideration. The High Court also rejected the argument that it was necessary to establish a pre-existing legal relationship between the parties before estoppel could be invoked. As *Walton Stores* amply demonstrates, the action of the promisor in going back upon his promise can be as unconscionable where there is no pre-existing legal relationship between the parties as when there is such a relationship.

Three principal difficulties will lie ahead if the English courts choose to follow the lead taken in *Walton Stores*. The first lies in ascertaining when it is unconscionable for a promisor to go back upon his promise where there is no pre-existing legal relationship between the parties. As was pointed out by Mason CJ and Wilson J in *Walton Stores*, a failure to fulfil a promise does not of itself amount to unconscionable conduct. It therefore follows that mere reliance upon a promise will not suffice to bring promissory estoppel into play; something more must be established. That 'something more' they held could be

> 'found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into exist-

> ence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party.'

These factors were all present on the facts of *Walton Stores*. It may be that there are other factors which will be found to be relevant but these will have to be worked out over time.

The second difficulty is much more fundamental and it relates to the remedies available to the court in estoppel cases. This debate takes us to the very heart of what estoppel is all about. The account of *Walton Stores* (above) makes clear that the aim of the remedy, according to Brennan J, was to protect the reliance interest of the claimant and not the expectation interest (see to similar effect *Commonwealth of Australia* v. *Verwayen* (1990) 170 CLR 394, 413, 430, 454, 475 and 501). But this rationalisation of the remedy runs into difficulties when one looks to the remedy actually awarded in *Walton Stores* where damages were awarded on the basis that the defendants were estopped from going back on their promise that completion would take place, thus essentially protecting the claimant's expectation interest. Cases post *Walton Stores* have tended to protect the expectation interest rather than the reliance interest. Indeed in *Giumelli* v. *Giumelli* (1999) 161 ALR 473 the High Court of Australia expressly rejected an argument that the court could not grant relief which went beyond the reversal of any detriment suffered. This remedial confusion is also reflected in the academic literature where some commentators take the view that protection of the expectation interest should be the normal remedy in estoppel cases (see, for example, Cooke, 1997), while others maintain that it should be the protection of the reliance interest (see, for example, Robertson, 1998). Those who seek to defend the reliance model have to overcome the obvious difficulty that in many of the cases the remedy awarded has actually protected the claimant's expectation interest; they do so (see Robertson, 1998) on the ground that fulfilment of the claimant's expectation interest is often the only way of ensuring that the reliance interest is fully protected (usually because it is difficult for the claimant to calculate or to prove the extent of the reliance). But, where the reliance is disproportionate to the claimant's expectations (in the sense that the reliance is much less) then they claim that the court should only protect the reliance interest (a claim which draws some support from *Giumelli* (above)).

This remedial debate raises two issues of importance. The first relates to the relationship between estoppel and consideration. If the remedy in estoppel cases does seek to protect the claimant's expectation interest then there is an obvious conflict with the doctrine of consideration which has to be sorted out. This leads on to the second, related point which

relates to the function of estoppel and its location within the law of obligations. The reliance-based approach tends to locate estoppel essentially within the law of civil wrongs. The defendant has committed a wrong in acting unconscionably in (at the very least) making a promise which the claimant has, to his knowledge, relied upon (to his detriment). The location of estoppel within the law of wrongs explains why the remedy should be one which seeks to protect the claimant's reliance interest, consistently with most remedies in the law of wrongs (torts). Alternatively it could be argued that estoppel should be located within the law of contract so that a contract would consist of a promise made by deed, promises supported by consideration and a promise which has been relied on in such a way that the claimant cannot go back on it and must honour it. If seen in this way, estoppel will act as an alternative to consideration. It is this role which *Combe* v. *Combe* currently denies to estoppel. This issue is a very important one on which the English courts must make a choice. Estoppel presently seems more at home within the law of (equitable) wrongs and, if that is the case, it does not undermine the doctrine of consideration and the remedy should ordinarily seek to protect the claimant's reliance interest. On the other hand, if estoppel is to go further and become truly a part of the law of the contract then it ought to be a genuine alternative to consideration and the remedy should ordinarily aim to protect the claimant's expectation interest.

The third point of difficulty is whether or not there is, or should be, a unified doctrine of estoppel. In England it is clear that there is as yet no unified doctrine of estoppel nor any overarching principle (see, for example, *Republic of India* v. *India Steamship Co Ltd* (*(No 2)* [1997] 3 WLR 818, 830 (Lord Steyn)), although the position is not so clear in Australia (the initial enthusiasm for the creation of a unified doctrine to be found in the judgment of Mason CJ in *Verwayen* (at p.412) has since given way to a more cautious approach (see, for example, *Giumelli* (above)). If the estoppels are indeed separate then the need to explain the current differences between the estoppels might not be so pressing so that it becomes possible, for example, to accept that proprietary estoppel can create a cause of action while promissory estoppel cannot. The most obvious difference which justifies a difference in treatment is between estoppel by representation and promissory estoppel. Representations (or statements of fact) and promises are different (see further 13.1) and should be treated differently. A representation invites reliance while a promisor goes further and undertakes an obligation to do or to refrain from doing a particular thing. This suggests that the remedy in estoppel by representation cases should be no more than the protection of the reliance interest but it opens up the possibility that the remedy in cases

of promissory estoppel should extend to the protection of the expectation interest. It has also been argued (Halson, 1999) that the different estoppels can be distinguished on the ground that estoppel by convention is a 'powerful tool to protect the reasonable expectations of negotiating parties' while promissory estoppel is concerned with the modification of contracts. The difficulty with this view is that there is no obvious distinctive policy basis for proprietary estoppel and the claim that promissory estoppel is exclusively about contract modification is doubtful. Although most promissory estoppel cases are modification cases, this cannot be said of all of them (*Walton Stores* v. *Maher* being an obvious example). There is an obvious common theme running through the estoppel cases and that relates to the rights of those who rely (to their detriment) on promises which are not otherwise enforceable. These rights should be analysed irrespective of whether the promise relates to the formation of a contract, the modification of a contract or the creation of an interest in land or other property. The basic choice which has to be made by the law is whether such protection as the law affords should be conferred within the law of wrongs (with the focus on any unconscionable conduct of the defendant and the remedy should aim to protect the claimant's reliance interest) or whether protection should be conferred within the law of contract (with the emphasis being placed on the promise and the (detrimental) reliance upon it by the claimant and the remedy aiming to protect the claimant's expectation interest).

5.29 Conclusion: The Future of Consideration

After the decision of the Court of Appeal in *Williams* v. *Roffey Bros* (above, 5.11), the future of consideration in English contract law is somewhat uncertain. The Court of Appeal did not attempt expressly to throw out the doctrine; its stated aim was to 'limit' and 'refine' the rule in *Stilk* v. *Myrick* by placing emphasis upon the need to identify practical benefit rather than legal benefit. But the inference which one draws from the tenor of the judgments is that the court, particularly Russell LJ, saw the doctrine as a technicality which, on occasions, could operate to prevent the court from giving effect to the intention of the parties. Far from being an essential ingredient of a contract, the court appeared to regard consideration as a vitiating factor; that is to say, they perceived it as a doctrine which operated to set aside what was an otherwise valid and subsisting contract. More than that, they regarded it as a 'technical vitiating factor'; in other words, it was a vitiating factor which could not distinguish between modifications which were in the public interest and

those which were not. That task, they thought, could be better achieved through the invocation of the doctrine of duress. The centrality of consideration to the creation of a contract was therefore thrown into doubt by the court. These doubts were raised once again by Lord Goff in his speech in *White* v. *Jones* [1995] 2 AC 207, 262–263 when he said that 'our law of contract is widely seen as deficient in the sense that it is perceived to be hampered by the presence of an unnecessary doctrine of consideration'. These criticisms must be seen in their proper perspective. The argument is not that bargain promises should not be enforced, but that consideration draws the net of enforceability too tightly. As Professor Dawson has pointed out (1980).

> 'even the most embittered critics of bargain consideration do not really object to the enforcement of bargains. The objection has been to its transformation into a formula of denial, a formula that would deny legal effect to most promises for which there is nothing given or received in exchange.'

If the courts choose to develop these arguments they could lead to the abolition of consideration as a doctrine. This approach has been adopted in Article 2.101 of the Principles of European Contract Law which states:

> '(1) A contract is concluded if:
> (a) the parties intend to be legally bound; and
> (b) they reach a sufficient agreement
> without any further requirement.
> (2) A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.'

A similar approach has been taken in Article 3.1 of the Unidroit Statement of Principles for International Commercial Contracts, which states that 'a contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement'. The note to the Article states that consideration is of 'minimal practical importance' and that its elimination 'can only bring about greater certainty and reduce litigation'. While this may be true in the context of international commercial contracts, the task of limiting the scope of the law of contract must be entrusted to some set of rules. That task has traditionally been performed by consideration which has insisted that there must be a bargain between the parties; that is to say, both parties must contribute something

to the transaction. Admittedly, the task of identifying the existence of a bargain has not always been easy, but is English law really ready to abandon the requirement of a bargain in favour of the more nebulous requirement of 'mere agreement'?

A more limited argument is that the vital question in future cases should be: did the parties have an 'intention to contract'? The role of consideration would then be confined to answering this particular question. If the parties had an intention to contract, there would be consideration; if not, there would be none. This appears to be the approach of Russell LJ in *Williams* when he said that 'the courts nowadays should be more ready to find [the existence of consideration] so as to reflect the intention of the parties'. This would take consideration into close proximity with the doctrine of intention to create legal relations (see Chapter 6). While this test may be relatively easy to operate in the commercial context, it is not at all obvious that the question whether the parties had an intention to contract will be any easier to answer than the question whether or not there was consideration (in the bargain sense) to support the agreement. It is the responsibility of those who advocate the abolition of the doctrine of consideration to formulate a precise set of alternative rules to mark out the limits of the law of contract.

Summary

1 English contract law does not generally insist upon requirements of form.
2 The classical definition of consideration is that a promisee should not be able to enforce a promise unless he has given or promised to give something in exchange for the promise or unless the promisor has obtained (or been promised) something in return.
3 Consideration must be sufficient but it need not be adequate and it must be something which the law regards as being of value. Natural love and affection does not constitute value for this purpose.
4 It is not clear when performance of an existing duty can constitute consideration. The orthodox view is that performance of a contractual duty owed to a third party does constitute consideration but that performance of an existing legal duty and performance of an existing contractual duty owed to the promisor does not constitute good consideration. The reason for the doubt relates to the scope of the decision of the Court of Appeal in *Williams* v. *Roffey Bros* which suggests that performance of an existing (contractual) duty can constitute consideration where it results in a 'practical benefit' to the promisor.
5 Part payment of a debt does not constitute good consideration for the discharge of the entire debt, although it must be said that it is not easy to reconcile *Foakes* v. *Beer* with *Williams* v. *Roffey Bros.*
6 Past consideration is not good consideration. The harshness of this rule is mitigated by the doctrine of implied assumpsit.

7 Consideration must move from the promisee.
8 Where the act of the promisee can be shown to be at the request, express or implied, of the promisor then the act of the promisee will constitute good consideration.
9 Estoppel can act as a shield but not as a sword. There must be a pre-existing legal relationship between the parties under which the promisor promises to give up some of his rights under that relationship. The effect of the estoppel is to prevent the promisor going back on his promise where the promisee has acted in reliance upon it.
10 The maxim that estoppel acts as a shield but not as a sword operates in the case of estoppel by representation, waiver and promissory estoppel, but not in the case of proprietary estoppel (the position is unclear in relation to estoppel by convention).
11 It is a matter for debate whether the English courts should follow the High Court of Australia and conclude that, in an appropriate case, promissory estoppel can create a cause of action.

Exercises

1 What is meant by the maxim 'consideration must be sufficient but it need not be adequate'? Give examples to illustrate your answer.
2 Can performance of an existing duty ever constitute consideration? Should it ever constitute consideration?
3 What is a 'practical benefit'?
4 Can *Williams* v. *Roffey Bros* be reconciled with *Foakes* v. *Beer*?
5 What is past consideration? Do you think that the decision of the court in *Eastwood* v. *Kenyon* is (a) correct as a matter of principle and (b) fair?
6 What is implied assumpsit?
7 What is 'estoppel'? How many different types of estoppel are there and what is the relationship between them?
8 Describe the fact situation in the following two cases and explain their legal significance:
   (a) *Combe* v. *Combe* [1951] 2 KB 215
   (b) *Central London Property Trust Ltd* v. *High Trees House Ltd* [1947] KB 130.
9 What is meant by the phrase 'estoppel can act as a shield but not as a sword'? Can estoppel ever act as a sword?

