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**Privity and
Exceptions to Privity
in Scots Private Law:
A New Taxonomy**



Lorna Jane MacFarlane

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Abstract

The doctrine of privity of contract broadly provides that a contract should neither benefit nor burden parties external to the contract. This thesis can be divided into two parts: the first on privity itself, and the second on its exceptions.

The first part contains a historical analysis of the development of privity, leading to the provision of a definition of privity in modern Scots law. It also examines whether privity is compatible with the leading theories of Scots contract law (will theory, promissory theory, and assumption theory) and considers the relationship between privity and third party rights. The interaction between privity and delict has proved controversial in various situations involving third-party loss. Accordingly, this part analyses the intersection between privity and delictual liability. The first part also identifies and assesses the policy considerations that have justified statutory exceptions to privity. It concludes with discussion on whether privity does and should continue to exist in Scots law.

The second part provides a taxonomy of concepts which operate where:

1. There is an extra-contractual party
2. Which has suffered loss caused by non-performance or defective performance of a contract
3. And it lacks a contractual right to recover its losses
4. And the concept provides a means of recovery for the extra-contractual party, and/ or a means by which the contracting party which did not cause the loss can recover on behalf of the extra-contractual party.

The four relevant concepts are: contracts for the benefit of another; transferred loss; ad hoc agency; and undisclosed agency. The thesis analyses each concept in turn, examining its relationship with privity, contract theory, and delictual liability. Policy considerations supporting each exception are identified and assessed. The conclusions of the thesis address whether these concepts can be recognised as justifiable exceptions to privity. The question of whether external network liability should be recognised as a new exception to privity is also considered.

Whilst the thesis focuses on Scots law, comparative reference is made throughout to English law. This is because the development of contracts for the benefit of another, transferred loss, and undisclosed agency is closely intertwined in the two jurisdictions.

Lay Summary

This thesis examines a legal rule, privity of contract, and exceptions to the rule. Privity of contract means that a contract is only between the contracting parties. In other words, parties external to the contract cannot force the parties to fulfil their contract, and the parties to the contract cannot require an external party to perform under their contract.

In terms of the privity rule itself, the thesis provides historical research on the development of the rule in Scots law and considers both case law and academic works to offer a precise definition of the rule. There are a number of exceptions to the privity rule in legislation. The thesis examines these in order to identify the unifying policy justifications behind the exceptions, and consequently the reasons which justify deviation from the privity rule. The thesis also considers the relationship between the privity rule and the law of delict (the law that a person must exercise a duty of care to prevent harm to others).

The second half of the thesis examines four concepts which have been created by judges, rather than introduced in Scots law through legislation:

- Contracts for the benefit of another: A enters into a contract with B for the purpose of benefiting C. For example, A books a holiday for herself and C with package holiday provider B. A can recover damages from B for C's loss if the contract is not properly performed.
- Transferred loss: A contracts with B. B works on A's property (for example, B renovates A's house). A transfers the property to C. C then discovers a defect in B's work. A can recover damages for C's loss under his contract with B.
- Undisclosed agency: A engages B to act as her agent (i.e. for B to make contracts on A's behalf). B concludes a contract with C without disclosing that she is working for A, and C believes she has entered a contract directly with B. Once A's identity and existence is revealed, A and C can sue one another under the contract.
- *Ad hoc* agency: A has not employed B as his agent, but B is treated as A's agent for the purposes of a specific contract between B and C, to allow A to enforce the contract.

The thesis ascertains whether each concept is an exception to the privity rule, considers its compatibility with Scots law as a whole, and determines whether there are adequate policy justifications to support the existence of the concept.

The conclusions of the thesis address whether the privity rule and each concept should be recognised in Scots law. The thesis also considers when and how new exceptions to privity should be permitted.

Declaration

I, Lorna Jane MacFarlane, declare that this thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where states otherwise by reference or acknowledgement, the work presented is entirely my own.

Lorna Jane MacFarlane

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Chapter 1: Introduction

1.1. Overview of chapter 1

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

1.2. Key research questions

The two main aims of the thesis are to analyse and define the privity doctrine in Scots contract law, and to provide a taxonomy of concepts which operate where:

1. There is an extra-contractual party
2. Which has suffered loss caused by non-performance or defective performance of a contract
3. And it lacks a contractual right to recover its loss
4. And the concept provides a means of recovery for the extra-contractual party, and/ or a means by which the contracting party which did not cause the loss can recover on behalf of the extra-contractual party.

In defining privity, the thesis analyses historical and modern case law and commentary on the doctrine to discuss whether privity is compatible with Scots contract theory and the principles of freedom to contract and freedom of contract. The relationship between privity and delict has proved controversial in situations involving third party loss, and so the thesis also examines the relationship between these two areas of Scots law. The thesis addresses whether privity does and should exist, and identifies the policy reasons which justify the creation of exceptions to privity.

For the purposes of the taxonomy, the four relevant concepts are: contracts for the benefit of another, transferred loss, *ad hoc* agency, and undisclosed agency. The thesis also assesses whether network theory could and should

be recognised in Scots law, because network theory is a normative concept which meets the specifications outlined above.

Third party rights are not considered, because the third party has a contractual right (i.e. the third party right) to recover its loss. The thesis does not address exclusion clauses, which allow for protection from liability rather than a means by which to recover loss.¹ Issues of unjustified enrichment are also excluded from the work. The thesis addresses third party loss due to defective or non-performance of contracts, rather than situations in which the third party wishes to recover a gain made by a contracting party at its expense.² Additionally, the thesis considers claims made by or on behalf of parties external to contracts, and so it is not relevant to this work to consider whether a contracting party can make an unjustified enrichment claim against an external party.

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

The key research questions are therefore:

1. What does 'privity of contract' mean in Scots law?
2. Does and should Scots law recognise the privity doctrine?
3. How does the privity doctrine interact with delictual liability?
4. Which policy reasons justify the creation of exceptions to the privity doctrine?

¹ Discussion on exemption clauses and privity is, however, found in: R Merkin, "Third Party Immunity granted under Contract" in R Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (LLP, London/ Hong Kong, 2000) 67; JLR Davis, "Privity and Exclusion Clauses" in P Kincaid (ed), *Privity: Private justice of public regulation* (Ashgate, Dartmouth, 2001) 284.

² For an overview of the law of unjustified enrichment in Scots law, see NR Whitty and D Visser, "Unjustified Enrichment" in K Reid, R Zimmermann and D Visser (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford University Press, Oxford, 2004) 400 at 404-406.

5. Are contracts for the benefit of another, transferred loss, *ad hoc* agency, and undisclosed agency:
 - a. Compatible with the privity doctrine;
 - b. Compatible with Scots contract theory;
 - c. Classifiable as a form of delictual liability; and
 - d. Justifiable in terms of policy considerations supporting each concept?
6. Would Scots law's doctrinal recognition of network theory be:
 - a. Compatible with the privity doctrine;
 - b. Compatible with Scots contract theory;
 - c. Classifiable as a form of delictual liability; and
 - d. Justifiable in terms of policy considerations?

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

1.3. Justification for the topic of the thesis

Walker comments, in respect of contract law generally, that:

“Unfortunately it is increasingly the practice of unplanned and unconsidered legislation to make particular rules for particular kinds of contract or contracts in particular circumstances, and accordingly to multiply the number of specialties and of exceptions to general principles and rules of contract.”³

This observation can certainly be applied to the state of the law on privity and its exceptions. Scots law recognises a number of exceptions to privity,⁴ however, the wide range of situations in which privity is bypassed leaves the privity doctrine and its exceptions in a state of confusion. The danger is that

³ DM Walker, *The law of contracts and related obligations in Scotland* (T & T Clark, London, 3rd edn, 1995) 3.4.

⁴ Statutory exceptions are discussed in subsection 3.2.3. and section 5.2.

privity is hollowed out by its exceptions to the extent that it eventually collapses. Thus far, no attempts have been made in Scots law to synthesise the justifications for exceptions to privity. Indeed, as discussed in chapter 2,⁵ there is a lack of consensus in Scots law as to whether the privity doctrine exists at all. The question thus arises as to whether Scots law recognises privity, and, if so, in which situations exceptions are and should be applied. The thesis provides doctrinal clarity on these issues, offering conclusions on the existence of the privity doctrine, the four concepts identified above, and policy considerations which justify new exceptions to privity.

The thesis is therefore of practical and doctrinal importance, because it addresses the current confusion and lack of coherence in the law. The following subsections explain why doctrinal clarity would be beneficial to both contracting parties and third parties.

1.3.1. The protection of contracting parties

It is crucial that contracting parties can ascertain the existence and extent of their liabilities towards extra-contractual parties. Trebilcock notes that a strict privity doctrine completely excludes the possibility for third parties to claim legal rights under contracts,⁶ but the “opposite extreme” of delimiting the class of third party beneficiaries too broadly “could deter socially beneficial contractual relationships.”⁷ In other words, if contracting parties are unable to anticipate the costs of liability to external parties, they will enter into fewer socially beneficial transactions.⁸ This is because liability towards third parties affects the financial value of any commercial project or transaction, as well as the cost of insurance required to cover potential third party claims.

Brownsword observes that modern commerce necessitates a business culture of confidence rather than fear, and “this is where the law of contract

⁵ See, in particular, subsection 2.3.1.

⁶ The benefits of recognition of third party rights and other exceptions to privity are discussed in section 5.2.

⁷ M Trebilcock, “The Doctrine of Privity of Contract” 2007 57(2) *University of Toronto Law Journal* 269 at 272. See also R Brownsword, *Contract law: themes for the twenty-first century* (Oxford University Press, Oxford, 2nd edn, 2006) 8.

⁸ Trebilcock (n 7) at 274.

makes a key contribution to the social and economic life of the nation.”⁹ The current lack of clarity on the status of privity in Scots law unnecessarily jeopardises parties’ confidence in Scots law transactions, whereas a clearly defined privity doctrine provides “peace of mind”¹⁰ for contracting parties to conduct business with an accurate understanding of their likely liabilities to third parties.

Whilst contracting parties should not be permitted to contract with no regard for the consequences of their dealings for third parties,¹¹ the law should provide sufficient clarity to protect them from unexpected liabilities.

Otherwise, parties will justifiably choose to contract outwith Scots law. The thesis balances the competing considerations of the ability of contracting parties to accurately predict the risks and liabilities involved in their transactions, and the protection of third parties from the impact of contractual activities. The key contribution of the thesis is a practically workable framework for the former to anticipate their liability towards the latter. It is therefore of practical relevance in ensuring that contracting parties can apply clear, well-defined legal doctrine to predict liability which will result from defective or non-performance of a contractual obligation.

1.3.2. The protection of third parties

Third parties are impacted by defective or non-performance of a contract in many circumstances. Wilson offers various examples:¹² in *Glanzer v Shepard*,¹³ public weighers, under contractual instruction from the seller, gave the buyer an incorrect certificate of weight, and the buyer overpaid in his contract with the seller; in *Junior Books v Veitchi*,¹⁴ a party was left with a defective floor due to the negligence of a sub-contractor with whom it was not

⁹ Brownsword, *Contract law* (n 7) 8.

¹⁰ J Morgan, *Great debates in contract law* (Palgrave Macmillan, Basingstoke, 2012) 275.

¹¹ This is discussed in sections 5.3 and 5.4.

¹² These cases are discussed in WA Wilson, “Mapping Economic Loss”, in DM Walker and AJ Gamble (eds), *Obligations in Context: Essays in Honour of David M Walker* (W Green, Edinburgh, 1990) 141 at 143.

¹³ *Glanzer v Shepard* (1922) 233 NY 236.

¹⁴ *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

in a direct contractual relationship; in *The Aliakmon*,¹⁵ a buyer sought to recover the price of goods lost due to defective performance of a contract of carriage between the carrier and seller. It is questionable in each case whether the external party can recover losses resulting from defective or non-performance of a contract, and, if they can recover, whether the liability owed is contractual or delictual. It is imperative that third parties can easily predict whether they can recover their losses. Precise laws on the situations in which privity can be bypassed would allow third parties to make an informed decision as to whether they should bring a claim against one of the contracting parties. The thesis provides clarity as to when and how third parties can recover loss caused by defective or non-performance of a contract. This will protect third parties by allowing them to apply practically workable law to recover their losses in such situations. The thesis also proposes reforms to various concepts which would allow them to better reflect a policy of protecting third parties.

1.3.3. Summary

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

Devlin observes that:

“Rigidity and a regular pattern are pleasing to the legal mind, and so as soon as he can the lawyer sets up a system of principles and rules from which he is reluctant to depart. He may start close to his subject, but because it is alive, illogical and contrary, it is likely to slip and slither out of the pattern he devises for it. *The danger in any branch of the law is that it ossifies.*”¹⁶

As discussed in chapter 2,¹⁷ the privity doctrine has not been subject to ‘maintenance’ in recent times. Its boundaries have not been discussed and

¹⁵ *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785.

¹⁶ P Devlin, *Samples of Law-making* (Oxford University Press, London, 1962) 30-31. Emphasis added.

¹⁷ See in particular subsections 2.3.1 and 2.4.2.1.

refined as new exceptions have been created, resulting in a lack of coherence in the law. It appears that the law has evolved to meet practical concerns without full consideration of its 'bedrock' of privity. Consequently, the law on privity has 'ossified', and the extensive range of exceptions means that the law is uncertain. Accordingly, the thesis's explanation of the role of privity in Scots law and identification of justifications for new exceptions contributes to the doctrinal clarity and coherence of Scots law. Ibbetson notes the "startling" lack of studies on the privity doctrine in historical English law.¹⁸ Whilst there are now a number of English texts on the doctrine,¹⁹ this work constitutes the first in-depth Scots study of privity and its exceptions. The thesis therefore offers a significant doctrinal contribution to Scots law.

1.4. Methodology

There are four methodological strands in the research: doctrinal, theoretical, comparative, and historical. These are explained in turn in the following subsections.

1.4.1. Doctrinal analysis

Chapters 2 and 3 constitute a doctrinal examination of the privity doctrine. This is the foundation of the thesis: it will not be possible to taxonomise exceptions to privity without a thorough understanding of the privity doctrine itself. Chapter 4 provides a doctrinal analysis of the relationship between contract and delict in situations involving third party loss, and Chapter 5 examines statutory exceptions to privity and their underlying policy justifications. Subsequent chapters on contracts for the benefit of another, transferred loss, *ad hoc* agency, and undisclosed agency gather and synthesise materials and commentary on each concept.

¹⁸ D Ibbetson, "English Law before 1900" in J Hallebeek and H Dondorp (eds), *Contracts for a Third-Party Beneficiary: A Historical and Comparative Perspective* (Martinus Nijhoff, Leiden, 2008) 93 at 93.

¹⁹ The leading examples are P Kincaid (ed), *Privity: Private justice of public regulation* (Ashgate, Dartmouth, 2001) and M Furmston and GJ Tolhurst, *Privity of Contract* (Oxford University Press, Oxford, 2015).

The key contribution of the thesis to doctrinal scholarship is therefore the provision of a full analysis of the privity doctrine in Scots contract law, including its relationship with delict, and an examination of concepts which allow for recovery of extra-contractual losses, both statutory and common law.

1.4.2. Theoretical analysis

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

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

1.4.3. Comparative law

Whilst the thesis focusses primarily on Scots law, it also contains extensive research and analysis on English law. Scots and English law share many statutory exceptions to privity,²⁰ and Scots law's acceptance of transferred loss²¹ was based on an English House of Lords case.²² The Scots and English laws on undisclosed agency and contracts for the benefit of another

²⁰ For further discussion, see JN Adams, D Beyleveld, and R Brownsword, "Privity of Contract – the Benefits and Burdens of Law Reform" 1997 60(2) *Modern Law Review* 238 at 243, and section 5.2.

²¹ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323.

²² *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

are also closely intertwined.²³ It is not, however, intended that the thesis constitutes a full and detailed comparison between Scots and English law. Rather, English law is consulted and distinguished from Scots law where necessary.

Chapter 10, on network theory, assesses the work of German academic Gunther Teubner, because Teubner's work is the source of this theory.²⁴ German law is not, however, consulted in other chapters.

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

1.4.4. Historical law

The thesis contains an in-depth historical analysis of the development of the privity doctrine in Scots law. As such, it constitutes the first work to fully consider the historical and current definition of privity in Scots contract law. To a lesser extent, the thesis also examines the historical development of undisclosed agency, in order to understand its doctrinal and policy background. Extensive historical research is not provided in respect of contracts for the benefit of another, transferred loss, and *ad hoc* agency, because these concepts are relatively novel.

1.5. The scope of 'loss'

The thesis does not seek to contribute to the doctrinal understanding of 'loss' in Scots contract law. Rather, it identifies and analyses the situations in which third parties are adversely affected by defective or non-performance of contractual obligations, and ascertains whether resulting losses ought to be

²³ See sections 9.2 and 6.2 respectively.

²⁴ G Teubner, *Networks as Connected Contracts* (Hart Publishing, Oxford, 2011). The text is a translation of the German original: G Teubner, *Netzwerk als Vertragsverbund. Virtuelle Unternehmen, Franchising, just-in-time in sozialwissenschaftlicher und juristischer Sicht* (Nomos, Baden-Baden, 2004).

recoverable. Defective or non-performance of a contract may result in third party loss in terms of personal injury, damage to property, or financial loss.²⁵

1.6. Overview of the thesis

Chapters 2 and 3 provide a historical analysis of the privity doctrine, argue that privity does exist in Scots law, and explain that privity is compatible with Scots contract theory and the principles of freedom to contract and freedom of contract. It is submitted in chapter 3 that recognition of third party rights alongside privity is logically sound.

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

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

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

- Contracts for the benefit of another should be recognised in Scots law as a passive form of third party rights. The concept is compatible with privity and Scots contract theory.

²⁵ See discussion in R Stevens, *Torts and Rights* (Oxford University Press, Oxford, 2007) ch 3.

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

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

Chapter 2: The Privity Doctrine

2.1. Overview of chapter 2

This chapter defines the privity doctrine. It provides a historical overview of the use of the word ‘privity’ in its ordinary and legal meanings and examines the historical development of the doctrine in Scots and English law. The chapter considers both purposes of the privity doctrine: protecting contracting parties from liability towards third parties and protecting third parties from being burdened under contracts to which they are not party.²⁶

2.2. Definitional issues

This section concerns the linguistic development of the term ‘privity’, both within and outwith the context of Scots private law.

2.2.1. Historical development of the word ‘privity’

In the English language, the word ‘privity’ was taken from the French *privauté*, meaning ‘privacy’.²⁷ Historically, when one took a walk in private, the journey was called a ‘privity-walk’.²⁸ Whilst there are no entries for ‘privity’ in the Scottish National Dictionary,²⁹ the Dictionary of the Older Scottish Tongue³⁰ yields several results, all with connotations of privacy, secrecy, intimacy, or seclusion. These definitions are reflected in the ordinary modern

²⁶ Both aspects of privity are outlined in: A Mason, “Privity – A Rule in Search of Decent Burial?” in P Kincaid (ed), *Privity: Private justice of public regulation* (Ashgate, Dartmouth, 2001) 88 at 88.

²⁷ VV Palmer, *The paths to privity: a history of third party beneficiary contracts at English law* (Austin & Winfield, San Francisco, 1992) 7, citing S Johnson, *Dictionary of the English Language* (J & P Knapton, London, 1755) “Privity”. See also J Baker, “Privity of Contract in the Common Law before 1680” in EJM Schrage (ed), *Ius quaesitum tertio* (Duncker & Humblot, Berlin, 2008) 35 at 35.

²⁸ “Privity: compounds” in the Oxford English Dictionary (online edition, available at: <http://www.oed.com/> and accessed 3 July 2018). For further discussion of the earlier usage of the term, see Palmer, *Paths to privity* (n 27) 6.

²⁹ The Scottish National Dictionary (online edition, available at: <http://www.dsl.ac.uk/results/privity> and accessed 3 July 2018).

³⁰ The Dictionary of the Older Scottish Tongue (online edition, available at: <http://www.dsl.ac.uk/results/privity> and accessed 3 July 2018).

meaning of the word, which indicates secret matters or plans, private thoughts, counsel, or business affairs, privacy, and close familiarity.³¹

2.2.2. Use of ‘privity’ in the context of contract law

The contractual meaning of ‘privity’ is relatively clear. The *Oxford English Dictionary* (‘OED’) offers the following definition of privity in its contractual sense:

“the limitation of a contractual relationship to the two parties making the contract, which prevents any action at law by an interested third party such as a beneficiary.”³²

This definition broadly aligns with legal commentary.³³ This aspect of the privity doctrine does not prevent a contract from conferring incidental benefits on third parties.³⁴ For example, a contract between a landowner and an architect for an inner-city housing development may have a positive effect on local homeowners, in terms of increased housing prices and a greater supply of amenities. Whilst privity does not prevent these incidental benefits, it prevents third parties from enforcing contracts which incidentally benefit them.

However, the *OED* definition only accounts for one aspect of the privity doctrine, namely, preventing third parties from claiming on or attempting to enforce a contract to which they are not party. The second aspect of privity prevents extra-contractual parties from being burdened by contractual

³¹ “Privity” in *Oxford English Dictionary* (n 28) (accessed 3 July 2018). See also the entries therein for “privity”.

³² “Privity” in *Oxford English Dictionary* (n 28) (accessed 3 July 2018).

³³ See, for example, P Kincaid, “Preface” in P Kincaid (ed), *Privity: Private justice of public regulation* (Ashgate, Dartmouth, 2001) xi at xi; A Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, Oxford, 2016) §45; P Sutherland, “Third-Party Contracts” in H MacQueen and R Zimmermann, *European Contract Law: Scots and South African Perspectives* (Edinburgh University Press, Edinburgh, 2006) 201 at 204. The views of further commentators are examined below (see, in particular, subsections 2.3.1. and 2.4.2.2.).

³⁴ Furmston and Tolhurst, *Privity* (n 19) 8.23. The authors assume that Scots law does not recognise the privity doctrine (8.20), but their comments on the scope of privity apply equally in Scotland.

obligations. The nuances of both aspects of the privity doctrine in Scots and English law are discussed further below.³⁵

Privity in contract is sometimes denoted by the Latin maxim *res inter alios acta aliis nec nocet nec prodest*.³⁶ The thesis uses the terms ‘privity’, ‘privity of contract’, and ‘the privity doctrine’.

2.2.3. Privity without contract?

Various Scots authorities indicate that it is possible for parties to be ‘in privity’ without being in a direct contractual relationship. In 1933, the Lord Justice-Clerk (Lord Alness) considered that the Road Traffic Act 1930 section 36(4), which provided that insurers were liable in respect of third parties falling within the scope of those covered by their policies, may establish privity of contract between the insurance company and an injured third party.³⁷ More recently, Lord Skerrington commented that “there was no privity of contract except between the parties who contracted directly *or indirectly* with each other.”³⁸ Lord Moncrieff³⁹ and Lord Cuninghame⁴⁰ note (respectively) that brokers and agents may create privity between third parties and their clients/principals. However, these cases represent a small minority of the total number of cases discussing privity in Scots law. On the whole, Scots case law indicates that privity refers only to a direct relationship between contractual parties.⁴¹

³⁵ The first aspect is discussed further below at subsection 2.3.2, and the second at section subsection 2.3.3.

³⁶ ‘A thing done between others does not harm or benefit others.’ See TB Smith, *Short Commentary on the Law of Scotland* (W Green, Edinburgh, 1962) 773.

³⁷ *Greenlees v Port of Manchester Insurance Co.* 1933 SC 383 at 397 per Lord Justice-Clerk (Alness). He did, however, find that the provision did not establish a direct right of action on the part of the third party.

³⁸ Emphasis added. *Stuart v Potter, Choate & Prentice* (Outer House, unreported) per Lord Skerrington, produced in *Stuart v Potter, Choate & Prentice* 1911 1 SLT 377 at 379. See also Lord Skerrington’s comments in *Bertram, Gardner, & Co.’s Trustee v King’s Remembrancer* 1920 SC 555 at 562.

³⁹ *Lamont, Macquisten & Co. v Inglis* (1903) 11 SLT 409 at 409 per Lord Moncrieff.

⁴⁰ *Farrar and Rooth and Mandatory v North British Banking Co.* (1850) 12 D 1190 at 1193 per Lord Cuninghame.

⁴¹ A discussion of these cases follows at subsection 2.3.1

At least one English judge has indicated that privity may arise outwith a direct contractual relationship. In *Collis v Selden*, Bovill CJ questioned whether there was “any contract or privity between the plaintiff and defendant out of which a liability could arise”.⁴² This could be taken as implying that the notions of privity and contract are separate. However, this can also be construed as referring to ‘privity of contract or proximity between’ the plaintiff and defendant. None of the judgments cited appear to be intended to make substantive comment on the privity doctrine itself. Rather, the statements were made in the context of determining which of the parties may owe liability based on the presence of contractual ties. Arguments based on the creation of privity outwith a direct contract were dismissed in *Clavering, Son & Co. v Hope*.⁴³ The Scots and English authorities implying that privity might arise between non-contractual parties appear therefore to be discussing only whether the parties are closely interlinked despite their lack of contractual relationship.

2.2.4. Uses of ‘privity’ which are not relevant to the thesis

Numerous cases mention ‘privity’ without necessarily referring to privity of contract. The non-legal use of the word ‘privity’, in the sense of proximity or nearness, is found in many Scots⁴⁴ and English⁴⁵ cases. In England, it has been adopted judicially as a synonym for ‘private’.⁴⁶ In a Scottish case, a man purchased two flats in neighbouring tenement properties and wished to build a door from the common stair in one property directly into his flat in the neighbouring property. This was successfully prevented by another user of the common stair on the grounds that creating the door would interfere with the “privity” in the common stair.⁴⁷ Perhaps the most prevalent extra-contractual use of the term ‘privity’ in the Scottish courts is as a synonym for

⁴² *Collis v Selden* (1867-68) LR 3 CP 495 at 497 per Bovill, CJ.

⁴³ *Clavering, Son & Co. v Hope* (1897) 4 SLT 300 at 302 per Lord Stormonth Darling.

⁴⁴ See, for example, *Henry v Gladstone* 1933 SC 283 at 309 per Lord Murray and *Alastair M’Iain M’Donald v Miss Elizabeth Moore Menzies M’Donald and Miss Adriana M’Donald* (1879) 6 R 521 at 537 per Lord Gifford.

⁴⁵ *Henry Munster v Richard Cobden Cox* (1885) 10 App. Cas. 680 at 686 per Earl of Selborne LC.

⁴⁶ *Residuum of Sir Francis Englefields Case* (1573) 4 L 169.

⁴⁷ *Gellatly v Arrol* (1863) 1 M 592 at 602 per Lord Benholme.

'knowledge' or 'concern'.⁴⁸ The term has been used similarly in England.⁴⁹ In *The King v Ward*,⁵⁰ for example, a young woman eloped to Scotland with the "privity" of her aunt, who was the subject of an action to have her returned to England.

In terms of other legal doctrines, privity of contract ought not to be confused with privity of estate. The latter refers to situations in which two or more parties have legal rights and obligations in respect of the same estate (i.e. their estates cover the same immovable property).⁵¹ The concept developed due to the difficulties privity posed to landlords where leases were transferred from one tenant to another. If the second tenant defaults, privity normally prevents the landlord from suing that tenant, but privity of estate allows the landlord to sue the new tenant.⁵² This concept has been recognised and discussed judicially in Scotland,⁵³ and is recognised in English case law⁵⁴ and commentary, for example, as one of the four main forms of privity

⁴⁸ Scots cases include: *Watson v George Gibson & Co* 1908 SC 1092 at 1096-1097 per Lord Stormonth-Darling; *Lunnie v Glasgow and South-Western Railway Co.* (1906) 8 F 546 at 550 per Lord Kyllachy; *Potter v Bartholomew* (1847) 10 D 97 at 108 per Lord Cuninghame W; *Willox v Young or Farrell* (1847) 9 D 766 at 778 per Lord Jeffrey; *Samuel Stirling and others v Robert Forrester* (1821) III B 575 at 585.

⁴⁹ See, for example: *Versloot Dredging BV and another v HDI Gerling Industrie Versicherung AG and others* [2016] UKSC 45 at 60 and 62 per Lord Hughes; *Barclays Bank plc v Ente Nazionale di Previdenza ed Assistenza dei Medici e degli Odontoiatri* [2016] EWCA Civ. 1261 at para 22 per Moore-Bick LJ; *The Midland Insurance Company v Smith and Wife* (1881) 6 QBD 561 at 567- 568 per Watkin Williams J.

⁵⁰ *The King v Ward* (1762) 1 Blackstone W 386.

⁵¹ Law Commission, Report on *Landlord and Tenant Law: Privity of Contract and Estate* (Law Com No 74, 1993) 2.1-3.

⁵² R Merkin, "The Burden of Contracts and the Doctrine of Privity" in R Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (Informa Law, London/ Hong Kong, 2000) 79 at 4.2. Bankton acknowledged the English concept of privity of estate: AM Bankton, *An institute of the law of Scotland in civil rights: with observations upon the agreement or diversity between them and the laws of England* (Stair Society, Edinburgh, 1994 reprint of the 1751 edition) 1.201.6. See also *Tulk v Moxhay* (1848) 2 Ph. 774 and GJ Bell, *Principles of the law of Scotland* vol 1 (10th edn. 1889, reprinted by Law Society of Scotland, Butterworths, Edinburgh, 1989) 895A.

⁵³ *Spiers and Others v Morgan* (1901) 9 SLT 162 at 164 per Lord Kincairney; *Earl of Zetland v Hislop and Others* (1882) 9 R (HL) 40 at 48 per Lord Watson.

⁵⁴ *Budana v The Leeds Teaching Hospitals NHS Trust and Another* [2017] EWCA Civ. 1980 at para 55 per Gloster LJ; *Pye v Stodday Land Ltd and another* [2016] EWHC 2454 at para 32 per Norris J; *Titterton v Cooper* (1882) 9 QBD 473 at 489 per Brett LJ; *Bridget Ann Papendick v William Bridgwater* (1855) 5 E & B 166 at 176 per Lord Campbell; *The Marquis of Anglesey v Lord Hatherton and Another* (1842) 10 M & W 218 at 247 per Rolfe B.

identified by Coke.⁵⁵ A similar concept, “privity of tenure”, is discussed in *Johnston v Irons*.⁵⁶

Bankton refers to privity in blood.⁵⁷ For example, the privileges afforded by infancy can be used by “the infant himself, and his representative privies in blood”.⁵⁸

Privity has also been used to indicate an individual’s proximity to a crime, resulting in liability for the commission of that crime.⁵⁹ A court’s ‘privity of jurisdiction’ refers to the competence of a court to hear a particular case.⁶⁰

None of these uses of the term are relevant to the examination of privity in contract law, and so are not discussed further in the thesis.

2.3. The privity doctrine in Scots law

This section considers the historical development of both aspects of privity in Scots law.

⁵⁵ E Coke, *A Commentary upon Littleton* (Brooks, Oxford, 15th edn, 1794) vol II, Lib 3, Cap 8, sec 461, 271a. See also Furmston and Tolhurst, *Privity* (n 19) 7.06.

⁵⁶ *Johnston v Irons* 1909 SC 305 at 312 and 316 per Lord President Dunedin. See also discussion on the concept of “horizontal privity” in US law in M Lewyn, “The Puzzling Persistence of Horizontal Privity” 2013 27(3) *Probate and Property* 32. According to this doctrine, the burden of a restrictive covenant usually runs with the land only if the parties to the original covenant are in ‘horizontal privity’, or, in other words, they have an interest in the same land.

⁵⁷ Bankton, *Institute* (n 52) 1.200.5 and 2.243.9.

⁵⁸ *Ibid.* 1.200.5. In English law, see Coke, *Commentary* (n 55) vol II, Lib 3, Cap 8, sec 461, 271a; *John Stowel, Esquire v George Zouch, Lord Zouch Saintmaure and Cautelupe* (1563) 1 P 353 at 363.

⁵⁹ *Jameson v Barty* (1893) 1 Adam 92 at 95 per The Lord Justice-Clerk (Lord Kingsburgh): “privity to the act of poaching”; and *Mackenzie & Johnston* (1846) Ark. 135 at 136 per Lord Justice-Clerk (Lord Hope): “If there was privity, even by so slight a communication with the actual thief as a nod or a wink, that would make the party so privy, guilty of theft art and part”.

⁶⁰ For example, *Fitzpatrick v Glasgow District Licensing Board and Another* 1978 SLT (Sh. Ct.) 63 at 64 per Sheriff Principal R. Reid, QC, citing *Lundie v Magistrates of Falkirk* (1890) 18 R 60 at 65-66 per Lord President Inglis. See also the Judiciary of Scotland’s Glossary definition of ‘Privative jurisdiction’, available at: <http://www.scotland-judiciary.org.uk/29/0/Glossary/a#P> and accessed 3 July 2018.