6 Intention to Create Legal Relations

6.1 Introduction

The fact that the parties have reached agreement does not necessarily mean that they have concluded a legally enforceable contract, even where the agreement is supported by consideration. The following fact situation will demonstrate the point. I promise to pay my wife £50 if she will type the manuscript of this chapter of the book. My wife agrees. Does this agreement create a legally enforceable contract? On the face of it there appears to be no reason why it should not. We have reached agreement and the agreement is supported by consideration. But it is likely that an English court would conclude that we had not entered into a legally binding contract because we lacked an 'intention to create legal relations', which has been held to be an essential element in any contract. Before examining the relevant case law, we must stop and contemplate the juristic basis of this doctrine of intention to create legal relations.

It could be said that the doctrine is based on the intention of the parties, objectively interpreted; that is to say, my wife and I did not intend that our agreement would have legal consequences. But my wife certainly expected to receive the £50 if she typed the manuscript, although it is unlikely that either of us intended that she would have to go to court to get her money. However to say that we did not intend that she would have to go to court to get her money is not the same thing as saying that, if the case did come to court, that we thought her action would fail.

Alternatively, it could be said that the doctrine is based upon public policy; that is to say that, as a matter of policy, the law of contract ought not to intervene in domestic situations because the courts would then be swamped by trifling domestic disputes. Thus the Scottish Law Commission has stated (1977) that

> 'it is, in general, right that courts should not enforce entirely social engagements, such as arrangements to play squash or to come to dinner, even though the parties themselves may intend to be legally bound thereby.'

In such a case it is for the court to decide, as a matter of policy, whether the agreement is 'entirely social' and hence not legally enforceable.

6.2 *Balfour* v. *Balfour*

The approach which has been adopted in the English courts is best illustrated by reference to the case of *Balfour* v. *Balfour* [1919] 2 KB 571. A wife sought to enforce a promise by her husband to pay her £30 per month while he worked abroad. The action failed because the wife had not provided any consideration for the promise of her husband and because it was held that the parties did not intend their agreement to 'be attended by legal consequences'. Atkin LJ said that

> 'agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses . . . . The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts.'

But how did Atkin LJ know that the parties did not intend to create legal relations? Did he inquire into the intention of the parties or did he lay down this rule as a matter of policy? It appears from his judgment that he was more concerned with policy than with ascertaining the intention of the parties because he said that

> 'it would be of the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the Courts. . . . the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations.'

It was the need to prevent what was, in the opinion of the court, unnecessary litigation and the desire of the court to keep the law out of the marriage relationship ('each house is a domain into which the King's writ does not seek to run') which were the predominant factors behind the finding that there was no intention to create legal relations.

However it does not necessarily follow from the fact that the judgment of Atkin LJ is based primarily upon considerations of policy that the intention of the parties is thereby completely irrelevant. The rule laid down in *Balfour* has been interpreted subsequently as a *presumption* that parties to a domestic agreement do not intend to create legal relations. Cases concerning intention to create legal relations are thus commonly divided into two categories; the first, concerning domestic and social agreements, where the presumption is that the parties did not intend to create legal

relations and the second, concerning commercial agreements, where the presumption is that the parties did intend to create legal relations. Both presumptions may be rebutted by evidence of contrary intention. But the fact that the initial presumption may be rebutted by evidence of contrary intention does not mean that the presumption itself is based upon the intention of the parties. Rather, as the judgment of Atkin LJ in *Balfour* makes clear, the initial presumption is a matter of policy. The policy which underpins these presumptions is one of 'keeping contract in its place; to keep it in the commercial sphere and out of domestic cases, except where the judges think it has a useful role to play' (Hedley, 1985). While this policy may have been appropriate for 'Victorian marriages' such as that of the Balfours, it is not entirely clear that it is appropriate for modern society in which family law 'has steadily embraced contract as its governing principle' and 'increasingly . . . extends to those in family relationships the power to regulate their own lives' (Freeman, 1996).

6.3 Rebutting the Presumption

Although we have noted that evidence of intention is relevant to the rebuttal of the presumption, even here the role of intention is, at best, marginal. This is so for two reasons. The first is that in the case of many domestic and social agreements the parties have no discernible intention one way or the other. The second reason is that it is a very difficult task to rebut a presumption because of the strength of the initial presumption. In domestic agreements 'clear' evidence is required of an intention to create legal relations, whereas in commercial cases the presumption of legal relations is a 'heavy one' which is not discharged easily (*Edwards* v. *Skyways* [1964] 1 WLR 349). The marginal role of intention will be demonstrated by examining the scope of the two presumptions and then the factors which have been held to be relevant to the rebuttal of these presumptions.

6.4 Domestic and Social Agreements

As we have seen, an agreement between a husband and a wife is presumed not to be legally enforceable (*Balfour* v. *Balfour* (above)). Similarly, agreements between parents and children are presumed not to be legally binding. In *Jones* v. *Padavatton* [1969] 1 WLR 328, a mother

persuaded her daughter, who was a secretary in Washington DC, to give up her work and read for the English Bar by promising to pay her $200 maintenance per month. After the daughter had begun to read for the Bar, the agreement was varied. The mother bought a house in London so that the daughter could live there rent free and the rent from letting out the other rooms to tenants would provide the daughter with her maintenance. Eventually, after the daughter had had more than one unsuccessful attempt at passing the Bar examinations, the mother and daughter fell out. The mother came to England and sought to gain possession of the house. The daughter relied upon their agreement as a defence to her mother's action. The Court of Appeal held that the agreement was not intended to be legally binding and that the mother was entitled to possession (see too *Hardwick* v. *Johnson* [1978] 1 WLR 683).

Social arrangements are also presumed not to give rise to legal relations. In *Lens* v. *Devonshire Social Club*, *The Times* 4 December 1914, it was held that the winner of a competition held by a golf club could not sue for his prize because no one involved in the competition intended that legal consequences should flow from entry into the competition.

The presumption may, of course, be rebutted by evidence of contrary intention, but a mere subjective intention to create legal relations will not suffice. There must be some objective evidence of a contrary intent. Although a complete list cannot be drawn up of the factors to which the court will have regard in considering whether or not the presumption has been rebutted, in practice the following three factors are among the most important.

The first is the context in which the agreement is made. If an agreement is entered into by family members in what the courts perceive to be a 'business context', the court will be readier to infer that the presumption has been rebutted. In *Snelling* v. *John G Snelling Ltd* [1973] 1 QB 87, it was held that legal relations were created when three brothers, who were directors of a family company, entered into an agreement relating to the running of the company. Similarly where a husband and a wife are about to separate or have separated, the presumption does not operate because in such a case the parties 'bargain keenly' and do not rely on 'honourable understandings' (*Merritt* v. *Merritt* [1970] 1 WLR 1121, 1123 per Lord Denning).

Secondly, the court will have regard to any reliance which has been placed upon the agreement. Where one party has acted to his detriment on the faith of the agreement a court may be more willing to conclude that the agreement was intended to have legal consequences. Such was

the case in *Parker* v. *Clark* [1960] 1 WLR 286. The defendants, who were an elderly couple, suggested that the claimants, who were their friends, come to live with them. The claimants were agreeable to the proposal but pointed out that, if they were to live with the defendants, they would have to sell their own house. The defendants replied stating that the problem could be resolved by the defendants leaving to the claimants a share of their house in their will. The claimants accepted this offer, sold their house, lent the balance of the money to their daughter to enable her to purchase a flat and moved in with the defendants. However the parties soon began to disagree over certain matters and the result was that the defendants asked the claimants to leave. The claimants left the house to avoid being evicted and brought an action against the defendants for breach of contract. The defendants argued that there was no contract between them because of a lack of intention to create legal relations. It was held that the parties had intended to create legal relations. Devlin J stated that

> 'I cannot believe . . . that the defendant really thought that the law would leave him at liberty, if he so chose, to tell the [claimants] when they arrived that he had changed his mind, that they could take their furniture away, and that he was indifferent whether they found anywhere else to live or not.'

Similarly, there is some authority for the proposition that an agreement between workmates under which one is to provide the other with a lift to work in return for a contribution towards the petrol does not create legal relations with regard to journeys to be undertaken in the future (see Upjohn LJ in *Coward* v. *Motor Insurers' Bureau* [1963] 2 QB 259, 271) but that it does create legal relations with regard to journeys which have already been undertaken (see Lord Cross in *Albert* v. *Motor Insurers' Bureau* [1972] AC 301, 340). In these cases the determining factor appears to be the fact that the parties have acted in reliance upon the agreement. The courts are reluctant to allow the parties to go back on their agreement once it has been acted upon.

Finally, the court will consider the certainty of the agreement which has been entered into by the parties. In *Vaughan* v. *Vaughan* [1953] 1 QB 762, it was held that a promise by a husband to allow his deserted wife to stay in the matrimonial home did not have contractual force because its vagueness evidenced that it was neither intended to have, nor was understood as having, contractual force. The husband did not state how long she could live there, nor did he indicate the terms on which she could stay. Similarly, the uncertainty of the agreement in *Jones* v. *Padavatton* (above) was

a factor which persuaded the court to hold that there was no intention to create legal relations, despite the fact that the daughter had detrimentally relied upon the agreement. The daughter had been in London for six years and this was held to be long enough to complete her Bar exams. The mother's promise of support could not be treated as lasting indefinitely.

6.5 Commercial Agreements

The presumption is that parties to commercial agreements do intend to create legal relations and the presumption is a heavy one. The operation of the presumption can be seen in the case of *Esso Petroleum Ltd* v. *Commissioners of Customs and Excise* [1976] 1 WLR 1. Esso supplied garages with World Cup Coins in 1970, instructing the garages to give away one coin with every four gallons of petrol sold. It was sought to subject these coins to a purchase tax on the ground that they had been sold. On the facts it was held that the coins were not supplied under a contract of sale. But the House of Lords divided on the issue of whether or not there was an intention to create legal relations. The majority, Lord Simon, Lord Wilberforce and Lord Fraser, held that there was an intention to create legal relations. They placed heavy reliance on the onus of proof in commercial transactions and on the fact that Esso envisaged a bargain of some description between the garage owner and the customer. But the minority, Lord Russell and Viscount Dilhorne, relying upon the language of the advertising posters which said that the coins were 'going free' and the minimal value of the coins, held that there was no intention to create legal relations (see too *J Evans & Son (Portsmouth) Ltd* v. *Andrea Merzario Ltd* [1976] 1 WLR 1078).

The presumption may be rebutted by an express term of the contract which states that the parties do not intend to create legal relations. The parties must, however, make their intention clear. Thus agreements for the sale of land are usually made 'subject to contract' and, on that ground, do not create legal relations. At common law a collective agreement entered into between trade unions and an employer was held not to give rise to legal relations (*Ford Motor Co Ltd* v. *AEF* [1969] 1 WLR 339). This common law rule has been reinforced by a statutory presumption to the effect that a collective agreement is conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless it is in writing and expressly provides to the contrary (see s.179, Trade Union and Labour Relations (Consolidation) Act 1992).

The most interesting example in this category is, however, what is known as an honour clause. In *Rose and Frank Co* v. *J R Crompton and Bros Ltd* [1925] AC 445, an agreement stated

> 'this arrangement is not entered into as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts but is only a definite expression and record of the purpose and intention of the parties concerned to which they each honourably pledge themselves.'

The court held that this agreement was not a legally binding contract because it was not intended that it would have such an effect. The courts interpret such clauses restrictively and clear words must be used to create such an honour clause (see *Home Insurance Co* v. *Administratia Asiguraliror* [1983] 2 Lloyd's Rep 674, 677).

Summary

1 An intention to create legal relations is an essential element in any contract.
2 In cases of domestic and social agreements the presumption is that the parties did not intend to create legal relations. The presumption may be rebutted by 'clear' evidence to the contrary.
3 Factors which may persuade a court to hold that the presumption has been rebutted include the context in which the agreement was made (that is, was it a business context?) and any reliance which has been placed upon the agreement.
4 In cases involving commercial agreements the presumption is that the parties did intend to create legal relations. This presumption is also a 'heavy' one.
5 Clear evidence is required to rebut the presumption. The presumption has been rebutted in cases of agreements to sell land 'subject to contract', collective agreements and 'honour clauses'.

Exercise

1 Is the doctrine of intention to create legal relations based on considerations of policy or does the court genuinely seek to discover the intention of the parties?
2 Reagan Ltd are considering inserting an 'honour clause' in their agreement with their major supplier, Jones Ltd. Advise them as to the advantages and disadvantages of such a course of action.
3 John offers £50 to anyone who will remove rubbish from his garden. The following people comply with the terms of his offer:
   (a) his wife, Beatrice;
   (b) his ex-wife, Brenda;
   (c) his mistress, Belinda;
   (d) his son, Billy;

(e) his nephew, Brian, whom he had never seen before;
(f) his god-child, Bernard; and
(g) his next-door neighbour, Benedict.

Advise John whether or not, in these circumstances, any legally enforceable contracts have been concluded.