2.3.1. Historical development of privity in Scots law

The privity doctrine is manifested in numerous contexts in Scots law. For example, a creditor may not sue its debtor's debtor,⁶¹ and a party cannot sue on a contract purely on the grounds that it has a financial interest in its fulfilment.⁶² The doctrine is recognised by the Scottish Law Commission,⁶³ and privity is also expressly acknowledged in academic commentary. Walker encompasses both aspects of privity in his statement that it is:

“clear and well-settled, that under a contract between two parties no third party either acquires rights or comes under duties by virtue of the contract. Consequently no third party can, in general, sue for performance of a contract or for damages for breach thereof, nor be sued for performance or for damages.”⁶⁴

According to Gloag, one cannot assume from a party's decision to enter into a contractual obligation the intention to be bound to:

“anyone who may think that the fulfilment of that obligation would be advantageous to him, and hence it is a general rule that only the parties to a contract have a title to sue upon it.”⁶⁵

Thomas Smith observes that a “contract can neither benefit nor bind a stranger to it.”⁶⁶ Similarly, Rankine notes that the lack of privity of contract between a lessor and sublessee means that “no rights or obligations can arise directly between them on the footing of contract”.⁶⁷ A clear declaration of the doctrine's existence in Scots law can be found in the most recent edition of *Gloag and Henderson*:

“Scots law recognises the principle of privity of contract. In the ordinary case the only persons whose rights and liabilities are affected

⁶¹ *Henderson v Robb* 1889 16 R 341; *Gill's Trs v Patrick* 1889 126 R 403; *Prudential Assurance Co v Cheyne* 1884 11 R 871.

⁶² *Finnie v Glasgow and South-Western Railway Co* (1857) 20 D (HL) 2 at 4 per Lord Cranworth.

⁶³ Scottish Law Commission, Discussion Paper on *Third Party Rights in Contract* (Scot Law Com DP No 157, 2014) 2.13.

⁶⁴ Walker, *Contracts* (n 3) 29.1.

⁶⁵ WM Gloag, *The law of contract: a treatise on the principles of contract in the law of Scotland* (W Green, Edinburgh, 2nd edn, 1929) 218. See also 219.

⁶⁶ Smith, *Short Commentary* (n 36) 773.

⁶⁷ J Rankine, *Principles of the law of Scotland* (W Green, Edinburgh, 20th edn, 1903) 197.

by a contract are the contracting parties. Strangers to the contract have no right to sue upon it and incur no liabilities under it.”⁶⁸

MacQueen has, however, firmly stated that there is “no equivalent [in Scots law] to the common law doctrine of privity”,⁶⁹ seemingly because Scots law recognises third party rights and assignation.⁷⁰ The relationship between third party rights and privity, including MacQueen’s comments, is discussed in chapter 3.⁷¹ It is noted at this stage that academic acceptance of privity in Scotland is not absolute.

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

“If the company alone had been pursuers, I should have had difficulty in sustaining the title, because there was never any contract between them and the defenders. But the individual pursuers are in a different position, because they are the very parties with whom the contract was admittedly made”.⁷²

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

“There was no privity of contract between the first parties and Macdougalls. There was accordingly no question of the first parties having any recourse against Macdougalls.”⁷³

⁶⁸ H MacQueen and Lord Eassie (eds), *Gloag and Henderson: The Law of Scotland* (W Green, Edinburgh, 14th edn, 2017) 8.01.

⁶⁹ HL MacQueen, *The Laws of Scotland: Stair Memorial Encyclopaedia: Obligations: Contract (vol 15)* (hereafter “SME”), (LexisNexis/ Law Society of Scotland, London/ Edinburgh, 1995) para 814. See also Norrie’s statement that “Scots law has never been troubled by the English concept of privity of contract”: K Norrie, “Professional Negligence” in JM Thomson (ed), *Scottish Universities Law Institute: Delict* (Thomson/ W Green, 2007) ch 19 at 19.11.

⁷⁰ MacQueen, *SME* (n 69) para 814.

⁷¹ See, in particular, subsection 3.2.2.

⁷² *MacLaren and Others v Mayberry and Others* (1904) 11 SLT 636 at 637 per Lord Low.

⁷³ *Borders Regional Council v J. Smart & Co. (Contractors) Ltd.* 1983 SLT 164 at 172 per Lord Brand.

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

“All conditions annexed to the enjoyment of property... are to be strictly construed as against the grantor and in the grantee's favour, but especially as between the grantor and parties who have no privity of contract with him”.⁷⁴

Similarly, Lord Adam has recognised the difficulty in ascertaining the basis of a contractual claim by a pursuer against a defender, “there being no privity of contract between them”.⁷⁵ Throughout the nineteenth century, there are numerous other Scots law cases which assume the validity of privity of contract, and rely upon the doctrine to prevent recovery by extra-contractual parties.⁷⁶ *Tulloch v Davidson* refers to the absence of “privity of contract between the parties, out of which legal liability could be inferred, or right of action could emerge”.⁷⁷ This indicates that the right to sue in contract must stem from privity. Further, it is clear that privity of contract cannot be implied without the existence of a valid and enforceable contract.⁷⁸ Towards the end of the nineteenth century, Lord Adam stated that:

“the fact that A has employed B to do something for the benefit of C, does not confer on C a right of action against B for any loss which he may have sustained through B’s negligence, and for the plain reason that there is no privity of contract between B and C. That is exactly what this case comes to.”⁷⁹

⁷⁴ *Tailors of Aberdeen v Coutts* (1837) 2 SM 609 at 667 per Lord Brougham.

⁷⁵ *William Robertson v James Ross & Company* (1892) 19 R 967 at 970 per Lord Adam.

⁷⁶ For example: *Blumer v Scott* (1874) 1 R 379 at 386 per Lord Ardmillan; *Morier and Others v Brownlie and Others* (1895) 3 SLT 27 at 29 per Lord Low; *Edinburgh United Breweries, Limited, and Others v James A. Molleson and Another* (1894) 21 R (HL) 10 at 16 per Lord Watson.

⁷⁷ *Tulloch v Davidson* (1858) 20 D 1045 at 1056-1057 per Lord Cowan.

⁷⁸ *McEwan v Campbell and Others* (1853) 16 D 117 at 125 per Lord Ivory.

⁷⁹ *Tully v Ingram* (1891) 19 R 65 at 75-76 per Lord Adam.

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

Privity has been similarly recognised throughout the twentieth century. The last century has not seen a great deal of judicial discussion on the nuances of the doctrine. Rather, its validity and existence as a requisite for title to sue has been accepted and applied.⁸⁰ Whilst Lord Thankerton accepts that parties may demonstrate patrimonial interest other than by privity,⁸¹ it is clear in the case law in the twentieth century that privity was recognised as a requirement to sue on a contract. In 1964, Lord Sorn recognised the “ordinary rules of privity” in *Eagle Lodge, Limited v Keir and Cawder Estates, Limited*.⁸²

It should be noted that Lord Deas’ comments in one First Division case may cast doubt upon the existence of the privity doctrine in Scots law. In the case, a Dundee company had arranged for goods to be delivered to a company in Glasgow by a railway company. When the Dundee company became bankrupt, the railway company declined to deliver the goods to the Glasgow company. The question arose as to whether the Glasgow company could sue the railway company for the goods, and Lord Deas commented that:

“The general principle recognised in England seems to be that you can go only against the company with whom the contract was made, and that there being no privity of contract with the other company... it is incompetent to go against them. I am not, at present, prepared to say that that is the law of Scotland, but I should desire to give very grave and deliberate consideration to the question before coming to a decision upon it.”⁸³

⁸⁰ *George Heriot's Trust v Carter and Others* (1902) 10 SLT 514 at 516 per Lord Pearson; *Anderson v Dickie* 1915 SC (HL) 79 at 81 per Lord Kinnear and at 90 per Lord Dunedin; *Michelin Tyre Company Limited v Macfarlane (Glasgow) Limited (in Liquidation)* 1916 2 SLT 221 at 226 per Lord Skerrington; *McHale v Fife Coal Company Limited* 1947 SLT (Sh. Ct.) 77 at 78 per Sheriff John A Lille KC; *MacDougall v MacDougall's Executors* 1994 SLT 1178 at 1183 per Lord Cameron of Lochbroom.

⁸¹ *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1940 SC (HL) 52 at 55 per Lord Thankerton.

⁸² *Eagle Lodge, Limited v Keir and Cawder Estates, Limited* 1964 SC 30 at 45 per Lord Sorn.

⁸³ *Scottish Central Railway Co. v Ferguson & Co.* (1863) 1 M 750 at 756 per Lord Deas.

He also refers to “what [the English] call a ‘privity of contract’”, perhaps implying that Scots law does not recognise privity. It is unclear whether he intended for his comments to be applied to Scots law only in the context of company liability, or whether his comments cast doubt on the existence of privity in Scots law generally. If the correct interpretation is the latter, however, the case can be viewed as an ‘outlier’: the vast majority of Scots cases which mention privity assume that it is recognised in Scots law. Another ‘outlier’ is *Clark Contracts Ltd v The Burrell Co (Construction Management) Ltd (No 2)*, in which Sheriff Taylor referred to privity as “an English problem”.⁸⁴ However, he does not expressly exclude the possibility that Scots law recognises privity to some extent, and he also refers to “England’s approach to the doctrine of privity of contract.”⁸⁵ One could infer from this statement that Scots law takes a different, less problematic approach to privity.

Perhaps the strongest judicial statement in favour of privity is its acknowledgement in *United Dominions Trust v Taylor* as “fundamental to the common law of contract”.⁸⁶ In the case, the defender’s interpretation of the Consumer Credit Act 1974 section 75(1) was rejected by Sheriff Principal Reid on the ground that it contravened privity.⁸⁷ The provision states that:

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

The pursuer had loaned the defender money for the purchase of a car from a supplier. Due to the defective state of the car, the defender informed the pursuer that he viewed the contract as breached, and the pursuer sued the defender for return of the loan payments. The defender argued that his

⁸⁴ *Clark Contracts Ltd v The Burrell Co (Construction Management) Ltd (No 2)* 2003 SLT (Sh. Ct.) 73 at para 7 per Sheriff Taylor.

⁸⁵ *Ibid.* at para 37 per Sheriff Taylor.

⁸⁶ *United Dominions Trust v Taylor* 1980 SLT (Sh. Ct.) 28 at 31 per the Sheriff Principal R Reid QC.

⁸⁷ *Ibid.* This was followed in *Forward Trust Ltd v Hornsby and Windermere Aquatic Ltd* 1995 SCLR 574 per Sheriff Simpson.

rescission affected both the contract of sale with the supplier of the car, and the loan agreement with the pursuer. Sheriff Principal Reid concluded that the suggestion that the provision could create “linked transactions” containing contracts with different parties and interdependent fates was not compatible with privity of contract.⁸⁸ Whilst his judgement as a whole has been subject to academic criticism,⁸⁹ his statement that privity is fundamental to Scots contract law has not.

Privity has also been recognised more recently, in the current century. For example, Lord Reed recognises that landlords cannot sue sub-tenants directly due to privity of contract.⁹⁰ Further, Lord Eassie has acknowledged *Duke of Queensberry's Exrs*⁹¹ as an authority for the rule that there is “no privity of contract between [a] landlord and [a] subtenant”,⁹² describing privity as a “well established rule”.⁹³ Lord Drummond Young referred in 2006 to the “ordinary principles of privity of contract”.⁹⁴

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

“privity of contract prevents any direct contractual action by the party who suffers the loss [i.e. the finance company] against sub-contractors or works contractors, or any member of the professional team.”⁹⁵

This is also reflected in earlier Outer House construction cases involving chains of contracts between contractors, sub-contractors, sub-sub-

⁸⁸ *United Dominions Trust v Taylor* 1980 SLT (Sh. Ct.) 28 at 31 per Sheriff Principal R Reid QC.

⁸⁹ See discussion in *Durkin v DSG Retail Ltd* 2010 SC 662 at para 41 (submissions for the second respondents).

⁹⁰ *Douglas Shelf Seven Ltd v Co-operative Wholesale Society Ltd and Kwik Save Group Plc* [2007] CSOH 53 at para 577 per Lord Reed.

⁹¹ *Duke of Queensberry's Executors v Maxwell* (1831) 5 W & S 771.

⁹² *Sears Properties Netherlands BV v Coal Pension Properties Ltd* 2001 SLT 761 at 765 per Lord Eassie.

⁹³ *Ibid.* at 766 per Lord Eassie.

⁹⁴ *Laurence McIntosh Limited v Balfour Beatty Group Limited and The Trustees of the National Library of Scotland* [2006] CSOH 197 at para 33 per Lord Drummond Young. See also A Warrender, “Title to sue and assignation” April 18 2007 *Contract Journal* 32.

⁹⁵ *Scottish Widows Services Ltd v Harmon/ CRM Facades Ltd (in liquidation)* 2010 SLT 1102 at para 1 per Lord Drummond Young.

contractors, and so on.⁹⁶ The principle that chains of contracts cannot create privity outwith the context of a direct contractual relationship is also found in earlier cases involving feu duties.⁹⁷

Whilst the ‘fundamentals’ of privity are impliedly accepted, there is a dearth of judicial comment on the nuances of the doctrine and the situations in which it may be circumvented. Only a small handful of cases emphasise that privity is an inherent part of Scots law. In *MacLachlan v Sinclair & Co.*,⁹⁸ for example, Sheriff Dundas relied on Erskine’s *Principles* in his assumption that privity of contract is accepted in Scots law.⁹⁹ However, privity is not expressly recognised in any of the main Scots Institutional Writings. It is perhaps the case that privity is viewed judicially as a matter of common sense, and Scots judges have not felt any great need to emphasise its existence and validity.

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

⁹⁶ *Balfour Beatty Ltd v Britannia Life Ltd* 1997 SLT 10 at 16 per Lord Penrose. See also *JB Mackenzie (Edinburgh) Ltd. v Lord Advocate* 1972 SC 231 at 237 per Lord Kissen.

⁹⁷ In *Sandeman v The Scottish Property and Building Society and Others* (1885) 10 App. Cas. 553, for example, it was found that there was no privity of contract between a prime superior and sub-feuer, and consequently the latter party was bound to pay only the mid-superior (with whom he was in a direct contractual relationship).

⁹⁸ *MacLachlan v Sinclair & Co.* (1897) 5 SLT 155.

⁹⁹ J Erskine, *Principles of the law of Scotland* (Bell & Bradfute, Edinburgh, 19th edn, 1895) 2.6.14: “There being no privity of contract between the landlord and the sub-lessor, neither party can bring a direct action on the contract [between the tenant and sub-lessor]” (cited in *MacLachlan v Sinclair & Co.* (1897) 5 SLT 155 at 157 per Sheriff Dundas).

2.3.2. Benefiting the third party

The academic and judicial material discussed above demonstrates that privity in Scots law bars third parties from suing under contracts to which they are not party. There are two possible interpretations of these cases and academic opinions. It could be that the external parties may not derive contractual rights under contracts to which they are not party, or they could be excluded from deriving *any* rights from the contract.

Some of the statements considered above are ambiguous. For example, it has been said that a lack of privity means that the external party did not have “any recourse” against one of the contracting parties.¹⁰⁰ In another case, it was stated that, where there is no privity, the external party cannot “go against” the contracting parties.¹⁰¹ These judicial comments do not expressly explain whether the external party is barred from making only contractual claims, or whether their lack of privity means that they cannot make a claim of any nature against the contracting parties.

However, Lord Drummond Young has clearly stated that privity “prevents any direct *contractual* action” by external parties.¹⁰² Walker’s definition also clearly provides that the effect of privity is that “no third party can, in general, sue for *performance of a contract* or for damages for breach thereof”.¹⁰³ These comments indicate that privity bars contractual claims only.

There is no definitive statement in Scots law that privity bars *all* legal claims by external parties against contracting parties. Further, parties to a contract cannot treat their contractual relationship as a protective shield against any and all legal claims which external parties might have against them. For example, privity would not protect contracting parties against their obligations

¹⁰⁰ *Borders Regional Council v J. Smart & Co. (Contractors) Ltd.* 1983 SLT 164 at 172 per Lord Brand.

¹⁰¹ *Scottish Central Railway Co. v Ferguson & Co.* (1863) 1 M 750 at 756 per Lord Deas.

¹⁰² *Scottish Widows Services Ltd v Harmon/ CRM Facades Ltd (in liquidation)* 2010 SLT 1102 at para 1 per Lord Drummond Young. Emphasis added.

¹⁰³ Walker, *Contracts* (n 3) 29.1. Emphasis added.

to pay costs associated with their transactions.¹⁰⁴ Indeed, as is discussed in chapter 4, third parties can in certain circumstances claim against contracting parties in delict.¹⁰⁵

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

The thesis addresses situations in which third parties can recover for losses sustained due to defective or non-performance of contracts to which they are not party where the third party does not have a personal contractual right to performance.¹⁰⁶ Concepts which operate in these situations are analysed in chapters 6-9. There are exceptions to the privity doctrine which arise where the third party does have a personal right to performance of the contract. These exceptions, their relationship with the privity doctrine, and their impact on the Scots definition of privity are discussed further in chapter 3.¹⁰⁷

2.3.3. Burdening the third party

Scots judicial and academic commentary recognises the second aspect of the privity doctrine, which provides that extra-contractual parties cannot be burdened by contracts to which they are not party. In *Ashley v Muir*,¹⁰⁸ for example, Lord Fullerton mentions that a third party had “no direct responsibility [for contractual performance], or what is called ‘privity of contract’”.¹⁰⁹ Gloag notes that “it is not within the province of contract to

¹⁰⁴ For example, the purchaser of a property might come under a duty to pay land and buildings transaction tax by virtue of its contract with the seller (see GL Gretton and KGC Reid, *Conveyancing* (W Green, Edinburgh, 5th edn, 2018) 19.01). Privity is no defence to the payment of this tax.

¹⁰⁵ This is discussed in section 4.3.

¹⁰⁶ The scope of the thesis is outlined in section 1.3.

¹⁰⁷ These are discussed in section 3.2.

¹⁰⁸ *Ashley v Muir* (1845) 7 D 524.

¹⁰⁹ *Ibid.* at 530 per Lord Fullerton.

impose any liability upon a third party” because “parties to a contract cannot fetter the free will of a third party”.¹¹⁰ McBryde similarly states that it is:

“axiomatic that a duty could not be imposed on the third party against its will, but a right could be conditional on performance by the third party.”¹¹¹

The impact of this on the ‘burdens’ aspect of privity, and other exceptions to the no-burdens rule, are discussed in chapter 5.¹¹²

This aspect of privity is also accepted in English law.¹¹³ Professor Neil H Andrews comments, for example, that the ‘no burdens’ rule “appears sound”.¹¹⁴

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

¹¹⁰ Gloag, *Contract* (n 65) 257.

¹¹¹ WW McBryde, *The law of contract in Scotland* (Thomson/ W Green, Edinburgh, 3rd edn, 2007) 10.10. See also MacQueen and Lord Eassie (eds), *Gloag and Henderson* (n 68) 8.01-02.

¹¹² See, in particular, section 5.5.

¹¹³ VV Palmer, “Contracts in Favour of Third Persons in Europe: First Steps Toward Tomorrow’s Harmonisation” 2003 11(1) *European Review of Private Law* 8 at 12; S Whittaker, “Reciprocity Beyond Privity” in P Kincaid (ed), *Privity: Private justice of public regulation* (Ashgate, Dartmouth, 2001) 259 at 259-260; G Treitel, *Some Landmarks in Twentieth Century Contract Law* (Clarendon, Oxford, 2002) 48; AG Guest, *Anson’s Law of Contract* (Clarendon Press, Oxford, 26th edn, 1984) 363; *Dunlop Pneumatic Tyre Co Ltd v Selfridges Ltd* [1915] AC 847.

¹¹⁴ NH Andrews, “Does a third party beneficiary have a right in English law?” 1988 8(1) *Legal Studies* 14 at 14.

2.4. Comparative discussion

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

2.4.1. General remarks on comparative law on the privity doctrine

Continental jurisdictions exhibit a more lenient view on the enforcement of third party rights than common law jurisdictions, which have historically viewed such rights as violations of the privity doctrine.¹¹⁵ The stance of public international law is closer to continental law than the common law.¹¹⁶

However, the privity doctrine itself is “deeply embedded” in every European legal system.¹¹⁷ In civilian jurisdictions, various Codes embodying the strict Roman approach to privity¹¹⁸ were revised when the undeniable usefulness of mechanisms allowing for third party rights became clear due to the expansion of commerce.¹¹⁹ This is relevant to the question of whether privity ought to be recognised in Scots and English law. If either jurisdiction departs entirely from privity, they will be considered as outliers in European comparative legal studies. The lack of certainty associated with a failure to recognise privity¹²⁰ might discourage commercial parties from concluding contracts under Scots and English law relative to other jurisdictions.

2.4.2. English law

These subsections overview relevant English jurisprudence and academic commentary, and address the relationship between privity and consideration.

¹¹⁵ C Engel, “E Omnes: Why does public international law ignore privity of contract?” 2009 165(1) *Journal of Institutional and Theoretical Economics* 24 at 24.

¹¹⁶ *Ibid.* at 24.

¹¹⁷ Palmer (n 113) at 12.

¹¹⁸ Furmston and Tolhurst, *Privity* (n 19) 1.03, citing Paul’s Digest 44.7.11 (later qualified in Ulp. Digest 45.1.38.20).

¹¹⁹ Palmer (n 113) at 14-15.

¹²⁰ This is discussed further at section 5.3.

2.4.2.1. The development of English jurisprudence

Ibbetson observes the recognition of privity, in the sense that “persons not party to the agreement could not sue or be sued on it” in covenant cases as early as the thirteenth-century.¹²¹ However, Vernon Palmer’s research on the status of privity in the sixteenth and seventeenth century reveals that, in the 1500-1680 period, the courts took a liberal attitude to allowing third party actions, such that the “sheer number of actions and liberal results” indicate that a strict privity rule did not in fact exist in England prior to 1680.¹²²

According to Vernon Palmer, this can be attributed to the fact that privity was not yet a dominant doctrine in English law.¹²³

In the sixteenth and seventeenth centuries, the beneficiary’s right to sue was generally ascertained according to whether it had given consideration.¹²⁴

There were, however three legal doctrines according to which the third party could sue on a contract to which it was not party. Firstly, the ‘promisee in law’ theory allowed the third party to sue if it declared that it was, in fact, the promisee.¹²⁵ A second means of assessing the third party’s action in 1500-1680 was the interest test. Essentially, the party who had an interest in the promise had the right to enforce it.¹²⁶ The rationale was that non-performance of the contract constituted an injury to the beneficiary’s interest, for which it should be compensated.¹²⁷ Zimmermann draws a parallel between the interest theory and the Roman rule that a stipulator could

¹²¹ DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, Oxford, 2001) 77-78.

¹²² VV Palmer, “The History of Privity – The Formative Period (1500-1680)” 1989 33(1) *American Journal of Legal History* 3 at 5. See also Furmston and Tolhurst, *Privity* (n 19) 1.07-1.08.

¹²³ *Ibid.* at 5.

¹²⁴ *Ibid.* at 6

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.* In *Hadves v Levitt* (1632) Het. 176, for example, the bride’s father (the defendant) promised the groom’s father (the plaintiff) that he would pay £200 to the plaintiff’s son after he had married the defendant’s daughter. The plaintiff promised to consent to the marriage and make a reciprocal grant to the bride. The defendant failed to pay, and the plaintiff brought an action in assumpsit, claiming that he was constrained, as a result of the breach of promise, to give the couple greater maintenance than otherwise would have otherwise been necessary. The plaintiff’s claim was rejected on the grounds that the action was “more properly” brought by his son, because he was person “in whom the interest is”.

enforce a performance due to a third party only where it had an interest in the fulfilment of the performance.¹²⁸ The third doctrine was the beneficiary test: “the party to whom the benefit of a promise accrues may bring the action.”¹²⁹ This was used, for example, in *Provender v Wood*.¹³⁰ In the case, the plaintiff brought an action in assumpsit for a breach of the defendant’s promise to pay the plaintiff’s father £20 on the occasion of the marriage of the plaintiff to the defendant’s daughter. Yelverton and Richardson JJ allowed recovery on the grounds that “the party to whom the benefit of a promise accrues, may bring his action.”¹³¹

In light of these doctrines allowing third party recovery, privity was clearly not strictly applied in English law during the sixteenth and seventeenth century. It is however clear that privity was recognised in some form in England during this period, from at least the sixteenth century.¹³² In *Humble v Oliver*, for example, it was said that an extra-contractual party could not “have advantage of the privity, he being a meer stranger to the contract”.¹³³ In *Living v Edmunds* it was similarly noted that an action could not be “grounded upon any privity of contract, for both the parties are strangers to it”.¹³⁴ Privity was recognised and applied to prevent third party claims in numerous cases in the seventeenth century.¹³⁵ It was also held that an original lessee remained liable despite assignment to a third party, because there remained privity of contract with the lessor.¹³⁶ Accordingly, English law in this period

¹²⁸ R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, Oxford University Press, 1996) 37.

¹²⁹ Palmer (n 122) at 6.

¹³⁰ *Provender v Wood* (1628) Het. 30.

¹³¹ See also *Disborne v Denabie* (1649) R Ab. 30 at 31 per Chief Justice – “it matters not from whom the consideration moveth, but who hath the benefit thereby”, and further NG Jones, “Aspects of Privity in England: Equity to 1680” in EJM Schrage (ed), *Ius quaesitum tertio* (Duncker & Humblot, Berlin, 2008) 135 at 150-151 and 154-157 for discussion of marriage agreements in the fifteenth and sixteenth centuries respectively.

¹³² *Anonymous* (1565) 2 D 247b; *Alexander v Dyer* (1588) CE 169; *Overton v Sydal* (1594) CE 555. Further discussion of case law from this period is found in Jones (n 131) at 136-141.

¹³³ *Humble v Oliver* (1593) P 55 at 55.

¹³⁴ *Living v Edmunds* (1597) CE 636.

¹³⁵ *The Lord Rich v Franke* (1610) 2 B & G 202 and *March v Brace* (1613) 2 B 151, which refer to privity of contract between a lessor and lessee. See also *Sir John Brett v Cumberland* (1616) CJ 521 at 522.

¹³⁶ *Walker v Harris* (1793) 145 ER 861.

appears to have enforced third party claims in some circumstances, whilst simultaneously recognising and enforcing the privity doctrine in other cases.¹³⁷ Two of the leading cases during this time came to contrasting views on the enforceability of third party rights: *Bourne v Mason*,¹³⁸ in which a third party right was unenforceable, and *Dutton v Poole*,¹³⁹ in which a third party claim was upheld. Towards the end of this 1500-1680 'Formative Period', consideration emerged as the dominant means of assessing third party actions.¹⁴⁰ This replaced the previous tests, and accordingly limited the recompense available to third parties at common law.¹⁴¹ In *Bourne v Mason*,¹⁴² for example, it was said that:

“the plaintiff did nothing of trouble to himself or benefit to the defendant, but is a meer stranger to the consideration.”

Alongside the increasing importance of the consideration test, Vernon Palmer recognises a “new assumption”¹⁴³ in the period between *Bourne v Mason*¹⁴⁴ and *Dutton v Poole*¹⁴⁵ that third party claims were generally not permissible. Flannigan also comments that these cases were the turning point of the “complete reversal” from recognition of third party rights, to a much stricter application of the privity doctrine.¹⁴⁶ Vernon Palmer summarises:

“During the 16th and 17th century, the beneficiary suing in assumpsit succeeded as in no other period. The period ended, however, with the formation of a solid privity limitation based upon the consideration doctrine. Contemporaries may not have easily appreciated that such a significant event had occurred.”¹⁴⁷

During the eighteenth century, the tension between privity and third party rights was not yet resolved, and common law outcomes were contradictory.

¹³⁷ See also *Bell v Chaplain* (1675) H 321; *Bafeild v Collard* (1646) 82 ER 882.

¹³⁸ *Bourne v Mason* (1668) 86 ER 5.

¹³⁹ *Dutton v Poole* (1677) 83 ER 523.

¹⁴⁰ Palmer (n 122) at 7.

¹⁴¹ *Ibid.* at 7.

¹⁴² *Bourne v Mason* (1668) 86 ER 5 at 7. See also *Clypsam v Morris* (1669) 2 Keb. 401 at 443 and 453.

¹⁴³ Palmer (n 122) at 44.

¹⁴⁴ *Bourne v Mason* (1668) 86 ER 5.

¹⁴⁵ *Dutton v Poole* (1677) 83 ER 523.

¹⁴⁶ R Flannigan, “Privity: the end of an era” 1987 103(Oct) *Law Quarterly Review* 564 at 565-566.

¹⁴⁷ Palmer (n 122) at 52.

Judicial opinion in the eighteenth century does not offer a definitive view on whether third party rights were enforceable at this stage in the development of English law. *Crow v Rogers*¹⁴⁸ upheld *Bourne v Mason*,¹⁴⁹ and *Martyn v Hind*¹⁵⁰ followed *Dutton v Poole*.¹⁵¹

Similarly, at the beginning of the nineteenth century, an examination of the relevant case law reveals that the courts continued to recognise both third party rights and uphold the privity doctrine. In this period, third party rights were recognised in various cases.¹⁵² However, in *Inglis v Mansfield*, for example, it was said that:

“Between the bankrupt and the trustee there can be no privity such as to affect the latter with any personal obligation incurred by the former”.¹⁵³

The privity doctrine was recognised in this period in the House of Lords¹⁵⁴ as well as various lower courts.¹⁵⁵ As in Scots law, privity appears to have been applied in a variety of contexts without extensive judicial consideration as to the exact definition and scope of the doctrine. It cannot be said that there was a clear, overarching view of privity at this stage of its development in English law. Instead, its application was contextual and fact-specific.

However, the case of *Tweddle v Atkinson*¹⁵⁶ in 1861 marked the point at which third parties were prevented from enforcing contractual rights construed in their favour.¹⁵⁷ Prior to this case, as discussed above, there were conflicting judicial opinions on the question of whether third party claims

¹⁴⁸ *Crow v Rogers* (1724) 1 S 592.

¹⁴⁹ *Bourne v Mason* (1688) 86 ER 5.

¹⁵⁰ *Martyn v Hind* (1776) 2 Cowp. 437

¹⁵¹ *Dutton v Poole* (1677) 83 ER 523.

¹⁵² Flannigan (n 146) at 567; *Carnegie v Waugh* (1823) 1 LJ (KB) 89. See also *Philips v Bateman* (1812) 16 E 356; *Barford v Stuckey* (1820) 2 B & B 333.

¹⁵³ *Inglis v Mansfield* (1835) 1 S & Macl. 203 at 338 per Lord Brougham.

¹⁵⁴ *Thomas Doolan v The Directors & Co. of the Midland Railway Company* (1877) 2 App. Cas. 792 at 802 per Lord Blackburn; *The Directors, etc., of the Bristol and Exeter Railway v Robert Canning Collins* (1859) VII C 194 at 91.

¹⁵⁵ *Saxby v The Manchester, Sheffield, and Lincolnshire Railway Company* (1868-69) LR 4 CP 198 at 204 per Lord Keating; *Lofft v Dennis* (1859) 120 ER 987 at 990 per Lord Campbell CJ; *Smyth and Two Others v Anderson* (1849) 7 CBR 21 at 33 and 42 per Maule J.

¹⁵⁶ *Tweddle v Atkinson* (1861) 9 WR 781.

¹⁵⁷ *Furmston and Tolhurst, Privity* (n 19) 1.14.

were enforceable. However, the case has since been treated as a firm authority for the unenforceability of third party claims in English law.

It is notable that the term 'privity of contract' does not appear in *Tweddle v Atkinson*.¹⁵⁸ Although Wightman J's judgment notes that "it has always been held that no stranger can take advantage of a contract made with another person",¹⁵⁹ the case was in fact decided "overwhelmingly in terms of consideration".¹⁶⁰ It has accordingly been suggested that the case could be treated as authority for the consideration rule, rather than privity.¹⁶¹ However, regardless of whether it ought to be treated as an authority for the privity or consideration rule (or both), the case was accepted throughout the twentieth century as demonstrating that English law had adopted the privity rule. This is reflected in "case after case".¹⁶²

There has however been judicial backlash to this interpretation of *Tweddle v Atkinson*.¹⁶³ Lord Denning states in *Smith and Snipes Hall Farm LD v River Douglas Catchment Board* that privity:

"is not nearly so fundamental as it is sometimes supposed to be. It did not become rooted in our law until the year 1861... It has never been able entirely to supplant another principle whose roots go much deeper, I mean the principle that a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it".¹⁶⁴

¹⁵⁸ *Tweddle v Atkinson* (1861) 9 WR 781.

¹⁵⁹ *Ibid.* at 782 per Wightman J.

¹⁶⁰ Furmston and Tolhurst, *Privity* (n 19) 1.15. See, for example, *Tweddle v Atkinson* (1861) 9 WR 781 at 764 per Wightman J.

¹⁶¹ Furmston and Tolhurst, *Privity* (n 19) 1.19.

¹⁶² *Ibid.* 2.03, citing *Gandy v Gandy* (1885) 30 Ch. D 57 at 69 per Bowen J; *McCruther v Pitcher* [1904] 2 Ch. 306 at 308-9 per Vaughan Williams LJ.

¹⁶³ *Tweddle v Atkinson* (1861) 9 WR 781.

¹⁶⁴ *Smith and Snipes Hall Farm LD v River Douglas Catchment Board* [1949] 2 KB 500 at 514 per Lord Denning.

Lord Denning also expressed this view in *Scruttons Ltd v Midland Silicones Ltd*.¹⁶⁵ Steyn J has raised similar concerns, asserting that the “genesis of the privity rule is suspect”, originating in a “misunderstanding” of *Tweddle*.¹⁶⁶ He stresses that:

“there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties.”¹⁶⁷

Dillon J similarly describes the rule as “a blot on our law and most unjust”,¹⁶⁸ and Lord Diplock’s view is that privity is “an anachronistic shortcoming that has for many years been regarded as a reproach to English private law”.¹⁶⁹

However, most judges during this period recognise the privity doctrine as part of English law. In *Beswick v Beswick*, for example, Lord Reid acknowledged Lord Denning’s view that extra-contractual parties should be able to enforce rights construed in their favour, but concluded that such rights are not enforceable.¹⁷⁰ Lord Reid was, however, of the view that legislation ought to be introduced to allow such rights to be enforceable and this was supported by other members of the judiciary.¹⁷¹ The Law Revision Committee had also previously recommended that third parties should be able to enforce rights expressly conferred in their favour in contracts to which they are not party.¹⁷²

¹⁶⁵ *Scruttons v Midland Silicones* [1962] AC 446 at 483 per Lord Denning. See also *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* (1924) AC 522; *Drive Yourself Hire v Strutt* [1953] 2 All ER 1475; *Adler v Dickinson* [1955] 1 QB 158.

¹⁶⁶ *Darlington BC v Wiltshire Northern Ltd* [1995] 1 WLR 68 at 76 per Steyn J.

¹⁶⁷ *Ibid.* See also *Olsson v Dyson* (1969) 120 CLR 365 at 393 per Windeyer J.

¹⁶⁸ *Forster v Silvermere Golf and Equestrian Centre* (1981) 125 SJ 397.

¹⁶⁹ *Swain v The Law Society* [1983] 1 AC 598 at 611 per Lord Diplock.

¹⁷⁰ *Beswick Appellant v Beswick Respondent* [1967] 3 WLR 932 at para 72 per Lord Reid. See also Lord Hodson at para 78 and Lord Pearce at paras 92-93.

¹⁷¹ *Ibid.* at para 72 per Lord Reid. See also Lord Reid’s comments in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 473; *Woodar Investment Development Ltd. v Wimpey Construction U.K. Ltd.* [1980] 1 WLR 277 at 300 per Lord Scarman and at 279-298 per Lord Keith of Kinkel.

¹⁷² Law Revision Committee, *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)* (Cmd. 5449, 1937) 31.

Tweddle was acknowledged as confirming the position of privity in English law in *Dunlop v Pneumatic Tyre*.¹⁷³ In the case, Viscount Haldane stated that English law contained the fundamental principle that:

“only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract... A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognized in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established.”¹⁷⁴

This was affirmed by the House of Lords in *Scruttons Ltd v Midland Silicones Ltd*.¹⁷⁵ Referring to Lord Denning's earlier comments, Viscount Symonds stated that “certain statements... must be rejected”,¹⁷⁶ referring to the “fundamental rule that a person not party to a contract cannot sue to enforce it.”¹⁷⁷

More recent judgements have, generally speaking, assumed the existence of privity of contract without discussing its meaning and origins.¹⁷⁸ For example, it was said in the High Court of Justice Chancery Decision that an assignee could not be held liable for the actions of his assignor under the assignor's contract with a dairy company, because of the lack of privity between the

¹⁷³ *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (although Lord Dunedin dissented).

¹⁷⁴ *Ibid.* at 853 per Lord Haldane.

¹⁷⁵ *Scruttons v Midland Silicones* [1962] AC 446 at 467-468 per Viscount Symonds.

¹⁷⁶ *Ibid.* at 468 per Viscount Symonds. He refers, for example, to *Smith and Snipes Hall Farm LD v River Douglas Catchment Board* [1949] 2 KB 500 at 514 per Lord Denning (discussed above in this subsection).

¹⁷⁷ *Scruttons v Midland Silicones* [1962] AC 446 at 469 per Viscount Symonds.

¹⁷⁸ *Haberdashers' Aske's Federation Trust Limited and others v Zurich Insurance Plc and others* [2018] EWHC 588 at paras 41-42 and 56 per Lord Justice Fraser; *Signature of St Albans (Property) Guernsey Ltd v Wragg* [2017] EWHC 2352 at para 72 per HHJ Paul Matthews; *Sackville UK Property Select v Robertson Taylor Insurance Brokers Limited* [2018] EWHC 122 at para 47 per Mr Justice Fancourt; *George v Countrywide Surveyors Ltd* [2009] LR PN 141; *Western Digital Corp v British Airways Plc* [2001] QB 733; *Effort Shipping Co. Ltd. Respondent v Linden Management S.A. and Others Appellants* [1998] 2 WLR 206. Dyer observes that the lack of intensive judicial discussion on privity is perhaps because it is “so bound up with the concept and definition of contract itself that it is easy to find many cases where the principle is assumed and applied, but not many where it is analysed or its rationale explored.”: DL Dyer “Pulling the privity thread: will contract law unravel?” 1999 2(2) *International Trade Law Quarterly* 105 at 109.

assignee and the dairy company.¹⁷⁹ The House of Lords held in 2000 that privity of contract prevents the formation of any form of ‘implied’ contractual relationship between an employer and a sub-contractor.¹⁸⁰

In summary, privity at an early stage of its development in English law was not strictly enforced. In the sixteenth and seventeenth centuries, privity was subject to various doctrines allowing third party claims (the ‘promisee in law’ theory, the interest test, and the beneficiary test). Privity was however judicially recognised during this period, as evidenced by its acknowledgment in a number of cases. The tension between privity and third party claims remained throughout the eighteenth and nineteenth century. In some cases, third party claims were denied because of privity, whereas in others the third party was able to enforce contracts in his favour. *Tweddle v Atkinson*¹⁸¹ appears to signpost an era of recognition of a strict form of privity. Whilst the case was decided in terms of consideration rather than privity, it was treated in the nineteenth and twentieth centuries as an authority for England’s recognition of privity. English judicial opinion was not wholly in favour of a strict privity doctrine. However, by the end of the twentieth century, the doctrine was strictly applied and deeply entrenched. Accordingly, the Law Commission’s proposals to introduce third party rights into English law were viewed as a reform of the privity doctrine.¹⁸² The impact of the introduction of a statutory third party right on the English privity doctrine is further discussed in the following chapter.¹⁸³

2.4.2.2. Academic commentary

Various commentators recognise positive attributes of the privity doctrine. Collins’ “most significant argument” in favour of privity is that, in the absence

¹⁷⁹ *Arla Foods UK plc v George Barnes, Mary Barnes, David Barnes, Withgill Farm Limited, Peter Willes, D H Willes & Partners (a firm)* [2008] EWHC 2851 at para 49 per Sir Edward Evans-Lombe. The question of whether burdens are assignable in Scots law is discussed at subsection 5.5.1.1.

¹⁸⁰ *Lafarge Redlands Aggregates Ltd (formerly Redland Aggregates Ltd) v Shephard Hill Civil Engineering Ltd.* [2000] CLC 1669 at 1670 per Lord Hope of Craighead.

¹⁸¹ *Tweddle v Atkinson* (1861) 9 WR 781.

¹⁸² Law Commission, Report on *Privity of contract: Contracts for the benefit of third parties* (Law Com No 242, 1996) 1.2.

¹⁸³ See, in particular subsection 3.2.2.2.

of the doctrine, contracting parties could incur liability for non-performance to an unlimited number of extra-contractual parties, resulting in indeterminate liability.¹⁸⁴ He also notes that where privity is commercially obstructive, devices such as collateral contracts may be used to prevent direct challenge to the doctrine whilst protecting the expectations of the parties.¹⁸⁵ Sir Anthony Mason¹⁸⁶ and Kincaid¹⁸⁷ point out that privity embodies the concept of contracts as bargains (i.e. the principle that a contract can only confer rights and obligations on those who make the bargain). Kincaid also argues that it is not necessarily unjust to refuse third party claims, given that contractual promises are not made to or paid for by third parties.¹⁸⁸

However, most commentators recognise that privity should not be strictly construed, and some argue that privity does not and should not exist in English law. Flannigan discusses how:

“a dogmatic approach has been necessary for the continued survival of the privity doctrine in its present form because... there is precious little to support the doctrine or to show it to be a ‘good and useful’ rule.”¹⁸⁹

He criticises Viscount Haldane’s comments¹⁹⁰ for their lack of doctrinal justification and his failure to examine earlier case law.¹⁹¹ Flannigan further argues that courts in the nineteenth and twentieth centuries failed to recognise earlier cases permitting third party claims, and this has led to the modern recognition of privity.¹⁹² JA Andrews’ similar view is that privity lacks a historical basis in English law.¹⁹³ These commentators are correct that English law does not exhibit a strong historic privity doctrine, and its relatively

¹⁸⁴ H Collins, *The law of contract* (LexisNexis, London, 4th edn, 2003) 275.

¹⁸⁵ *Ibid.* 309. The interaction between privity and concepts which bypass privity in accordance with the intentions of the contracting parties is discussed at subsection 3.2.2.3.

¹⁸⁶ Mason (n 26) at 90.

¹⁸⁷ P Kincaid, “Privity and Private Justice in Contract” in P Kincaid (ed), *Privity: Private justice of public regulation* (Ashgate, Dartmouth, 2001) 60 at 60. See also Mason (n 26) at 92.

¹⁸⁸ Kincaid (n 187) at 60.

¹⁸⁹ Flannigan (n 146) at 564.

¹⁹⁰ See above at (n 174).

¹⁹¹ Flannigan (n 146) at 572.

¹⁹² *Ibid.* at 565.

¹⁹³ JA Andrews, “Section 56 Revisited” [1959] 23 *Conveyancer and Property Lawyer* 179 at 188-189.

recent firm recognition has stemmed from an acceptance of consideration in English law. The mere fact of privity's tenuous roots, however, does not lead to the conclusion that privity should not be recognised in any context in English law.

Vernon Palmer noted, prior to the Contracts (Rights of Third Parties) Act 1999, that English law's strict approach to privity cannot be explained as a matter of logic or justice,¹⁹⁴ and Merkin stresses that privity has "proved to be inconvenient in commerce and unjust in private relationships."¹⁹⁵ Flannigan submits that privity is incompatible with a doctrine of unconscionability, referring to the idea that contract law should generally prevent contractual injustice and abuse of bargaining power.¹⁹⁶ He reasons that "everyone agrees that [privity] is productive of unfairness and hardship",¹⁹⁷ and it is obviously unfair that privity allows a promisor in breach of contract to receive the "windfall benefit" of evading responsibility.¹⁹⁸ These comments, however, fail to acknowledge the fact that privity allows security and predictability to contracting parties.¹⁹⁹ Arguments based on the impact of privity on the fairness and justice of transactions which affect third parties must also account for the perspective of contracting parties. Further, Kincaid was critical of the Law Commission's view that privity produced unjust results,²⁰⁰ arguing that "the third-party rule is about justice, and the exceptions [to privity] are about commercial convenience or efficiency."²⁰¹

In summary, the majority of commentators accept that the privity doctrine is in itself a sensible principle, but they recognise that it should not be absolute.

¹⁹⁴ Palmer, *Paths to privity* (n 27) 4.

¹⁹⁵ R Merkin, "The Enforcement of Promises made for the Benefit of a Third Party" in R Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (Informa Law, London/ Hong Kong, 2000) 21 at 2.1.

¹⁹⁶ See, for example MA Eisenberg, "The Bargain Principle and Its Limits" 1982 95(4) *Harvard Law Review* 741 at 799-800.

¹⁹⁷ Flannigan (n 146) at 592.

¹⁹⁸ *Ibid.*

¹⁹⁹ This is discussed in subsection 1.3.1 and section 5.3.

²⁰⁰ Report on *Privity of contract* (n 182) 3.5.

²⁰¹ Kincaid (n 187) at 68.

The question of whether privity ought to continue to exist in Scots and English law is further discussed in chapter 5.²⁰²

2.4.2.3. Privity and consideration

Unlike Scots law, which does not require consideration in the formation of contractual obligations,²⁰³ the consideration rule is well-established in England.²⁰⁴ In English law, there is a “long-standing debate” on whether privity and consideration are essentially identical concepts, both serving the same function of preventing third parties from claiming on contracts to which they are not party.²⁰⁵ As such, consideration was previously considered an “insurmountable obstacle” to the enforcement of third party rights.²⁰⁶

This raises the question of whether privity is an application of the rule that those who do not provide consideration cannot enforce the contract, or whether privity operates independently from consideration, preventing the third party from enforcing the contract regardless of whether it supplies consideration.²⁰⁷ Whilst early English assumpsit cases concerned neither consideration nor privity, by the end of the sixteenth century the courts took the view that an action in assumpsit was dependent on consideration.²⁰⁸ The reasons for this development are “obscure”, although Merkin surmises that this reflects the influence of equity and the belief that *quid pro quo* should be required in the formation of contracts.²⁰⁹ In dealing with assumpsit cases, the courts accepted by the beginning of the eighteenth century that the doctrine of consideration is based on detriment on the part of the promisee, rather

²⁰² See, in particular section 5.3.

²⁰³ MacQueen and Lord Eassie (eds), *Gloag and Henderson* (n 68) 1.12 and 5.03.

²⁰⁴ *Barber v Fox* (1682) 2 WS 134 at 137.

²⁰⁵ Furmston and Tolhurst, *Privity* (n 19) 2.26. See also S Swaminathan, “The great Indian privity trick: hundred years of misunderstanding nineteenth century English contract law” 2016 16(1) *Oxford University Commonwealth Law Journal* 160.

²⁰⁶ W Müller-Freienfels, “The undisclosed principal” 1953 16(3) *Modern Law Review* 299 at 305.

²⁰⁷ R Merkin, “Historical Introduction to the Law of Privity” in R Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (Informa Law, London/ Hong Kong, 2000) 1 at 1.10.

²⁰⁸ *Ibid.* at 1.11-12 and 1.14; Baker (n 27) at 42-43.

²⁰⁹ Merkin (n 207) at 1.13.

than any benefit to the promisor.²¹⁰ There are various sixteenth and seventeenth century cases in which third parties successfully brought actions in *assumpsit*.²¹¹ However, it was asserted in other cases that the promisee rather than the third party is the correct claimant.²¹² Some cases which could have been resolved in terms of privity expressly turned on consideration.²¹³ The early cases therefore tended to resolve third party claims in terms of consideration rather than privity.

The concepts of privity and consideration became more closely interlinked in later years. As discussed above, consideration is perhaps the cause of English law's recognition of privity.²¹⁴ This is a logical assessment of the early case law. Whilst the courts did not expressly rely on the privity doctrine, the fact that consideration could only be provided by a contracting party emphasises that contractual benefits (receipt of consideration and enforceability of the right to receive consideration) and contractual burdens (obligations to provide consideration) accrued only to contracting parties. The link between privity and consideration was expressly developed in *Bourne v Mason*.²¹⁵ In the case, privity was framed in terms of the absence of consideration.²¹⁶

However, privity developed as a standalone doctrine throughout the nineteenth century.²¹⁷ It is now generally accepted that privity and consideration are separate tests to be used in ascertaining whether contractual obligations are enforceable.²¹⁸ Accordingly, a third party may be

²¹⁰ Merkin (n 207) at 1.16-19; *Manwood v Burston* (1587) 2 L 203.

²¹¹ *Rippon v Norton* (1602) CE 849; *Provender v Wood* (1627) Het. 30; *Hadvess v Levit* (1632) Het. 176. These cases are discussed in Merkin (n 207) at 1.21.

²¹² *Jordan v Jordan* (1594) CE 369; *Taylor v Foster* (1600) CE 776.

²¹³ *Gilbert v Ruddeard* (1607) D 272b; *Ritler v Dennet* (1606) 1 K 44.

²¹⁴ See the summary of Palmer's discussion above at subsection 2.4.2.2. and further Merkin (n 207) at 1.21 and Ibbetson (n 18) at 111-113.

²¹⁵ *Bourne v Mason* (1668) 86 ER 5.

²¹⁶ Discussed above at subsection 2.4.2.1.

²¹⁷ *Jones v Robinson* (1847) 1 Ex. 454; *Alton v Midland Railway* (1865) 19 CBNS 219; *Price v Easton* (1833) 4 B & Ad. 433. See also Swaminathan (n 205) at 173-177; Guest, *Anson's Law of Contract* (n 113) 86.

²¹⁸ Furmston and Tolhurst, *Privity* (n 19) 2.27; Mason (n 26) at 89; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847; *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 469 per Viscount Simonds.

unable to enforce a contractual obligation because it has not provided consideration under the contract and/ or because it is not a party to the contract. In practice, the third party will likely be excluded from enforcing the contract in English law on the grounds of both a lack of consideration and a lack of privity. However, the third party could potentially provide consideration under the contract (for example, through part-funding one party's performance) without intending to become a full contracting party. It is therefore logical to maintain the distinction between the two doctrines. Indeed, the Supreme Court has recently acknowledged that consideration "has nothing to do with the doctrine of privity."²¹⁹

Further, the modern conception of consideration in English law is logically incompatible with the privity doctrine. Throughout the nineteenth century, consideration continued to be thought of as a detriment to the promisee.²²⁰ In the modern law, however, consideration must move to the promisor.²²¹ Allowing the consideration to take the form of the benefit to the promisor does not require that only the person providing consideration may sue on the contract – a third party could, according to the modern definition, provide the consideration. The reason third parties are barred from suing on contracts to which they are not party (generally speaking) must therefore be privity.²²²

Finally, it is noted that recognition of consideration is not a prerequisite for the recognition of privity. Consideration is a common law concept which affects the formation of contracts, but does not prevent the imposition of a general rule against third party claims on contracts. Roman law recognised privity without enforcing a consideration requirement,²²³ and it appears that Scots law does the same.

²¹⁹ *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67 at para 296 per Lord Toulson.

²²⁰ *Crow v Rogers* (1724) 1 S 592.

²²¹ Merkin (n 207) at 1.35.

²²² *Ibid.* at 1.36; R Merkin, "The Contracts (Rights of Third Parties) Act 1999" in R Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (Informa Law, London/ Hong Kong, 2000) 91 at part VI.

²²³ Furmston and Tolhurst, *Privity* (n 19) 1.03.

2.5. Concluding remarks

This chapter provides the first extensive Scots law study of the privity doctrine in Scots law, examining its judicial and academic development in detail. Whilst there are numerous meanings and uses of the term 'privity', this research considers privity in its contractual sense only. The contractual definition of privity encompasses two aspects: preventing third parties from accruing enforceable contractual benefits under contracts to which they are not party and protecting third parties from the imposition of obligations. Both aspects of privity are now accepted in both Scots and English case law, although the doctrine is universally accepted by academics in neither jurisdiction.

Chapter 3: Compatibility of Privity and its Exceptions with Scots Contract Law

3.1. Overview of chapter 3

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

3.2. Exceptions to the privity doctrine

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

3.2.1. Agency/ mandate²²⁴

It is said that agency:

“refers to a relationship... in terms of which the principal instructs the agent to act on his behalf in order to produce legally binding effects for the principal.”²²⁵

Thomas Smith²²⁶ and the Law Commission²²⁷ treat agency as an exception to privity. This initially appears to be a reasonable assumption. The agent negotiates with the third party, but the principal, rather than the agent, benefits from this interaction. Accordingly, the principal seems to be circumventing privity in enforcing its benefits stemming from the transaction between the agent and the third party.

²²⁴ In essence, mandate is gratuitous, and agency is not. See LJ Macgregor, *The law of agency in Scotland* (W Green, Edinburgh, 2013) 2.01; Smith, *Short Commentary* (n 36) 774; JD Stair, *The institutions of the law of Scotland* (G Hamilton and J Balfour, Edinburgh, 3rd edn, 1759) 1.12.1. Undisclosed agency is discussed in chapter 9.

²²⁵ Macgregor, *Agency* (n 224) 2.01.

²²⁶ Smith, *Short Commentary* (n 36) 773. See also Guest, *Anson's Law of Contract* (n 113) 161.

²²⁷ Report on *Privity of contract* (n 182) 2.15.

However, the agent does not in fact contract with the third party. The agent merely negotiates with the third party with the purpose of concluding a contract between the third party and principal.²²⁸ Indeed, Thomas Smith recognises that agency is an “aspect of representation.”²²⁹ The ‘true’ contracting parties throughout the transaction are thus the principal and third party. The privity doctrine is irrelevant, because the agent is at all times a representative of the principal only, and so the contract is between the principal and third party.

Further, MacQueen comments that treating the principal as party to the contract, rather than the agent, is “perfectly consistent” with Scots contract law because this is “clearly the intention” of the parties concerned, including the third party.²³⁰ There is an assumption that the agent is only an intermediary, and not a contracting party, although it can be liable to the third party in certain circumstances.²³¹ This also aligns with the three parties’ contractual intentions. Accordingly, the parties have the flexibility to agree that the agent may be liable to the third party, for example, in the event of the principal’s non-payment.²³² Generally speaking, however, the agent is a representative of the principal, contracting on the principal’s behalf without personally accruing the benefits or burdens of the contract. Therefore, there is no question of the principal bypassing privity to sue on the contract, because it is the contracting party.

²²⁸ See further Merkin (n 195) at 2.26; ADM Forte and JP van Niekerk, “Agency” in K Reid, R Zimmermann and D Visser (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford University Press, Oxford, 2004) 240 at 257-258.

²²⁹ Smith, *Short Commentary* (n 36) 774. Smith uses this terminology to denote the fact that agency is one of a number of legal concepts which allow a person to act on behalf of another. He indicates, for example, that mandate and *negotiorum gestio* are also encompassed within this term. See also Furmston and Tolhurst, *Privity* (n 19) 3.27.

²³⁰ MacQueen, *SME* (n 69) para 816. See also Walker, *Contracts* (n 3) 29.4

²³¹ For example, the agent will be personally bound where the factual situation indicates that it intended to contract in its own capacity: Walker, *Contracts* (n 3) 29.5. It will also usually owe liability to the third party if it refuses to identify its principal or purports to act for a principal who does not exist: Macgregor, *Agency* (n 224) 2.04. It is noted, however, that the case of *Halifax Life Limited v DLA Piper Scotland LLP* [2009] CSOH 74 has cast doubt on the scope of this rule - for discussion, see LJ Macgregor, “New Scottish Agency Case”, Edinburgh Centre for Commercial Law blog, 26.06.2009, available at: <http://www.ecclblog.law.ed.ac.uk/2009/06/26/new-scottish-agency-case/>.

²³² Macgregor, *Agency* (n 224) 12.01.

3.2.2. Third party rights

A third party right arises where the contracting parties intend to confer a personal, enforceable contractual right on the third party.²³³ This contrasts with the concepts considered in the thesis, which allow contractual performance to be enforced in favour of third parties in the absence of a right voluntarily conferred by the contracting parties. Third party rights should, however, be treated as an exception to privity because the third party is able to enforce contractual performance. This subsection defines third party rights and examines the interaction between privity and third party rights.

3.2.2.1. The Scots third party right

Third party rights are long-accepted in Scots law²³⁴ and now exist in statutory form, following the enactment of the Contract (Third Party Rights) (Scotland) Act 2017. The Scots third party right, formerly known as a *jus quaesitum tertio*,²³⁵ arises where the contracting parties intend to confer a benefit on a third party, and the contract contains an undertaking that at least one of the contracting parties will do or not do something for the third party's benefit.²³⁶ Such intention can be express or implied.²³⁷

²³³ The intention of the contracting parties is recognised as a requirement for the formation in both Scots and English law (as discussed below in subsections 3.2.2.1 and 3.2.2.2 respectively).

²³⁴ Hogg notes that, from 1591 onwards, Morison's Dictionary has listed case reports under the heading '*jus quaesitum tertio*': M Hogg, *Promises and contract law: comparative perspectives* (Cambridge University Press, Cambridge, 2011) 305 (footnote 71). An example of early case law is: *Wood v Moncur* (1591) Mor. 7719 at 7719: "albeit the defender was no contractor, yet there was a provision made in the same in his favours." Similar statements are found in: *Renton v Ayton* (1634) Mor. 7721 and *Supplicants v Nimmo* (1627) Mor. 7740. See also T Hope, *Major Practicks* (Neill & Co, Edinburgh, 1608–1633) 2.3.37; J Erskine, *An institute of the law of Scotland* (Law Society of Scotland, Butterworths, Edinburgh, 8th edn, 1871) 3.1.8; Stair, *Institutions* (n 224) 1.10.5.

²³⁵ McBryde, *Contract* (n 111) 10.01. The contracting parties were referred to as the debtor and stipulator (the former being responsible for delivering the performance to the third party), and the third party was the *tertius*: MacQueen, *SME* (n 69) paras 824-825. The term '*jus quaesitum tertio*' literally means 'the third party has acquired a right', and the Scottish Law Commission suggested that the term was adopted by Stair due to the influence of civilian jurisprudence: Scottish Law Commission, Memorandum on *Constitution and Proof of Voluntary Obligations: Stipulations in Favour of Third Parties* (Memorandum No 38, March 1977) 2.

²³⁶ Contract (Third Party Rights) (Scotland) Act 2017 section 1(1)(a)-(b).

²³⁷ *Ibid.* section 2(3).

In order to provide an enforceable third party right, the contracting parties must ensure that the contract adequately identifies the third party.²³⁸ A third party may acquire a right even if it was not in existence or did not fall within the class of those intended to benefit from the third party right when the right was created.²³⁹

Prior to the Contract (Third Party Rights) (Scotland) Act 2017, there was a lack of consensus on whether an enforceable Scots third party right must necessarily be irrevocable.²⁴⁰ The Scottish Law Commission identified irrevocability as a “central issue of law reform”²⁴¹ in their recent Report on *Third Party Rights*.²⁴² The resulting legislation now provides that contracting parties may confer a revocable or modifiable third party right.²⁴³

It is acknowledged that the Scots third party right has been treated as a form of unilateral promise by some historical and modern commentators.²⁴⁴ However, it is submitted that the modern third party right is not promissory,²⁴⁵ and the analysis in the remainder of this section assumes that the nature of the third party’s right is a contractual benefit.

²³⁸ Contract (Third Party Rights) (Scotland) Act 2017 section 1(3).

²³⁹ *Ibid.* section 1(4).

²⁴⁰ In *Sir John Baird v Creditors of Mr Hugh Murray* (1744) Mor. 7737, for example, a party was contractually obliged to transfer money to another’s next of kin, but because this arrangement was revocable, the situation did not give rise to a *jus quaesitum tertio*. See also *Carmichael v Carmichael’s Executrix* 1920 SC (HL) 195 at 200 per Lord Dunedin and JT Cameron “Jus Quaesitum Tertio: The True Meaning of Stair I.x.5” 1961 *Juridical Review* 103 at 118. Opposing views, according to which a third party right need not be irrevocable, include Hogg, *Promises and contract* (n 234) 305-306; DN MacCormick “*Jus Quaesitum Tertio: Stair v. Dunedin*” 1970 *Juridical Review* 228 at 236-241; and Gloag, *Contract* (n 65) 242.

²⁴¹ Scottish Law Commission, Report on *Third Party Rights* (Scot Law Com No 245, July 2016) 2.16 and chapter 5.

²⁴² Irrevocability of third party rights is discussed in-depth in chapter 5 of the Report (n 241).

²⁴³ Contract (Third Party Rights) (Scotland) Act 2017 sections 2(4) and 3. This is subject to section 6, which provides for the third party’s protection from revocation in certain circumstances.

²⁴⁴ See, for example, Hogg, *Promises and contract* (n 232) 284

²⁴⁵ A promissory analysis of third party rights is addressed in L MacFarlane, “The Nature of Third Party Rights: Lessons from German Law” in S Lorenzmeier and D Miler (eds), *The New Law* (Nomos, Baden-Baden, 2018) 27 at 28-30.

3.2.2.2. The English third party right

English law did not allow for third party rights prior to the Contracts (Rights of Third Parties) Act 1999.²⁴⁶ Various judges indicated that the barrier to recognition of third party rights posed by the privity doctrine was unsatisfactory.²⁴⁷ However, whilst the Law Revision Committee had previously recommended the introduction of an English third party right,²⁴⁸ this did not result in legislation, and the House of Lords declined to recognise third party rights at common law in *Beswick v Beswick*.²⁴⁹ English law eventually provided for a statutory third party right with the enactment of the 1999 Act, following the Law Commission's Report on *Privity of Contract*.²⁵⁰

In terms of the formation requirements of the English third party right, the contracting parties must, as in Scots law, expressly or impliedly intend to confer an enforceable benefit on the third party.²⁵¹ The third party must be identified by name or as a member of a class of beneficiaries, but does not need to be in existence when the contracting parties create the right.²⁵² The contracting parties may not revoke the right where the third party communicates its assent to receiving the right, the promisor is aware that the third party has acted in reliance on its right, or it is reasonable to expect that

²⁴⁶ This was certainly the case immediately before the Act, it is debateable whether this was the case historically: see above at subsection 2.4.2.1.

²⁴⁷ *Woodar Investment Development v Wimpey Construction UK Ltd* [1980] 1 WLR 277 per Lord Salmon at 291 and Lord Scarman at 300; *Forster v Silvermere Golf and Equestrian Centre Ltd* (1981) 125 SJ 397 per Dillon J; see also above at section 2.4.2.1. and discussion in GWF Dold, *Stipulations for a Third Party* (Stevens & Sons Limited, London, 1948) 98 and AM Tettenborn, "Third party contracts - pragmatism from the Law Commission" 1996(Dec) *Journal of Business Law* 602.

²⁴⁸ Law Revision Committee, *Sixth Interim Report* (n 172), discussed in J Beatson, "Reforming the Law of Contracts for the Benefit of Third Parties: A Second Bite at the Cherry" 1992 45(2) *Current Legal Problems* 1.

²⁴⁹ *Beswick v Beswick* [1968] AC 58; Memorandum on *Stipulations in Favour of Third Parties* (n 235) 3.

²⁵⁰ Report on *Privity of contract* (n 182). The Report and its draft Bill are summarised in NH Andrews, "Reform of the Privity Rule in English Contract Law: The Law Commission's Report No. 242" 1997 56(1) *Cambridge Law Journal* 25. See also C MacMillan, "A Birthday Present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999" 2000 63(5) *Modern Law Review* 721.

²⁵¹ Contracts (Rights of Third Parties) Act 1999 section 1(2).

²⁵² *Ibid.* section 1(3).

the promisor had foreseen that the third party would rely on the right and the third party has done so.²⁵³ The right is otherwise revocable.

3.2.2.3. Third party rights and the privity doctrine

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

Firstly, the Scottish Law Commission indicate that the *jus quaesitum tertio*:

“is not... an exception grafted onto the general rule of contract law that strangers to a contract cannot sue upon it, but rather the application of a general principle of Scots law that pollicitation (in our ascribed sense) creates obligations – at least in those relationships which other systems would recognise as obligations in favour of third parties.”²⁵⁴

Secondly, there are those who view third party rights as an exception to privity. For example, Gloag describes the Scots third party right as an exception to the privity doctrine, justified on the basis that the third party must show that the right to enforce the contract has been conferred upon it.²⁵⁵ This view is also found in judicial opinion.²⁵⁶ Lord Skerrington, commenting on the parties’ obligations under a lease, states that “it confers a *jus quaesitum* upon the pursuer... although there is no privity of contract between them”.²⁵⁷ This indicates that he viewed third party rights as an exception to privity. Furmston and Tolhurst frame England as “a jurisdiction that has a general legislative exception to the privity rule”²⁵⁸ and the Law Commission also view third party rights as an exception to privity.²⁵⁹

The third opinion is that of MacQueen. He asserts that there is no Scots privity doctrine, because of Scotland’s recognition of third party rights and

²⁵³ Contracts (Rights of Third Parties) Act 1999 section 2(1).

²⁵⁴ Memorandum on *Stipulations in Favour of Third Parties* (n 235) 12.

²⁵⁵ Gloag, *Contract* (n 65) 218. See also 235 and McBryde, *Contract* (n 111) 10.01.

²⁵⁶ *D & J Nicol v Dundee Harbour Trustees* 1915 SC (HL) 7 at 13 per Lord Dunedin; *Laurence McIntosh Limited v Balfour Beatty Group Limited and The Trustees of the National Library of Scotland* [2006] CSOH 197 at para 35 per Lord Drummond Young.

²⁵⁷ *Taylor v The Auchinlea Coal Company Limited* 1912 2 SLT 10 at 12 per Lord Skerrington.

²⁵⁸ Furmston and Tolhurst, *Privity* (n 19) 1.01 (referring to the Contracts (Rights of Third Parties) Act 1999).