7 Third Party Rights

7.1 Introduction

The Contracts (Rights of Third Parties) Act 1999 has made a fundamental change to English contract law in that it enacts a substantial exception to the doctrine of privity of contract, which had long been a central, albeit controversial part of English contract law. The doctrine of privity of contract consisted of two distinct general rules. The first rule has not been affected in any way by the 1999 Act. It is that a third party cannot be subjected to a burden by a contract to which he is not a party. This rule is not at all controversial. It would be wholly unreasonable for a legal system to enable two parties to subject a third party to a contractual obligation of which he was completely unaware. It is the second rule which was the controversial one and it is this aspect of the privity doctrine which has been reformed by the 1999 Act. The second rule was that a person who was not a party to a contract could not sue upon the contract in order to obtain the promised performance, even in the case where the contract was entered into with the very object of benefiting him.

The latter rule has had a somewhat chequered career. Prior to 1861 cases can be found in which third parties were held to be entitled to sue upon a contract entered into for their benefit (see, for example, *Dutton* v. *Poole* (1677) 2 Lev 211 and, more generally, Flannigan, 1987). But that development was brought to a halt in 1861 in *Tweddle* v. *Atkinson* (1861) 1 B & S 393 when it was held that the third party had no such right of action and that decision was affirmed by the House of Lords more than 50 years later in *Dunlop Pneumatic Tyre Company Ltd* v. *Selfridge* [1915] AC 847. In the twentieth century the rule in *Tweddle* and *Dunlop* survived a sustained attack by Lord Denning (launched in cases such as *Smith and Snipes Hall Farm Ltd* v. *River Douglas Catchment Board* [1949] 2 KB 500 and *Beswick* v. *Beswick* [1966] Ch 538). While the attack was ultimately rejected by the House of Lords (in cases such as *Scruttons Ltd* v. *Midland Silicones Ltd* [1962] AC 446 and *Beswick* v. *Beswick* [1968] AC 58), numerous expressions of disquiet about the state of the law continued to appear in the law reports (see, for example, *Scruttons Ltd* v. *Midland Silicones Ltd* [1962] AC 446, 473 (Lord Reid); *Woodar Investment Development Ltd* v. *Wimpey Construction UK Ltd* [1980] 1 WLR 277, 300 (Lord Scarman); *White* v. *Jones* [1995] 2 AC 207, 262–3

(Lord Goff); *Darlington Borough Council* v. *Wiltshier Northern Ltd* [1995] 1 WLR 68, 77 (Steyn LJ) and *The Mahkutai* [1996] AC 650, 664–5 (Lord Goff)). However the difficulty was that the judiciary showed little inclination to act on their expressions of disquiet; in fact, Lord Denning apart, they tended to be remarkably orthodox in their interpretation and application of the doctrine of privity, even extending it in places (for example in *Scruttons Ltd* v. *Midland Silicones*, discussed in more detail at 7.2 below) and at other times rejecting devices which would have enabled them to avoid some of the unfair consequences produced by its strict application (see, for example, *Woodar Investment Development Ltd* v. *Wimpey Construction UK Ltd*, discussed in more detail at 7.14 below). So it was not until the 1999 Act was passed that significant reform of the rule was introduced.

It is this second aspect of the privity doctrine which forms the main subject-matter of this chapter (we shall return briefly to the first aspect of the doctrine at 7.23). We shall start by considering the way in which the doctrine operated prior to the 1999 Act (7.2) and its relationship with the doctrine of consideration (7.3) before turning to a more detailed analysis of the 1999 Act (7.5–7.13) and then a discussion of the various exceptions to the doctrine of privity which pre-date the 1999 Act (7.14–7.21).

7.2 Privity in Operation

The rule that a person who was not a party to a contract could not sue upon the contract in order to obtain the promised performance, even in the case where the contract was entered into with the object of benefiting him, was capable of producing hardship. It applied both where the claimant was seeking to assert a positive right under the contract (for example, to be paid a sum of money) and where he was seeking to rely on a term in the contract as a defence to a claim brought by the claimant (for example, an exclusion clause contained in a contract between the claimant and a third party). Although many examples could be given in each category, it will suffice to provide one from the first category and two from the second category.

The case in the first category is *Beswick* v. *Beswick* [1968] AC 58. Peter Beswick sold his coal round and the goodwill of his business to his nephew John Beswick in return for a promise to pay £6 10s a week to Peter Beswick for the rest of his life and thereafter £5 a week to Peter Beswick's widow for the rest of her life. The nephew ceased making payments to

the widow shortly after Peter Beswick's death. The widow brought an action to compel the nephew to continue making the payments. She failed in the action in so far as it was brought in her own name because she was not privy to the contract between her husband and her nephew and so she was not entitled to sue on it. But she did succeed in another capacity in that she happened to be the administratrix of her husband's estate (when a person dies the administrator or administratrix of the estate, broadly speaking, acquires the rights of the deceased). So on the facts of the case no injustice was done and it was not necessary for the House of Lords to create an exception to the doctrine of privity in order to give the widow the remedy which it was thought she deserved. It was not necessary to create an exception to the doctrine of privity because in bringing a claim as the administratrix of her husband's estate it was as if Peter Beswick himself was suing and, of course, he was privy to the original agreement. But the fact that her third party claim was held to be without foundation demonstrated to many people that the privity doctrine was capable of giving rise to injustice.

Turning now to the second category of case, the doctrine of privity also makes it very difficult for third parties to rely on an exclusion clause contained in a contract between two other parties. That this was so can be demonstrated by reference to the following two cases. The first case is *Scruttons Ltd* v. *Midland Silicones Ltd* [1962] AC 446. The claimants, who were the owners of a drum of chemicals, entered into a contract with a firm of carriers for the transportation of the drum. Under the contract the carriers limited their liability to the claimants to $500. Stevedores, who were employed by the carriers to discharge the drum, negligently dropped it and the claimants brought an action in tort against them in respect of the resulting damage. The stevedores sought to rely on the limitation clause contained in the contract between the claimants and the carriers but it was held that they could not do so because they were not privy to that contract. The House of Lords held that English law knew of no doctrine of vicarious immunity (which would have enabled the stevedores, as agents, to claim the benefit of the immunity which had been negotiated by their principals) and that, in any case, the limitation clause only referred to the carriers and so was incapable of providing protection for the stevedores. This conclusion gave rise to considerable commercial inconvenience because it made it extremely difficult for an employer to give his employees and agents the benefit of an exclusion clause negotiated by the employer, even where the exclusion clause was a legitimate method of allocating the risks under the contract between the employer and the claimant.

Numerous attempts were made to get round this inconvenient ruling. Lord Reid provided the most hopeful route in *Midland Silicones* itself when he said that the stevedores might be able to claim the protection of an exclusion clause:

> 'if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.'

Lord Reid therefore envisaged that, at the moment the carrier signed the contract, two contracts would come into existence; the first between the owner and the carrier and the second between the owner and the stevedore. The difficulty with this analysis was that, at that moment in time, it was extremely difficult to find any consideration supplied by the stevedore; indeed, at the moment of signing the contract, it might not have been known which firm of stevedores was to unload the goods. Lord Reid's solution was therefore not entirely satisfactory.

The issue was reconsidered by the Privy Council in *New Zealand Shipping Co Ltd* v. *A M Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154, in which the stevedores were held to be entitled to take the benefit of the exclusion clause contained in the contract between the consignors and the carriers. The fact situation was similar to *Midland Silicones* except that the bill of lading was much more complex and clearly sought to give the stevedores the benefit of the exclusion clause. The first three of Lord Reid's four conditions were satisfied. The bill of lading expressly extended the benefit of the exclusion clause to any servants, agents and independent contractors employed by the carriers. The carriers had also contracted as the agents of the stevedores and they were authorised by the stevedores so to act. The principal problem lay in locating the consideration provided by the stevedores for the consignor's offer of immunity and in accommodating the solution within the offer and acceptance framework. The solution adopted by the Privy Council proceeded in the following stages. First, they held that when the consignors signed the bill of lading they made an offer to all the world that anyone who unloaded their goods at the port of discharge would be entitled to the benefit of the exclusion clause. Secondly, they held that this offer was

accepted by the stevedores unloading the goods at the port of discharge and at that moment a binding contract came into existence. The consideration supplied by the stevedores was the performance of their contractual duty owed to the carriers and, as we noted at 5.16, performance of a contractual duty owed to a third party is good consideration for a promise given by the claimant.

The Eurymedon demonstrates that it was possible in some cases to get round the doctrine of privity of contract but only by considerable ingenuity and no doubt significant expense (in terms of employing lawyers to draft the clause and then to litigate the matter through the courts). And, while the clause worked on the facts of *The Eurymedon*, it did not appear to work in all cases. For example, it did not work where the stevedore damaged the goods before he started to unload them because the acceptance of the owner's offer only took place when the stevedore began to unload the goods and by that time they had already been damaged (see *Raymond Burke Motors Ltd* v. *Mersey Docks & Harbour Co* [1986] 1 Lloyd's Rep 155). In *The Mahkutai* [1996] AC 650, 664–5 Lord Goff evaluated *The Eurymedon* critically and wondered whether its development was 'yet complete'. He noted that, while the solutions

> 'are now perceived to be generally effective for their purpose, their technical nature is all too apparent; and the time may well come when, in an appropriate case, it will fall to be considered whether the courts should take what may legitimately be perceived to be the final, and perhaps inevitable, step in this development, and recognise in these cases a fully-fledged exception to the doctrine of privity of contract, thus escaping from all the technicalities with which courts are now faced in English law.'

The law in this area had become too complex and too technical. The aim of the parties was simple, namely to extend the benefit of an exclusion clause to a third party, but the law lacked the mechanism which enabled them to achieve that aim in a straightforward manner.

7.3 Privity and Consideration

Before turning to consider the 1999 Act, it is necessary to discuss the relationship between the doctrine of privity and the doctrine of consideration because the historical development of privity is very closely linked with the doctrine of consideration. The link can be seen if we examine the two principal cases which established the doctrine of privity as we knew

it prior to the enactment of the 1999 Act. The first case is *Tweddle* v. *Atkinson* (1861) 1 B & S 393. In this case John Tweddle and William Guy entered into an agreement under which each promised to pay a sum of money to William Tweddle on the occasion of William Tweddle's marriage to William Guy's daughter. The agreement between them further stated that 'it is hereby further agreed . . . that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified'. However, William Guy failed to pay the promised sum and, on his death, William Tweddle sued the executor of William Guy for the promised amount. It was held that he could not maintain such a cause of action. Now there was one obvious reason why he could not sue; he had provided no consideration for William Guy's promise. The consideration had been provided by John Tweddle. Indeed, Wightman, Crompton and Blackburn JJ all appeared to base their judgments on the rule that a stranger to the consideration cannot enforce the promise. There was therefore no need to explain the result in *Tweddle* on the basis of an independent doctrine of privity.

The second leading case is *Dunlop Pneumatic Tyre Company Ltd* v. *Selfridge* [1915] AC 847. In this case the claimants attempted to operate a price-fixing ring. For this purpose they extracted a promise from dealers called Dew & Co that they in turn would obtain a written undertaking from any third party to whom they sold Dunlop products that the third party would not sell at a price below Dunlop's list price. The defendants, Selfridge, bought Dunlop products from Dew and gave the required undertaking to Dew but nevertheless sold Dunlop products at less than the list price. In these circumstances Dunlop brought an action for an injunction and damages against Selfridge. The action failed. The majority held that the action failed because Dunlop had provided no consideration for the promise of Selfridge; the consideration had been provided by Dew. But Viscount Haldane, in a judgment which has since assumed considerable significance, held that, independently of the need for consideration, it was a fundamental principle of English law that 'only a person who is a party to a contract can sue on it' and that, because Dunlop were not a party to the contract between Dew and Selfridge, they could not sue on it.

Tweddle and *Dunlop* both demonstrate that there is a very close relationship between the doctrines of privity and consideration. Indeed, on one view, there is no difference between the doctrine of privity and the rule that consideration must move from the promisee (see Furmston, 1960). Privity then becomes swallowed up in the larger rule that con-

sideration must move from the promisee. *Tweddle* and *Dunlop* are both consistent with this view because the majority view in each case was that the claimant could not sue because he had not provided consideration for the defendant's promise. Despite the strength of this argument, the more widely accepted view, and the one subsequently adopted by the House of Lords in the cases of *Scruttons Ltd* v. *Midland Silicones Ltd* [1962] AC 446 and *Beswick* v. *Beswick* [1968] AC 58, is that expressed by Viscount Haldane in *Dunlop*, namely that the doctrine of privity is separate and distinct from the rule that consideration must move from the promisee. The following example is often used to illustrate the point. X makes a promise to Y and Z to pay £100 to Z in exchange for consideration provided by Y. In such a case Z is privy to the contract but cannot maintain an action against X unless he has provided consideration for X's promise. Privity and consideration constitute two hurdles for Z to surmount and not one (see *Kepong Prospecting Ltd* v. *Schmidt* [1968] AC 810).