²⁵⁹ Adams, Beyleveld, and Brownsword (n 20) at 263. The relevant Law Revision Committee document is the *Sixth Interim Report* (n 172).

assignment.²⁶⁰ Lord Kingarth stated (prior to the Contracts (Rights of Third Parties) Act 1999) that privity of contract prevented recognition of third party rights in English law,²⁶¹ and it is Thomas Smith's view that:

“[being] free from doctrines of ‘consideration’ and ‘privity of contract’ Scottish law developed a doctrine of *jus quaesitum tertio* at an early stage.”²⁶²

Confusingly, however, Smith also refers to the “primary rule” that only contracting parties can enforce contracts.²⁶³ He further states that third party rights are recognised as an exception to privity where “it can be shown that the agreed object of a contract between A and B was to benefit a third party”.²⁶⁴

Does the fact that Scots law has long-recognised third party rights mean that it does not recognise the privity doctrine? It is wrong to state that Scots law has historically *strictly* adhered to privity, given its acceptance of third party rights and the fact that express judicial recognition of privity is relatively recent. In light of the numerous judicial references to privity discussed in the previous chapter,²⁶⁵ however, it is submitted that MacQueen's comment is inaccurate, because Scots law does recognise the privity doctrine. His statement was made prior to the Contracts (Rights of Third Parties) Act 1999, and so he is correct that privity previously prevented recognition of third party rights in English law. However, it is clear that Scots law has (judicially) accepted privity since at least the nineteenth century, and that third party rights are an exception to the doctrine. It may be that MacQueen would now acknowledge the existence of privity in Scots law. He is one of the editors of the most recent edition of *Gloag and Henderson*, in which it is stated that:

²⁶⁰ MacQueen, *SME* (n 69) para 814.

²⁶¹ *Holmes v Bank of Scotland* 2002 SLT 544 at para 17 per Lord Kingarth.

²⁶² Smith, *Short Commentary* (n 36) 778.

²⁶³ *Ibid.* 777.

²⁶⁴ *Ibid.* 778.

²⁶⁵ See subsection 2.3.1.

“The rule that the contracting parties alone have the right to enforce their contract suffers exception in cases where it is shown that their object or intention was to advance the interests of a third party.”²⁶⁶

There is no logical reason why a legal system could not enforce the privity doctrine as a general, overarching principle subject to exceptions. This approach to privity was recognised in Roman law, which upheld the privity doctrine but recognised a number of exceptions.²⁶⁷ In Scots law, it appears that third party rights operate as an exception in accordance with the intentions of the contracting parties. Accordingly, the second view is an accurate view of Scots law. Third party rights are an exception to privity, but the existence of third party rights means that the ‘character’ of the privity doctrine in Scots law is affected, because privity in Scotland has never been absolute. The Scots third party right will not be subject to in-depth further analysis throughout the thesis, because it has previously been fully analysed²⁶⁸ and it is compatible with the current law, including the privity doctrine.

The English third party right is similarly compatible with privity. Lord Denning states that privity has always been subject to the rule that promises ought to be binding, even if they are made in favour of a third party.²⁶⁹ Further, during the Hansard debates on the Contracts (Rights of Third Parties) Bill, the Lord Chancellor (Lord Irvine of Lairg) recognised that English law upholds privity, but that the Bill should give effect to the “simple and straightforward principle”

²⁶⁶ MacQueen and Lord Eassie (eds), *Gloag and Henderson* (n 68) 8.04. This appears to recognise that third party rights are an exception to privity. See also (n 68) above.

²⁶⁷ Zimmermann, *Obligations* (n 128) 34-40; P du Plessis, *Borkowski’s Textbook on Roman Law* (Oxford University Press, Oxford, 4th edn, 2010) 259-260; Ulp. Digest 45.1.38.17; Ulp. D. 13.7.13 pr.

²⁶⁸ A selection of relevant works includes: Cameron (n 240); L Loewensohn, “Jus quaesitum tertio: a comparative and critical survey” 1940 56 *Scottish Law Review* 77 and 104; W McBryde, “Jus Quaesitum Tertio” 1983 *Juridical Review* 137; MacCormick (n 240); HL MacQueen, “Third Party Rights in Contract: *Jus Quaesitum Tertio*” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 2 (Oxford University Press, Oxford, 2000) 220; A Rodger, “Molina, Stair and the Jus Quaesitum Tertio” 1969 *Juridical Review* 128.

²⁶⁹ *Smith and Snipes Hall Farm LD v River Douglas Catchment Board* [1949] 2 KB 500 at 514 per Lord Denning, discussed above at subsection 2.4.2.1. See also P Kincaid, “The UK Law Commission’s Privity Proposals and Contract Theory” 1994 8(1) *Journal of Contract Law* 51 at 57: whilst Kincaid comments that the enforcement of third party rights is not justified by contractual intention alone, he acknowledges that the contracting parties’ intention to benefit the third party is contained in their promise to it.

that the will of the parties should be respected.²⁷⁰ Indeed, it was said during the debates that the “theme” of the Bill was allowing contractual intentions to be effected.²⁷¹

3.2.3. Other exceptions to the privity doctrine

There are various specific statutory exceptions to the privity doctrine, for example in the context of insurance and carriage of goods by sea.²⁷² Where a statutory provision affords title to sue outwith a contract, such title will not be negated due to an argument of lack of privity.²⁷³ The statutory exceptions provide a specific right of enforcement for the third party and result from extensive policy-based examination of the circumstances in which the exception is required. Some of the statutory exceptions are examined further in chapter 5,²⁷⁴ which assesses the policy considerations justifying deviation from the privity doctrine.

Walker lists the following examples of common-law exceptions to the privity doctrine: transfer by negotiation;²⁷⁵ transmission of contract on death;²⁷⁶ transmission to or against successors in office;²⁷⁷ transmission on dissolution of a firm;²⁷⁸ transmission of the granting of trust deeds;²⁷⁹ transmission of

²⁷⁰ Hansard Debates on the Contracts (Rights of Third Parties) Bill, 3 Dec 1998: Column 6056, 3.43pm, Lord Chancellor (Lord Irvine of Lairg).

²⁷¹ Ibid. 2 Feb 1999: Column 1431, Lord Chancellor (Lord Irvine of Lairg). For further discussion, see H Beale, “A Review of the Contracts (Rights of Third Parties) Act 1999” in A Burrows and E Peel (eds), *Contract Formation and Parties* (Oxford University Press, Oxford, 2010) 225 at 246-247.

²⁷² For a discussion of these provisions, see: Adams, Beyleveld, and Brownsword (n 20) at 243. Discussion of statutory exceptions to privity more generally is found in D Ibbetson, “English Law: Twentieth Century” in J Hallebeek and H Dondorp (eds), *Contracts for a Third-Party Beneficiary: A Historical and Comparative Perspective* (Martinus Nijhoff, Leiden, 2008) 115 at 126-127.

²⁷³ See, for example, Lord Murray’s statement that “It is clear that privity of contract affords no test of the validity of such a claim. The claim rests upon statute.” The text of Lord Murray’s Note from Interlocutor is provided in *Waddell v Howat* 1924 SLT 468. See also S Whittaker, “Privity of Contract and the Tort of Negligence: Future Directions” 1996 16(2) *Oxford Journal of Legal Studies* 191 at 215.

²⁷⁴ See section 5.2.

²⁷⁵ Walker, *Contracts* (n 3) 29.36.

²⁷⁶ Ibid. 29.39.

²⁷⁷ Ibid. 29.41.

²⁷⁸ Ibid. 29.42.

²⁷⁹ Ibid. 29.43.

contract on the appointment of a receiver;²⁸⁰ transmission of contract on the liquidation of companies;²⁸¹ and contracts running with land or transmitting with goods.²⁸² These are not considered further, because they cannot be used to recover extra-contractual losses.

3.3. Compatibility of privity with the current law

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

3.3.1. Overview of the dominant theories of contract in Scots law

This subsection provides an overview of the dominant theories of Scots contract law: the will, promissory and assumption theories of contract. The thesis will not seek to provide an extensive overview of the competing theories of Scots contract law (this is outwith the scope of the work), but it will ascertain whether the privity doctrine and its exceptions are compatible with these three theories. Accordingly, this chapter does not consider every theory of contract which has been discussed in relation to Scots law.

3.3.1.1. Will theory

Whilst there is a “bewildering array of contract theories” in Anglo-American law generally, Scots law exhibits an “essentially uniform contract theory”.²⁸³ Stair’s view that contracts are based on the agreement of the contracting parties to be bound by obligations to one another²⁸⁴ is “largely unchallenged.”²⁸⁵

²⁸⁰ Walker, *Contracts* (n 3) 29.45.

²⁸¹ *Ibid.* 29.46.

²⁸² *Ibid.* 29.47.

²⁸³ M Hogg, “Competing Theories of Contract: An Emerging Consensus?” in LA DiMatteo and Q Zhou, *Commercial Contract Law: Transatlantic Perspectives* (Cambridge University Press, Cambridge, 2013) 14 at 14.

²⁸⁴ Stair, *Institutions* (n 224) 1.10.6.

²⁸⁵ Hogg (n 283) at 15.

According to Stair:

“Conventional obligations do arise from our will and consent; for, as in the beginning hath been shown, the will is the only faculty constituting rights, whether real or personal.”²⁸⁶

Stair states that there are three acts of will: desire (a tendency or inclination of the will towards its object), resolution (the decision to do what is desired), and engagement.²⁸⁷ This view is reflected in other Institutional Writings.²⁸⁸ For example, Bell notes that a “full and perfect” obligation requires, on the part of the obligor, “a deliberate consent and engagement to him who is to have the right of exacting performance”.²⁸⁹ Erskine has similarly commented that a contract is a:

“voluntary agreement of two or more persons, by which something is to be given or performed upon one part, for a valuable consideration, either present or future, on the other part.”²⁹⁰

The will theory is also recognised in modern commentary. Gloag, for example, remarks that “the will to be bound to some obligation, actual, or implied by law, is necessary before contractual obligation can exist.”²⁹¹

The importance of contractual will is also upheld in English law. Atiyah remarks that:

“the modern lawyer... sees little or no difference between saying that the parties voluntarily enter into a transaction to which the law

²⁸⁶ Stair, *Institutions* (n 224) 1.10.1: obediential obligations arise from the will of God, and conventional from the will of man.

²⁸⁷ *Ibid.* 1.10.2. Bell similarly recognises three acts of will: deliberation, resolution, and engagement; noting that the law will enforce obligations at the engagement stages only: GJ Bell, *Principles of the law of Scotland* vol 1 (4th edn, 1839, reprinted by the Edinburgh Legal Educational Trust, Edinburgh, 2010) 7.

²⁸⁸ Walker, *Contracts* (n 3) 3.1.

²⁸⁹ GJ Bell, *Commentaries on the law of Scotland and on the principles of mercantile jurisprudence* vol 1 (7th edn, 1870, reprinted by T&T Clark, Edinburgh, 1990) I, 313. See also his statement that “In most codes of jurisprudence, with a view to the sure establishing of that consent which is of the essence of all contracts and obligations, there have been appointed certain requisites and solemnities, as at once evincing the deliberate act of consent and the authenticity of the contract.” (I, 335). He has further commented that: “To a perfect obligation (besides the proof requisite), it is necessary that there shall be a deliberate and voluntary consent and purpose to engage” (Bell, *Principles* (n 287) 10).

²⁹⁰ Stair, *Institutions* (n 224) 3.1.16.

²⁹¹ Gloag, *Contract* (n 65) 16. See also Hogg, *Promises and contract* (n 234) 169.

attributes certain consequences, and saying that the consequences themselves are the creation of the will of the parties.”²⁹²

The will theory is treated in the thesis as the dominant theory of Scots contract law, and influential in English law.

3.3.1.2. Promissory theory

According to promissory theory, contracts consist of reciprocal promises.²⁹³

Hogg outlines the two main sub-types of promissory theories of contract.²⁹⁴

Firstly, Contractarianism bases the duty to adhere to promises in a social contract, and provides that individuals adhere to promises on the rational basis that this facilitates trust amongst members of society.²⁹⁵

Contractualism, on the other hand, views promise as an “institutional obligation” based on the rule that promises must be kept, which derives from the basic moral principle of fairness.²⁹⁶ One of the most notable proponents of a promissory theory of contract in recent times is Fried, although Bix comments that Fried’s work *Contract as Promise*²⁹⁷ is likely restricted to an analysis of US law.²⁹⁸

Thomas Smith notes that the distinction between unilateral promissory obligations and bilateral contractual obligations dates back to Roman and canon law.²⁹⁹ Scotland has long-recognised the enforceability of unilateral promises.³⁰⁰

²⁹² PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979) 406.

²⁹³ SA Smith, *Contract Theory* (Oxford University Press, Oxford, 2004) 43-44.

²⁹⁴ Hogg, *Promises and contract* (n 234) 93-95.

²⁹⁵ *Ibid.* 93-94.

²⁹⁶ *Ibid.* 94; J Rawls, *A Theory of Justice* (Belknap Press, Massachusetts, reissue edn, 2005) 112.

²⁹⁷ The most recent edition is: C Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford University Press, Oxford, 2nd edn, 2015). Bix refers to the previous edition: C Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Massachusetts, 1990).

²⁹⁸ BH Bix, “Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried” 2012 45(3) *Suffolk University Law Review* 719 at 721.

²⁹⁹ TB Smith, “Pollicitatio – Promise and Offer: *Stair v. Grotius*” 1958 *Acta Juridica* 141 at 141. See also MA Hogg, “Promise: the neglected obligation in European private law” 2010 59(2) *International and Comparative Law Quarterly* 461 at 463-464.

³⁰⁰ For an overview of the development of the law of promise in Scotland, see WDH Sellar, “Promise” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 2 (Oxford University Press, Oxford, 2000) 252.

In Scotland, the will theory is dominant,³⁰¹ although Hogg casts third party rights in promissory terms.³⁰² Hogg also notes that firm offers likely consist of an offer and a promise to keep an offer open.³⁰³

Kincaid argues that English law currently embodies the promissory theory.³⁰⁴ Atiyah notes that it “has had no serious rival” in the last century,³⁰⁵ and Stephen Smith also favours promissory theory.³⁰⁶ Brownsword and Hutchison explain that promissory theory can account for situations involving both ‘direct’ promises to third parties (in which contracting party A promises contracting party B that it will confer a benefit on third party C, and A promises C that it will confer a benefit on C) and ‘indirect’ promises (A promises B that it will benefit C, but does not make such a promise to C).³⁰⁷ Atiyah acknowledges elements of promissory theory in English law.³⁰⁸ His view is that the promissory theory is “alive and well”³⁰⁹ despite the fact that it requires qualification and modification in the context of analysing certain consumer and family arrangements.³¹⁰

Promissory theories are not incompatible with will-based accounts of contract law. This is because promises are, in Scots law, historically rooted in unilateral declarations of the promisor’s will.³¹¹ Thomas Smith’s view is that *pollicitatio* continue to constitute expressions of unilateral will,³¹² and, more

³⁰¹ See above at subsection 3.3.1.1.

³⁰² Hogg, *Promises and contract* (n 234) 284.

³⁰³ Hogg (n 299) at 465.

³⁰⁴ It is noted that Kincaid equates the will, promise, and assumption theories: “If the three terms do not mean exactly the same thing, they are variations on a common theme.” Kincaid (n 269) at 52.

³⁰⁵ PS Atiyah, *Essays on Contract* (Oxford University Press, Oxford, 1990) 12. See also PS Atiyah, “Contracts, Promises and the Law of Obligations” 1978 94(Apr) *Law Quarterly Review* 193 at 194.

³⁰⁶ Smith, *Contract Theory* (n 293) 60-68.

³⁰⁷ R Brownsword and D Hutchison, “Beyond Promissory Principle and Protective Pragmatism” in P Kincaid (ed), *Privity: Private justice of public regulation* (Ashgate, Dartmouth, 2001) 126 at 130.

³⁰⁸ PS Atiyah, “The theoretical basis of contract law – an English perspective” 1981 1(2) *International Review of Law and Economics* 183 at 189-190.

³⁰⁹ Atiyah, *Essays* (n 305) 13.

³¹⁰ *Ibid.* 12.

³¹¹ Smith (n 299) at 142 and 145, citing Stair, *Institutions* (n 224) 1.1.12, 1.10.3-7. Stair’s promissory views appear to include promises in favour of third parties: 1.10.5 notes *jus quaesitum tertio* as the main example of promises which do not require acceptance.

³¹² Smith (n 299) at 142 at 147.

generally, Scots law “has accepted a general doctrine of obligation by unilateral declaration of will”.³¹³ Hogg has recently acknowledged that a promise is “constituted by the act or declaration of will of one party alone, this making it a type of unilateral juridical act (or unilateral legal transaction).”³¹⁴ Referring to English law, Stephen Smith comments that “contracts are promises or, if not promises, then agreements or something similar”.³¹⁵ Indeed, will theory was dominant in nineteenth-century English contract theory, and promissory theory is thought to be a “contemporary, if somewhat narrower” branch of will theory.³¹⁶

3.3.1.3. Assumption theory

The most notable advocate for assumption theory is the New Zealand commentator Coote.³¹⁷ According to Coote:

“Contractual obligations are not imposed by the law *ab extra* but are those which at formation the parties have assumed, that is, have taken upon themselves. Whether there has been such an assumption falls to be determined objectively.”³¹⁸

In Scots law, Hogg considers that there are elements of the assumption theory in the work of Stair, explaining that Stair understood the “essence” of contract law to be the recognition of contractual parties’ voluntary undertakings.³¹⁹ Hogg also notes that Scots lawyers more generally would perhaps agree with Coote’s view that contract law involves the assumption of legal duties.³²⁰ Indeed, Hogg has described Coote’s theories as taking a:

“commendable approach to the importance of personal liberty and freedom of action, stressing... the voluntary intention of the parties as the constitutive means of assuming an obligation.”³²¹

³¹³ Smith (n 299) at 142 at 149. See also Smith, *Contract Theory* (n 293) 57.

³¹⁴ Hogg (n 299) at 462.

³¹⁵ Smith, *Contract Theory* (n 293) 168. See also 44 and 56. Atiyah similarly states that a contract “consists of an exchange of promises... with the intention of creating a binding deal”: Atiyah (n 305) at 194. See also 195.

³¹⁶ Smith, *Contract Theory* (n 293) 56.

³¹⁷ B Coote, *Contract as assumption: essays on a theme* (Hart Publishing, Oxford, 2010).

³¹⁸ B Coote, *Contract as Assumption II* (Hart Publishing, Oxford, 2016) 1.

³¹⁹ M Hogg, “Publication Review: Contract as Assumption” 2011 15(2) *Edinburgh Law Review* 315 at 316. See also Hogg (n 283) at 27.

³²⁰ Hogg (n 319) at 316.

³²¹ *Ibid.* at 316-317.

Save for these comments, the assumption theory has not gained considerable recognition in Scotland. Phang argues that various English cases can be explained in terms of the assumption theory.³²² On the whole, however, assumption theory has gained less traction in English law than will-based theories and promissory theory.

Assumption theory is compatible with will-based theories of contract. According to the theory, contracting parties voluntarily agree to uphold contractual obligations.³²³ In other words, they voluntarily assume their respective contractual obligations because they intend to do so. Coote explains that an enforceable contract consists of promises or undertakings “in respect of which legal contractual obligation has been assumed by means that the law recognises as effective for that purpose”, such that the party’s intention to assume its obligations under the contract is treated as incidental to its intention to contract.³²⁴ Hogg surmises that Coote:

“does not reject out of hand promissory ideas about contract law, but rather suggests that what is crucial to a legally relevant promise is that the promisor is assuming an obligation in the act of promising”.³²⁵

Thus, like the will theory, contractual obligations can only arise with the parties’ consent.

3.3.1.4. Summary

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

“The core offer-acceptance rule thus provides, in principle anyway, that contracting parties control the contract-making process: both the existence and the content of contractual duties are up to the parties.”³²⁶

³²² A Phang, “Contract as Assumption – The Scholarship and Influence of Professor Brian Coote” 2011 27(3) *Journal of Contract Law* 247 at 250-255.

³²³ Hogg (n 283) at 27.

³²⁴ Coote, *Assumption II* (n 318) 11.

³²⁵ Hogg (n 319) at 317.

³²⁶ Smith, *Contract Theory* (n 293) at 168.

These theories are also compatible with modern statements of contract as “agreement”.³²⁷ If the contracting parties have voluntarily agreed to perform under the contract, they are bound by their own will to do so. Similarly, they can be said to have agreed to fulfil their promises to one another, and they have agreed to perform under their voluntarily assumed obligations.

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

3.3.2. Compatibility of privity with contract theory

It has been said that privity of contract is “difficult to accommodate” in will-based theories, because it is not entirely clear why the will of contracting parties should be restricted to the extent that third parties can gain rights.³²⁸ Hogg states that there is “no convincing answer” to this question.³²⁹ Kincaid asserts that the intention of the contracting parties does not create the third party’s right to sue – rather, the right is attached by law. He argues that the parties’ intention is relevant to the “fact and content” of the contract, but not the creation of rights outwith the contract.³³⁰ It is however difficult to follow Kincaid’s logic. The third party right is a term in the contract, and as such the obligation on the part of the debtor to perform in favour of the third party is part of the content of the contract to which the parties have consented. Kincaid’s argument is based on his view of contracts as bargains. He asserts that the legal relationship between the contracting parties is constituted by promises within the setting of a bargain and cannot encompass third parties.³³¹ This ignores the fact that at least one of the contracting parties has bargained for contractual performance in favour of the third party.

³²⁷ In English law, see Burrows, *Restatement* (n 33) §2. In Scots law, McBryde notes that “In practice, lawyers talk of agreement”: McBryde, *Contract* (n 111) 1.07.

³²⁸ Hogg (n 283) at 36.

³²⁹ *Ibid.*

³³⁰ Kincaid (n 187) at 63-64. See also 74.

³³¹ *Ibid.* at 63.

Third party rights are conferred according to the intentions of the contracting parties, and so the will of the parties is not circumvented where third parties enforce their rights. This reflects that the Scots conception of privity is compatible with the will theory: it does not prevent the recognition of third party rights where this accords with contractual intention. MacQueen notes that, generally speaking, only the contracting parties will benefit under their contract, subject to their contrary intentions.³³² He elaborates that the:

“purpose of contract law is to give effect to the legitimate intentions of the parties, and in Scots law, if the intention is to confer enforceable rights upon third parties, that will be given effect”.³³³

Crucially, the Scottish Law Commission has recently stated that privity is an “important principle”, but it “yields to one even more fundamental”: giving effect to the intentions of contracting parties.³³⁴ These statements reflect that the privity rule in Scots law accounts for will-based theories of contract law, in that it is subject to contractual intention. This explains why Scots law has historically recognised the *jus quaesitum tertio*, and has introduced a statutory third party right, alongside its recognition of privity. Privity and the will theory are not contradictory. Rather, the former is subject to the latter. Privity is a default effect of contracting, which can be disapplied by the contracting parties’ intentions.

In terms of the relationship between the privity doctrine and promissory theory, Flannigan argues that there is no theoretical justification for privity in systems adhering to promissory theory. According to Flannigan, if promises (and promisors) are to be taken seriously, we must “show respect” by allowing third parties to enforce promises made in their favour.³³⁵ Sir Anthony Mason’s stance is that promissory theory is “even more opposed to the privity

³³² MacQueen, *SME* (n 69) para 814.

³³³ *Ibid.* See also Gloag, *Contract* (n 65) 218-219.

³³⁴ Discussion Paper on *Third Party Rights* (n 63) 2.15. The Law Commission similarly comment that in situations in which the law refuses to uphold third party rights where the contracting parties intend for them to arise, this “frustrates their intentions, and undermines the general justifying theory of contract”: Report on *Privity of contract* (n 182) 3.1. See also Sutherland (n 33) at 205.

³³⁵ Flannigan (n 146) at 587.

rule than the will theory”.³³⁶ He does not discuss why this is the case, but refers to Macneil’s comment that privity is “unrelated to social needs”.³³⁷ As discussed in chapter 1,³³⁸ privity allows contracting parties to predict their liability towards external parties. Efficient contracting can be construed as a social good. If external parties were permitted to sue on contracts as they choose, this would result in increased costs for contracting parties who would be forced to defend such actions. This would be disadvantageous for commercial parties, and so applying the privity doctrine to limit the ability of external parties to enforce contracts promotes contractual efficiency. Sir Anthony Mason is therefore incorrect to suggest that privity and promissory theory are incompatible because privity does not promote social needs. It is submitted that the privity doctrine is compatible with the promissory theory, because privity reflects the principle that promises are usually only enforceable by those to whom they are directed. Further, Stephen Smith comments that privity aligns with promissory theory:

“The privity rule is consistent with this view because promissory obligations are personal obligations. A promise is created by communicating an intention to undertake an obligation *to someone*—the promisee—and the obligation thus created is in principle owed to that person alone.”³³⁹

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

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

³³⁶ Mason (n 26) at 99.

³³⁷ I Macneil, *Contracts: Exchange Transactions and Relations* (Foundation Press, St. Paul, Minnesota, 2nd edn, 1978) 333 (cited in Mason (n 26) at 99).

³³⁸ See, in particular, subsection 1.3.1.

³³⁹ Smith, *Contract Theory* (n 293) 60.

3.3.3. Freedom to contract and freedom of contract

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

3.3.3.1. Freedom to contract and freedom of contract in Scots contract law

The principle of freedom to contract can be distinguished from freedom of contract: the former refers to a party's choice to enter into a contract, and the latter concerns freedom as to the content of one's contracts.³⁴⁰

The freedom to contract (or not) as one chooses is a fundamental principle of Scots law. Stair refers to:

“that freedom we have of disposal of ourselves, our actions and things, which naturally is in us, is by our engagement placed in another, and so engagement is a diminution of freedom, constituting that power in another, whereby he may restrain or constrain us to the doing or performing of that whereof we have given him power of exaction”.³⁴¹

Freedom of contract is also an important contractual principle in Scots law.

Bankton notes that conventional obligations arise: “from the will of the parties, in matters wherein they are otherwise free, which happens by contracts among them.”³⁴²

3.3.3.2. Compatibility of privity with freedom to contract and freedom of contract

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

³⁴⁰ MacQueen and Lord Eassie (eds), *Gloag and Henderson* (n 68) 9.10.

³⁴¹ Stair, *Institutions* (n 224) 1.10.1.

³⁴² Bankton, *Institute* (n 52) 1.11.1.

Allowing for exceptions to privity in line with the intentions of the contracting parties is also compatible with freedom of contract. In the case of third party rights, the contracting parties have voluntarily curtailed their freedom by binding themselves to perform in favour of the third party. Indeed, Glog comments that a contracting party can consent to “the curtailment of his ordinary liberty of action” in respect of contractual rights owed to another who “need not necessarily be the other party to the contract.”³⁴³ The privity doctrine allows contracting parties to provide for third party rights in their contracts, thus controlling the content and scope of their contractual obligations.

3.3.4. Summary

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

3.4. Comments on English law

The Contracts (Rights of Third Parties) Act 1999 has been described as delivering a “body blow”³⁴⁴ to the privity doctrine. However, it is submitted that the Act has merely ensured that the application of the doctrine is subject to the intentions of the contracting parties, as required by the will theory.

Whilst will theory is not necessarily the dominant theory of contract in English law,³⁴⁵ recognition of third party rights has been justified by reference to the

³⁴³ Glog, *Contract* (n 65) 218.

³⁴⁴ *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 at para 1 per Colman J. Merkin has also described the Act as the “abolition of the privity doctrine”: Merkin (n 222) at 5.9. See also E McKendrick, “Breach of Contract and the Meaning of Loss” 1999 52(1) *Current Legal Problems* 37 at 56 and N Andrews, “Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999” 2001 60(2) *Cambridge Law Journal* 353 at 354.

³⁴⁵ See the discussion above at subsection 3.3.1.1.

intentions of contracting parties.³⁴⁶ Further, Vernon Palmer suggests that the English reception of will theory in the nineteenth century “changed the face of English contract” and allowed for a second conception of privity based on will theory rather than consideration.³⁴⁷ This second theory of privity was based on the premise that obligations were sourced in promises rather than consideration, and so, as third parties were recipients of promises, they should be able to directly enforce their rights.³⁴⁸ He comments that, had will theory had an earlier reception in English law, its recognition may have “logically” resulted in a more liberal approach to privity, such that third party rights were permitted.³⁴⁹

Accordingly, the privity doctrine in English law is compatible with contract theory on the same grounds as the Scots doctrine. Will theory is not violated by privity, because, following the Contracts (Rights of Third Parties) Act 1999, parties can exert their contractual intention by providing for an enforceable third party right. Privity is also compatible with a promissory theory of contract law. As third party rights are permitted in English law, the contracting parties can confer an enforceable promise on the third party if they so intend. They are similarly permitted to voluntarily assume obligations in favour of third parties, upholding the assumption theory. It is recognised in English law that allowing third party rights extended the freedom of contracting parties to bind themselves to uphold obligations owed to third parties.³⁵⁰

Finally, the idea that privity has ‘evaporated’ due to the development of third party rights in England does not account for the numerous concepts which

³⁴⁶ Report on *Privity of contract* (n 182) 3.1; C Mitchell, “Privity reform and the nature of contractual obligations” 1999 19(2) *Legal Studies* 229 at 235-236. See also *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 at 75-76 per Steyn LJ; A Phang, “On Justification and Method in Law Reform – The Contracts (Rights of Third Parties) 1999” 2002 18(2) *Journal of Contract Law* 32 at 28.

³⁴⁷ Palmer, *Paths to privity* (n 27) 175.

³⁴⁸ *Ibid.* 185.

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

have been framed as statutory exceptions to privity.³⁵¹ Third party rights in English law were in fact an addition to the large body of existing exceptions to privity. Indeed, MacMillan acknowledges that the Contracts (Rights of Third Parties) Act 1999 “does not abolish the privity rule but merely reforms it in certain circumstances”.³⁵² The view that third party rights legislation has abolished privity in English law is incorrect. Privity remains a default rule in Scots and English law, barring recovery by third parties unless they can rely on a specific statutory or common law exception to privity. These exceptions mitigate the unjust results of rigid adherence to the doctrine.³⁵³

3.5. Concluding remarks

This chapter has examined the relationship between privity, third party rights, Scots contract theory, and the principles of freedom to contract and freedom of contract. In particular, the chapter has shown that it is inaccurate to state that Scots or English law has exhibited a strict approach to privity throughout the last few centuries. Whilst there is a dearth of definitive commentary on the point, both jurisdictions recognise the privity doctrine subject to the intentions of the contracting parties. Both jurisdictions uphold third party rights where the contracting parties intend for the right to be enforceable at the suit of the third party. Accordingly, it can be said that, in both Scots and English law, the privity doctrine is subject to the principle that the intentions of the contracting parties should be upheld. This has been accepted in Scotland since at least the nineteenth century.³⁵⁴ In England, the ‘blemishes’ on the legal landscape, consisting of cases which refused to enforce third party rights, appear to have arisen because the courts gave greater weight to the

³⁵¹ Beale also comments that *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85 went “some way to mitigating privity’s effects” (H Beale, “Privity of Contract: Judicial and Legislative Reform” 1995 9(1) *Journal of Contract Law* 103 at 104). This case, which was heard before the passage of the Contracts (Rights of Third Parties) Act 1999, is an early authority on the transferred loss doctrine, and is further discussed at subsection 7.2.2.

³⁵² MacMillan (n 250) at 721.

³⁵³ Discussed further at section 5.3.

³⁵⁴ See above at subsection 2.3.1.

fact that the third party had not provided consideration than the importance of upholding contractual intention.³⁵⁵

A strict application of privity would be incompatible with the leading theories of contract in Scots and English law, but the recognition of third party rights in both jurisdictions ensures that privity applies in line with the intentions of the contracting parties. Privity is thus compatible with the will, promissory, and assumption theories. In both Scots and English law, privity means that the parties can confer an enforceable benefit on a third party if they so intend. It has also been shown that privity is compatible with the principles of freedom to contract and freedom of contract in both jurisdictions.

³⁵⁵ This is discussed above at subsections 2.4.2.1. and 2.4.2.3.

Chapter 4: The Interaction between the Privity Doctrine and Delictual Liability

4.1. Overview

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

This chapter does not contain separate subsections on English law, as seen in the previous chapters, because the relevant Scots and English laws are closely intertwined and are consequently examined together. The term 'delict' is used to refer to both delict and tort when discussing common elements of Scots and English law. 'Tort' refers specifically to English law.

4.2. Delict

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

4.2.1. Defining delict

According to Walker, a delict is

“voluntary conduct, by act or omission, by one person, with the requisite state of mind, in breach of a duty, imposed on that person by general rules of law, owed in the circumstances by that person to another person, causing that other unjustifiable harm by the infringement of a legally protected interest”.³⁵⁶

³⁵⁶ DM Walker, *The Law of Delict in Scotland* (W Green & Son, Edinburgh, 2nd edn, 1981) 52.

A delict results in an obligation to repair the damage caused.³⁵⁷ The “basis” of delictual liability is accordingly *culpa*, or fault.³⁵⁸

Delict is distinguished from contract because the latter involves consensual obligations.³⁵⁹ Delictual obligations (not to cause harm by unjustifiably infringing on another’s interests, and to provide compensation for harm unjustifiably done) are imposed by law, regardless of the will of the parties.³⁶⁰ The primary contractual obligation (to perform in accordance with the contract) arises due to the parties’ agreement.³⁶¹ The secondary obligation (to provide compensation for breach) is imposed by law, but only arises due to the primary obligations, to which the parties consent, and can generally be excluded by the parties’ agreement.³⁶² Contractual liability is based on the contracting parties’ intentions, whereas delictual liability is imposed involuntarily. This is reflected in Stair’s distinction between conventional obligations (i.e. contract), and obediencial obligations arising by force of law.³⁶³

4.2.2. The law on recovery for personal injury and damage to property

In terms of personal injury, the crucial case is, of course, *Donoghue v Stevenson*,³⁶⁴ in which Mrs Donoghue suffered shock and gastroenteritis after consuming ginger beer from a bottle containing a decomposing snail. She was prevented from suing the manufacturer of the beverage due to privity of contract, but successfully sued in delict. In the case, Lord Atkin outlined the neighbour principle, according to which: “[you] must take

³⁵⁷ Bankton, *Institute* (n 52) 1.4.26; J Thomson, *Delictual Liability* (Bloomsbury, Haywards Heath, 5th edn, 2014) 1.1; Walker, *Delict* (n 356) 4-5.

³⁵⁸ Thomson, *Delictual Liability* (n 357) 3.1.

³⁵⁹ WJ Stewart, *Delict* (Thomson/ W Green, Edinburgh, 4th edn, 2004) 1.2. In English law, see Brownsword, *Contract law* (n 7) 197 and A Robertson, “On the Distinction between Contract and Tort” in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (UCL Press, London, 2004) 87 at 87-91 and 93.

³⁶⁰ Walker, *Delict* (n 356) 13 and 52; Stair, *Institutions* (n 224) 1.1.3 and 1.9.1.

³⁶¹ Walker, *Delict* (n 356) 13-14; Stair, *Institutions* (n 224) 1.1.3.

³⁶² Walker, *Delict* (n 356) 13-14; Stair, *Institutions* (n 224) 1.1.3. The ability of contracting parties to exclude liability for breach of contract is subject to statutory restrictions (see, for example, the Consumer Rights Act 2015 section 31).

³⁶³ Stair, *Institutions* (n 224) 1.3.2.

³⁶⁴ *Donoghue v Stevenson* 1932 SC (HL) 31 at 44 per Lord Atkin.

reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.”³⁶⁵

*The Nicholas H*³⁶⁶ indicates that a test of whether it is fair, just, and reasonable to impose a duty of care applies in cases involving damage to property. In the context of business-to-consumer contracts, the Consumer Protection Act 1987 now provides for strict statutory liability in respect of defective products.³⁶⁷

4.2.3. The law on recovery for pure economic loss

The law on delictual recovery for economic loss is not settled.³⁶⁸ Unlike personal injury and damage to property cases, foreseeability alone is insufficient to result in a duty of care in respect of pure economic loss.³⁶⁹ Following *Murphy v Brentwood DC*,³⁷⁰ claims in respect of pure economic loss are not generally permitted.³⁷¹ There are, however, four categories of cases in which pure economic loss is sometimes recoverable.³⁷² These are considered in turn in the following subsections.

Scots and English law on the topic is similar; an “unsurprising case of insular convergence.”³⁷³ The duty of care is used as a ‘screening device’, preventing claims by those to whom the duty is not owed, and its scope is determined by judicial policy choices.³⁷⁴

³⁶⁵ *Donoghue v Stevenson* 1932 SC (HL) 31.

³⁶⁶ *Marc Rich and Co AG v Bishop Rock Marine Co Ltd (The Nicholas H)* [1996] AC 211. This has been applied in Scotland: *British Telecom v Thomson* 1997 Rep. LR 23; *Coleridge v Miller* 1997 SLT 485.

³⁶⁷ See subsection 5.2.7.

³⁶⁸ Stewart, *Delict* (n 359) 10.01; G Wagner, “Comparative Tort Law” in M Rimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2008) 1003 at 1015.

³⁶⁹ Wagner (n 368) at 1019.

³⁷⁰ *Murphy v Brentwood District Council* [1991] 1 AC 398.

³⁷¹ See discussion in M Bussani and VV Palmer, “The liability regimes of Europe – their façades and interiors” in M Bussani and VV Palmer (eds), *Pure Economic Loss in Europe* (Cambridge University Press, Cambridge, 2003) 120 at 140.

³⁷² Stewart, *Delict* (n 359) 10.02.

³⁷³ Bussani and Palmer (n 371) at 142.

³⁷⁴ *Ibid.* at 124-125 and 142.

4.2.3.1. *Hedley Byrne liability*

In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,³⁷⁵ a “major step” in the expansion of liability for pure economic loss,³⁷⁶ the defendants were liable for loss resulting from the pursuer’s reliance on their negligent misstatement. There was no contract between the parties, but liability was based on their sufficiently proximate ‘special relationship’. Such a relationship arises where the pursuer reasonably relies on the defendant’s statement, and it is reasonable that the defender knows that the pursuer will rely on that statement.³⁷⁷ The rationale of the case has applied in Scotland since *Martin v Bell-Ingram*.³⁷⁸ There have been various formulations of the *Hedley Byrne* rule, but Lord Morris’ dicta reflect “the current view”³⁷⁹ of the principles stemming from the case:

“if in a sphere in which a person is so placed, that others could reasonably rely upon his judgment or his skill or upon his ability to make careful enquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.”³⁸⁰

Hedley Byrne has also been applied in cases involving physical damage arising from defective performance³⁸¹ and non-performance³⁸² of contractual obligations. Whilst the case has been subject to criticism,³⁸³ it continues to provide a means of recovering pure economic loss.

³⁷⁵ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

³⁷⁶ Wagner (n 368) at 1018. See also P Mitchell, “*Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963)” in C Mitchell and P Mitchell, *Landmark Cases in the Law of Tort* (Hart Publishing, Oxford, 2010) 171 at 171.

³⁷⁷ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 539 per Lord Pearce.

³⁷⁸ *Martin v Bell Ingram* 1986 SLT 575; Stewart, *Delict* (n 359) 10.03.

³⁷⁹ LJ Powell and T Stewart, *Jackson and Powell on Professional Liability* (Sweet & Maxwell, London, 7th edn, 2012) 17.028.

³⁸⁰ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 503 and 514 per Lord Morris.

³⁸¹ *Phelps v Hillingdon LBC* [2000] 3 WLR 747.

³⁸² *Barrett v Ministry of Defence* [1995] 1 WLR 1217.

³⁸³ A Goodhart, “Liability for Innocent but Negligent Misrepresentation” 1964 74(2) *Yale Law Journal* 286; G Dworkin, “The Value of a Banker’s Reference” 1962 25(2) *Modern Law Review* 246 at 248; PS Atiyah, “Judges and Policy” 1980 15(3) *Israel Law Review* 346 at 355.

4.2.3.2. Bright-line non-liability cases

This form of liability is defined as “loss which arises as a consequence of physical injury to the person or property of another”, and is also referred to as ‘secondary’ or ‘derivative’ loss.³⁸⁴ In other words, the ‘bright line’ refers to the firm denial of liability for any economic losses which stem from another’s injury.³⁸⁵ In *Allan v Barclay*,³⁸⁶ for example, an employer could not recover for loss of his employee’s services when the latter was injured by the defender. Similarly, the House of Lords did not permit a delictual claim in respect of a company’s economic loss caused by damage to a property which the company did not own.³⁸⁷ There have however been a number of isolated cases in which recovery was permitted, or carefully considered. Stewart³⁸⁸ offers several examples such as *Nacap Ltd v Moffat Plant Ltd*,³⁸⁹ in which a pursuer was working on a pipe. The defender damaged the pipe at a time at which the pursuer was professionally responsible for the pipe, and the pursuer could recover in respect of its loss sustained due to the damage. These cases all require the narrow circumstance of the pursuer’s ownership or possession of the property in question.³⁹⁰

4.2.3.3. *Henderson v Merrett Syndicates Ltd*³⁹¹ liability

This form of liability is an extension of *Hedley Byrne* liability.³⁹² In *Henderson v Merrett Syndicates*,³⁹³ Lord Goff of Chieveley commented that the principle of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*³⁹⁴ was not confined to negligent misstatements, but “extends beyond the provision of information

³⁸⁴ AB Wilkinson and AD Forte, “Pure Economic Loss – A Scottish Perspective” 1985 *Juridical Review* 1 at 8.

³⁸⁵ Stewart, *Delict* (n 359) 10.08.

³⁸⁶ *Allan v Barclay* (1864) 2 M 873.

³⁸⁷ *Simpson & Co v Thomson* (1877) 5 R (HL) 40.

³⁸⁸ Stewart, *Delict* (n 359) 10.08.

³⁸⁹ *Nacap Ltd v Moffat Plant Ltd* 1987 SLT 221. See, more recently *Cruden Building & Renewals Ltd v Scottish Water* [2017] CSOH 98.

³⁹⁰ Stewart, *Delict* (n 359) 10.08-09, citing Lord Penzance’s *obiter* remarks in *Simpson & Co v Thomson* (1877) 5 R (HL) 40.

³⁹¹ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

³⁹² Mitchell (n 376) at 171.

³⁹³ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

³⁹⁴ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

and advice to include the performance of other services”.³⁹⁵ The case concerned insurance syndicates. Such syndicates share the profits and risks of underwriting insurance policies, and are managed by underwriting agents. Those who invest in the syndicates are known as ‘names’, and the liability of the names is unlimited. Following a series of hurricanes in the USA, the syndicate demanded that the names covered their proportionate share of the losses associated with meeting the insurance pay-outs. The names sued the underwriting agents on the grounds that they had mismanaged the syndicate’s funds. It was found that a duty of care was owed by underwriting agents to the names for the running of syndicates because the agents had assumed responsibility for the names.³⁹⁶ This form of liability can extend to physical or economic loss.³⁹⁷

4.2.3.4. *White v Jones*³⁹⁸ liability

*White v Jones*³⁹⁹ is the leading ‘disappointed beneficiary’ case. Such cases arise where a beneficiary does not receive its intended inheritance because the testator’s legal representative does not properly execute the testator’s instructions. Disappointed beneficiaries may not make contractual claims in Scots law.⁴⁰⁰ Whilst Scots law did not previously recognise delictual claims on the part of disappointed beneficiaries,⁴⁰¹ *Robertson v Bannigan*⁴⁰² permitted such claims.⁴⁰³ In a recent similar case, *Antonio Caliendo Barnaby*

³⁹⁵ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 180 per Lord Goff of Chieveley.

³⁹⁶ *Ibid.* at 168 per Lord Goff of Chieveley. See further discussion in S Hedley, “Negligence – Pure Economic Loss – Goodbye Privity, Hello Contorts” 1995 54(1) *Cambridge Law Journal* 27 at 27-28.

³⁹⁷ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 180 per Lord Goff of Chieveley.

³⁹⁸ *White v Jones* [1995] 1 AC 207.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Tully v Ingram* (1891) 19 R 65; *Raes v Meek* (1889) 14 App. Cas. 558. *Robertson v Fleming* (1861) 23 D (HL) 8. See further Stewart, *Delict* (n 359) 22.7; Norrie (n 69) at 19.19.

⁴⁰¹ *Robertson v Fleming* (1861) 23 D (HL) 8; *Weir v JM Hodge* 1990 SLT 266; *MacDougall v MacDougall’s Executors* 1994 SLT 1178.

⁴⁰² *Robertson v Bannigan* 1965 SC 20.

⁴⁰³ In Scots law, *White v Jones* [1995] UKHL 5 was later accepted in *Robertson v Watt & Co* (Inner House, 4 July 1995, unreported); *Holmes v Bank of Scotland* 2002 SLT 544; and *McLeod v Crawford* 2010 SLT 1035. For further discussion see S Waddams, “Breaches of Contracts and Claims by Third Parties” in JW Neyers, E Chamberlain and SGA Pitel, *Emerging Issues in Tort Law* (Hart Publishing, Oxford and Portland, Oregon, 2007) 191 at 191-198.

Holdings LLC v Mishcon de Reya LLP,⁴⁰⁴ the defendant solicitors were found to have assumed responsibility for the third party claimant's interests. It is not necessary that the intended beneficiary demonstrates that the client's testamentary intention remained constant until death.⁴⁰⁵ Where the solicitor's duty to the testator is contrary to their potential duty to the intended beneficiary, a duty of care will not be owed to the latter.⁴⁰⁶ It was acknowledged in *White v Jones*⁴⁰⁷ at the Court of Appeal that liability might be owed where a solicitor is instructed to complete the transfer of a gift during the client's lifetime.⁴⁰⁸ The principle has been similarly applied where a solicitor did not complete the variation of a lease,⁴⁰⁹ and it has been held that a company operating a will-making service owes a duty of care to disappointed beneficiaries, despite the fact that the company is not a firm of solicitors.⁴¹⁰

*Henderson v Merrett Syndicates*⁴¹¹ liability does not apply in disappointed beneficiary cases. In *Henderson v Merrett Syndicates*,⁴¹² the names had relied on the underwriting agents to properly manage the syndicate funds. In disappointed beneficiary cases, however, the beneficiary has not relied on the solicitor's performance.⁴¹³ Even if the solicitor can be said to have assumed responsibility for the beneficiary (as the agents assumed responsibility for the names), this form of liability is not applicable.

⁴⁰⁴ *Antonio Caliendo Barnaby Holdings LLC v Mishcon de Reya LLP* [2016] EWHC 150. The case cites *Gorham v British Telecommunications plc* [2000] 4 All ER 867 at para 33 per Lightman J: where a solicitor "is retained by one party and there is a conflict of interest between the client and the other party to a transaction, the court should be slow to find that the solicitor has assumed a duty of care to the other party to the transaction, for such an assumption is ordinarily implausible."

⁴⁰⁵ *Humbleston v Martin Tolhurst Partnership (A Firm)* [2004] EWHC 151.

⁴⁰⁶ Powell and Stewart, *Professional Liability* (n 379) 11.055. See also *Clarke v Bruce Lance Co* (1988) 4 PN 129; *Bacon v Howard Kennedy* [1999] PNL R 1.

⁴⁰⁷ *White v Jones* [1995] 1 AC 207.

⁴⁰⁸ *Ibid.* at 227A-227B per Sir Donald Nicholls VC.

⁴⁰⁹ *Clarke v Bruce Lance* (1988) 4 PN 129.

⁴¹⁰ *Esterhuizen v Allied Dunbar Assurance Plc* [1998] 2 FLR 6.

⁴¹¹ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

⁴¹² *Ibid.*

⁴¹³ Thomson, *Delictual Liability* (n 357) 7.5-6.

4.2.3.5. Implications for professional liability generally

In terms of professional liability generally, Scots law recognises the *spondet peritiam artis* principle, which demands that a person who professes a skill must answer for the failure to deliver it.⁴¹⁴ This principle did not initially permit third party claims. According to Bell: “one who professes any art is, in general, liable only to his employer, and not to those who may have been intended to benefit by his work”.⁴¹⁵ However, the modern law has expanded the scope of this principle. Norrie states that:

“there is little doubt that a professional person when a defender is subject to a rather differently determined, and higher, standard than a non-professional person”.⁴¹⁶

The standard of care imposed “is that which it is reasonable to expect from a professional person”.⁴¹⁷ In the context of construction, for example, foreseeable injury caused by defects can give rise to liability,⁴¹⁸ and construction professionals are under a duty not to cause physical damage both to the property they are working and to other properties adjacent to or nearby their worksites.⁴¹⁹ Previously, the key test in ascertaining whether accountants and auditors are liable for negligent misstatements was the three-fold test developed in *Caparo*,⁴²⁰ together with the assumption of

⁴¹⁴ Stewart, *Delict* (n 359) 1.2; Norrie (n 69) at 19.22. The historical law is discussed in CB Labatt, “Negligence in Relation to Privity of Contract” 1900 16(2) *Law Quarterly Review* 168 at 173. See also Bell, *Principles 1889* (n 52) 153. The relevant English law is overviewed in AJE Jaffey, “Contract in tort’s clothing” 1985 5(1) *Legal Studies* 77 at 79-87.

⁴¹⁵ Bell, *Principles 1889* (n 52) 154.

⁴¹⁶ Norrie (n 69) at 19.20.

⁴¹⁷ *Ibid.*

⁴¹⁸ Powell and Stewart, *Professional Liability* (n 379) 9.074; *Eckersley v Binnie Partners* 18 Con. LR 1. It is said that “Where the defendant is involved in an activity which, if he is not careful, will create a foreseeable risk of personal injury to others, the defendant owes a duty of care to those others to act reasonably having regard to the existence of that risk” (*Perrett v Collins* [1998] 2 Lloyds Rep. 255 at 261 per Lord Hobhouse).

⁴¹⁹ Powell and Stewart, *Professional Liability* (n 379) 9.076; *North West Water Authority v Binnie* [1990] 3 All ER 547.

⁴²⁰ The test is: whether the imposition of liability is fair, just, and reasonable; whether the harm was reasonably foreseeable; and whether there was a proximate relationship. See *Caparo Industries Plc v Dickman* [1990] 2 AC 605 and discussion in Powell and Stewart, *Professional Liability* (n 379) 17.027.

responsibility test.⁴²¹ According to *Caparo*,⁴²² accountants are generally under a duty to take reasonable care in preparing their accounts and reports, though they are not liable for casual remarks in general conversation, statements made outwith their work, and statements made in a personal capacity.⁴²³ Lord Jauncey of Tullichettle refines the scope of liability by making the accountant's knowledge that the accounts were to be submitted to the third party claimant a condition of liability.⁴²⁴ Further, accountants are liable only in respect of transactions for which they had knowledge that the accounts were required.⁴²⁵ The 'special relationship' dicta in *Hedley Byrne*⁴²⁶ has influenced the development of liability of accountants and auditors,⁴²⁷ and the actuarial profession.⁴²⁸

The Supreme Court has however recently found that *Caparo*⁴²⁹ has been wrongly determined in case law to date. In *Steel and Another v NRAM Limited*,⁴³⁰ it was determined that a two-part test applies: it must have been reasonable for the third party to rely on the representation,⁴³¹ and the representor should have reasonably foreseen that the third party would do so.⁴³²

4.2.4. Concurrent actions in contract and delict

In recent years, concurrent liability has been the subject of judicial and academic interest.⁴³³ It is clear that Scots law recognises concurrent liability,

⁴²¹ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 181 per Lord Goff of Chieveley, *White v Jones* [1995] 2 AC 207 per Lords Goff of Chieveley and Browne-Wilkinson. See further Powell and Stewart, *Professional Liability* (n 379) 17.027.

⁴²² *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

⁴²³ *Ibid.* at 655 per Lord Jauncey of Tullichettle.

⁴²⁴ *Ibid.* at 662 per Lord Jauncey of Tullichettle.

⁴²⁵ *Ibid.*, and further *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 486 per Lord Reid (the relevant test is whether the professional ought to have known of the potential impact).

⁴²⁶ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

⁴²⁷ Powell and Stewart, *Professional Liability* (n 379) 17.028.

⁴²⁸ *Ibid.* 18.022-023.

⁴²⁹ *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

⁴³⁰ *Steel and Another v NRAM Limited (formerly NRAM Plc)* [2018] UKSC 13.

⁴³¹ *Ibid.* at paras 32 and 35 per Lord Wilson.

⁴³² *Ibid.* at paras 19, 23, and 32 per Lord Wilson.

⁴³³ M Hogg, *Obligations* (Avizandum, Edinburgh, 2nd edn, 2006) 3.63. See also M Hogg, "Concurrent liability in the Scots law of contract and delict" 1998 *Juridical Review* 5.

and that a contractual relationship is not a barrier to the imposition of delictual obligations between the contracting parties.⁴³⁴

Hogg comments that, whilst Stair did not discuss concurrency in his *Institutions*, his view of delict as a prior, obediencial obligation is consistent with the idea that delictual obligations will be owed by parties unless excluded by contract,⁴³⁵ thus permitting the concurrency of claims in contract and delict.⁴³⁶ Walker explains, for example, that a passenger injured in a railway accident can sue in respect of his injuries for breach of the implied contractual term that the train company must carry him safely, and in delict for the breach of the company's general duty of care not to injure him.⁴³⁷

In England, the early common law was generally hostile to concurrent remedies.⁴³⁸ However, concurrency of claims is now permitted in English law.⁴³⁹

Accordingly, delictual claims may arise from contractual relationships in both Scots and English law. In the example above, the railway passenger accrues the right to make a delictual claim because he has a contractual relationship with the transport provider. This demonstrates that privity does not mean that the contracting parties derive only contractual rights from their relationship. Rather, their contractual connection might also give rise to a delictual duty of care.

4.3. Delict as an exception to privity

In case law and commentary, delict has erroneously been treated as circumventing the privity doctrine. This section briefly summarises the

⁴³⁴ *Realstone v Messrs J & E Shepherd* [2008] CSOH 31 at para 11 per Lord Hodge. See also *Norwich Union Life Insurance Society v Covell Matthews Partnership* 1987 SLT 452; Norrie (n 69) at 19.08 and 19.11; WJ Stewart, *A Casebook on Delict* (W Green/ Sweet & Maxwell, Edinburgh, 2nd edn, 1997) 13.5.12; Hogg, *Obligations* (n 433) 3.67; F McManus and E Russell, *Delict: A Comprehensive Guide to the Law in Scotland* (Dundee University Press, Dundee, 2011) 9.3-4.

⁴³⁵ Hogg, *Obligations* (n 433) 3.64.

⁴³⁶ *Ibid.*

⁴³⁷ Walker, *Delict* (n 356) 14. See also *Gray v London and North Eastern Rly Co* 1930 SC 989; Walker, *Contracts* (n 3) 3.3 and 29.2.

⁴³⁸ Palmer, *Paths to privity* (n 27) 202, citing *Hambly v Trott* (1776) 1 C 371.

⁴³⁹ See, for example, *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ. 1146.

relevant case law and commentary, and explains why delict is not an exception to privity.

4.3.1. The development of case law at the intersection of privity and delict

Vernon Palmer identifies the English case of *Winterbottom v Wright*⁴⁴⁰ as the initial cause of the controversial relationship between tort and privity.⁴⁴¹ In the case, the coach-driver of a Post Office mail carriage had no claim in respect of his personal injuries sustained following the breakdown of a defective coach supplied by the defendant to the Post Office. Lord Abinger claimed that there is:

“no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road who was injured by the upsetting of the coach, might bring a similar action.”⁴⁴²

Thus, as noted by Vernon Palmer, “originated the famous citadel of privity in the field of tort.”⁴⁴³

This case was not strictly adhered to in later Scots or English case law involving personal injury or damage to property. Ibbetson acknowledges *Donoghue v Stevenson*⁴⁴⁴ as a reversal of the line of cases beginning with *Winterbottom v Wright*⁴⁴⁵ which denied tortious recovery on the grounds that this would violate privity of contract.⁴⁴⁶ As discussed above,⁴⁴⁷ concurrent

⁴⁴⁰ *Winterbottom v Wright* (1842) 152 ER 402. See also *Tollit v Sherstone* (1839) 5 M & W 283.

⁴⁴¹ Palmer, *Paths to privity* (n 27) 198. See also VV Palmer, “Why privity entered tort” 1983 27(1) *The American Journal of Legal History* 85.

⁴⁴² *Winterbottom v Wright* (1842) 152 ER 402 at 404-405 per Lord Abinger.

⁴⁴³ Palmer, *Paths to privity* (n 27) 205.

⁴⁴⁴ *Donoghue v Stevenson* 1932 SC (HL) 31.

⁴⁴⁵ *Winterbottom v Wright* (1842) 152 ER 402.

⁴⁴⁶ Ibbetson, *Obligations* (n 121) 190-193. It was acknowledged in the earlier case of *McGowan v Barr & Co* 1929 SC 461 that there could be a claim in delict on behalf of two children who had suffered injury after drinking a bottle of ginger beer which contained a dead mouse, despite the fact that there was no privity of contract between the children and the manufacturers (Barr & Co). However, it was found that the facts of the case did not give rise to a duty of care. See *McGowan v Barr & Co* 1929 SC 461 at 479 per Lord Anderson. Further discussion of the case is available in WW McBryde, “Donoghue v. Stevenson: The Story of the ‘Snail in a Bottle’ Case” in DM Walker and AJ Gamble (eds), *Obligations in Context: Essays in Honour of David M Walker* (W Green, Edinburgh, 1990) 13 at 21-22.

⁴⁴⁷ See subsection 4.2.4.

claims in contract and delict are permissible in Scots (and English) law. This has resulted in cases such as *Donoghue v Stevenson*⁴⁴⁸ in which the party who has suffered the loss succeeds in suing in delict although its claim failed (or would likely have been unsuccessful, had it been pled) in contract. Mrs Donoghue was not the recipient of a third party right,⁴⁴⁹ and could not therefore have made a contractual claim, but her claim in delict succeeded. Similarly, relatives of tenants may not sue contractually on the lease where they are injured due to defects in the leased premises,⁴⁵⁰ but they may sue in delict.⁴⁵¹ An injured person cannot contractually sue a party employed by its employer for defective work which caused the injury, but it can make a delictual claim.⁴⁵² *Donoghue v Stevenson*⁴⁵³ clarified that the English legal “fallacy” providing that a party who owes a contractual duty to one party cannot owe delictual liability to another in respect of its contractual performance is not part of Scots law.⁴⁵⁴ In particular, Lord Macmillan stated that there is “no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort.”⁴⁵⁵

In terms of pure economic loss, case law reveals a movement towards a ‘high point’ of permissibility of delictual claims where a contractual claim would be denied. This was followed by a stricter approach, according to which delictual liability was denied if there was no privity of contract between

⁴⁴⁸ *Donoghue v Stevenson* 1932 SC (HL) 31.

⁴⁴⁹ A third party rights claim would have been unsuccessful, because the contracting parties (Mrs Donoghue’s friend and Mr Stevenson) did not expressly or impliedly confer a right on Mrs Donoghue. See J Steele, *Tort Law: Text, Cases, and Materials* (Oxford University Press, Oxford, 3rd edn, 2014) 144. Some indicate that the case should have been pled as a *jus quaesitum tertio* (see, for example, WW McBryde, “Contract law – a solution to delictual problems?” 2012 8 *Scots Law Times* 45 at 45). However, these arguments do not fully address the lack of intention in the case (i.e. that the contracting parties did not intend to confer a *jus quaesitum tertio* on Mrs Donoghue).

⁴⁵⁰ *Cameron v Young* [1908] AC 176.

⁴⁵¹ Occupiers’ Liability (Scotland) Act 1960 section 3.

⁴⁵² *Campbell v A & D Morrison* (1891) 19 R 282.

⁴⁵³ *Donoghue v Stevenson* 1932 SC (HL) 31.

⁴⁵⁴ Memorandum on *Stipulations in Favour of Third Parties* (n 235) 39-40. See also Stevens, *Torts and Rights* (n 25) 177; R Baker and J Garton, “*Cavalier v Pope* (1906)” in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Tort* (Hart Publishing, Oxford, 2010) 153, especially at 153 and 158; and *Greene v Chelsea BC* [1954] 2 QB 127 at 138 per Lord Denning.

⁴⁵⁵ *Donoghue v Stevenson* 1932 SC (HL) 31 at 64 per Lord Macmillan. See also *Edgar v Lamont* 1914 SC 227; *JG Martin Plant Hire Ltd v Macdonald* 1996 SLT 1192.

the parties. *Dutton v Bognor Regis UDC*⁴⁵⁶ was one of the first cases in which a tortious claim was permitted to ‘overcome’ privity.⁴⁵⁷ In the case, it was found that any person who had negligently caused risk to the health or safety of the occupiers of a building were liable in tort regardless of whether any damage had materialised, and regardless of whether they were in a contractual relationship with the occupiers. This judgement resulted in a “flood” of cases, “exacerbated” by *Anns v Merton*.⁴⁵⁸ The ‘high point’ in the House of Lords’ decision was *Junior Books*.⁴⁵⁹ Following the case, there were concerns amongst commentators that contractors would be exposed to unlimited liability, and contract lawyers remained dissatisfied with the strict approach to the privity doctrine, which excluded contractual claims on the part of third party claimants.⁴⁶⁰ The key concern was that *Junior Books*⁴⁶¹ allowed claimants to circumvent the privity doctrine by framing their claims in terms of negligence rather than contract.⁴⁶² Thereafter, the courts gradually withdrew from this approach. The case was “all but overruled”⁴⁶³ in *Murphy v Brentwood DC*⁴⁶⁴ and *D&F Estates v Church Commissioners for England and Wales*.⁴⁶⁵ The latter case restricted tortious liability owed to third parties in

⁴⁵⁶ *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373.

⁴⁵⁷ See discussion in J Jenkins and J Duckworth, “The Construction Industry” in R Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (Informa Law, London/ Hong Kong, 2000) 185 at 8.5.

⁴⁵⁸ *Anns v Merton London Borough Council* [1978] AC 728. See also Jenkins and Duckworth (n 457) at 8.7.

⁴⁵⁹ *Junior Books Ltd v Veitchi Co Ltd* 1982 SLT 333. This was the first case to allow negligence-based recovery for pure economic loss. See Jenkins and Duckworth (n 457) at 8.8.

⁴⁶⁰ Views of commentators are discussed further below at subsection 4.3.2.

⁴⁶¹ *Junior Books Ltd v Veitchi Co Ltd* 1982 SLT 333.

⁴⁶² R Brownsword, “Network Contracts Revisited” in M Amstutz and G Teubner, *Networks: Legal Issues of Multilateral Co-operation* (Hart Publishing, Oxford, 2009) 31 at 31. Whilst Lord Fraser questioned why a contractual case had not been raised against the builders in *Junior Books Ltd v Veitchi Co Ltd* 1982 SLT 333, it is noted that there was no evidence of intention on the part of the contracting parties to create a third party right in favour of the employer. Accordingly, it is unlikely that a claim based on third party rights would have been successful.

⁴⁶³ Merkin (n 195) at 2.2.

⁴⁶⁴ *Murphy v Brentwood District Council* [1991] 1 AC 398.

⁴⁶⁵ *D & F Estates Ltd v Church Commissioners for England and Wales* [1989] AC 177. See also Burnton LJ’s more recent comment in *Robinson v PE Jones (Contractors) Ltd* [2011] 3 WLR 815 at 834 that *Anns v Merton LBC* [1978] AC 728 and *Junior Books v Veitchi* [1983] 1 AC 520 “must now be regarded as aberrant, indeed as heretical”.

respect of defective contractual performance to claims for personal injury or damage to property.

A separate issue is that, in some instances in Scots law, privity is bypassed, and it is unclear whether the relevant contracting party's liability ought to be viewed as contractual or delictual. In *Fortune v Young*,⁴⁶⁶ for example, it was held that a guarantor of an individual's financial standing is liable to anyone who gives credit to that individual in reliance on the guarantee, even if the guarantee is not addressed to any particular person. Whilst this case is historic, and has not been followed, it is noted that the judgment is obviously unsatisfactory, because the basis of liability ought always to be clear. This case is individually problematic and reveals confusion in the doctrinal relationship between contract and delict. However, this case is not considered further, because it appears to result from inadequate judicial reasoning in a particular context and does not provide analysis on the concurrency of claims or the relationship between privity and delict.

The confusion in the interaction between privity and delict is also reflected in cases and commentary erroneously referring to privity in the context of tortious claims. For example, the *Solicitors Journal*, discussing *George v Skivington*,⁴⁶⁷ mentions that the fact that defective hairwash was purchased for Mrs George by her husband "was held to create a sufficient privity between her and the defendant to support the right of action by her".⁴⁶⁸ Similarly, Robert Stevens argues that privity is "a principle most commonly considered within the law of contract, but it is applicable to all rights."⁴⁶⁹ He applies the notion of privity to tort, noting that, for example, only those with a proprietary right over land can sue in delict in respect of nuisance interfering with the quiet enjoyment of the land, whereas others, such as licensees

⁴⁶⁶ *Fortune v Young* 1918 SC 1.

⁴⁶⁷ *George and Wife v Skivington* (1869) LR 5 Ex. 1.

⁴⁶⁸ 1870 14 *Solicitors Journal* 314. In the case, a husband purchased hairwash from the defendant, and both parties knew that this was for his wife, Mrs George, who suffered extensive injury and hair loss due to the corrosive nature of the hairwash. Mrs George's tortious claim was unsuccessful. The case is said to be "vindicated" in *Donoghue*. See further D Ibbetson, "George v Skivington" in C Mitchell and P Mitchell, *Landmark Cases in the Law of Tort* (Hart Publishing, Oxford, 2010) 69 at 69.

⁴⁶⁹ Stevens, *Torts and Rights* (n 25) 173. See also 174-176.

cannot.⁴⁷⁰ Stevens uses privity to explain concepts such as *per quod consortium*, according to which a husband could recover against an individual who caused harm to his wife in respect of the loss of her affection.⁴⁷¹ These are, however, unusual uses of the term ‘privity’. Stevens appears to be discussing the notions of proximity and remoteness in the context of tortious liability. Whilst other commentators have not adopted ‘privity’ terminology in reference to delict or tort, these uses of the concept of privity in tortious circumstances risks doctrinal uncertainty. Further, the concepts of proximity and remoteness are adequate in discussing tortious liability. It is suggested that the term ‘privity’ should not be used in the context of tortious or delictual claims, in light of the historical difficulties in understanding the relationship between privity and delict. Instead, the normal language of delictual claims (i.e. remoteness and title to sue) should be used.