However, even those who maintain that privity and the rule that consideration must move from the promisee (on which see 5.19) are two separate rules, nevertheless concede that there is a very strong relationship between privity and consideration and that it is very difficult to reform the one without the other. For example, a rule which abolished the doctrine of privity but left intact the rule that consideration must move from the promisee would not avail the claimants in *Tweddle* and *Dunlop* because their claims would then be dismissed on the sole ground that they had not provided any consideration for the promise in respect of which they were bringing the claim. So when reforming privity it is necessary to take steps to ensure that the practical effects of the reform are not nullified by the doctrine of consideration (see further 7.7).

The relationship between privity and consideration does, however, throw up a deeper issue and that relates to the justification for giving the third party a right of action in the first place. The difficulty is that the third party is in most of the cases a gratuitous beneficiary; he or she has given nothing in return for the promise. If the law does not generally allow a gratuitous beneficiary to bring a contractual claim (and the doctrine of consideration prevents him from doing so) why should we give a claim to a *third party* gratuitous beneficiary? The answer to that question is that in the third party case the consideration has been provided by the other contracting party and all that is happening is that the third party is, in effect, being allowed to take advantage of the consideration provided by that contracting party. So the case is distinguishable from a gratuitous promise where no one has provided consideration for the promise in respect of which the claim is being brought.

7.4 Criticisms of the Doctrine of Privity

By the end of the 1990s the doctrine of privity had few friends, at least that part of it which prevented third parties suing to obtain the benefit which the contracting parties had agreed to confer on them. There were four principal criticisms levelled against the old law. The first was that it failed to give effect to the expressed intentions of the parties (see, for example, *Tweddle* v. *Atkinson* (above)). The second was that the law was unduly complex. A number of exceptions had grown up to the doctrine (some of which are set out below at 7.14–7.21) and some of them were extremely artificial (as was the case with the trust of the promise device (see 7.17) and the use made of the collateral contract (see 7.15)). The contorted reasoning of the Privy Council in *The Eurymedon* (see 7.2 above) also demonstrated the unnecessary complexities which could arise in seeking to give effect to the intention of the contracting parties. The third deficiency was that the doctrine of privity was commercially inconvenient (see, for example, the difficulties which arose in *The Eurymedon* situation and, as we shall see (7.21), commercial transactions such as insurance and carriage of goods by sea had to be put on a statutory footing in order to get round the privity problem). The final deficiency was that the application of the doctrine could sometimes lead to results which were regarded as fundamentally unjust (see *Tweddle* v. *Atkinson* (7.3 above)). It was therefore no real surprise when the Law Commission (1996) recommended substantial reform of this area of the law. These recommendations were finally implemented in the 1999 Act.

7.5 The Contracts (Rights of Third Parties) Act 1999

It could be said that the Contracts (Rights of Third Parties) Act 1999 introduces into English law a limited third party right of action to enforce a term of a contract made between two other parties or, alternatively, that it carves out a further (substantial) exception to the doctrine of privity of contract. This may turn out to be no more than two ways of saying the same thing; on the other hand, the difference in emphasis may turn out to be important. The Act is based on a Law Commission Report (1996) and, in that Report, the Law Commission stated (at paragraph 5.16) that, while their proposed reform

> 'will give some third parties the right to enforce contracts, there will remain many contracts where a third party stands to benefit and yet will not have a right of enforceability. Our proposed statute

carves out a general and wide-ranging exception to the third party rule but it leaves the rule intact for cases not covered by the statute.'

Thus the old rule of privity of contract and its exceptions remain intact (the exceptions are discussed below at 7.14–7.21) and, grafted on to the old law, is a new third party right of action which, in turn, has exceptions where the new third party right will not be available (see s.6 of the Act). While the Act will no doubt improve the law 'it will scarcely simplify the law' on this topic (Chitty, 1999, para 19–002).

The complexity arises in part from the fact that the new Act and the old law must co-exist. Four distinct situations appear to be discernible. The first arises where the third party has a right of action under the Act but not at common law; in such a case the third party's right will be governed by the Act. The second situation is where the third party has no claim under the Act but does have a claim apart from the Act (that is to say at common law or by virtue of some other legislative provision). In such a case the third party's right will continue to be governed by that alternative provision. The third situation is where the third party has a right both under the Act and under the previous law. In such a case it would appear that the third party can choose which right to assert. The final case is where the third party has no rights under the Act or at common law. In such a case the third party will only be entitled to bring a claim if it can persuade a court that it ought to introduce a new exception to the doctrine of privity of contract (see 7.22). Here it should be noted that the Law Commission explicitly state in their report (at paragraph 5.10) that the courts should continue to be free to develop the common law where it is appropriate to do so. The Act should not have the effect of freezing the common law as at the date on which the Act came into force. The Act came into force on the day on which it was passed (11 November 1999) but it does not apply in relation to a contract entered into before the end of the period of six months beginning with that day (s.10(2)). It therefore applies to contracts entered into on or after 11 May 2000. However it is open to contracting parties to contract into the Act before that date by expressly providing in their contract for the application of the Act (s.10(3)).

7.6 The Intention Test

The scope of the third party right of action created by the Act is determined by the intention of the contracting parties themselves. The third

party is given a right of action in two circumstances, the first being much more straightforward than the second.

The first situation where the third party is given a right to enforce a term of the contract arises where 'the contract expressly provides that he may' (s.1(1)(a)). The right of action given to the third party may be a right to sue to enforce a positive right, for example to payment, or it may be a right to rely on an exclusion or limitation clause contained in the contract between the two contracting parties (s.1(6)). Thus it applies both to the *Beswick* v. *Beswick* type fact situation and to the fact situation in *The Eurymedon*. Gone are *The Eurymedon* days in which contracting parties had to express themselves in convoluted terms in order to confer the benefit of an exclusion or limitation clause on a third party. The need for complex drafting or judicial ingenuity in order to give effect to third party rights has been significantly reduced as a result of the enactment of the 1999 Act. It will suffice for the contracting parties to state that the third party 'shall have the right to enforce the contract' or that the third party 'shall be excluded from all liability towards the employer for damage caused in the performance of the contract'.

It is, however, important to note that the intention test cuts both ways; that is to say, the contracting parties can make clear their intention *not* to confer a right of action on the third party or to subject the third party right of action to some sort of condition precedent. In other words, the third party cannot assert a right of action in the teeth of the terms of the contract. Furthermore the contracting parties can exclude the third party right of action without having to worry about the potential impact of s.3 of the Unfair Contract Terms Act 1977 (UCTA, on which see 11.11). The Law Commission were of the view that to give third party rights of action was 'relatively uncontroversial' but that to prevent the contracting parties from contracting out of that third party right was to go too far. Where, however, the third party suffers loss or damage as a result of the negligence of one of the contracting parties, the proposition that UCTA does not apply to the exclusion of liability towards the third party requires some modification. If the claim is one in respect of death or personal injury caused by the negligence of one of the contracting parties, then section 2(1) of UCTA will operate to render the exclusion or limitation clause void (see 11.10). On the other hand, where the claim is one in respect of property damage or other loss caused by the negligence of one of the contracting parties, section 2(2) of UCTA will regulate the exclusion clause where the claim brought by the third party is one in the tort of negligence but not where the claim is that there has been a breach of a contractual duty of care owed to the third party (see s.7(2) of the 1999 Act: it should, however, be noted that UCTA can apply as between the

two contracting parties so that, where the failure to confer a benefit on a third party also constitutes a breach of contract as between the contracting parties, UCTA applies in the usual way as between them).

Much more difficult is the case where the contracting parties do not make their intention express and the contract term 'purports to confer a benefit on' the third party (s.1(1)(b)). In such a case the third party may have a right to enforce the term. There is, however, an important limit on the right of the third party to enforce the term in such a case, which is that the right of action is not triggered where 'on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party' (s.1(2)). The difficulty here will of course lie in discerning the intention of the parties where they have not expressed it. The view of Professor Burrows (1996), the Law Commissioner primarily responsible for the preparation of the Report which led to the Act, is that the presumption of enforceability by the third party is 'a strong one'. He continues:

> 'I would anticipate that it would not normally be rebutted unless there is a term in the contract expressly negating the third party's legal rights, or an express term that is otherwise inconsistent with the third party having legal rights, or unless the parties have entered into a chain of contracts which gives the third party a contractual right against another party for breach of the promisor's obligations under the alleged "third party" contract.'

Thus the Law Commission were of the view that in *Beswick* v. *Beswick* (above, 7.2) Mrs Beswick would now have a claim in her own right under this second limb because the nephew would not be able to show that he and his uncle did not intend to give her the right to enforce the term (it is, of course, impossible to be sure on this point because we are applying a test which the courts at the time were never asked to apply; but the inference that this was the intention of the parties seems a reasonable one).

The reference by Professor Burrows to 'a chain of contracts' suggests that the Law Commission did not intend that one party should be allowed to jump up a chain of related contracts in order to obtain an advantage which he could not obtain by suing his immediate contracting party. Take the typical example of a contract entered into between an employer and a main contractor, and the main contractor then sub-contracts some of the work to a sub-contractor. Can the sub-contractor enforce against the employer a term in the contract between the main contractor and the employer or can the employer enforce against the sub-contractor a term

of the contract between the main contractor and the sub-contractor? The answer in both cases would appear to be 'no'. In the latter case the inference which is likely to be drawn by a court is that, on a true construction of the sub-contract, interpreted in the light of the head-contract and the understanding and practice of the construction industry, the employer should not have a contractual right of action against the sub-contractor but should rather be confined to his contractual right of action against the main contractor who should then pursue his claim on the contract against the sub-contractor (thus, in a case such as *Junior Books* v. *Veitchi & Co Ltd* [1983] 1 AC 520, discussed below at 7.18, it is unlikely that the employer would be able to invoke the 1999 Act in order to entitle him to enforce a term of the contract against the sub-contractor).

Difficulties may also arise where the main contract contains a clause under which one of the parties assigns his rights under that contract to a third party. For example, in *Darlington Borough Council* v. *Wiltshier Northern Ltd* [1995] 1 WLR 68 Morgan Grenfell entered into a contract with the defendant construction company under which the defendants agreed to build a recreational centre for Darlington Borough Council. It was alleged that the construction work had been done defectively and the cost of repairs was estimated at £2 million. Could Darlington now bring a claim against the defendants under the 1999 Act? There is a case for saying that it should be able to do so. The only interest which Morgan Grenfell had in the performance of the contract was a financial one; they were not interested in performance of the work to a proper standard provided that they got their money back. The work was done to benefit Darlington and so the case seems to fall squarely within s.1(1)(b) of the Act. But, on closer analysis it is not at all obvious that Darlington would have such a claim. There are two factors which make it difficult to assert with any confidence that Darlington would now have a right under the Act to enforce a term of the contract against the defendants. First, Darlington did have a direct right of action against the defendants for liquidated damages for delay in the performance of the contract. Secondly, Morgan Grenfell assigned their interest under the contract with the defendants to Darlington and it was in its capacity as assignee that Darlington brought its claim for damages. Does it not therefore follow that the parties' intention was to give Darlington a direct right of action only for liquidated damages but that otherwise its rights were only those which it acquired by virtue of the assignment? Of course, it can be argued that, now that a direct right of action has been created under the 1999 Act, there is no longer any need for the inclusion of such a comprehensive

assignment clause in a contract. But the parties may well prefer the certainty of a comprehensive assignment clause to the uncertainty of a direct right of action of doubtful scope. And, if they do include such an assignment clause in their contract, does this operate to exclude the third party right of action under the Act? The answer, ultimately, turns on the intention of the parties. But there is a strong case for saying that the effect of the assignment will generally be to negative the intention to create a direct right of action in the third party, thereby confining the third party to his rights as an assignee of one of the contracting parties. The fact that no clear answer can be given to this question underlines the need for the parties to make their intention explicit on the face of the contract. If they fail to do so, their intention in relation to the third party may well be a matter of conjecture.

One further limitation on the right of the third party to sue is that the third party 'must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into' (s.1(3)). This requirement applies to both limbs of the test for the existence of a third party right of action, and both where the third party wishes to enforce a positive right and where it seeks to rely on an exclusion or limitation clause in the original contract. As far as positive rights are concerned, take the case where contracting party A enters into a construction contract with B under which B agrees to construct a building for A. At some later point in time A sells the building to C. It is subsequently discovered that the building requires extensive repair work caused by the failure of B to exercise reasonable care when constructing the building. Can C sue B? The answer, as far as the Act is concerned, is that it cannot do so because C was not 'expressly identified' in the contract (thus the Act would not give the third party a right of action on the facts of a case such as *Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (see 7.14 below) because the third party was not identified in the contract). But suppose that the contract between A and B had stated that the warranty of quality given by B to A also extended to subsequent owners and/or tenants of the building. In such a case C, as a subsequent owner, has been identified as a member of a class which has been identified in the contract, and so can bring a claim against B under the terms of the Act. The same point applies in the context of reliance by a third party on an exclusion clause in the main contract (as in *The Eurymedon* type case). If the contract between A and B contains a limitation clause but does not purport to extend the benefit of that clause to C (whether individually or as a member of a class) then C cannot rely on the limitation clause. It is

therefore of fundamental importance to ensure that reference is made to the third party in the contract, either individually or as a member of a class. A failure to do so will mean that the third party will be unable to rely on the rights contained in the Act.