4.3.2. An analysis of commentary on the intersection between privity and delict

The tortious cases discussed above were decided prior to the passage of the Contracts (Rights of Third Parties) Act 1999. Accordingly, the cases could not, in English law, have been decided on the basis of third party rights. Numerous commentators highlight that the move towards the ‘high point’ of delictual liability was influenced by the need to correct the perceived rigidity of contract law, and the move away from this ‘high point’ was driven by a desire to respect the privity doctrine. Jenkins and Duckworth suggest that the strict application of privity resulted in judicial intervention through tort to “mitigate its rigidity.”⁴⁷² O’Sullivan describes the disappointed beneficiary cases⁴⁷³ as the “most obvious example” of tort law’s use in bypassing “the strictures of privity”.⁴⁷⁴ Similarly, Brownsword notes that:

⁴⁷⁰ Stevens, *Torts and Rights* (n 25) 173, citing *Hunter v Canary Wharf Ltd* [1997] AC 655.

⁴⁷¹ *Ibid.* 174.

⁴⁷² Jenkins and Duckworth (n 457) at 8.5.

⁴⁷³ An overview of the law on disappointed beneficiary cases is provided above at subsection 4.2.3.4.

⁴⁷⁴ J O’Sullivan, “Suing in tort where no contractual claim will lie – a bird’s eye view” 2007 23(3) *Professional Negligence* 165 at 172.

“in the context of third-party claims, it is well known that a restrictive law of tort can result in pressure being put on contract law, and vice versa.”⁴⁷⁵

In Scots law, ‘correction’ of the privity doctrine through the imposition of delictual liability was not necessary, because Scots law has historically recognised third party rights. However, Scots cases permitting delictual liability where third party rights were not possible have also been characterised as violations of the privity doctrine, and commentators recognise an apparent tension between third party delictual claims in respect of defective contractual performance and the privity doctrine. For example, Swain suggests that, in asking “Who, then, in law, is my neighbour?”, Lord Atkin “opened up the way for claims in negligence which in contract would run up against the privity rule.”⁴⁷⁶

Whilst these commentators might have intended only to point out that delictual actions might arise where contractual claims will fail, others have been more overt in their treatment of delictual liability as an exception to privity. For example, the Law Commission lists the tort of negligence as an exception,⁴⁷⁷ and Merkin remarks that a “boisterous and expansive approach to the duty of care in tort could easily have undermined the doctrine of privity of contract.”⁴⁷⁸ Van Heerden states that the boundary between contract and tort is breaking down due to the “steady expansion” of the tort of negligence in England.⁴⁷⁹ More recently, Furmston and Tolhurst include tort in their discussion of exceptions to privity.⁴⁸⁰

⁴⁷⁵ Brownsword, *Contract law* (n 7) 196-197. See also Palmer, *Paths to privity* (n 27) 198; Mitchell (n 376) at 172; J Fleming, “Comparative Law of Torts” 1984 4(2) *Oxford Journal of Legal Studies* 235.

⁴⁷⁶ W Swain, “Third Party Beneficiaries in English Law 1880-2004” in EJM Schrage (ed), *Ius Quaesitum Tertio* (Duncker & Humblot, Berlin, 2008) 331 at 343 (quoting *Donoghue v Stevenson* 1932 SC (HL) 31 at 44 per Lord Atkin).

⁴⁷⁷ Report on *Privity of contract* (n 182) 2.13-2.14.

⁴⁷⁸ Merkin (n 195) at 2.2. See also D Beylveled and R Brownsword, “Privity, Transitivity and Rationality” 54(1) *Modern Law Review*, 1991 48 at 50-51.

⁴⁷⁹ D Hutchison and B van Heerden, “The tort/ contract divide seen from the South African perspective” in D Visser (ed), *The Limits of the Law of Obligations* (Juta & Co Ltd, Cape Town, 1997) 97 at 97.

⁴⁸⁰ Furmston and Tolhurst, *Privity* (n 19) 3.03-11.

However, these sources do not reflect the definition of privity: it bars external parties from making *contractual* claims only, and has no bearing on whether the external party can make a claim in delict. Whilst Stewart notes that the existence of the *jus quaesitum tertio* means that it is in some cases unnecessary to apply delictual liability,⁴⁸¹ the absence of a third party right does not mean that delictual liability in respect of a third party is an impossibility.

The fact that external parties can make delictual claims against contracting parties despite the fact that they are barred from bringing contractual actions is a clear and justifiable consequence of the privity doctrine. Stewart comments that increasing support for Lord Brandon's dissent in *Junior Books v Veitchi*⁴⁸² may be due to the fact that it is "grossly unfair" to hold someone to a higher standard under delict than they would have been under the contract establishing their liability.⁴⁸³ As noted by Lord Goff of Chieveley, "the law of tort is the general law, out of which the parties can, if they wish, contract".⁴⁸⁴ However, a contracting party can only contract out of delictual liability owed to fellow contracting parties, not the public at large. This is supported by the general rules of professional responsibility, discussed above,⁴⁸⁵ that a professional has a general duty of care to properly carry out his work. A contracting party cannot expect that its defective performance of a contract can only be subject to claims under the contract itself. Where, according to the normal principles of delictual liability, a contracting party breaches a duty of care owed to third parties impacted by the contractual performance, the third party should be permitted to bring a delictual claim.

The tension between privity and delictual liability is simply an instance of confusion between two separate areas of law. It is likely that this confusion has resulted from English law's strict adherence to the privity doctrine and

⁴⁸¹ Stewart, *Delict* (n 359) 1.2., citing *Scott Lithgow Ltd v GEC Electrical Projects Ltd* 1989 SC 412.

⁴⁸² *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

⁴⁸³ Stewart, *Casebook* (n 434) 13.4.3. See also Hedley (n 395) at 28-29.

⁴⁸⁴ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 191 per Lord Goff of Chieveley.

⁴⁸⁵ See subsection 4.2.3.5.

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

Vernon Palmer comments that the relationship between privity and tort is “one of the most enigmatic, controversial, and misunderstood phenomena of nineteenth century law”.⁴⁸⁶ The enigma is resolved simply by acknowledging that privity bars only *contractual* claims by non-contracting parties: it ought not to have any bearing on the question of whether the contracting party might owe a delictual duty of care to the third party. Indeed, Vernon Palmer also points out that the “privity doctrine in the field of tort turns out to be a haunting tale about a judicially-created phenomenon.”⁴⁸⁷ The explanation of the contract-tort fallacy is that English judges have incorrectly viewed themselves as restrained by privity in tortious claims in *Winterbottom v Wright*⁴⁸⁸ and similar cases,⁴⁸⁹ and academics have wrongly characterised

⁴⁸⁶ Palmer, *Paths to privity* (n 27) 198. Palmer further explains that there are three further historical functions of the privity doctrine (schematic, evidentiary, and denoting relationships required by writs), but clarifies that these are no longer useful: Palmer, *Paths to privity* (n 27) 10.

⁴⁸⁷ Palmer, *Paths to privity* (n 27) 206.

⁴⁸⁸ *Winterbottom v Wright* (1842) 152 ER 402.

⁴⁸⁹ Palmer, *Paths to privity* (n 27) 212.

cases expanding the law on negligence as infringing on the privity doctrine. Delict is not therefore an exception to privity.

4.3.3. Further points on delict and contract

This subsection returns to the distinction between contract and delict first introduced above:⁴⁹⁰ that contract involves consensual obligations, whilst delictual liability is imposed by law.

The Law Commission's Report on *Privity of contract*,⁴⁹¹ according to Catherine Mitchell, reflects a commitment to maintaining the distinction between contractual and tortious liability.⁴⁹² She comments that there is a "neat dividing line" between third party beneficiaries who are granted the right to sue, and strangers who are not, noting that this defines the boundary between those who claims are contractual, and those who must proceed in tort.⁴⁹³ Jenkins and Duckworth comment that the 1999 Act does not grant third party rights in cases which have been subject to judicial expansion of tortious liability.⁴⁹⁴ This reflects the fact that third party rights are found where the parties intend for such a right to arise, whereas delictual liability is imposed regardless of the parties' intentions (subject to the express exclusion of delictual liability). The separation between delictual and contractual liability must be maintained, because there is a clear difference between obligations which arise consensually and obligations which arise by operation of law. Recognition in case law and commentary that privity does not have an impact on the permissibility of delictual claims would reflect that these types of liability are distinct.

It is acknowledged that contracting parties should be permitted to voluntarily alter the delictual duties of care they owe to one another. Generally, the parties to a contract can expressly limit their duty of care, the standard of that duty of care, and the losses which will be recoverable in the event of breach,

⁴⁹⁰ See subsection 4.2.1.

⁴⁹¹ Report on *Privity of contract* (n 182).

⁴⁹² C Mitchell, "Searching for the Principles Behind Privity Reform" in P Kincaid (ed), *Privity: Private justice of public regulation* (Ashgate, Dartmouth, 2001) 105 at 112.

⁴⁹³ *Ibid.*

⁴⁹⁴ Jenkins and Duckworth (n 457) at 8.100.

subject to the law that one cannot exclude or restrict liability for death or personal injury.⁴⁹⁵ This allows a great deal of scope for defining their duty of care towards each other. If the parties have not made specific provision in their contract, then the normal principles of delict should apply. In *Gilmour v Simpson*,⁴⁹⁶ for example, a painter negligently used a blow lamp, which resulted in the destruction of the pursuer's farmhouse. Thomas Smith notes that damages were assessed on the basis of negligence, on the same grounds as *Hutchison v Davidson*,⁴⁹⁷ a similar case in which there was no contractual relationship.⁴⁹⁸ Unless they have specifically excluded the application of delictual liability, there is no reason to claim that parties in a contractual relationship owe exclusively contractual liability to one another.

Regarding third parties, the boundary between contract and delict may appear to be blurred by the so-called 'paracontractual'⁴⁹⁹ situations. In *Hedley Byrne v Heller*,⁵⁰⁰ Devlin LJ states that "I have found... in the idea of a relationship that is equivalent to contract all that is necessary to cover the situation that arises in this case."⁵⁰¹ Similarly, in *Junior Books v Veitchi*,⁵⁰² Lord Fraser states that the exceptionally close proximity between the parties is "only just short of a direct contractual relationship."⁵⁰³ In these cases, however, the factor which determines the existence of a duty of care is that the relationship between the parties is very close. In other words, the paracontractual connection is evidence of close proximity between the parties: it does not impact the rules on contractual liability. Wilson's characterisation of these cases as "Contract Leap-frog"⁵⁰⁴ claims is perhaps not wholly descriptive of the third party's action. The third party's proximity to

⁴⁹⁵ G Jackson, *The Laws of Scotland: Stair Memorial Encyclopaedia: Building Contracts (Reissue)* (hereafter "SME"), (LexisNexis/ Law Society of Scotland, London/ Edinburgh, 2012) para 148; noting also the restrictions under the Unfair Contract Terms Act 1977 section 16. See also Part II of the Consumer Rights Act 2015 in the case of consumers.

⁴⁹⁶ *Gilmour v Simpson* 1958 SC 477.

⁴⁹⁷ *Hutchison v Davidson* 1945 SC 395.

⁴⁹⁸ Smith, *Short Commentary* (n 36) 864.

⁴⁹⁹ Wilson (n 12) at 147.

⁵⁰⁰ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

⁵⁰¹ *Ibid.* at 530 per Devlin LJ.

⁵⁰² *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

⁵⁰³ *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 at 553 per Lord Fraser.

⁵⁰⁴ Wilson (n 12) at 148.

the defender is based on the fact that they are connected through a 'chain' of contracts. The third party could therefore be viewed as 'leapfrogging' on to the contract between the defender and those with whom the defender is in contract, bypassing its own lack of contractual connection. However, the third party is not relying on another's contract to make a contractual claim. Rather, it is suing in delict because the circumstances of the contractual connections give rise to a proximate relationship between itself and the defender. The fact that this relationship has been described as akin to contract does not detract from the fact that the liability owed is delictual.

The relevancy of contractual chains to delictual liability is considered in a recent Outer House judgment. In the case of *Realstone v Messrs J & E Shepherd*,⁵⁰⁵ the pursuer owned land earmarked for housing development. The pursuer instructed an architect to prepare plans for the site, and the architect subcontracted the work to the defender. The defender's negligence in mis-designating the plot (such that it obtruded on to a roadway) resulted in the pursuer's loss, because the pursuer incurred the cost of repurchasing the plot from the party to whom it had sold the plot. Lord Hodge commented that he was:

“not persuaded that the mere existence of a contractual chain from A to B to C means in all circumstances that C cannot owe A a duty of care to avoid causing A pure economic loss... Nonetheless, there are many circumstances in which either the structure of the contracts in a contractual chain or the terms of those contracts, or both, will exclude a duty of care by C to A in relation to economic loss. One has to look at the circumstances of the particular case.”⁵⁰⁶

Accordingly, it may be that the contractual relationship between the parties is structured so as to protect a particular party against delictual claims, or indeed to ensure that delictual redress is available in particular cases. It was noted that there was no indication that the pursuer's delictual claim would circumvent any of the contractual agreements.⁵⁰⁷ However, the existence of a contractual chain does not indicate definitively that there is or is not liability in

⁵⁰⁵ *Realstone v Messrs J & E Shepherd* [2008] CSOH 31.

⁵⁰⁶ *Ibid.* at para 12 per Lord Hodge.

⁵⁰⁷ *Ibid.* at para 18 per Lord Hodge.

a particular case. In the particular case of *Realstone v Messrs J & E Shepherd*,⁵⁰⁸ the factors which led Lord Hodge to believe that there may be liability were the defender's awareness that the pursuer would use the plans prepared, and the extent to which the architect would review the defender's work.⁵⁰⁹ Lord Hodge also considered whether the defender "voluntarily" agreed to produce the plans, and, by doing so, "placed themselves in a special relationship with the pursuers which is akin to contract" which may result in a duty protect the pursuer against economic loss.⁵¹⁰ He surmised that the architect's supervision of the defender would reduce the likelihood that the court would find that there was a special relationship between the pursuer and defender.⁵¹¹ Lord Hodge notes the reluctance of the judiciary to rely on *Junior Books*.⁵¹² However, this judgment illustrates that the concept of a 'special relationship' continues to be influential in Scots law.

Of course, in some situations the contracting parties may have structured their relationships to avoid contractual connections between certain parties. Hogg notes that one issue at play in the boundary between contract and delict is the policy against allowing delictual claims to subvert contractual relationships and contractual structures adopted by parties.⁵¹³ In *Pacific Associates Inc v Baxter*,⁵¹⁴ the parties made an arrangement such that there was no contract between an engineer and a contractor, although their employer had entered into separate contracts with the contractor and the engineer. Russell LJ said that the:

"absence of any contract between the contractor and the engineer... is not without significance. The tests of proximity and foreseeability may be satisfied, but it is not just and reasonable that there should be

⁵⁰⁸ *Realstone v Messrs J & E Shepherd* [2008] CSOH 31 at para 18 per Lord Hodge.

⁵⁰⁹ *Ibid.* at para 13 per Lord Hodge.

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

⁵¹² *Junior Books Ltd v Veitchi Co Ltd* 1982 SLT 333.

⁵¹³ Hogg, *Obligations* (n 433) 3.67.

⁵¹⁴ *Pacific Associates Inc v Baxter* [1989] 2 All ER 159.

imposed on the engineer a duty which the engineer chose not to make a contractual one”.⁵¹⁵

This erroneously assumes that the engineer wished its lack of contractual connection to be treated as an indication that it wished to neither sue nor be sued in delict. It is illogical to assume that a person’s lack of desire to enter into a contract with another means that it implicitly abandons any legal right of redress through delict when it is adversely affected by the other’s professional work. Contracting parties should not be able to exclude liability towards third parties by virtue of their contract with each other, because the third party has not consented to such limitation. The lack of contractual connection is however relevant to the question of proximity – Walker states that “a contract may bring parties into such proximity as to give rise to a primary obligation to refrain from harm which might not otherwise have arisen”.⁵¹⁶

This is compatible with the dominant commentary on the hierarchy of obligations in Scots law more generally. Hogg notes that there are two main theories as to how private law obligations should be placed in a hierarchy. According to the first, “the 3:1”, contract, promise, and delict are equal, and unjustified enrichment is ‘lower’ and thus applicable only in situations in which the other three are not.⁵¹⁷ Conversely, “the 2:2” provides that delict and unjustified enrichment ought to be placed at the top of the hierarchy, because they are imposed by the law and can only be excluded if the parties so agree, unlike contract and promise which can only arise from the intentions of the contracting parties.⁵¹⁸ If the first theory is accurate and contract and delict are equal, then there is no reason why the doctrine of privity of contract, as a contractual rule, should usurp the operation of delictual liability. If the latter theory is correct, this strengthens the idea that contracting parties ought not

⁵¹⁵ *Pacific Associates Inc v Baxter* [1989] 2 All ER 159 at 192 per Russell LJ. See also *Scruttons v Midland Silicones* [1962] AC 446 at 470-471 per Viscount Simonds. For further discussion, see Jenkins and Duckworth (n 457) at 8.12.

⁵¹⁶ Walker, *Delict* (n 356) 14, citing *Donoghue v Stevenson* 1932 SC (HL) 31 at 64 per Lord Macmillan; *Vacwell Engineering Co v BDH Chemicals Ltd* [1971] 1 QB 88 at 108 per Rees J.

⁵¹⁷ Hogg, *Obligations* (n 433) 3.19.

⁵¹⁸ *Ibid.*

to evade delictual liability through arguments based on privity, but, rather, only through arguments based on contractual consent. Where the parties have expressly agreed in their contractual terms that they should or should not have the ability to sue one another in delict, this should be upheld. However, the existence of a contract between two parties does not prevent the parties (or external parties) from claiming in respect of losses suffered as a result of defective contractual performance.

The concurrency of claims is clear:

“the professional man owes a duty of care *ex contractu* to clients, and duty of care *ex lege* to persons, including clients, who may foreseeably be harmed in mind/ body/ pocket by failure to show adequate skill and care in doing his professional work”.⁵¹⁹

Indeed, Labatt recognised in 1900 that it is logically unsound to argue that:

“a party to the contract, whatever the form of his action, can recover only where he could have recovered in a suit directly upon the contract [since this] involves the corollary that a stranger to the contract, being unable to sue upon it, is precluded from redress altogether.”⁵²⁰

4.3.4. Reasonable expectation

The distinction between contractual and delictual liability is further reflected in the different expectations which contracting parties and third parties have under contract and delict law. Brownsword’s view is that the “baseline” of the intersection between contract and delict is reasonable expectation.⁵²¹

Delictual liability reflects the expectations of the community in respect of compensation for wrongful behaviour, whilst contractual liability recognises the reasonable expectations of the contracting parties operating in the relevant business sector.⁵²² Specific contractual provisions, Brownsword states, can alter contractual expectations only.⁵²³ Contracting parties can also, of course, determine the extent and scope of delictual liability towards

⁵¹⁹ Walker, *Contracts* (n 3) 3.3. See also Gloag, *Contract* (n 65) 241.

⁵²⁰ Labatt (n 414) at 172-173.

⁵²¹ Brownsword, *Contract law* (n 7) 229.

⁵²² Brownsword, *Contract law* (n 7) 229. See also *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCC 533 at 533 per Steyn LJ: a “theme that runs through our law of contract is that the reasonable expectations of honest men must be protected.”

⁵²³ Brownsword, *Contract law* (n 7) 229.

one another. However, non-contractual parties have not contractually assented to the alteration of their reasonable expectation to redress under delict law. A third party will reasonably have the expectation that their third party right will be upheld, if so granted by the contracting parties. A third party may also be protected by an exclusion of liability clause.⁵²⁴ They will not otherwise have the right to sue on, or claim protection under, a contract to which they are not party. The lack of direct contractual connection does not, however, impact the third party's reasonable expectation to redress under delictual law if it is impacted by defective contractual performance and the requirements for a successful delictual claim are met.

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

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

⁵²⁴ See the materials cited in (n 1).

4.3.5. Public and private obligations

Weinrib differentiates between private obligations (involving particular relationships between persons) and public obligations (based on the notion of “public rightfulness” – that private law should provide redress for infringement of one’s interests by another party regardless of any prior relationship between the two).⁵²⁵ This serves as a further useful illustration of the boundary between contractual and delictual liability in situations involving extra-contractual loss. For example, the tort of inducing breach of contract provides that a party can be sued where they induce someone to break their contract with another.⁵²⁶ In *Lumley v Gye*,⁵²⁷ a singer was contracted to sing at Lumley’s opera house. Gye offered the singer a higher fee and was liable in tort for Lumley’s loss caused by the singer’s breach in contract. Weinrib discusses how the private element of the tort of inducing breach of contract is the contract between the contracting parties, and the public aspect is the obligation imposed on the rest of the world to respect that contract.⁵²⁸ This could potentially be a useful frame of reference for the distinction between contractual and delictual obligations in the context of extra-contractual loss. Cases involving delictual liability owed to third parties can more accurately be said to arise from public rights rather than contractual personal rights. In *Donoghue v Stevenson*,⁵²⁹ for example, the contract between the café owner and the manufacturer could be said to give rise to private contractual rights

⁵²⁵ EJ Weinrib, “Private Law and Public Right” 2011 61(2) *University of Toronto Law Journal* 191 at 191-192.

⁵²⁶ PS Davies, *Accessory Liability* (Hart Publishing, Oxford, 2015) at 1-2 and 6. See further F Sayre, “Inducing breach of contract” 1992 36(1) *Harvard Law Review* 663 at 669; MR Macnair, “Free Association versus juridification” 2011 39(1) *Critique* 53; *Quinn v Leathem* [1901] AC 495.

⁵²⁷ *Lumley v Gye* (1853) 2 E & B 216. The concept is also accepted in Scots law: J Macleod, “Offside Goals and Induced Breaches of Contract” 2009 13(2) *Edinburgh Law Review* 278 at 279-280; *British Motor Trade Association v Gray* 1951 SC 586 at 603 per Lord Russell; *Couper v Macfarlane* (1879) 6 R 683; *Exchange Telegraph Co v Giulianotti* 1959 SC 19.

⁵²⁸ Weinrib (n 525) at 204. This case has been criticised on the grounds that “[w]hen I make a contract with someone to do something, I do not expect that, by making the contract, the whole world comes under an obligation to ensure that it is performed”: D Howarth, “Against *Lumley v Gye*” 2005 68(2) *Modern Law Review* 195 at 209. See also Merkin (n 52) at 4.1 and further concerns raised in AP Simester and WMF Chan, “Inducing breach of contract: one tort or two?” 2004 63(1) *Cambridge Law Journal* 132 at 144.

⁵²⁹ *Donoghue v Stevenson* 1932 SC (HL) 31.

between them as well as public obligations owed by the manufacturer to subsequent purchasers of the goods sold to the café owner.

This distinction also highlights the doctrinal incoherence of disappointed beneficiary cases. The public are not owed a right against all legal professionals that the professional must ensure that the public inherit according to the wishes of testators.⁵³⁰ This can be contrasted with Robert Stevens' example of a pedestrian who has been injured because a bicycle has been manufactured carelessly – in such a case, the question of whether there is a contract between, for example, the manufacturer and the cyclist is “irrelevant to the claim brought by the pedestrian.”⁵³¹ The pedestrian has a right to safety enforceable in delict against the world, whereas it is not immediately obvious why the disappointed beneficiary should have a right to surety of inheritance.

4.4. Concluding remarks

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

⁵³⁰ Stevens, *Torts and Rights* (n 25) 178.

⁵³¹ *Ibid.* 176-177.

Chapter 5: Policy considerations justifying statutory exceptions to privity

5.1. Overview

As noted in chapter 3,⁵³² there are various statutory exceptions to the privity doctrine. This chapter is not intended to provide a list of all statutory exceptions to privity, but it discusses a selection of modern and historical statutory examples to identify the common policy considerations justifying deviation from the ‘no benefits’ aspect of privity. Later chapters will consider whether the concepts of contracts for the benefit of another, transferred loss, undisclosed agency, and *ad hoc* agency also reflect these policy considerations.

This chapter also assesses whether privity itself does and should exist in light of the numerous justifications for deviating from the doctrine. The final section examines exceptions to the ‘no burdens’ aspect of privity and identifies the policy considerations which justify deviation from this aspect of the rule.

5.2. Statutory exceptions to privity and their policy justifications

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

5.2.1. Married Women’s Property Act 1882

Historical exceptions to privity include the English Married Women’s Property Act 1882. The Act aimed to mitigate the effects of a House of Lords

⁵³² See subsection 3.2.3.

decision⁵³³ that married women could not enter into contracts in their own right.⁵³⁴ Section 11, which is still in force, allows a married woman to rely on a life insurance policy on her or her husband's life for her own benefit, according to which a trust is created in favour of the person(s) named in the policy.⁵³⁵ The requirements are less stringent than the general law of trusts,⁵³⁶ providing a straightforward solution in allowing a married woman to financially protect herself (and, where relevant, her children) in the event of her husband's death.⁵³⁷ The scope of the Act has been extended to policies effected by civil partners for the benefit of their partner and/or their children⁵³⁸ by the Civil Partnership Act 2004 section 70. The 1882 Act provides for a specific statutory exception to privity: the widow can enforce the life insurance contract between her husband and the insurance provider despite the fact that she is not a party to that contract. The key policy consideration is the protection of women from laws which would otherwise cause financial hardship.

This specific statutory right is no longer required. According to the doctrine of coverture, a wife's legal rights and obligations were subordinate to her husband's, such that a married woman could not enter into contracts in her own name.⁵³⁹ This doctrine has been abolished, and beneficiaries under life insurance contracts can now enforce their rights under the Contracts (Rights of Third Parties) Act 1999. Modern life insurance contracts more generally also protect third parties from financial hardship.⁵⁴⁰ Similar Scots legislation, the Married Women's Property (Scotland) Act 1881, is no longer in force.

⁵³³ *Cahill v Cahill* (1883) 8 App. Cas. 420.

⁵³⁴ Merkin (n 195) at 2.52.

⁵³⁵ The provision is produced in full in Furmston and Tolhurst, *Privity* (n 19) 4.04.

⁵³⁶ Merkin (n 195) at 2.54.

⁵³⁷ *Cousins v Sun Life Assurance Society* [1933] Ch. 126 at 133 per Lord Hanworth MR.

⁵³⁸ Including children of either or both of the civil partners.

⁵³⁹ T Stretton and KJ Kesselring, "Introduction: Coverture and Continuity" in T Stretton and KJ Kesselring (eds), *Married Women and the Law* (McGill-Queen's University Press, Montreal & Kingston/ London, 2013) 3 at 3 and 6-8.

⁵⁴⁰ See discussion in MacQueen, *SME* (n 69) para 841, and further below at subsection 5.2.3.

5.2.2. Carriage of Goods by Sea Act 1992

Section 2 of the Carriage of Goods by Sea Act 1992 was enacted because of the commercial impracticalities of disallowing a consignee to sue a carrier for loss resulting from the breach of a bill of lading to which it was not party.⁵⁴¹

The provision allows the consignee to sue the carrier directly despite the lack of privity between them, thus creating a specific statutory exception to privity. This ensured that the law was up-to-date in respect of modern carriage practices and compatible with the international rules of carriage.⁵⁴² The Act replaced the Bills of Lading Act 1855, which was passed in response to delict and tort claims against carriers.⁵⁴³ The 1855 Act allowed the buyer of goods a specific remedy against the carrier although it was not privy to the contract of carriage.⁵⁴⁴ The 1992 Act addressed practical deficiencies in the 1855 Act, modernising the law and providing a clearer statutory regime.⁵⁴⁵

The Law Commissions indicated that their key concern in proposing the legislation was:

“reconciling the interests of all parties to a contract of sea carriage, in accordance with the dictates of good sense and commercial certainty”.⁵⁴⁶

This demonstrates a policy objective of circumventing privity where doing so is commercially convenient for the parties concerned. Bradgate and White add that the legislation also fulfils the policy objective of ensuring that the person who suffers loss recovers compensation from the person who causes

⁵⁴¹ T Howard, “The Carriage of Goods by Sea Act 1992” 1993 24(1) *Journal of Maritime Law and Commerce* 181 at 186. See also Merkin (n 195) at 2.73.

⁵⁴² R Bradgate and F White, “The Carriage of Goods by Sea Act 1992” 1993 56(2) *Modern Law Review* 188 at 188-189. The changes in the law brought about by the 1992 Act are summarised in Howard (n 541) at 188-189.

⁵⁴³ Bradgate and White (n 542) at 193.

⁵⁴⁴ For discussion see Bradgate and White (n 542) at 188-189 and *Sevylor Shipping and Trading Corp v Altfadul Company for Foods, Fruits & Livestock, Siat Societa Italiana Assicurazioni E Riassicurazioni S.P.A.* [2018] EWHC 629 at para 42 per Mr Justice Andrew Baker.

⁵⁴⁵ Bradgate and White (n 542) at 190-191.

⁵⁴⁶ Law Commission and the Scottish Law Commission, Report on *Rights of Suit in respect of Carriage of Goods by Sea* (Law Com No 196; Scot Law Com No 130, 1991) 1.10.

it,⁵⁴⁷ highlighting a second justification of ensuring that those who cause loss do not escape liability because of privity.

Section 2 of the Carriage of Goods by Sea Act 1992 can be classified as a specific statutory third party right. Clive notes that the 1855 Act was unnecessary in Scots law due to the common law recognition of the *jus quaesitum tertio*, “but as a matter of practical politics, it was obvious that it would be extended to Scotland”.⁵⁴⁸ Therefore, the policy objectives achieved in recognising third party rights⁵⁴⁹ more generally apply to the provision.

5.2.3. Third Parties (Rights against Insurers) Act 2010

The Third Parties (Rights against Insurers) Act 1930 allowed for the rights of an insured person against its insurers to transfer to and vest in an injured person to whom the insured person owed liability upon the insured’s insolvency.⁵⁵⁰ The third party’s right following the insolvency of the insured could not surpass the insured’s prior right (because the insured’s right was transferred).

This legislation was enacted following a case in which a third party was injured in a motor accident by a car owned by an insured company in liquidation. The court concluded that the insurance proceeds were to be treated as part of the assets of the insured company to be allocated to the creditors as a whole.⁵⁵¹ Atkin LJ and Lord Hanworth MR indicated that the

⁵⁴⁷ Bradgate and White (n 542) at 189. They note at 198, however, that this policy objective is not perfectly fulfilled, because sellers may suffer loss resulting from breach of contract on the carrier’s part which is not associated with the passing of risk (which determines who is liable under the 1992 Act). For example, the loss may be caused by delay in loading the ship. Clive also raised this point in his Note of Partial Dissent (Report on *Rights of Suit* (n 546) para 5). See also E Clive, “*Jus Quaesitum Tertio* and Carriage of Goods by Sea” in DLC Miller and DW Meyers (eds), *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith QC* (Butterworths, Edinburgh, 1992) 47.

⁵⁴⁸ Clive (n 547) at 51.

⁵⁴⁹ The policy justifications are discussed further below at subsection 5.2.9.

⁵⁵⁰ For discussion see MacQueen, *SME* (n 69) para 841; Law Commission and the Scottish Law Commission, Discussion Paper on *Third Parties (Rights Against Insurers) Act 1930* (Law Com No 152 and Scot Law Com No 104, 1998) 1.2-1.5.

⁵⁵¹ *Re. Harrington Motor Co Ltd* [1928] Ch. 105. See also *Hood’s Trs v Southern Union General Insurance Co* [1928] Ch. 739.

law ought to be reformed,⁵⁵² and the 1930 Act was the eventual result. The legislation was intended primarily to address situations involving insured but insolvent motorists,⁵⁵³ although the scope of the Act was intentionally wider, to cover, for example, employees of insolvent employers.⁵⁵⁴ The Law Commissions recognised, in their Discussion Paper preceding the Act, that liability insurance protects the financial interests of those to whom the insured might owe liability as well as the insured itself.⁵⁵⁵ The key policy consideration behind the Act was, as its title suggests, the protection of third parties.⁵⁵⁶

The objective of protecting third parties continues to be recognised in the new Third Parties (Rights against Insurers) Act 2010 (as amended by the Insurance Act 2015 and the Third Parties (Rights against Insurers) Regulations 2016/570).⁵⁵⁷ According to these new provisions, the third party is now able to proceed directly against the insurer. The previous requirement that the claim must be transferred from the insolvent company no longer applies.⁵⁵⁸ This provides a more cost-effective and efficient solution to the third party,⁵⁵⁹ further demonstrating that the purpose behind this legislation is the protection of the third party's interests.

⁵⁵² *Re Harrington Motor Co Ltd* [1928] Ch. 105 at 118 per Atkin LJ and at 117 Lord Hanworth MR.

⁵⁵³ Discussion Paper on *Third Parties (Rights Against Insurers) Act 1930* (n 550) para 2.2, citing Hansard Debates on the Third Parties (Rights Against Insurers) Act 1930, 29 October 1929 vol 231, col 128 and 130; *McCormick v National Motor and Accident Insurance Union Ltd* (1934) 49 Ll L Rep 361 at 363 per Scrutton LJ. See also Merkin (n 195) at 2.58.

⁵⁵⁴ Discussion Paper on *Third Parties (Rights Against Insurers) Act 1930* (n 550) para 2.2, citing Hansard Debates on the Third Parties (Rights Against Insurers) Act 1930, 29 October 1928, vol 231, col 130.

⁵⁵⁵ Discussion Paper on *Third Parties (Rights Against Insurers) Act 1930* (n 550) 1.10. The Commissions noted that this is expressly recognised in the Louisiana Direct Action Statute: "all liability policies... are executed for the benefit of all injured persons... to whom the insured is liable" (Appendix F, 1.24).