7.7 No Consideration Required

The third party will be able to enforce the term of the contract notwithstanding the fact that he himself has not provided any consideration for his right to sue to enforce the term of the contract. The fact that the contract is supported by the consideration supplied by the original contracting parties is sufficient to give him a right of action. While it is true that the Act itself does not expressly deal with the doctrine of consideration, the fact that section 1 states that the third party may 'in his own right enforce a term of the contract' was thought to be sufficiently explicit to confer a right of action on the third party whether or not he had provided consideration. The fact that Parliament has expressly stated that the third party may in his own right enforce a term of the contract will make it practically impossible for the courts to qualify that right of action by adding in the requirement that the third party must himself have provided consideration. The wording of the Act should be sufficient to prevent it being outflanked by an argument based on lack of consideration. Indeed, it is the very fact that the third party can sue even where he has provided no consideration for his right of action that has been seized upon by those who are critical of the Act and its aims (see, for example, Kincaid, 2000).

7.8 The Remedies Available to the Third Party

Where the third party does acquire a right to enforce a term of the contract under the Act, there 'shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly)' (s.1(5)). The normal rules of contract law will therefore presumably apply to the third party's right of action (for example, the rules on remoteness of damage, mitigation etc will be applicable to any action brought by the third party). The Law Commission intended to exclude termination of the contract from the scope of this provision on the ground that termination is not a judicial remedy. The Law Commis-

sion also believed that 'the third party should not be entitled to terminate the contract for breach as this may be contrary to the promisee's wishes or interests' (see paragraph 3.33 of the report). It is therefore for the parties to the original contract to decide whether or not to terminate the contract in the event of a repudiatory breach by one party to the contract.

7.9 Variation and Cancellation

Can the contracting parties between themselves divest the third party of his right of action on the contract? The general answer is that substantial limitations have been placed on the ability of the contracting parties to do so. This issue is addressed in section 2 of the Act which states:

> 'Subject to the provisions of this section, where a third party has a right under section 1 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent, if –
>
> (a) the third party has communicated his assent to the term to the promisor,
> (b) the promisor is aware that the third party has relied on the term, or
> (c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied upon it.'

The easiest example is perhaps the case where the third party has communicated his assent to the promisor. Assent may be by words or conduct and, if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until received by him (s.2(2)). A third party who wishes to be secure in his third party right should assent expressly to the existence of the third party right of action and ensure that the assent is communicated to the promisor.

More controversial is the case where the third party has not communicated his assent to the promisor but has relied on the term. There is no requirement that the third party act to its detriment; reliance is enough in and of itself provided that the promisor is aware of it or could reasonably be expected to have foreseen that reliance would be placed on the term. The burden of proof will be on the third party to prove that he

has relied on the term. The reliance must have been that of the third party; the reliance of another party, even if closely related to the third party, will not suffice. Rather curiously perhaps, the third party who has relied on the contract is not confined to the recovery of damages to protect his reliance outlay. The third party is entitled to recover its expectation damages in the ordinary way and so can recover its loss of profit (provided it is not too remote) as well as its detrimental reliance. The 'reliance' provisions may well give rise to some difficulty in practice; for example, it may be no easy task for the third party to prove that the promisor was 'aware' of its reliance or that the promisor could reasonably be expected to have foreseen that the third party would so rely. It is in order to avoid these evidential difficulties that a third party should communicate his assent expressly to the promisor.

However it is open to the contracting parties to agree to rescind or vary the contract without the consent of the third party by reserving to themselves in their contract the right to do so (s.2(3)(a)). Take a case in which a construction contract between an employer and a main contractor makes provision for variations of the works in certain circumstances. There is an obvious advantage in ensuring that any third party who acquires rights under the contract is bound by any such variation. The Act makes it possible for the contracting parties to ensure that such a party is bound by making appropriate provision in the contract itself. The inclusion of such a reservation will make the right of the third party rather vulnerable but, given that it is open to the contracting parties to exclude or limit the right of the third party, it was thought that it must follow that they ought to be able to withdraw or vary the right of the third party provided that the power to withdraw or to vary is set out in the contract itself. It is also open to the contracting parties to agree that the third party's right to enforce the term shall crystallise on the occurrence of an event other than those stated in section 2(1) of the Act (see s.2(3)(b)). For example, it is open to the contracting parties to provide in their contract that they can vary or cancel the contract until such time as the third party notifies them of his assent in writing.

The court (or, as the case may be, arbitral tribunal) is given a power to dispense with the third party's consent where that consent cannot be obtained because the whereabouts of the third party cannot reasonably be ascertained or he is mentally incapable of giving his consent (s.2(4)) or where it cannot be ascertained whether the third party has in fact relied on the contract (s.2(5)). The court or arbitral tribunal may impose conditions on any such dispensation including 'a condition requiring the payment of compensation to the third party' (s.2(6)).

7.10 The Defences Available to the Promisor

The right which the third party acquires is essentially the right to enforce the term of the contract subject to the defences which would have been available to the promisor had he been sued on the contract by the promisee. The third party stands in no better situation than the promisee. Thus section 3(2) of the Act states that

> 'the promisor shall have available to him by way of defence or set-off any matter that –
>
> (a) arises from or in connection with the contract and is relevant to the term, and
> (b) would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.'

The Law Commission rejected the argument that s.3(2) should also apply to counterclaims on the ground that it would have been 'misleading and unnecessarily complex' to include counterclaims within the subsection. The reason for this is that a counterclaim may possibly exceed the value of the third party claim, in which case the effect of the counterclaim would be to impose a burden on the third party (in that its claim against the promisor would be subject to a counterclaim against the promisee which exceeded the value of the claim brought by the third party against the promisor). An example may illustrate the point. Suppose that A and B agree to confer a right of action on C. B fails to perform in accordance with the contract so that C now has a claim against B for £5000 in consequence. Assume further that B has a counterclaim against A for £10,000. B cannot rely on that counterclaim in C's action to recover £5000. The reason for this is that C would be worse off if B could do so (in that C would then be subject to a liability to pay £5000 to B). The aim of the Act is to give the third party a right of action in certain circumstances; it is not to alter the rule that a burden cannot be imposed on a third party without the latter's consent. The counterclaim problem could have been dealt with by providing that B could rely on the counterclaim provided that it did not exceed the value of C's claim but it was thought by the Law Commission to be too complex to insert such a provision into the Act. This exclusion of counterclaims from section 3(2) may make it important to distinguish between a set-off and a counterclaim.

Once again the contracting parties can contract out of this provision and they can do so in either direction. They can include within the contract an express provision to the effect that the promisor may not raise

any defence or set-off that would have been available against the promisee (s.3(5)). Such a clause will have the effect of reducing the uncertainty for the third party, particularly in the context of a construction contract where there is a grant to subsequent owners of the building of contractual rights to have defects in the building repaired where the defect is attributable to the default of the builder. The value of the right to the subsequent owner could be devalued significantly if the contractor was able to set-off against the third party claim any defences that the original contractor had against the employer. Thus, where it has the bargaining power to do so, it may be possible for the employer to require the contractor to give to the third party a right of action which is not subject to any set-off or defences which the contractor has against the employer.

Conversely it is open to the contracting parties to include in their contract an express term which makes the third party's claim subject to all defences and set-offs that the promisor would have had against the promisee (that is to say, whether or not they arise from or in connection with the contract and are relevant to the term) (s.3(3)). In this instance the third party's right is obviously much more vulnerable.

In addition to the third party's claim being subject to defences and set-offs which would have been available to the promisor in an action brought by the promisee, the third party's claim is also subject to the defences, counterclaims (not arising from the contract) and set-offs that would have been available to the promisor had the third party been a party to the contract (although it is also possible for the parties to agree an express term that the promisor may not raise these matters against the third party) (s.3(4)). The promisor is entitled to bring counterclaims into account when the counterclaim is against the third party himself on the ground that there is no question here of making the third party worse off as a result of the counterclaim (in that, if the counterclaim succeeds, the third party owes the sum claimed to the promisor in any event).

Where the third party seeks to avail himself of an exclusion or limitation clause (or conceivably some analogous clause) in relation to proceedings brought against him, he may do so only to the extent that he could have done so had he been a party to the contract (s.3(6)). In other words, where the exclusion clause is invalid as between the two contracting parties, it will also be invalid when relied upon by the third party.

7.11 Avoiding Double Liability

As we shall see (7.14) the Act does not impinge upon the promisee's rights under the contract. So both the promisee and the third party may now

have an action against the promisor. Steps have therefore been taken to reduce, if not eliminate, the possibility of double liability on the part of the promisor. Where the third party has recovered damages from the promisor, the promisee's claim for damages is likely to fail on the ground that the promisee has suffered no loss. More difficult is the case where the promisee has sued and recovered damages from the promisor and the third party then brings an action against the promisor. The Act seeks to deal with this issue in section 5 which provides that where a term of the contract is enforceable by a third party in accordance with section 1 of the Act, and

> 'the promisee has recovered from the promisor a sum in respect of –
>
> (a) the third party's loss in respect of the term, or
> (b) the expense to the promisee of making good to the third party the default of the promisor,
>
> then, in any proceedings brought in reliance on that section by the third party, the court or arbitral tribunal shall reduce any award to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee.'

The aim of this provision is clearly to protect the promisor against double liability. It does not deal with the question whether or not the promisee can be compelled to account to the third party for the sum which it has recovered from the promisor. That question will have to be answered by the courts applying common law (or equitable) principles.

7.12 Exceptions to the New Third Party Right of Action

In the absence of a saving provision, the 1999 Act had the potential to cause difficulty by cutting across some existing legislative schemes and so result in a distribution of rights and liabilities other than that intended by those who devised the original statutory scheme. In order to avoid this happening a provision has been inserted into the Act which states that the right party right conferred by section 1 does not apply in certain situations (see s.6). For example, section 1 confers no rights on a third party in the case of a contract on a bill of exchange, promissory note or other negotiable instrument (s.6(1)). Nor does the section 1 right apply to contracts for the carriage of goods by sea (ss.6(5), (6) and (7)) or to various

contracts which are governed by certain international transport conventions (s.6(8)).

7.13 Preserving Existing Exceptions

One further effect of the Act will be to reduce the practical significance of many of the pre-1999 exceptions to the doctrine of privity. But it is very important to note that the Act does not repeal or abolish these exceptions. On the contrary, section 7(1) of the Act states that section 1 'does not affect any right or remedy of a third party that exists or is available apart from this Act'. Equally section 4 of the Act provides that the creation of the new third party right of action shall not 'affect any right of the promisee to enforce any term of the contract'. So the old exceptions together with the right of the promisee to bring a claim have been preserved, albeit that one might expect their practical significance to diminish somewhat. That said, there may still be cases in which it is necessary to consider the relative merits and demerits of the different ways of conferring enforceable rights on a third party. In the following sections (7.14–7.21), consideration will be given to the rights of the promisee and the existing exceptions to the doctrine of privity and an attempt will be made, where appropriate, to assess their likely significance after the Act.

7.14 Rights of the Promisee

As has been noted, section 4 of the 1999 Act expressly preserves the right of the promisee to enforce any term of the contract. Suppose that A and B enter into a contract under which, in return for some act to be performed by B, A agrees to pay £50 to C. A failure by A to pay the £50 to C will constitute a breach of contract between A and B. What remedies, if any, does B have against A in such a case? There are at least four possible actions which B could bring against A.

The first possibility is to bring an action for damages for breach of contract. The difficulty here is that B does not appear to have suffered any loss as a result of A's breach and so his damages are likely to be nominal (although if the £50 was to be paid to discharge a debt owed by B to C then B might be entitled to more than nominal damages; see Windeyer J in *Coulls* v. *Bagot's Executor* (1967) 119 CLR 460, 501–2 and see also the discussion of *Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd*

[1994] 1 AC 85 and *Darlington Borough Council* v. *Wiltshier Northern Ltd* [1995] 1 WLR 68, below). But even if B could recover substantial damages, this would be of no avail to C because the damages recovered by B would be held on his own behalf and not on behalf of C. So B would not be under any obligation to give any portion of the damages recovered to C (although in the case of a debt owed by B to C, B would remain liable to repay the debt).