⁵⁵⁶ Hansard Debates on the Third Parties (Rights Against Insurers) Act 1930, Attorney-General, Sir William Jowitt, 29 October 1929, vol 231, cols 128-143.

⁵⁵⁷ The Act came into force on 1 August 2016 following the Law Commission's recommendations: Discussion Paper on *Third Parties (Rights Against Insurers) Act 1930* (n 550). For further discussion see ADM Forte, *The Laws of Scotland: Stair Memorial Encyclopaedia: Insurance (vol 12)* (hereafter "SME"), (LexisNexis/ Law Society of Scotland, London/ Edinburgh, 1991) para 904A; Furnston and Tolhurst, *Privacy* (n 19) 4.23.

⁵⁵⁸ Third Parties (Rights against Insurers) Act 2010 section 1.

⁵⁵⁹ Forte, *SME* (n 557) para 904A.

5.2.4. Road Traffic Legislation

Third parties injured in motor accidents did not have a direct right of enforcement against the insurer of the person who caused the accident under the previous road traffic legislation. In *Greenlees v Port of Manchester Insurance Co*,⁵⁶⁰ Lord Alness concluded that the Road Traffic Act 1930 section 36(4) did not provide for a direct right of action on the part of the third party injured by the policy holder against the insurer. Rather, he held that the provision requires that the insurer is liable to indemnify all persons and classes of persons specified in the policy. The more recent provisions – the Road Traffic Act 1988 sections 144, 148(7), and 151 – grant the third party a direct right of enforcement.⁵⁶¹ Section 151 embodies the previous right of direct enforcement on the part of third parties, which was previously recognised in the Road Traffic Act 1934.⁵⁶² In particular, section 151(9)(b) requires that insurers satisfy judgments against the insured at the suit of the third party. MacQueen acknowledges these provisions as “important”, explaining that this strengthens what may have been viewed as a straightforward third party right in Scots law.⁵⁶³ The legislation is treated as a statutory exception to privity in commentary⁵⁶⁴ and case law.⁵⁶⁵ This is correct: the third party is able to enforce a claim under the insurance contract to which it is not party.

The Road Traffic Act 1988 is a consolidation statute, and the materials produced by the Law Commissions do not discuss the matter of third party

⁵⁶⁰ *Greenlees v Port of Manchester Insurance Co*. 1933 SC 383 at 397 per Lord Justice-Clerk (Lord Alness).

⁵⁶¹ The third party’s direct action under these provisions was recognised and upheld in *Williams v Baltic Insurance* [1924] 2 KB 282.

⁵⁶² For discussion, see RM Merkin and J Stuart-Smith, *The Law of Motor Insurance* (Sweet & Maxwell, London, 1st edn, 2004) 5.198.

⁵⁶³ MacQueen, *SME* (n 69) para 841.

⁵⁶⁴ In England, Henley recognised the provisions in the 1988 Act as exceptions to the privity doctrine prior to passage of the Contracts (Rights of Third Parties) Act 1999: C Henley, “Insurance” in R Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (Informa Law, London/ Hong Kong, 2000) 213 at 9.3. See also Merkin (n 195) at 2.50.

⁵⁶⁵ *Tattersall v Drysdale* [1935] 2 KB 174; *Austin v Zurich Insurance* [1945] 1 KB 250.

protection.⁵⁶⁶ However, Merkin describes the purpose of the Road Traffic Act 1988 section 144 as ensuring “that the victim of a negligent driver is able to recover compensation from the driver or his insurers.”⁵⁶⁷ Whilst, as noted above, third parties did not have direct rights of enforcement under the Road Traffic Act 1930 section 36, Goddard J notes that this Act was: “aimed at the protection of the public by providing that there should be a body of insurers behind every driver of a car.”⁵⁶⁸ Commentary on more recent motor insurance regimes in the Road Traffic Acts reflect a policy objective of protecting third parties against financial implications of personal injuries and damage to property sustained in road traffic accidents.⁵⁶⁹

A similar regime, which also circumvents the privity doctrine, is recognised in the Motor Insurance Bureau’s Uninsured Drivers Agreement. According to this Agreement, the Motor Insurance Bureau will indemnify those who hold judgments against uninsured drivers for any damage caused by the driver.⁵⁷⁰ The Agreement is between the Motor Insurers’ Bureau and the Secretary of State for Transport. Whilst the Bureau refers to its “obligation to handle claims in accordance with the Agreements”,⁵⁷¹ the obligation owed is to the Secretary of State for Transport. A person who has suffered injury and/ or

⁵⁶⁶ Law Commission and the Scottish Law Commission, Report on *The Consolidation of Certain Enactments relating to Road Traffic* (Law Com No 56; Scot Law Com No 22, 1971); Law Commission and the Scottish Law Commission, Report on *The Consolidation of the Road Traffic Regulation Act 1967 and Certain Related Enactments* (Law Com No 133; Scot Law Com No 85, 1984).

⁵⁶⁷ Merkin (n 195) at 2.50.

⁵⁶⁸ *Tattersall v Drysdale* [1935] 2 KB 174 at 181 per Goddard J.

⁵⁶⁹ See discussion in MacQueen, *SME* (n 69) para 841. Merkin (n 195) at 2.50 discusses the Road Traffic Act 1988 sections 144, 148(7) and 151. See also *Tattersall v Drysdale* [1935] 2 KB 174; *Austin v Zurich Insurance* [1945] 1 KB 250; *Williams v Baltic Insurance* [1924] 2 KB 282.

⁵⁷⁰ The most recent document is the Motor Insurance Bureau, 2015 Uninsured Drivers’ Agreement England, Scotland, and Wales (applying to accidents on or after 1 August 2015) and Supplementary Agreement 2017 (updated definitions), available at: <https://www.mib.org.uk/making-a-claim/claiming-against-an-uninsured-driver/uninsured-drivers-agreements/> and accessed 3 July 2018. The key provision is Article 3(1): “if a claimant has obtained an unsatisfied judgment against any person in a Court in Great Britain then MIB will pay the relevant sum to the claimant or will cause the same to be so paid.” Essentially identical Agreements are also in place in respect of Northern Ireland, Gibraltar, the Isle of Man, Jersey, and Guernsey. See also the Motor Insurance Bureau, 2017 Untraced Drivers Agreement, available at: <https://www.mib.org.uk/making-a-claim/claiming-against-an-untraced-driver/untraced-drivers-agreements/> and accessed 3 July 2018, which provides similar protection to the victims of hit-and-run incidents.

⁵⁷¹ 2015 Uninsured Drivers Agreement (n 570)

damage to its vehicle who seeks to claim under the scheme is a third party to the Agreement. The Motor Insurers' Bureau could technically, therefore, attempt to bar a claim on the part of an injured third party on grounds of lack of privity, although it has never done so.⁵⁷² Lord Denning notes that the Agreements are "as important as any statute",⁵⁷³ and Upjohn LJ stresses that he could not envisage a privity argument being raised judicially.⁵⁷⁴

Accordingly, both the current statutory scheme and the Agreements provide for exceptions to privity aimed at protecting third parties from dangerous driving.

5.2.5. The Defective Premises Act 1972 and the Latent Damage Act 1986

There is a limited measure of protection for third parties in the Latent Damage Act 1986 section 3, which applies only in England and Wales.⁵⁷⁵

The provision allows a cause of action on the part of a person who acquires an interest in property after the date on which a cause of action in negligence arises in respect of damage to that property. The action is to be: "treated as if based on breach of a duty of care at common law owed to the person to whom it accrues".⁵⁷⁶ Similarly, the Defective Premises Act 1972 requires that dwellings are built in a workmanlike manner, with proper buildings, so that they are suitable for habitation.⁵⁷⁷ Where construction, repair, maintenance, or demolition is not properly carried out, a duty of care is owed to those who "might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work".⁵⁷⁸ This duty is not "abated by the subsequent disposal of the premises by the person who owed the duty".⁵⁷⁹

The Act also applies only in England and Wales,⁵⁸⁰ and provides for a duty of

⁵⁷² Merkin (n 195) at 2.51.

⁵⁷³ *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745. See also *Gardner v Moore* [1984] AC 548.

⁵⁷⁴ *Coward v Motor Insurers' Bureau* [1963] 1 QB 359.

⁵⁷⁵ Latent Damage Act 1986 section 5(4).

⁵⁷⁶ *Ibid.* section 3(2)(a).

⁵⁷⁷ Defective Premises Act 1972 section 1(1).

⁵⁷⁸ *Ibid.* section 3(1).

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Ibid.* section 7(3).

care only in respect of physical injury.⁵⁸¹ This scheme might allow, for example, the resident owner of a home to claim against the builder for defects in the property despite the fact that two parties are not in a contractual relationship. The scheme therefore allows privity to be bypassed, because the owner can make a claim despite its lack of contract with the person responsible for the defects.

Whilst the Defective Premises Act 1972 section 2 provides that a claim cannot be made under the Act where there is a right of recovery under an “approved scheme”, there are not currently any such approved schemes.⁵⁸² The term ‘dwelling’ is not defined in the Act, but has been interpreted as meaning a person’s home or one of its homes,⁵⁸³ provided that the building is used or capable of being used as a dwelling house, rather than predominantly for commerce.⁵⁸⁴

It was thought that the 1972 Act was necessary because liability in tort was not possible unless the premises were dangerous, and “the proper development” of tort law in respect of other defects was potentially “inhibited by the erroneous belief that [tortious liability] would necessarily entail an extension of the contractual liability for defects of quality.”⁵⁸⁵

⁵⁸¹ Defective Premises Act 1972 preamble.

⁵⁸² Powell and Stewart, *Professional Liability* (n 379) 9.042. Powell and Stewart note that, until 31 March 1979, the 10-year protection under the National House-Builders Registration Council (now known as the National House Building Council) was the main approved scheme. As such the Act has found application in numerous cases including *Thompson v Clive Alexander and Partners* (1992) 28 Con. LR 49; *Alexander v Mercouris* [1979] 1 WLR 1270; *Bole v Huntsbuild Ltd* [2009] EWHC 483; *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811. See also Law Commission, Report on *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com No 40, 1970) 3 and 6-7.

⁵⁸³ Powell and Stewart, *Professional Liability* (n 379) 9.043. The Act was interpreted to this extent for the purposes of the Housing Act 1988 in *Uratemp Ventures v Collins* [2001] UKHL 43.

⁵⁸⁴ *Caitlin Estates Ltd v Carer Jonas* [2005] EWHC 2315, discussed in Powell and Stewart, *Professional Liability* (n 379) 9.043. See also *Jenson v Faux* [2011] EWCA Civ. 423, which provides that the Act does not apply where an existing dwelling is refurbished or renovated to the extent that it creates a “wholly different” building from the original.

⁵⁸⁵ Law Commission, Report on *Defective Premises* (n 582) 1-2 and 13-14. As discussed in subsection 4.3.1., this was not problematic in Scots case law.

Merkin notes the similarities between the 1972 Act and the Consumer Protection Act 1987 Part 1.⁵⁸⁶ It is clear that the two statutes share similar policy objectives: protecting consumers.⁵⁸⁷

5.2.6. The Fire Prevention (Metropolis) Act 1774

The Fire Prevention (Metropolis) Act 1774 section 83, which is still in force, allows insurance companies and other interested parties to prevent tenants with short-term leases from claiming the full value of their insurance policies in the event of a fire.⁵⁸⁸ The insurers can instead ensure that the proceeds of the policy go towards rebuilding the premises.⁵⁸⁹ The Act applies only in the Cities of London and Westminster.⁵⁹⁰ This is an exception to privity because the insurers and other interested persons can determine that the moneys payable under the policy do not directly reach the insured.⁵⁹¹ In other words, the interested persons are benefited by the policy to the extent that they can control the use of funds issued under the policy and have a right to determine how the policy is paid out.

The provision itself refers to the effect of wilful fire-raising on “the lives and fortunes of many families [which] may be lost or endangered”. Its aim is thus to protect people in the vicinity of such fire-raising from physical and financial harm.⁵⁹² The provision also prevents fraud on the part of those who set alight their properties to benefit from insurance policies.⁵⁹³

⁵⁸⁶ Discussed at subsection 5.2.7. See further Merkin (n 52) at 4.23.

⁵⁸⁷ Law Commission, Report on *Defective Premises* (n 582) 1; Law Reform Committee, *Twenty-fourth Report (Latent Damage)* (Cmd. 9390, 1984) 2.11 and 4.21; Stevens, *Torts and Rights* (n 25) 184.

⁵⁸⁸ The detailed application of the provision is discussed in Furmston and Tolhurst, *Privity* (n 19) 4.10-13.

⁵⁸⁹ Merkin (n 195) at 2.56; Furmston and Tolhurst, *Privity* (n 19) 4.11.

⁵⁹⁰ Fire Prevention (Metropolis) Act 1774 Preamble. It was confirmed in *The Westminster Fire Office v The Glasgow Provident Investment Society* (1888) 13 App. Cas, 699 at 716 per Lord Watson that the Act was not intended to apply to Scotland. See further J Rankine, *A treatise on the law of leases in Scotland* (W Green, Edinburgh, 3rd edn, 1916) 232.

⁵⁹¹ Merkin (n 195) at 2.56. See also Henley (n 564) at 9.3.

⁵⁹² Furmston and Tolhurst, *Privity* (n 19) 4.11, citing *Royal Insurance Co Ltd v Mylius* (1926) 38 CLR 477 at 492 per Isaacs J.

⁵⁹³ Merkin (n 195) at 2.56. The preamble refers to “preventing Mischiefs by fire”.

5.2.7. Consumer Protection Act 1987 Part I

The Act implements the Product Liability Directive,⁵⁹⁴ and provides for strict liability on the part of the manufacturer and first importer of defective goods where consumers suffer from personal injury and/ or damage to their property.⁵⁹⁵ Merkin notes that the Act is an exception to privity because it:

“allows the victim to proceed directly against the manufacturer or first importer despite the absence of any contractual relationship with that person.”⁵⁹⁶

Liability in such circumstances may have existed in tort (following *Donoghue v Stevenson*⁵⁹⁷), however, a tortious claim would not protect the consumer in all circumstances due to the difficulty in establishing negligence and the causal link between negligence and loss suffered by the claimant.⁵⁹⁸

The purpose of this piece of legislation is obvious from its title: it is intended to protect consumers from defective goods. The Preamble to the Directive repeatedly mentions the need for consumer protection. For example:

“in situations where several persons are liable for the same damage, the protection of the consumer requires that the injured person should be able to claim full compensation for the damage from any one of them”.⁵⁹⁹

⁵⁹⁴ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

⁵⁹⁵ Consumer Protection Act 1987 section 2(1)-(2).

⁵⁹⁶ Merkin (n 52) at 4.22.

⁵⁹⁷ *Donoghue v Stevenson* 1932 SC (HL) 31.

⁵⁹⁸ Merkin (n 52) at 4.22. Similar provisions, discussed in Merkin (n 52) at 4.23, apply to those injured on another's land: Defective Premises Act 1972 sections 1 and 4; Occupiers' Liability Act 1957 (duty of care on occupiers of the land towards any person lawfully on the land); Occupiers' Liability Act 1984 (lesser duties towards trespassers).

⁵⁹⁹ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, Preamble.

Further, neither manufacturers nor first importers can exclude or limit their liability under the Act.⁶⁰⁰ This is referred to in the Preamble to the Directive⁶⁰¹ as a means of achieving “effective protection of consumers”.

The justification for protecting the consumer at the expense of the parties upon whom liability is imposed is the “fair apportionment of the risks inherent in modern technological production”.⁶⁰² At the Bill’s Second Reading in the House of Lords, it was also recognised that unsafe goods distort a consumer’s ability to participate in a “free and fair market.”⁶⁰³

The provisions were also recognised to be of benefit to retailers, because liability is “channelled” towards others (i.e. manufacturers and importers).⁶⁰⁴ The primary aim of the Act, however, is consumer protection.

5.2.8. Package Travel and Linked Travel Arrangements Regulations 2018

The recent Package Travel and Linked Travel Arrangements Regulations 2018 replaced the Package Travel, Package Holidays and Package Tours Regulations 1992.⁶⁰⁵ This subsection primarily discusses case law and commentary on the 1992 Regulations, due to the large body of materials addressing this legislation. The leading case recognising the concept of contracts for the benefit of another - *Jackson v Horizon Holidays*⁶⁰⁶ - would now be resolved using the Package Travel and Linked Travel Arrangements Regulations 2018. Organisers are liable to travellers for defective

⁶⁰⁰ Consumer Protection Act 1987 section 7.

⁶⁰¹ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, Preamble.

⁶⁰² Ibid.

⁶⁰³ House of Lords Debate on the Consumer Protection Bill, 20 January 1987 vol 483.

⁶⁰⁴ Ibid.

⁶⁰⁵ The Package Travel and Linked Travel Arrangements Regulations 2018 came into force on 1 July 2018 (in accordance with Package Travel and Linked Travel Arrangements Regulations 2018/634). These Regulations implement Directive 2015/2302/EU of the European Parliament and of the Council on package travel and linked travel arrangements.

⁶⁰⁶ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468. Contracts for the benefit of another are examined in chapter 6. The similar case of *Adcock v Blue Sky Holidays Ltd* (Court of Appeal, 13 May 1980, Unreported) would also likely be resolved using the regulations. Each of five holiday-makers received damages for their loss, after the judge considered how the breaches affected each of them individually.

performance of the package holiday contract (Regulation 15), and “traveller” is defined as “any individual who is seeking to conclude a contract, or is *entitled to travel on the basis of a contract concluded*, within the scope of these Regulations”.⁶⁰⁷ This means that a traveller can sue the organiser despite the fact that the two parties are not in a direct contractual relationship. A substandard holiday is arguably not comparable to injury which could be suffered due to a defective product,⁶⁰⁸ or, for example, the significant financial losses which could result if the relevant parties were not protected under the Carriage of Goods by Sea Act 1992.⁶⁰⁹ However, the Package Travel and Linked Travel Arrangements Regulations 2018 can still be said to protect third parties, and it is relevant to consider the scope of this protection and the policy reasons why third parties are so protected in the event of disappointing holidays.

Damages awarded in the relevant cases account for the emotional impact of disappointing holidays as well as financial compensation. Stephen Mason notes a tendency of ‘special pleading’, for example, damages sought in respect of the particular disappointment suffered due to a lost ‘holiday of a lifetime’ or ruined wedding anniversary celebrations.⁶¹⁰ Lord Denning notes that, when holidays fail, consumers are “greatly disappointed and upset” and, whilst this disappointment cannot accurately be quantified in monetary terms, “it is the task of the judges to do the best they can.”⁶¹¹ In *Milner v Carnival Plc*,⁶¹² the plaintiffs booked a holiday on the Queen Victoria’s maiden voyage for a total cost of £59,052. They only stayed on board for 28 days of the planned 106-day cruise, due to loud, reverberating noise caused by defective flooring in their cabin and their dissatisfaction with the proposed alternatives.

⁶⁰⁷ Emphasis added. The consumer could previously have claimed under the Package Travel, Package Holidays and Package Tours Regulations 1992 Regulation 14.

⁶⁰⁸ The relevant legislation is discussed immediately above at subsection 5.2.7.

⁶⁰⁹ See above at subsection 5.2.2.

⁶¹⁰ SM Mason, “Holiday damages: the gravy train slows down” 21 October 1987 *Law Society Gazette* 3002 at 3002. Katyar and Cairns also note that damages for distress, disappointment, and inconvenience can “substantially inflate awards over and above the actual contract price”: A Katyar and P Cairns, “It’s just not cricket” 1998 9(5) *Entertainment Law Review* 196 at 197.

⁶¹¹ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 per Lord Denning.

⁶¹² *Milner v Carnival Plc* [2010] EWCA Civ. 389.

They were financially compensated for wasted expenditure (on visas, clothing, etc.), as well as stress, anxiety, loss of enjoyment, and disappointment.⁶¹³ The *solatium* element of the damages amounted to £4,000 for Mr Milner and £4,500 for Mrs Milner. In his judgment, Ward LJ observes that damages for disappointment and distress will vary according to the significance of the holiday. Honeymoons and trips to attend weddings, for example, attract higher damages than “run of the mill” holidays.⁶¹⁴ The fact that the Milners expected a holiday of a lifetime (an expectation influenced heavily by the lavish descriptions of the cruise in Carnival’s brochures⁶¹⁵) meant that the damages awarded were of “platinum-quality”.⁶¹⁶ It appears from this case that the Milners had booked their cruise together, although *Jackson v Horizon Holidays*,⁶¹⁷ as discussed in chapter 6,⁶¹⁸ allows for damages to be recovered in respect of those for whom the holiday contract is made by the person who made the booking. Essentially, the Regulations and relevant case law demonstrate a policy objective of protecting consumers against emotional distress caused by ruined holidays.

It is noted that liability under the Regulations is not strict. In *Hone v Going Places Leisure Travel Limited*,⁶¹⁹ the claimant argued that Going Places were liable in respect of injuries he sustained during the emergency exit procedure on the return flight from his package holiday in Turkey. Due to a bomb scare, the flight was diverted to Istanbul for an emergency landing, during which the claimant suffered a spinal injury. It was found that Going Places could only be liable under Regulation 15 of the Package Travel, Package Holidays and Package Tours Regulations 1992 in respect of fault-based obligations, and

⁶¹³ *Milner v Carnival Plc* [2010] EWCA Civ. 389. Ward LJ’s judgment, considered as the benchmark of assessing holiday damages, advises that damages are to be assessed and offered under two heads: diminution in value, and distress and disappointment.

⁶¹⁴ *Ibid.*

⁶¹⁵ *Ibid.* at paras 4-7, at which Ward LJ discusses phrasing in the brochures such as “our most lavish expression of elegance”.

⁶¹⁶ *Milner v Carnival Plc* [2010] EWCA Civ. 389.

⁶¹⁷ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁶¹⁸ See, in particular, subsection 6.2.3.

⁶¹⁹ *Hone v Going Places Leisure Travel Limited* [2001] EWCA Civ. 947. For discussion see S Mason, “Package holiday claims – ‘the short but tortured history of tour operator liability’” 2001 4 *Journal of Personal Injury Law* 396 at 401.

that the onus was on the claimant to prove fault on the part of the tour operator.⁶²⁰ Urbanowicz and Grant suggest that it is “unfortunate” for consumers that the legislation is limited in this respect.⁶²¹ It is submitted, however, that this offers a balance between consumer protection and exposing the tour operator only to reasonable risks. This can be contrasted with the scope of protection available under the Consumer Protection Act 1987. Consumers ought reasonably to expect that products purchased will not cause personal injury or damage to property, and those liable under the 1987 Act should bear responsibility when this is not the case because the product should have been under the control of at least one of those parties. Tour operators, however, will not be able to control all of the potential risks to their consumers. Further, there are always risks associated with travelling, and the consumer cannot expect the tour operator to bear responsibility for any and all injuries, damages, or causes of distress.

5.2.9. Third party rights

General statutory third party rights now exist in both Scots and English law.⁶²² Kincaid criticised the Law Commission’s proposals for the English statutory right on the grounds that neither they nor the draft Bill sufficiently explained the values embodied by the new third party right.⁶²³ However, it is

⁶²⁰ *Hone v Going Places Leisure Travel Limited* [2001] EWCA Civ. 947 at para 8 per Longmore LJ. See also *Codd v Thomson Holidays Limited* (Court of Appeal, July 7 2000, Unreported) (discussed in Mason (n 619) at 402), which did not rely on the Regulations, but also makes clear that liability on the part of tour operators is not strict. In the case, a child was injured when his finger was caught in a lift door. The door had jammed, and the boy reached around the door to pull it towards him. This caused the door to quickly shut, and the boy’s finger was caught in the door, causing injury. The plaintiff could not establish liability against the tour operator because negligence could not be proved on the part of the hotel owners or managers. See also P Urbanowicz and D Grant, “Tour operators, package holiday contracts and strict liability” 2001(May) *Journal of Business Law* 253.

⁶²¹ Urbanowicz and Grant (n 620) at 272. For further discussion see S Prager and S Mason, “Regulation 15 of the Package Travel Regulations. Where are we now? And where are we going?” 2008 4 *International Travel Law Journal* 149. In the recent case of *X v Kuoni Travel Ltd* [2018] EWCA Civ. 938, the Court of Appeal found that a package tour provider was not liable in respect of a sexual assault allegedly committed by an electrician employed at the claimant’s hotel. However, Longmore J dissented (at para 14) on the grounds that sexual assault meant that the holiday arrangements were not to a reasonable standard under Regulation 15(2) of the Package Travel, Package Holidays and Package Tours Regulations 1992.

⁶²² See subsections 3.2.2.1 (Scots law) and 3.2.2.2. (English law).

⁶²³ Kincaid (n 269) at 51-52.

clear that the key policy aims are contractual efficiency and giving effect to contractual intentions.⁶²⁴ It is generally accepted that third party rights offer an efficient means of contracting. For example, Vogenauer notes that:

“From the perspective of law and economics, the contract in favour of a third party is a mechanism for increasing efficiency. It enables the parties to create an enforceable right for the third party by way of a single transaction, as opposed to conferring it first on one of the parties and then transferring it to the third party by way of a second, separate transaction.”⁶²⁵

In terms of the use of third party rights in practice, the insurance industry is the “most important application” in Scots law, in light of the prevalence of the use of third party rights in this context.⁶²⁶ In various jurisdictions, third party rights are used in the context of liability insurance, partnership agreements for the benefit of a third person, contracts made by municipalities for the benefit of inhabitants, indemnification terms in construction contracts, and collective labour agreements.⁶²⁷ The Scots *jus quaesitum tertio* was used relatively frequently in contracts for the carriage of goods by sea.⁶²⁸ This demonstrates that third party rights offer contractual efficiency in a range of contexts and industries.

Whilst some of the specific statutory third party rights discussed in this chapter provide redress against physical harm, neither the Contract (Third Party Rights) (Scotland) Act 2017⁶²⁹ nor the Contracts (Rights of Third Parties) Act 1999⁶³⁰ were aimed at such protection. However, the contracting parties would be permitted, under either Act, to provide for the third party to

⁶²⁴ Both aims are discussed above at subsection 3.2.2. The relationship between third party rights and contractual intention in particular is discussed in subsection 3.2.2.3.

⁶²⁵ S Vogenauer, “Contracts in Favour of a Third Party” in J Basedow, K J Hopt, R Zimmermann and A Stier (eds), *The Max Planck Encyclopaedia of European Private Law* vol 1 (Oxford University Press, Oxford, 2012) 385 at 386. Further, Ibbetson outlines various doctrinal means of bypassing the former prohibition on third party rights in English law. It is clear that these methods (making the third party a contractual party, or creating a collateral contract between the promisee and the third party) are less efficient than conferring an enforceable third party right: Ibbetson (n 272) at 127-128. See also Treitel, *Landmarks* (n 113) 84-89; Trebilcock (n 7) at 271.

⁶²⁶ MacQueen, *SME* (n 69) para 841.

⁶²⁷ Report on *Third Party Rights* (n 241) 1.13. This list is not exhaustive.

⁶²⁸ See further Clive (n 547).

⁶²⁹ Report on *Third Party Rights* (n 241) 1.13-1.14

⁶³⁰ Report on *Privity of contract* (n 182) 3.9-3.27.

make a contractual claim in respect of a failure to protect it from physical harm.

5.2.10. Summary

Parliament has provided statutory exceptions where “injustice has been glaring”,⁶³¹ or, in other words, for “reasons of commercial necessity or consumer protection”.⁶³² All of the exceptions considered protect parties who would otherwise have no financial recourse due to the privity doctrine. Some of the statutory exceptions protect against financial loss, and the Package Travel and Linked Travel Arrangements Regulations 2018 recognise recovery in respect of emotional distress. The diversity of provisions is unified by the policy objective of protecting non-contracting parties.

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

⁶³¹ Merkin (n 195) at 2.1.

⁶³² Ibid. at 2.49.

Legislation	Policy Justifications			
	Economic protection of weaker parties ⁶³³	Physical safety of weaker parties	Ensuring recovery of loss caused by breach of contract	Commercial necessity
Married Women's Property Act 1882	✓			
Carriage of Goods by Sea Act 1924	Sometimes		✓	✓
Third Parties (Rights against Insurers) Act 2010	✓	Sometimes	✓	
Road Traffic Legislation	✓	✓		
Latent damages/ defective premises legislation	✓	✓		
Fire Prevention (Metropolis) Act 1774	✓	✓		
Consumer Protection Act 1987 Part I	✓	✓		
Package Travel and Linked Travel Arrangements Regulations 2018	✓	✓	✓	
Third party rights legislation	✓			✓

Table 1: Policy Justifications

⁶³³ It is acknowledged that an external party might be in a stronger economic position than the contracting party against whom it claims. For example, the personal assets of a wealthy consumer injured by a defective good might be greater than the value of the business which sold it the product. The analysis in the following sections proceeds on the basis that consumers will generally be in a weaker position than commercial contracting parties.

5.3. When ought the law to recognise an exception to the privity doctrine?

The wide array of exceptions to the privity doctrine gives rise to the conviction that privity is “more honoured in its breach”,⁶³⁴ and cannot be said to exist in modern law. Certainly, the sheer number of exceptions to privity identified in this chapter and elsewhere in the thesis⁶³⁵ demonstrate that privity, if it exists, is certainly not absolute.

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

⁶³⁴ Merkin (n 207) at 1.1. See also Merkin (n 222) at 5.2.

⁶³⁵ See above at section 5.2 and subsection 3.2.3.

“may well have arisen as a natural or logical incident of the definition of contract itself, rather than as a rule deliberately formulated to give effect to deeper policy considerations.”⁶³⁶

The development of privity in Scots and English law demonstrates the truth of this statement.⁶³⁷ Nonetheless, there are clear policy considerations supporting the continued recognition of privity: certainty for contracting parties and third parties. Flannigan argues that privity is in opposition to an economic theory of contract, because “a privity rule is unnecessarily costly and results in the misallocation and wasting of resources”, submitting that the costs stemming from transactions structured to bypass privity are unjustifiable.⁶³⁸ However, as discussed above,⁶³⁹ parties are able to confer rights on third parties, and can therefore distribute resources according to their intentions in a manner which allows for maximum efficiency in their particular transaction.

The key question is therefore ascertaining when exceptions to privity are and should be permitted. This is the focus of the remainder of this section.

It is submitted that there are two ‘classes’ of exceptions to privity in Scots law. The first is traditionally understood third party rights, which arise where the contracting parties so intend. This may also encompass some of the statutory exceptions (namely, specific statutory third party rights in the context of, for example, third party motor insurance).⁶⁴⁰ The second class of exceptions are those justified on the basis of policy considerations which outweigh the privity doctrine and the intentions of the contracting parties. This method of ascertaining whether exceptions are justifiable is outlined in Diagram 1 on the following page.

⁶³⁶ Dyer (n 178) at 109.

⁶³⁷ The recognition of privity in Scots jurisprudence is examined in subsection 2.3.1. English law is discussed in subsection 2.4.2.1.

⁶³⁸ Flannigan (n 146) at 590. See also Merkin (n 207) at 1.1. Henley has made similar arguments in the context of the insurance industry: Henley (n 564) at 9.1.

⁶³⁹ See above at subsections 3.2.2.1-2 and 5.2.9.

⁶⁴⁰ For discussion see MacQueen, *SME* (n 69) para 841. Not all of the statutory exceptions can be explained as legislative third party rights, however. Merkin and Stuart-Smith are uncertain as to whether the Contracts (Rights of Third Parties) Act 1999 would apply to third parties in the context of motor insurance contracts if such parties were not protected by the road traffic legislation discussed above: Merkin and Stuart-Smith (n 562) at 3.11.