Secondly, B could seek to recover damages on behalf of C. The practical need for B to seek to recover damages on behalf of C has been considerably reduced by the enactment of the 1999 Act. But in a case in which the third party does not have a right of action under the 1999 Act, the promisee may still wish to sue and attempt to recover damages on behalf of the third party. Furthermore, the fact that the third party has been given a statutory right of action for damages does not absolve the law from laying down principles which determine the promisee's entitlement to sue and recover damages. Some authority for the proposition that a promisee can recover damages on behalf of a third party was provided by Lord Denning in the case of *Jackson* v. *Horizon Holidays* [1975] 1 WLR 1468. In this case the claimant entered into a contract with the defendants under which the defendants promised to provide the claimant and his family with a holiday of a certain standard. The holiday did not comply with the promised standard and the defendants admitted that they were in breach of contract (the Law Commission appear to be of the view that the family members would now be able to sue in their own right under s.1(1)(b) of the 1999 Act (see paragraph 7.40 of the report) but it is suggested that the position is less than clear-cut). The claimant was awarded damages of £1100, which included £500 for 'mental distress'. The defendants appealed, alleging that the damages awarded were excessive. The appeal was dismissed but the ratio of the decision is unclear. James LJ dismissed the appeal, apparently on the ground that £500 was the correct figure to compensate the claimant for the loss which he had suffered (presumably his loss had been increased as a result of his witnessing the distress and disappointment suffered by the other members of his family). Orr LJ simply concurred. However Lord Denning took a more radical approach. He held that £500 was excessive if it was regarded solely as compensation for the claimant's own loss. But he nevertheless upheld the award on the ground that the claimant could recover, not only in respect of his own loss, but also in respect of the losses suffered by the rest of his family; the latter compensation being held by the claimant on trust for the rest of his family. Lord Denning instanced other examples where such a principle could operate: a vicar making a contract for a coach trip for the church

choir, a host making a contract with a restaurant for dinner for himself and his friends. In all such cases Lord Denning thought that the contracting party could, in the event of breach, recover damages on behalf of himself and the other members of the group.

However, the view of Lord Denning was disapproved by the House of Lords in *Woodar Investment Development Ltd* v. *Wimpey Construction UK Ltd* [1980] 1 WLR 277. Purchasers of land agreed to pay £850,000 to the vendors and £150,000 to a third party on completion of the contract. One question which arose was whether, if the purchasers were in breach of contract, the vendors could recover damages in respect of the £150,000 payable to the third party (the third party would probably now have a direct right of action under s.1(1)(b) of the Act, see paragraph 7.49 of the Law Commission report). In considering this issue, the House of Lords took the opportunity to disapprove of the judgment of Lord Denning in *Jackson*. They did not disapprove of the result of the case; that was justified on the ground that the damages awarded did in fact represent the loss which the claimant himself had suffered. But they established in clear terms that English law does not allow a claimant to recover damages on behalf of a third party (although see the criticisms levelled against *Woodar* by Dillon J in *Forster* v. *Silvermere Golf and Equestrian Centre Ltd* (1981) 125 SJ 397, where he stated that the rule which it established was 'a blot on our law and thoroughly unjust'). It is, however, important to note that Lord Wilberforce did not shut the door completely on Lord Denning's proposition; he left the door slightly ajar by saying that *Jackson* could possibly be supported 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.'

This 'special treatment' would be that the contracting party could recover damages on behalf of the group. However, no appellate court has yet applied this 'special treatment'.

On the other hand, a recent line of cases involving construction contracts appears to cast some doubt upon the generality of the principle that damages cannot be recovered for loss actually suffered by a third party. The fact situation in these cases is essentially as follows. The defendant enters into a contract with the claimant for the construction of a building by the defendant. The building subsequently proves to be defective. The claimant no longer has (or never had) a proprietary interest in the building, which is now in the ownership of a third party. The third party had at the time no direct claim in contract against the builder, nor did it have a

claim in tort (as a result of the decision of the House of Lords in *D & F Estates Ltd* v. *Church Commissioners for England and Wales* [1989] AC 177). So the vital question was: could the claimant recover damages for breach of contract from the defendant? Such a claim runs into the obvious difficulty that the claimant has not suffered a financial loss either because the building never belonged to it or because the building no longer belongs to it, having been sold by it to the third party for full market value (the defect being latent at the time of sale). These difficulties were, however, swept aside by the House of Lords in *Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 and by the Court of Appeal in *Darlington Borough Council* v. *Wiltshier Northern Ltd* [1995] 1 WLR 68, in both of which the claimant was awarded substantial damages (note that in both cases, for the reasons given above at 7.6, it would appear that the third parties would not have a right of action under the 1999 Act so that the scope of the right of the promisee remains very much a live issue in this context).

In *Linden Gardens*, Lord Browne-Wilkinson stated that the case fell within an exception to the general rule that a claimant can only recover damages for his own loss. That exception was based on a decision of the House of Lords in *The Albazero* [1977] AC 774, 847 where Lord Diplock stated that:

> 'in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes the loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into.'

This principle, Lord Browne-Wilkinson held, was capable of being adapted to a contract for the construction of a building where it was in the contemplation of the parties that the building was going to be occupied, and possibly purchased, by a third party and there was a prohibition on the assignment of the benefit of the contract without the consent of the defendants, thereby making it foreseeable that the third party would be unable to bring a claim itself. But this principle cannot explain the outcome in *Darlington* where there was no change in ownership of the property and there was no prohibition on assignment. The reasoning

in *Darlington* is very much open to question. There are two issues which need to be separated out here. The first is: who has suffered the loss? And the second is: how should that loss be measured? A respectable argument can be made out that the loss is truly that of the claimant in that he did not receive the bargain for which he had contracted with the builder (this is essentially the argument of Lord Griffiths in *Linden Gardens*, on which see McKendrick, 1999). If this is so, the damages should belong to the claimant and the court should seek to ascertain the loss which it has suffered. But Lord Browne-Wilkinson and the Court of Appeal in *Darlington* appeared to be of the view that the loss was truly that of the third party (and the Court of Appeal in *Darlington* even went so far as to hold that the contracting party held the damages on trust for the third party). The principle enunciated by Lord Browne Wilkinson can be confined to cases in which there is a change in ownership of the property (although why, as a matter of principle, should it be so confined?), but *Darlington* cannot be so limited and it appears to be on a collision course with *Woodar*.

This inconsistency with *Woodar* became all the more apparent when the Court of Appeal in *Alfred McAlpine Construction Ltd* v. *Panatown Ltd* (1998) 88 BLR 67 held that the ability of a claimant to recover damages in respect of a loss suffered by a third party was in fact dependent upon the intention of the parties at the time of entry into the contract. If it was their intention that the claimant recover substantial damages on behalf of the third party, then effect should be given to that intention and the claimant should be accountable to the third party for the damages which he receives. One difficulty with this view is that the rule that a contracting party can only recover in respect of his own loss and not the loss of a third party appears to be a rule of law and not one based on the intention of the parties. It is probably a direct offshoot both of the principle that damages are awarded to compensate a claimant for the loss which he has suffered and of the privity rule in that it prevents the third party obtaining indirectly what he cannot obtain directly. That said, is the rule mandatory or can the parties contract out of it? If A and B enter into a contract and they agree that any breach by A will have a detrimental effect on C and that B should be entitled to sue and recover damages on behalf of C, why should the law refuse to give effect to that agreement? When privity was operated strictly by the courts, they may well have been reluctant to accede to an argument which effectively outflanked privity and the House of Lords in *Woodar* appeared to be of the view that the rule could not be contracted out of in this way. But now that privity is generally seen to be a doctrine which is both commercially

inconvenient and unjust, there seems no reason not to give effect to the agreement which A and B have voluntarily concluded. If A has agreed to pay damages to B on behalf of C, effect should be given to the agreement. If it is the case that the parties can contract out of the rule that a contracting party cannot sue and recover damages on behalf of a third party, how likely it is that the contracting parties will have such an intention and, further, be able to persuade a court that such was their intention? Where the parties are commercial parties who have been legally advised, such an intention may be discernible. But even in commercial contracts the creation of a direct contractual relationship between the third party and one of the contracting parties or a clause assigning to the third party the rights of one of the contracting parties (as was the case in *Darlington*) may make it difficult to persuade a court that the intention of the parties was that one contracting party should be entitled to sue and recover damages on behalf of the third party. In such a case it can be argued that the right of the third party is its right as assignee and its direct right of action; it is not a right to have a contracting party sue and recover damages on its behalf (although in *Darlington* the promisee was effectively allowed to recover in respect of the third party's loss, notwithstanding the assignment clause).

Thirdly, B could seek an order of specific performance against A (that is an order of the court that the promisor carry out his promise). This was of course what happened in *Beswick* v. *Beswick* (7.2 above). But now that in a case such as *Beswick* C is likely to have an action for damages under the 1999 Act, it may be harder for the promisee to demonstrate that damages would not be an adequate remedy and, if damages are not inadequate then specific performance may not be ordered (see further 21.9). This being the case, one effect of the 1999 Act may be to diminish the likelihood of a promisee obtaining a specific performance order (although it could be argued that such a conclusion is, in fact, contrary to the clear words of section 4). But, even if B is entitled to specific performance, it should be noted that there does not appear to be any procedure by which C can compel B to sue A, so that B could refuse to sue A and thereby leave C without a remedy. If the promise which B seeks to enforce is a negative one then B can, in an appropriate case, claim an injunction to restrain the threatened breach of contract by A (see further 21.10).

Finally, if the promise made by A to B is a promise not to sue C, and A, nevertheless in breach of contract with B, commences an action against C, B can ask the court, in its discretion, to stay the proceedings against C (*Snelling* v. *John G Snelling* [1973] QB 87, but contrast *Gore* v. *Van Der Lann* [1967] 2 QB 31).

7.15 Collateral Contracts

Turning now to the pre-1999 exceptions to the doctrine of privity, one exception which was employed on a number of occasions by the courts was the device of finding a collateral contract between the promisor and the third party. The mechanism now appears rather artificial and its practical significance is likely to reduce considerably in the light of the enactment of the 1999 Act. An example of the device in practice is provided by the case of *Shanklin Pier Ltd* v. *Detel Products Ltd* [1951] 2 KB 854. Contractors employed by the claimants to paint the claimants' pier were instructed by the claimants to use paint manufactured by the defendants. The contract to purchase the paint was actually made between the contractors and the defendants but a representation was made by the defendants to the claimants that the paint would last for seven years. The paint only lasted three months. It was held that the claimants were entitled to bring an action for breach of contract against the defendants on the ground that there was a collateral contract between them to the effect that the paint would last for seven years, the consideration for which was the instruction given by the claimants to their contractors to order the paint from the defendants.

The collateral contract device has also been usefully employed in cases of hire-purchase. In many cases consumers are unaware of the exact legal technicalities of a hire-purchase agreement. These technicalities are that the dealer will generally sell the goods to the finance house who in turn will hire the goods to the consumer on hire-purchase terms. Thus the contracts are between the dealer and the finance house and between the finance house and the consumer; there is no contract between the dealer and the consumer (and indeed this is likely to remain the position under the 1999 Act so that the consumer will not generally have a right of action against the dealer under the 1999 Act). But in *Andrews* v. *Hopkinson* [1957] 1 QB 229, it was held that the dealer's false warranty as to the roadworthiness of a car gave rise to a collateral contract between the dealer and the consumer, thereby enabling the consumer to bring an action against the dealer for breach of contract.

The limitation of the collateral contract device, however, is that the court must be able to find evidence upon which to imply such a contract and that consideration must be found to support the collateral contract. The latter requirement can give rise to some difficulty, as is illustrated by the case of *Charnock* v. *Liverpool Corporation* [1968] 1 WLR 1498. The claimant's car was damaged in an accident and he left the car to be repaired by the defendants' garage, the defendants having promised to do the repairs reasonably quickly. The car was repaired under a contract

between the claimant's insurance company and the defendants. But it was held that the claimant could nevertheless bring an action in respect of the defendants' failure to carry out the repair reasonably quickly. It was held that there was consideration to support the collateral contract because, although there was no detriment to the claimant, the defendants were benefited by virtue of the opportunity given to them to enter into a contract with the insurance company for the repair of the car (note that Treitel, 1976, treats this as a case of 'invented' consideration and Atiyah, 1986c, p.223 argues that this is a case of 'fictitious consideration' because the 'real' consideration was supplied by the insurers and not by the claimant).

7.16 Agency

It would cause great commercial hardship if a businessman who appointed an agent to enter into a contract on his behalf was prevented by the doctrine of privity from suing upon that contract himself. So the doctrine of agency exists to give the businessman such a right of action. An agency relationship arises where one party, the agent, is authorised by another, the principal, to negotiate and to enter into contracts on behalf of the principal. Once an agency relationship is created, the agent is thereby authorised to commit the principal to contractual relationships with third parties. Agency is now a specialised area of law and we will not deal with it in this book, except to give a very brief account of the relationship between agency and privity (for fuller consideration of the doctrine of agency see Treitel, 1999, ch.17). When the agent discloses to the third party that he is acting as an agent of a principal and he concludes the contract within the scope of his authority, the general rule is that the contract is made between the principal and the third party and the agent cannot sue or be sued on the contract. Such a transaction is not generally regarded as an exception to the doctrine of privity because the function of the agent is to negotiate the contract on behalf of his principal and once he has done that he 'drops out of the picture', leaving his principal as the true party to the contract.

However there are certain aspects of the law of agency which appeared to flout the traditional doctrine of privity. One such aspect is the rule that a principal may, in certain limited circumstances, sue upon the contract even though the agent has not disclosed to the third party that he is acting as an agent for the principal (see Treitel, 1999, pp.673–6). In these situations the third party can find himself in a contractual relationship with a person of whose existence he was blissfully unaware at the time that he

entered into the contract. The ability of a principal to ratify the unauthorised act of his agent is also said to be an exception to the doctrine of privity (see Treitel, 1999, pp.668–72). In should be noted that the 1999 Act will not confer rights on the principal in either of these two cases because he has not been 'expressly identified' in the contract itself, so that both cases will continue to be governed by the common law rules.

Another case which does not come within the 1999 Act and which is extremely difficult to reconcile with the traditional doctrine of privity is the controversial case of *Watteau* v. *Fenwick* [1893] 1 QB 346. In this case the agent, who was the manager of a public house, was prohibited by his principal (the owner of the public house) from purchasing cigars on credit for the purpose of the business. Despite this prohibition, the agent purchased cigars in his own name on credit from the claimants, who were unaware of the existence of the principal and therefore unaware of the prohibition placed upon the agent. It was held that the principal was nevertheless bound by the contract and was liable to the claimants. The rationale of the case appears to be that the principal, by employing the agent as his manager, was regarded as having given the agent the authority which was usually given to managers of a public house, which included the authority to purchase cigars. Further, the agreement between the principal and agent, under which the agent's authority was restricted, was not binding on a third party who was unaware of that restriction. So the principal was bound. But *Watteau* demonstrates that agency and privity were always rather strange bedfellows. It was highly anomalous that the existence of an agency relationship could enable a claimant to sue a defendant who expressly disavowed any intention to benefit the claimant third party, whereas privity, in cases such as *Tweddle* v. *Atkinson* (see 7.1), prevented a claimant third party from suing a defendant who had expressly declared an intention to benefit the claimant. The 1999 Act has largely removed this anomaly but it has not removed the need to rely on the rules of agency law because the latter rules confer rights of action on third parties (whether the third party be the principal or the person with whom the agent has dealt) in a wider range of circumstances than does the Act.

7.17 The Trust Concept

We have already noted that if A and B enter into a contract under which, in return for some act to be performed by B, A agrees to pay £50 to C, a failure by A to pay the £50 to C will constitute a breach of contract between A and B (see 7.14). There is no doubt that, in such a case, B has

a right to sue A for breach of contract. A further question which may be asked is: in what capacity does B hold his contractual right to sue A for breach of contract? The answer to this question would appear to be an obvious one, namely that he holds it in his own capacity and for his own benefit. An alternative answer, however, is that he holds his contractual right to sue A on trust for the benefit of C. A trust is an obligation, enforceable in equity, by which a person, the trustee, holds property on behalf of another, the beneficiary. In this case the subject matter of the trust is the right of B to sue A for breach of contract and that right of action can be held by B on trust for C (it is often referred to by lawyers as a 'trust of the promise'). The property right created by the trust enables the beneficiary, C, to enforce the trust in his own name, although he was not a party to the original agreement.

Such an analysis was adopted by the House of Lords in *Les Affréteurs Réunis* v. *Walford* [1919] AC 801. A term of a charterparty between a shipowner and a charterer stated that the shipowner would pay a commission to the broker who had negotiated the contract but was not party to the contract. It was held that the broker was a beneficiary of the trust, the subject matter of the trust being the contractual right of action created by the promise of the shipowner to pay the broker, and that, as the beneficiary, he could enforce the promise. On the facts of *Walford*, the finding of an intention to create a trust of the promise appeared to be no more than a fiction designed to do justice on the facts of the case by enabling the broker to sue the shipowner. The device may have been inelegant and artificial, but it effectively evaded the doctrine of privity. Indeed, Corbin argued (1930) that this was a device by which privity might be discarded in its entirety when a third party could show that he was the intended beneficiary of a promise, and greater use of the trust of a promise device was recently urged by Mason CJ and Wilson J in the High Court of Australia in *Trident General Insurance Co Ltd* v. *McNiece Bros Pty Ltd* (1988) 165 CLR 107.

However, since *Walford* was decided, the English courts have had a change of heart and the device is now practically defunct. The courts have undermined the device by insisting upon strict proof of an intention to create a trust of the promise (*Re Schebsman* [1944] Ch 83), instead of treating the requirement of intention as a fiction which simply enabled the court to invoke the doctrine. To establish the existence of a trust of the promise it must now be shown that the promisee intended the benefit of the contract to be enjoyed by the third party (*Vandepitte* v. *Preferred Accident Corp. of New York* [1933] AC 70) and the promise to benefit the third party must be intended to be irrevocable. In most cases it is unlikely that the contracting parties will intend their promise to be irrevocable

because they will then be deprived of the ability to change their mind. By a rigorous insistence upon compliance with these requirements, the courts have rendered this device practically insignificant.

It is interesting to compare the relative advantages and disadvantages of the trust device over the right of action created by the 1999 Act. The disadvantage of the trust, from the perspective of the contracting parties, is that it confers an irrevocable right on the beneficiary, whereas the right created by the Act can be varied or rescinded by them (within the limits set out above at 7.9). In this respect the Act offers greater flexibility to the contracting parties than the trust. On the other hand, the third party may prefer to be a beneficiary of a trust on the ground that his rights are irrevocable and are not subject to defences or set-offs which would be available to the promisor in a claim brought against him by the promisee. Where a beneficiary wishes to obtain such an irrevocable right it may be that the trust device will retain some practical utility.

7.18 The Role of the Law of Tort

Instead of bringing a contractual action, a third party may elect to bring an action against the promisor in the tort of negligence. Two cases illustrate this process (and in both of them it is relatively clear that the claimant would not have a claim against the defendant under the 1999 Act). The first is the infamous decision of the House of Lords in *Junior Books Ltd* v. *The Veitchi Co Ltd* [1983] 1 AC 520. The defendants were contractors who specialised in laying floors. The claimants had entered into a contract with the main contractors for the construction of a factory but they nominated the defendants to lay the factory floor. So the main contractors sub-contracted the laying of the floor to the defendants. The claimants argued that the floor had been laid defectively by the defendants and claimed damages from them, including the cost of replacing the factory floor. Thus they were seeking to be put in the position in which they would have been if the sub-contractors had laid the floor in accordance with their contract with the main contractors. There was no contract between the defendants and the claimants. The contracts were between the defendants and the main contractors and between the main contractors and the claimants. Nevertheless, the House of Lords held that the claimants were entitled to succeed in an action in tort against the defendants because of the extremely close relationship between the parties. The crucial elements in this relationship appear to be, firstly, the fact that the claimants relied upon the skill of the defendants in laying the floor, as indicated by the fact that they nominated the defendants to

do the work and, secondly, the fact that the defendants assumed a responsibility towards the claimants. It is not easy to see in what respects the defendants did assume a responsibility towards the claimants because the contractual relationships between the parties were structured in such a way that the defendants did not assume any direct responsibility towards the claimants (and, indeed such a contract structure would appear to exclude the possibility of any reliance on the 1999 Act, see 7.6). In later cases courts have held that the assumption of a contractual responsibility by a sub-contractor to a main contractor makes it very difficult to establish that the sub-contractor has assumed an additional obligation in tort to the claimant (see *Simaan General Contracting Co* v. *Pilkington Glass Ltd (No. 2)* [1988] QB 758).

In any event *Junior Books* is a highly anomalous case. The damaged floor was not the cause of personal injury, nor did it damage any other property of the claimants. It was simply the case that the floor was less valuable than it would have been had the contracts been performed according to their terms. To allow the claimants to recover in respect of such damage in a tort action conflicts with the general rule that, where the defect simply renders the product less valuable, the claimant's remedy, if any, lies in contract (see *D & F Estates Ltd* v. *Church Commissioners for England and Wales* [1989] AC 177).

Our second case is the decision of the House of Lords in *White* v. *Jones* [1995] 2 AC 207. The defendant solicitors were negligent in the preparation of a will. Their negligence took the form of an unreasonable delay in drawing up the will. The testator had previously fallen out with the claimants (his daughters) and had cut them out of his will. He was later reconciled with them and so he instructed the defendants to prepare a new will which was to include bequests of £9000 to each of the claimants. Unfortunately, the testator died before the new will could be executed. The claimants brought a claim in tort against the defendants and, by a bare majority, the House of Lords upheld their claim and awarded them £9000 each in damages. The difficulty which the claimants encountered lay in defining the basis and the scope of the duty of care which the defendants owed to them. This issue provoked sharply divergent responses from their Lordships and it is not necessary to rehearse these arguments here. We shall only deal with the case in so far as it relates to the doctrine of privity. Lord Keith dissented on the basis that to give the claimants a claim 'would in substance . . . be to give them the benefit of a contract to which they were not parties'. The tort of negligence could not, in his view, be used to subvert the doctrine of privity in this way. Lord Goff, in the majority, also discussed the doctrine of privity. He noted that at that time our law of contract was 'widely perceived to be . . . stunted through a

failure to recognise a *jus quaesitum tertio*' (third party right). He described how the German courts could have recourse to a doctrine called 'Vertrag mit Schutzwirkung für Dritte' (contract with protective effect for third parties) to deal with a case such as the present. But he concluded that the doctrines of consideration and privity presented serious obstacles to an English court reaching the same conclusion. In his view, *White* v. *Jones* was not a 'suitable occasion for reconsideration of doctrines so fundamental' as privity and consideration. Privity of course has since been reconsidered by the Law Commission but the 1999 Act will not extend to the *White* v. *Jones* type case for the simple reason that the promise of the solicitor to exercise reasonable care in preparing a will was not a promise to confer a benefit on a third party within the meaning of s.1(1)(b) of the Act. So it is still the case that a remedy on the facts of the case can only be found through the law of tort.

In the end, Lord Goff was driven by a concern for 'practical justice' to allow the claim to succeed in tort and he could see 'no unacceptable circumvention of established principles of the law of contract' in permitting the claim to succeed on this basis. While the result in *White* v. *Jones* may be acceptable, the reasoning of the court suggests that there is something amiss in the foundations of our law of obligations. All three judges in the majority gave different reasons for their conclusions (and, indeed, the fact that the case did not fit within existing principles and that there was nothing 'sufficiently special' about the position of the defendant solicitors was the basis of the dissenting speech of Lord Mustill). For the majority, Lord Goff found for the claimant for reasons of 'practical justice', Lord Browne-Wilkinson thought the claim was a species of *Hedley Byrne* v. *Heller* [1964] AC 465 liability (see 13.6), while Lord Nolan allowed the claim to succeed because, on the facts of the case, there was an extremely close relationship between the parties. While it is difficult to ascertain the ratio of *White* v. *Jones*, it is clear that the principle which it establishes is of limited application (Lord Goff, for example, confined it to 'testamentary dispositions' so that it has no application *inter vivos*). However limited the principle may be, it should be noted that the effect of granting the claimants a remedy in tort was to put them in the position which they would have been in had the contract between the defendant and the testator been performed by the defendant according to its terms, notwithstanding the fact that the claimants were neither privy to that agreement, nor had they provided any consideration.

The tort action therefore provides only a limited exception to the doctrine of privity. The most obvious limitation is that the promisor must have been negligent; it would not avail the claimant in *Tweddle* v. *Atkinson*, where the defendant was not negligent but simply refused to carry out

his promise. The second limitation is that there must be an extremely close relationship between the claimant and the defendant in order to justify the imposition of a duty of care upon the defendant.

7.19 Assignment

We have already seen that, if A and B enter into a contract under which, in return for some act to be performed by B, A agrees to pay £50 to C, C was, prior to the 1999 Act, prevented by the doctrine of privity from suing to enforce the right to payment. However, irrespective of the 1999 Act, if B validly assigns to C his contractual rights against A, then, provided the assignment has been validly made, C may sue A for the money.

Although at common law it was not possible to assign rights, rights can be assigned in equity or under s.136(1) of the Law of Property Act 1925 (for the detailed requirements of each method of assignment see Treitel, 1999, ch.16). The principal disadvantage of assignment from the perspective of the assignee is that any defence which would have succeeded against the assignor will also succeed against the assignee; the assignee takes 'subject to equities'.

The relationship between assignment and the 1999 Act has already been mentioned (see 7.6). Essentially the question which the courts will have to answer is whether the fact that the third party has taken an assignment of the promisee's rights means that third party does not acquire a third party right under the Act but only such rights as he acquires under the assignment. The answer to this question would appear to depend ultimately on the intention of the parties.

7.20 Negotiable Instruments

A negotiable instrument is a type of written promise under which the right to enforce that promise may be transferred either by delivery or by delivery and indorsement of the person to whom the debt was payable. The principal categories of negotiable instruments are bills of exchange, cheques and promissory notes. For example, a cheque is a written order by a person ('the drawer') to his bank ('the drawee') to pay on demand a stated sum of money to a named person. Now that person can transfer the cheque to another party and that third party can demand payment from the bank, even though he was not privy to any contract with the bank and has not himself furnished the bank with any consideration. The advantage of a negotiable instrument as compared with an assignment is

that a bona fide holder for value who is without notice of any defect in the title of the transferor obtains a good title and is able to demand payment and therefore does not take 'subject to equities'. Negotiable instruments are expressly excluded from the scope of the 1999 Act (s.6(1)).

7.21 Statutory Exceptions

There are a number of statutory exceptions to the doctrine of privity which pre-date the 1999 Act. These exceptions have no coherent rationale but are largely responses to the exigencies of the moment and they are expressly preserved by the 1999 Act. The importance of these statutory exceptions should not be underestimated. One commentator (Flannigan, 1987) has remarked that

> 'but for the statutory exceptions, the doctrine of privity would undoubtedly have been abolished long ago upon it having become widely appreciated that, for example, third parties had no right to the proceeds of life insurance policies taken out for their benefit.'

Thus section 11 of the Married Women's Property Act 1882 states that where a man has insured his life for the benefit of his wife and children, the policy shall create a trust in favour of the objects therein named. Third parties have been allowed, in certain circumstances, to sue on fire or marine insurance policies (Marine Insurance Act 1906 s.14(2)) and an injured third party may recover compensation from the insured's insurance company once he has obtained judgment against the insured (Road Traffic Act 1972 s.148(4)). Section 56 of the Law of Property Act 1925 provides that

> 'a person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.'

Finally, under section 2 of the Carriage of Goods by Sea Act 1992, a person who becomes the lawful holder of a bill of lading shall, by virtue of becoming the holder of the bill, have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract from the outset (similar principles apply to sea waybills and to ships' delivery orders) (see also ss.6(5)–(7) of the 1999 Act).

7.22 A Further Common Law Exception?

Finally, is it still possible for the judiciary to create a further common law exception to the doctrine of privity? Given the enactment of the 1999 Act, the practical need for the creation of a further exception has diminished substantially but the Law Commission were careful to state in their report that the Act is not designed to freeze the common law in its pre-Act position. One area in which such judicial development may yet take place is in *The Eurymedon* type case (see 7.2). As we have noted, Lord Goff in *The Mahkutai* recognised that the development of the law may not yet be complete and that the courts may develop a 'fully-fledged exception to the doctrine of privity of contract' in these cases. This step was in fact taken by the Supreme Court of Canada in the seminal case of *London Drugs Ltd* v. *Kuenhe & Nagel International Ltd* (1992) 97 DLR (4th) 261, where the majority of the court chose not to adopt a *Eurymedon* type analysis but instead held that employees were entitled to take the benefit of a contractual limitation clause contained in a contract between their employer and the claimants if (i) the limitation of liability clause either expressly or impliedly extended its benefit to the employees seeking to rely on it and, (ii) the employees were acting in the course of their employment and had been performing the very services provided for in the contract at the time at which the loss was suffered. There is much to be said for this approach and the House of Lords is not precluded from adopting it by virtue of the enactment of the 1999 Act.

7.23 Interference with Contractual Rights

Finally it is necessary to return to a point made at the beginning of this chapter in relation to the general rule that a third party cannot be subjected to a burden by a contract to which he is not a party (a matter not regulated by the 1999 Act). Notwithstanding this rule, a contract between two parties may in fact impose certain obligations upon a third party. The first such obligation is that a third party must not seek to persuade one contracting party to break his contract with the other. Thus it is a tort for a third party, without lawful justification, to interfere intentionally or recklessly with a contract between A and B, either by persuading A to break his contract with B or by preventing A from performing his contract with B by the use of some direct or indirect unlawful means. The case of *Lumley* v. *Gye* (1853) 2 El & Bl 216, provides a useful illustration of the operation of this tort. The claimant was a theatre owner who entered into a contract with a famous opera singer, Miss Wagner, under which she was

to sing only at his theatre for a period of time. The defendant, who was the owner of a rival theatre, procured Miss Wagner to break her contract with the claimant by promising to pay her more than she was receiving from the claimant. When Miss Wagner, in breach of contract, refused to continue to perform at the claimant's theatre, the claimant brought an action against the defendant alleging that the defendant had induced Miss Wagner to break her contract with him and that this had caused him loss. It was held that the defendant had indeed committed a tort and the claimant was therefore entitled to claim damages from the defendant to compensate him for his loss.

It has also been argued that a third party who acquires property in the knowledge that that property is affected by a contract between two other parties is bound by the terms of that contract and may be restrained from acting inconsistently with the terms of the contract. This indeed occurred in the case of *Tulk* v. *Moxhay* (1848) 2 Ph 774. The claimant sold land subject to a restrictive covenant that the land must not be built upon but must be preserved in its existing condition. After a number of conveyances the land was eventually conveyed to the defendant, who had notice of the covenant but nevertheless sought to build on the land. It was held that the claimant was entitled to an injunction to restrain the proposed building. The defendant was therefore bound by an agreement to which he was not a party simply because he had notice of the covenant. The question which arises is whether this principle applies only within the rather rarefied atmosphere of land law and restrictive covenants or whether it is of general application. The answer is that it is a matter of land law and, even within the confines of land law, the scope of the principle has been narrowed; for example, the claimant must now show that he has retained ownership of other land in the immediate vicinity which is capable of being benefited by the covenant.

However the prospect of extending the scope of *Tulk* v. *Moxhay* beyond the province of restrictive covenants was held out by the Privy Council in *Lord Strathcona Steamship Co* v. *Dominion Coal Co Ltd* [1926] AC 108. The owner of a ship chartered her to the claimants for a number of summer seasons. The owner sold the ship during the winter season. After a series of sales the ship was bought by the defendants who, although aware of the charterparty at the date of purchase, nevertheless refused to deliver the ship to the claimants for the summer season. The Privy Council held that the defendants were bound by the terms of the charterparty and granted the claimants an injunction to restrain the defendants from using the ship in any way inconsistent with the terms of the charterparty.

The result of the case does not seem to be entirely unfair. A person who buys property subject to the rights of third parties will generally pay

a lower price for the property and, if he could then take advantage of the rules of privity to disregard those rights, he would thereby free the property and be able to sell it at a considerable profit. Nevertheless, it is difficult to reconcile *Strathcona* with the rule that a contract of hire only creates personal and not proprietary rights and that therefore the purchaser should be free to ignore the contract of hire. *Strathcona* is therefore an extremely controversial case (see Gardner, 1982 and Tettenborn, 1982) and, indeed, in the case of *Port Line Ltd* v. *Ben Line Steamers Ltd* [1958] 2 QB 146, Diplock J said that he thought the case was wrongly decided and refused to follow it (contrast *Swiss Bank Corporation* v. *Lloyd's Bank Ltd* [1979] Ch 548 where Browne-Wilkinson J followed *Strathcona* on the ground that it was the equitable counterpart of the tort of knowing interference with contractual rights). The present standing of *Strathcona* is therefore unclear. In *Law Debenture Trust Corporation* v. *Ural Caspian Oil Corporation Ltd* [1993] 1 WLR 138, 144, Hoffmann J accepted that *Strathcona* was still good law but stated that the real difficulty was that 'neither the *Strathcona* case nor the *Swiss Bank* case make it entirely clear when the principle applies and when it does not'. Only two things are clear. The first is that *Strathcona* 'does not provide a panacea for outflanking the doctrine of privity of contract' (*Law Debenture Trust Corporation* v. *Ural Caspian Oil Corporation Ltd* (above)). The second is that it can only apply where the purchaser has actual knowledge of the contract at the time of the purchase and the only remedy available is an injunction restraining the purchaser from acting inconsistently with the contract. The claimant cannot obtain a specific performance order requiring the purchaser to carry out the terms of the contract (*Port Line Ltd* v. *Ben Line Steamers Ltd* (above); *Law Debenture Trust Corporation* v. *Ural Caspian Oil Corporation Ltd* (above)).

7.24 Conclusion

The 1999 Act will undoubtedly prove to be a useful tool where two contracting parties wish to confer an enforceable right of action upon a third party. It is now considerably easier to do so because a simple clause can be inserted into the contract giving the third party such a right of action. Where the contracting parties make their intention clear in relation to both the *existence* and the *scope* of the third party right, substantial difficulties should be few. On the other hand, where the parties fail to make their intention clear, difficulties will inevitably arise in deciding whether or not the parties had an intention to confer on the third party a right of action. In many respects freedom of contract is one of the driving forces

underneath the Act because of the degree of choice which is given to the contracting parties. Initially the Act will give rise to some uncertainty, particularly in relation to the scope of s.1(1)(b), but parties who make their intention clear should have nothing to fear from the Act. The Act does make an improvement to the law in that it reforms a doctrine which many parties regarded as unjust and commercially inconvenient, and the initial uncertainty should be more than outweighed by the longer-term benefits which the Act will produce for commercial parties.

Summary

1 The doctrine of privity consists of two distinct rules.
2 The first is that a third party cannot be subjected to a burden by a contract to which he is not a party.
3 The second was that a person who was not a party to a contract could not claim the benefit of it, even though the contract was entered into with the object of benefiting that third party. The latter rule has been substantially modified by the Contracts (Rights of Third Parties) Act 1999.
4 The 1999 Act gives a third party a right to enforce a term of the contract where the contract expressly provides he may and where the contract purports to confer a benefit on the third party. In the latter case the third party right is not triggered where, on a proper construction of the contract, it appears that the contracting parties did not intend the term to be enforceable by the third party. In both cases the third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract was entered into. The third party need not have provided consideration for his right of action.
5 The contracting parties can rescind or vary the third party right unless the third party has communicated his assent to the term to the promisor or where the promisor is aware that the third party has relied on the term or the promisor could reasonably be expected to have foreseen that the third party would rely and he has so relied.
6 Unless otherwise agreed, the right which the third party acquires is essentially the right to enforce the term subject to the defences which would have been available to the contracting party had he been sued on the contract by the original contracting party.
7 Where the promisee has already recovered damages in respect of the third party's loss, the third party's claim may be reduced to take account of the sum which has been recovered by the promisee.
8 Where, in breach of contract with a promisee, a promisor has failed to confer a benefit on a third party, the promisee may bring an action for breach of contract against the promisor. The promisee may be able to obtain damages, specific performance or a stay of proceedings but the general rule is that a promisee cannot recover damages on behalf of a third party.
9 There are a number of other situations in which English law does recognise the existence of enforceable third party rights and these have been preserved by the 1999 Act.
10 In limited circumstances a court may be prepared to find the existence of a con-

tract between the promisor and the third party which is collateral to the contract between the promisor and the promisee.

11 An agent may bring into existence a contract between his principal and a third party. An agency relationship arises where one party, the agent, is authorised by another, the principal, to negotiate and to enter into contracts on behalf of the principal.

12 Where an intention to create a trust can be shown to exist, a promisee may hold his right to sue the promisor on trust for the third party beneficiary, who can therefore sue to enforce the promise.

13 In limited circumstances a third party may be able to bring an action in the tort of negligence against a negligent promisor.

14 There are a significant number of statutory exceptions to the doctrine of privity.

15 Provided that the relevant formalities are complied with, a promisee may assign his right to sue the promisor to a third party.

16 A third party who seeks to procure a contracting party to break his contract without lawful justification commits a tort.

Exercises

1 Explain the relationship between the doctrine of privity and the rule that consideration must move from the promisee.

2 Rachel and Katie go out for a meal at Freddy's restaurant. Katie pays for the meal. Rachel's meal is inedible. What remedies are available to Katie? If Katie refuses to sue, could Rachel sue? (See *Lockett* v. *AM Charles Ltd* [1938] 4 All ER 170.)

3 Critically evaluate the Contracts (Rights of Third Parties) Act 1999. How would the following cases be decided under the Act:
   (a) *Beswick* v. *Beswick* [1968] AC 58
   (b) *Jackson* v. *Horizon Holidays* [1975] 1 WLR 1468
   (c) *The Eurymedon* [1975] AC 154
   (d) *White* v. *Jones* [1995] 2 AC 207?

4 What justification is there for giving a third party a right to sue to enforce a term of the contract when he has provided no consideration for that right?

5 When can the contracting parties deprive the third party of his right to enforce the term of the contract?