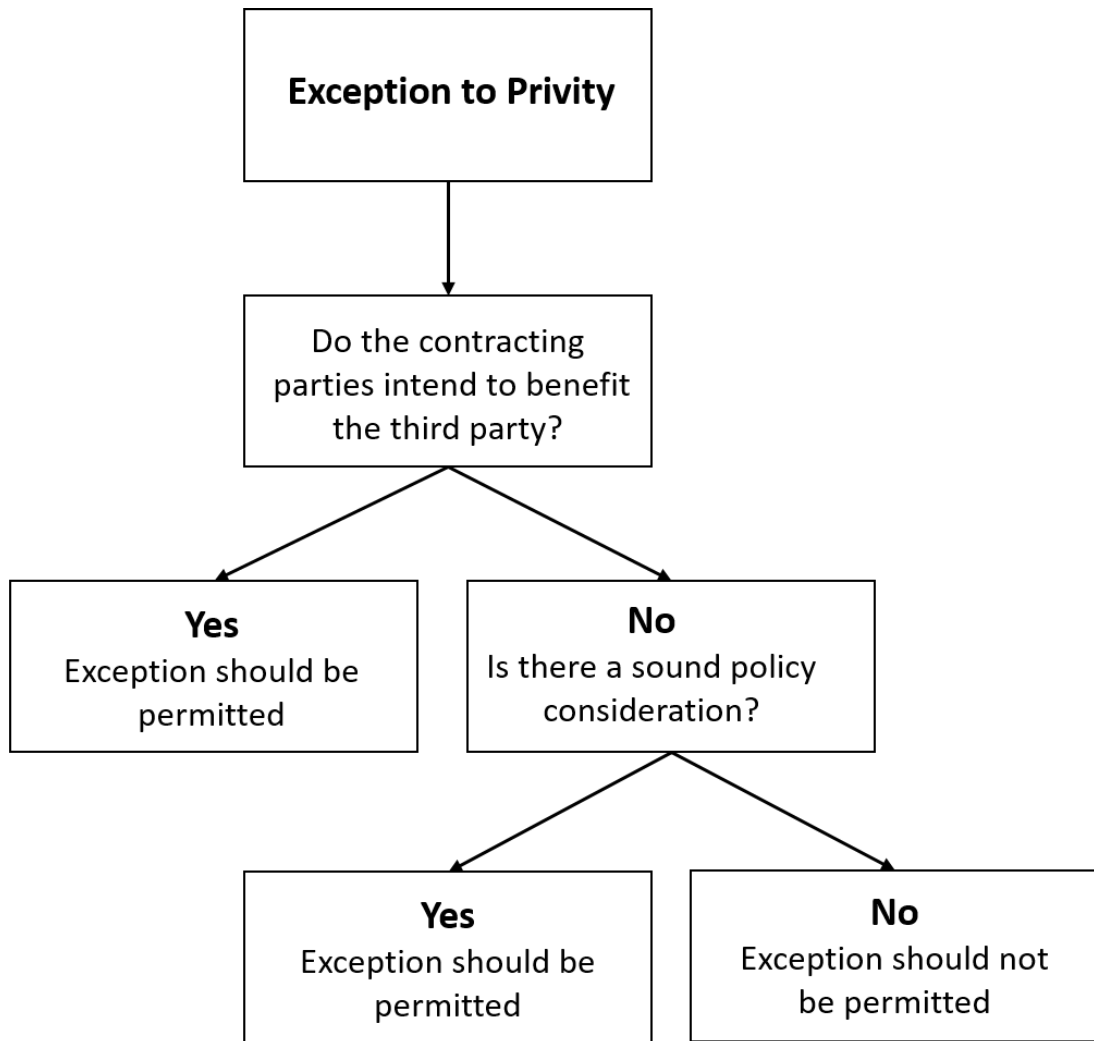


Diagram 1: Determining whether exceptions should be recognised

It is acknowledged that the policy justifications examined in this chapter are not intended to be treated as an exhaustive list of the only considerations which can justify present and future exceptions to privity. Other exceptions may be justified by reference to considerations not considered within this chapter.⁶⁴¹ The following section further examines the common policy justifications identified in the consideration of the exceptions discussed in section 5.2.

⁶⁴¹ Chapter 9 concludes that undisclosed agency is an exception to privity (subsection 9.3.1.) and examines potential justifications for the concept which are not considered in this chapter (subsection 9.4.3.).

5.4. Unifying policy considerations and their impact on the privity doctrine

This section discusses the interaction between the privity doctrine and its statutory exceptions, addressing how to obtain a balance between upholding the privity doctrine and bypassing the doctrine on policy grounds.

5.4.1. Protection of 'weaker' parties

The statutory exceptions all reflect a balance of interests between the third party and the contracting party who causes the loss. The contracting party ought to be able to predict to whom it will owe liability, but sometimes the protection of weaker parties necessitates the imposition of liability in respect of third party loss. The latter consideration ought not to easily outweigh the former where the law provides for means by which a party can protect itself, or could easily have done so. In other words, if the loss could have been easily prevented by the third party, the law ought not to interfere with the contracting parties' ability to predict and control their liability, but where it is unrealistic for the third party to have secured, for example, a collateral warranty, it is easier to justify the imposition of liability.

The point at which a third party's loss becomes legally significant (i.e. worthy of protecting against) is difficult to pinpoint precisely. Bagchi argues that the terms of contracts which inflict third party losses (directly or indirectly) ought to be construed narrowly, to allow recognition of third party interests.⁶⁴² For example, she notes that non-compete clauses (known as restrictive covenants in Scots law⁶⁴³) concluded between employers and employees have negative consequences for third-party competitors of the employer, in the form of the loss of opportunity to hire the employee. These clauses should, according to Bagchi, be interpreted narrowly considering the negative

⁶⁴² A Bagchi, "Other People's Contracts" March 27, 2015, *Yale Journal on Regulation*, Fordham Law Legal Studies Research Paper No. 2586136, available at: <https://ssrn.com/abstract=2586136>.

⁶⁴³ A discussion of restrictive covenants in Scots law generally is found in R Bradley, "Restrictive covenants" 2014 121(Jun) *Employment Law Bulletin* 2. See also Gloag, *Contract* (n 65) 569; HL MacQueen and J Thomson, *Contract Law in Scotland* (Bloomsbury Professional Limited, West Sussex, 4th edn, 2016) 7.30-47.

impact these clauses have on competitor firms.⁶⁴⁴ Regardless of whether such a principle is too broad to be applied to all contracts which have harmful consequences for third parties, her argument is not directly applicable to the justification of contracts for the benefit of another, transferred loss, undisclosed agency, and *ad hoc* agency. The loss suffered by third parties in such contexts do not arise because the contracting parties have concluded a contract which harms the interests of the third party. Rather, the third party suffers loss because the contract is defectively performed. Nonetheless, it is possible to identify a principle similar to that proposed by Bagchi: that third parties should be protected from defective contractual performance where their protection can be justified.

It is submitted that the third party's loss should be recoverable where the third party cannot reasonably be expected (or was unable) to protect itself against the loss, and the contracting party could reasonably foresee that defective performance would negatively impact those in the position of the third party. There are thus two aspects of ascertaining whether the third party's loss is recoverable: a) the third party's ability to protect itself, and b) whether the third party's loss is reasonably foreseeable to the relevant contracting party.

Regarding the third party's ability to protect itself, this should be determined on a case-by-case basis, examining factors such as the ease with which a third party could have taken out insurance in respect of the loss, and whether there is a party other than the party who caused the loss who could be sued in respect of the loss. Commercial third parties would generally be more likely to be expected to have taken out insurance in respect of potential loss than consumers. It would also be relevant to consider whether the third party had a weak bargaining position in respect of one or both contracting parties. In the case of a party purchasing a residential home in a personal capacity, for example, the buyer would likely not have had an opportunity to bargain with the construction company, and it would be in a significantly weaker

⁶⁴⁴ Bagchi (n 642) at 3.

bargaining position than the seller. Indeed, the Defective Premises Act 1972 was enacted specifically to provide consumer purchasers with statutory protection to counteract their weak bargaining position in respect of commercial builders.⁶⁴⁵ Another consideration is whether the third party reasonably expected that the loss would be recoverable. A person who has booked a holiday on behalf of itself and its friends, for example, may reasonably expect that loss suffered as a result of defective performance of the holiday contract would be fully recoverable. However, this factor must be balanced with consideration of whether the party in question had access to, or ought to have sought, appropriate legal advice. A consumer would not normally be expected to have a solicitor read over its package holiday contract, whereas commercial parties should arguably be assumed to have the requisite funds to access legal advice. A consumer third party is less likely to have had access to legal advice, but may have (reasonably) assumed that it would be able to recover for their losses caused by latent defects in a residential property. These factors indicate that consumers will generally be more likely to be protected than commercial parties. However, that is not to say that new exceptions to privity could not protect commercial parties, and must protect consumers – as stated above, this should be considered on a case-by-case basis. Ideally, future statutory exceptions should provide for specific tests within the legislation to determine whether the external party can rely on the exception. The factors discussed in this subsection can be used to determine whether the new exception should be enacted.

The matter of whether the loss is reasonably foreseeable should be determined according to the normal application of the test of reasonable foreseeability used in calculating damages in contract law more generally.⁶⁴⁶ For example, a construction company can foresee that loss caused by a

⁶⁴⁵ Law Commission, Report on *Defective Premises* (n 582) 4.

⁶⁴⁶ In accordance with the two-part test in *Hadley v Baxendale* (1854) 156 ER 145, the loss will be recoverable if it arises in the usual course of things, or if it fell within the reasonable contemplation of the contracting parties as a likely result of the breach.

latent defect in a building may fall on a party to whom the building is sold rather than the landowner with whom it originally contracts.

5.4.2. Ensuring recovery for losses caused by breach of contract

A second policy justification for the recognition of statutory exceptions is ensuring recovery of loss caused by breach of contract, even where the loss does not fall on the person with whom the contract-breaker originally contracted. This consideration supports the Carriage of Goods by Sea Act 1992, the Third Parties (Rights against Insurers) Act 2010, and the Package Travel and Linked Travel Arrangements Regulations 2018.

A closely related consideration is ensuring that contractual obligations are upheld. This accords with Stair's statement that "there is nothing more natural, than to stand to the faith of our pactions".⁶⁴⁷ Whilst the statutory exceptions violate the privity doctrine, they do in fact play a role in protecting and upholding contracts. Enforcing liability in situations where a third party suffers loss at the hands of a contract-breaker ensures that contractual promises are kept. The relevant statutory exceptions consequentially can be said to support rather than threaten contractual obligations, despite the fact that they violate privity and the intentions of the contracting parties. Flannigan notes the public interest "in seeing to the enforcement of individual agreements in order to maintain the integrity of the contracting process".⁶⁴⁸

However, contractual obligations are of course not always upheld.

Contracting parties can cancel contracts where they both agree to do so, and the interests of third parties are not generally relevant to their ability to terminate a contract or alter their contractual obligations. In the case of *Finnie v Glasgow and South-Western Railway*,⁶⁴⁹ for example, Finnie sought to enforce a contract between the railway authority and a local council which would have allowed for more efficient transport links for third party consumers. He was not able to enforce this contract, because his benefit was

⁶⁴⁷ Stair, *Institutions* (n 224) 1.1.21.

⁶⁴⁸ Flannigan (n 146) at 583.

⁶⁴⁹ *Finnie v Glasgow and South-Western Railway Co* (1857) 20 D (HL) 2 at 4 per Lord Cranworth.

only incidental to the contract and he was not intended to have the right to enforce the contract. Public interest in seeing contracts upheld must be balanced with the interests of contracting parties in exercising their freedom to cancel contracts, and their interests in ensuring that the liability they owe in respect of defective or non-performance is predictable and easily defined. The view that a failure in contractual performance ought always to be remediable regardless of whether the loss falls on a contracting party is not currently reflected in Scots⁶⁵⁰ or English⁶⁵¹ law. The fact that a third party will suffer loss as a result of defective or non-performance of the contract does not justify upholding the contractual obligations contrary to the intentions of one or all contracting parties through the recovery of third party loss, unless there are other policy considerations which justify the imposition of liability. Lord Millett comments that allowing contractual recovery in respect of a performance not rendered ought always to be possible, even where the performance was due to another, and that developing a wide concept of contractual loss would be beneficial.⁶⁵² However, he does not convincingly argue that *all* losses stemming from defective or non-performance ought to be accounted for in circumstances where the loss falls on a third party, and he does not assert that the third party itself should have the ability to enforce the contract. Accordingly, the policy of ensuring recovery for losses caused by breach of contract is a relevant consideration in ascertaining whether deviation from privity is justified, but this factor alone does not permit the creation of an exception to privity.

5.4.3. Commercial convenience/ efficiency

This policy justification is perhaps the least controversial. Contractual efficiency and convenience are undoubtedly of benefit to the contracting parties. Further, commercial convenience is a worthwhile policy aim in its own right, because lower transaction costs increase commercial activity. This

⁶⁵⁰ This rule is discussed in subsection 6.3.2. (see in particular (n 754)).

⁶⁵¹ *Cassell v Broome* [1972] AC 1027; McKendrick (n 344) at 37; Stevens, *Torts and Rights* (n 25) 191.

⁶⁵² *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 587-588 and 591 per Lord Millett.

justification ought to be upheld where there are no adverse consequences to third parties in allowing the contracting parties to contract efficiently. For example, third party rights save transaction costs,⁶⁵³ and ought to be permitted, given that they do not pose any burden to the third party.⁶⁵⁴

5.4.4. Upholding the contracting parties' intentions

It is relevant to consider a policy consideration competing against the justifications reflected in the statutory exceptions: upholding the contracting parties' intentions. Such intentions are expressed in their choice of contractual structure and their chosen means of distributing liability.

The principle that the contracting parties should be able to predict and control their liability is not absolute. Some of the statutory exceptions – for example, the Consumer Protection Act 1987 Part 1 – apply strict liability, because this was viewed as necessary for the protection of consumers. It is submitted that the contracting parties' intentions and chosen contractual structure should be overcome where the protection of the third party outweighs the importance of allowing their contractual freedom. As above, this is not necessarily the case where a collateral warranty could easily have been secured in respect of the third party.

Adams, Beyleveld, and Brownsword state that, where parties enter into contracts which are subject to statutory exceptions to privity, their intentions to enter these particular species of contract can be assumed to encompass an intention to fulfil liability owed under the exceptions.⁶⁵⁵ This accords with the current position in the law that, where a statutory provision affords title to sue outwith a contract, this will not be negated due to an argument of lack of privity.⁶⁵⁶ This is logically sound – parties can be assumed to have

⁶⁵³ See subsection 5.2.9.

⁶⁵⁴ If the third party views the receipt of a third party right as detrimental (because, for example, it does not wish to be associated with one or both of the contracting parties for reputational reasons), it can likely reject the right: Report on *Third Party Rights* (n 241) 6.1-8.

⁶⁵⁵ Adams, Beyleveld, and Brownsword (n 20) at 243.

⁶⁵⁶ See, for example, Lord Murray's statement that "It is clear that privity of contract affords no test of the validity of such a claim. The claim rests upon statute." (the text of Lord Murray's Note from Interlocutor is provided in *Waddell v Howat* 1924 SLT 468).

awareness of the legislation which impacts upon their contracts. They therefore ought to take steps in contractual negotiations to ensure that liability is distributed between the parties in such a way as to acknowledge liability which could be owed under relevant legislation. Each individual statutory provision has been enacted because other factors outweigh the privity doctrine and contractual intention, although, once the legislation is enacted, the parties are able to make an active choice as to whether they wish to enter a contract to which statutory exceptions to privity apply. This allows the parties to exercise their intentions without being 'blindsided' by the imposition of liability where they would otherwise be protected by the privity doctrine. However, consideration of the contracting parties' intentions highlights the need for clear, workable law on the exceptions to the privity doctrine, so that they can adequately identify potential third parties to whom they might owe liability.

5.5. Exceptions to the 'no burdens' rule

This section examines concepts which have been identified as exceptions to the 'no burdens' aspect⁶⁵⁷ of the privity rule, namely, assignation and forcing third parties to comply with arbitration clauses to enforce their third party rights. The section assesses whether these concepts are in fact exceptions to privity and identifies common policy considerations which justify deviation from the 'no burdens' rule. This section considers common law exceptions because of the lack of relevant statutory exceptions.

5.5.1. Assignation

This subsection briefly outlines the law on assignation, and then explains the relationship between assignation and the privity doctrine.

⁶⁵⁷ The 'no-burdens' rule is outlined in subsections 2.2.2. and 2.3.3.

5.5.1.1. The law on assignation

Assignation (also known as ‘cession’ or ‘assignment’⁶⁵⁸) is long-recognised in Scots law.⁶⁵⁹ In essence:

“A right arising under a contract may be assigned by the creditor (cedent) to a third party (assignee) so as to give that third party a title to sue the debtor for performance of the right.”⁶⁶⁰

Accordingly, assignation involves the transfer of rights, but (generally) not burdens.⁶⁶¹ The assignee is not, therefore, a full contracting party.⁶⁶² It is possible to assign obligations, however, the consent of the debtor in the assignment transaction (i.e. the cedent’s creditor) is required.⁶⁶³ Assignable rights encompass the right to payment or performance under a contract⁶⁶⁴ as well as damages for breach of contract.⁶⁶⁵ An assignation is completed by intimation to the debtor.⁶⁶⁶

In terms of the transfer of rights, the debtor need not consent to assignment.⁶⁶⁷ However, *delectus personae* applies.⁶⁶⁸ This refers to “the choice of a particular person which implies the exclusion of others.”⁶⁶⁹ In accordance with Lord Dunedin’s judgement in *Cole v Handasyde*, a contract is not assignable if it contains an element of *delectus personae*.⁶⁷⁰ This may

⁶⁵⁸ McBryde, *Contract* (n 111) 12.05; RG Anderson, *Assignation* (Edinburgh Legal Education Trust, Edinburgh, 2008) 1.01.

⁶⁵⁹ McBryde, *Contract* (n 111) 12.01 and 12.05; MacQueen, *SME* (n 69) para 854.

⁶⁶⁰ MacQueen, *SME* (n 69) para 855.

⁶⁶¹ Anderson, *Assignation* (n 658) 1.04; McBryde, *Contract* (n 111) 12.14; MacQueen and Lord Eassie (eds), *Gloag and Henderson* (n 68) 8.17; G Lubbe “Assignment” in H MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (Edinburgh University Press, Edinburgh, 2006) 307 at 310.

⁶⁶² Anderson notes the historical confusion on this point: Anderson, *Assignation* (n 658) 1.04. See also MacQueen and Thomson, *Contract Law* (n 643) 2.88.

⁶⁶³ Anderson, *Assignation* (n 658) 1.04; McBryde, *Contract* (n 111) 12.42; MacQueen, *SME* (n 69) para 856. All of these commentators acknowledge the lack of clarity in Scots law regarding the question of when and how an obligation can be assigned.

⁶⁶⁴ MacQueen, *SME* (n 69) para 855, citing *Dampskibsaktieselskapet Aurdal v Compania de Navegacion La Estrella* 1916 SC 882.

⁶⁶⁵ MacQueen, *SME* (n 69) para 855, citing *Constant v Kincaid & Co* (1902) 4 F 901.

⁶⁶⁶ MacQueen and Thomson, *Contract Law* (n 643) 2.87.

⁶⁶⁷ Anderson, *Assignation* (n 658) 1.03; McBryde, *Contract* (n 111) 12.02.

⁶⁶⁸ MacQueen, *SME* (n 69) para 855; Anderson, *Assignation* (n 658) 1.03; MacQueen and Lord Eassie (eds), *Gloag and Henderson* (n 68) 8.16.

⁶⁶⁹ McBryde, *Contract* (n 111) 12.36. See also 12.33 and 12.79.

⁶⁷⁰ *Cole v Handasyde & Co* 1910 SC 68 at 73 per Lord Dunedin. See also *International Fibre Syndicate Ltd v Dawson* (1901) 3 F (HL) 32 at 33 per Lord Robertson.

be the case if the contract concerns “a personal service of a peculiar nature”, or where a purchaser wishes goods to be made by a particular manufacturer due to considerations of, for example, the latter’s character or reputation.⁶⁷¹ McBryde makes clear that whether assignation is restricted on grounds of *delectus personae* depends on the intentions of the contracting parties,⁶⁷² and *delectus personae* can be bypassed through the parties’ agreement.⁶⁷³ Assignation may also be restricted by the express terms of the contract in question.⁶⁷⁴

5.5.1.2. Assignation and the privity doctrine

Thomas Smith states that assignation is an exception to privity, although he does not explain this view.⁶⁷⁵ He is, however, correct. A contract is not formed between the assignee and the debtor, but the assignee receives a right to claim against the debtor for payment under the contract between the debtor and creditor. Where an obligation has been assigned with the consent of the debtor, the assignee becomes burdened to the debtor, with whom it is not in a contractual relationship. This constitutes an exception to the ‘no burdens’ aspect of privity. The debtor also enjoys the benefit of having a right against the assignee, despite the fact that the debtor is in fact a third party to the assignment agreement between the cedent and assignee. Assignation is, therefore, clearly an exception to privity regardless of whether rights or obligations are assigned.

The interaction between privity and third party rights, as discussed in chapter 2,⁶⁷⁶ demonstrates that privity is generally applied subject to the intentions of the contracting parties. The assignment of obligations requires the active consent of the debtor, and so the intentions of both contractual parties (i.e.

⁶⁷¹ *Cole v Handasyde & Co* 1910 SC 68 at 73 per Lord Dunedin.

⁶⁷² McBryde, *Contract* (n 111) 12.36, citing *Cole v Handasyde & Co* 1910 SC 68 and *Berlitz School of Languages v Duchêne* (1903) 6 F 181.

⁶⁷³ Anderson, *Assignation* (n 658) 1.03 citing Stair, *Institutions* (n 224) 3.1.3.

⁶⁷⁴ McBryde, *Contract* (n 111) 12.38-39; MacQueen, *SME* (n 69) para 855.

⁶⁷⁵ Smith, *Short Commentary* (n 36) 773. Burrows and Guest make similar comment: Burrows, *Restatement* (n 33) §48; Guest, *Anson’s Law of Contract* (n 113) 379. Furmston and Tolhurst state that assignment is not an exception to privity (Furmston and Tolhurst, *Privity* (n 19) 3.52); the remainder of this subsection explains why their view is incorrect.

⁶⁷⁶ See, in particular, subsection 3.2.2.3.

the cedent and debtor) is protected. However, the third party clearly consents to this burden under the assignation agreement with the creditor. This situation would also constitute a deviation from privity in respect of the benefit accrued by the debtor, who receives a right under the contract between the cedent and assignee. This does not present any new challenge to the relationship between privity and contractual intention. Both parties to the contract between the cedent and assignee actively consent to the latter becoming bound to the debtor. Contractual intention is therefore upheld.

5.5.2. Arbitration

The Scottish Law Commission recently addressed the debate on whether a third party should be required to engage in arbitration to enforce its third party right if so-provided in the contract, given that the “very essence” of arbitration is its consensual nature.⁶⁷⁷ The Contract (Rights of Third Parties) (Scotland) Act 2017 section 9 provides that a third party is to be treated as if it was a party to the arbitration agreement referred to in the contract providing for its right. The provision is construed as a conditional benefit rather than a burden.⁶⁷⁸

In England, the Law Commission recommended that third parties ought not to be treated as arbitral parties, because this would be seen as imposing a duty to follow the arbitral procedure.⁶⁷⁹ Tettenborn disagreed with this proposal, commenting that this would allow the third party’s “having it both ways”.⁶⁸⁰ However, the Contracts (Rights of Third Parties) Act 1999 section 8 provides that third parties are to be treated as parties to any arbitration agreement required by contract to enforce their right.⁶⁸¹ The provision resulted from lobbyists’ arguments that the legislation would be more useful if

⁶⁷⁷ Report on *Third Party Rights* (n 241) 7.3-18.

⁶⁷⁸ Ibid. 7.5-6, Draft Bill Clause 9 (available at Appendix A of the Report).

⁶⁷⁹ Report on *Privity of contract* (n 182) 14.18.

⁶⁸⁰ Tettenborn (n 247) at 610.

⁶⁸¹ For discussion, see MacMillan (n 250) at 733 and C Ambrose, “When can a third party enforce an arbitration clause?” 2001 (Sep.) *Journal of Business Law* 415. See also *Shipowners’ Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret A.S.* [2016] EWCA Civ. 386 at para 2 per Lord Justice Longmore.

the Arbitration Act 1996 could apply to third party rights formed under the Act.⁶⁸² There is a continuing debate on whether ‘arbitration without privity’ can be imposed in situations such as multiparty construction contracts.⁶⁸³

This so-called burden can however be construed as a condition attached to the third party’s right. The Scots position is logical: if the third party is to take advantage of its right, it must do so in accordance with the conditions outlined in the contract as a whole.

If, however, requiring the third party to undergo arbitration is in fact a burden on the third party, this is justified on the grounds of commercial efficiency and commercial necessity from the perspective of the contracting parties.

Ambrose comments that it is a matter of “common sense and principle” that the contracting parties should have the ability to make the third party’s right conditional on the third party’s consent to the arbitration clause, particularly where the contract concerns confidential or otherwise sensitive information.⁶⁸⁴ This would not, of course, justify revision of the general rule that contracting parties cannot impose burdens on third parties. Rather, this limited deviation from privity is justified on the grounds that the third party stands only to gain in receipt of its third party right, and ought to follow the contracting parties’ dispute resolution provisions should they wish to enforce the right.

5.5.3. Summary

These scenarios highlight very narrow instances in which the ‘no burdens’ rule is bypassed. The policy considerations underlying deviation from this aspect are narrow, encompassing only intention (on the part of the third party as well as the contracting parties) and commercial convenience. The law ought not to otherwise allow contracting parties to burden third parties, so

⁶⁸² Report on *Third Party Rights* (n 241) 7.4. See also Andrews (n 344) at 373-374.

⁶⁸³ For an overview of the discussion on this issue, see Report on *Third Party Rights* (n 241) 7.18; AM Steingruber, *Consent in International Arbitration* (Oxford University Press, Oxford, 2012) 1.13; J Paulsson, “Arbitration without privity” 1995 10(2) *ICSID: Foreign Investment Law Journal* 232.

⁶⁸⁴ Ambrose (n 681) at 418.

that the third party's freedom of contract and financial and personal interests are protected.

5.6. Concluding remarks

This chapter has identified the policy considerations which justify deviation from the privity doctrine, and has explained why, despite the number of exceptions, privity must continue to be recognised. The chapter has also provided a means of identifying when new exceptions to the benefits aspect of privity should be accepted, namely, when the exception reflects the intentions of the contracting parties, or when there is a justifiable policy reason. Similarly, the chapter also provides a unification of considerations which justify deviation from the 'no burdens' rule.

The statutory exceptions to privity indicate that privity and contractual intention can and should be bypassed to reflect the following policy considerations: protection of third parties from physical and financial harm, ensuring loss caused by breach of contract is recoverable, and commercial convenience. Regarding the first of these considerations, the third party should not always be protected. The loss should only be recoverable where the third party cannot reasonably be expected (or was unable) to protect itself against the loss, and the contracting party could reasonably foresee that defective performance would negatively impact those in the position of the third party. The second consideration, ensuring loss caused by breach of contract is recoverable, is a relevant consideration but cannot provide the sole justification for creating a new exception to privity. Commercial convenience provides a suitable justification where the third party is not disadvantaged.

Chapter 6: Contracts for the benefit of another

6.1. Overview of chapter 6

This chapter analyses contracts for the benefit of another in Scots law. It follows the same structure as chapters 7 (transferred loss), 8 (*ad hoc* agency), and 9 (undisclosed agency). Each chapter defines its respective concept and explains the concept's development in Scots law, offering comparative comment where relevant. The chapters then address whether the concept is compatible with privity and Scots contract theory, whether the concept could and should be explained in terms of delictual liability, and whether there are sound policy considerations justifying the existence of the concept. Each chapter concludes with discussion on whether the concept should continue to be recognised in Scots law.

This chapter also considers the interaction between contracts for the benefit of another and third party rights.

6.2. Contracts for the benefit of another in Scots law

This section defines contracts for the benefit of another, explains the development of this concept in Scots and English law, and considers the potential impact of relevant English case law in Scotland.

6.2.1. Defining contracts for the benefit of another

A contract for the benefit of another arises where one of the contracting parties enters into a contract for the benefit of an extra-contractual party, and may recover damages for that party's losses resulting from defective contractual performance.⁶⁸⁵ The extra-contractual party cannot recover damages for itself.⁶⁸⁶

⁶⁸⁵ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 at 1473 per Lord Denning.

⁶⁸⁶ The contrast between contracts for the benefit of another and contracts providing enforceable third party rights is discussed further below at subsection 6.3.1.

6.2.2. Development of contracts for the benefit of another in Scots law

The authorities on contracts for the benefit of another in Scots law are limited. It is however accepted that where A contracts with B for services to be provided by B for the benefit of C, the measure of damages recoverable by A in the event of B's breach is the actual loss suffered by C.⁶⁸⁷ In *Blyth & Blyth v Carillion Construction Ltd.*,⁶⁸⁸ for example, Lord Eassie explained that if a husband contracted with a surgeon for his wife's treatment, the liability of the surgeon for treating the wife negligently should be quantified by the loss suffered by her.⁶⁸⁹ However, the case itself concerned financial damages, and there is no definitive authority in Scots law for the recovery of damages for another's physical injury (save for Lord Eassie's analogy), damage to their property, or injury to feelings. Nonetheless, Scots law generally allows for contractual damages to be awarded for injury to feelings⁶⁹⁰ and psychological injury.⁶⁹¹ Such damages could potentially be recovered in the context of contracts for the benefit of another.

6.2.3. Contracts for the benefit of another in English law

In English law, contracts for the benefit of another allow recovery of damages for injury to feelings as well as financial loss. The leading authority is *Jackson v Horizon Holidays Ltd*,⁶⁹² in which the plaintiff booked a holiday for himself, his wife, and his two toddler sons. The standard of accommodation did not meet various contractual conditions, and he recovered damages for the distress and discomfort suffered by his family as well as himself. Lord

⁶⁸⁷ Hogg, *Obligations* (n 433) 3.198.

⁶⁸⁸ *Blyth & Blyth v Carillion Construction Ltd* 2002 SLT 961.

⁶⁸⁹ *Ibid.* at para 36 per Lord Eassie. In the Outer House, Lord Johnston previously held in *Rosen v Stephen* (1907) 14 SLT 784 that a contractual action was not possible in a case in which a father had contracted with a chemist for ringworm treatment for his daughter, and the treatment caused her injury. Lord Johnston arrived at this conclusion on the grounds of the lack of privity between the daughter and defender. He did not consider whether the father could make a contractual claim on his daughter's behalf.

⁶⁹⁰ *Graham v Ladeside of Kilbirnie Bowling Club* 1994 SLT 1295; *Buchanan v Newington Property Centre* 1992 SCLR 583; *Black v Gibson* 1992 SLT 1076; *Diesen v Samson* (1971) SLT (Sh. Ct.) 49.

⁶⁹¹ *Ward v Scotrail Railways Ltd* 1999 SC 255; *Logan v Falkirk and District Royal Infirmary NHS Trust* 1999 GWD 30-1431.

⁶⁹² *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

Denning stated that the facts of the case were comparable with situations in which, for example, a host contracts with a restaurant for a meal for himself and his friends, or where a vicar contracts for transportation for his choir.⁶⁹³ He describes the concept as “a contract by one for the benefit of third persons”.⁶⁹⁴ According to his judgment, only the party who made the contract can sue, and the extra-contractual party cannot recover damages in its own name.⁶⁹⁵ In a similar Court of Appeal case, a contractual party could recover damages for disappointment and distress suffered by his friends for whom he had booked a skiing holiday.⁶⁹⁶

Whilst *Jackson v Horizon Holidays*⁶⁹⁷ has been described as “obscure”,⁶⁹⁸ it has not been expressly overruled. Contracts for the benefits of third parties are acknowledged judicially in various circumstances. In *Panatown Ltd v Alfred McAlpine Construction Ltd*,⁶⁹⁹ Lord Millet mentions *Jackson v Horizon Holidays*⁷⁰⁰ as a “broad decision on the measure of damages or as an example of a type of contract calling for special treatment”.⁷⁰¹ Lord Wilberforce makes similar comment, acknowledging that *Jackson*:⁷⁰²

“may be supported either as a broad decision on the measure of damages... or possibly as an example of a type of contract — examples of which are persons contracting for family holidays, ordering meals in restaurants for a party, hiring a taxi for a group — calling for special treatment.”⁷⁰³

⁶⁹³ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 at 1472 per Lord Denning.

⁶⁹⁴ *Ibid.* at 1473 per Lord Denning.

⁶⁹⁵ *Ibid.*

⁶⁹⁶ *Clive Avon Adcock v Blue Sky Holidays Limited* 1980 WL 613068, which cited but did not rely on *Jackson* (see the judgement of Lord Justice Cumming-Bruce). See also *Thomson v RCI Europe* [2001] CLY 4275 (in which the claimant recovered damages for distress and inconvenience suffered by her and her relatives caused by defective holiday accommodation in the USA) and *Sutcliffe and Greenwood v Cosmoair* [1996] CLY 711 (the claimant had paid for a holiday for himself and his partner, and recovered damages in respect of the couple’s distress at discovering a dirty swimming pool and damp bed linen).

⁶⁹⁷ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁶⁹⁸ Morgan, *Great debates* (n 10) 277.

⁶⁹⁹ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

⁷⁰⁰ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷⁰¹ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 588 per Lord Millet.

⁷⁰² *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷⁰³ *Woodar Investment Development v Wimpey Construction UK Ltd* [1980] 1 WLR 277 at 283 per Lord Wilberforce.

The case has also been applied outwith the context of holiday cases. In *Buckley v Lane Herdman & Co*,⁷⁰⁴ a married couple sued their solicitor for their expenses and distress resulting from the solicitor's failure to ensure that the sale of their house was simultaneous with the purchase of a new family home. The stress resulted from the search for accommodation and the fact that the only available alternative accommodation was in a noisy and unpleasant neighbourhood. *Jackson*⁷⁰⁵ was accepted as an authority for allowing the recovery of damages for the emotional impact of the breach of contract. The couple did not sue for the distress suffered by their children, but this arguably could have been accounted for, because damages were awarded in respect of the toddler sons' distress in that case.

The specific circumstances of *Jackson*⁷⁰⁶ now fall within the provisions of the Package Travel and Linked Travel Arrangements Regulations 2018. This legislation allows consumers to claim in certain circumstances where their package holidays are unsatisfactory.⁷⁰⁷ The European Court of Justice found that non-material damages are recoverable under the Directive which enacted the previous version of these regulations (the Package Travel, Package Holidays and Package Tours Regulations 1992).⁷⁰⁸ This would clearly encompass Mr Jackson's claim for the distress suffered by his family. In the more recent case of *Minhas v Imperial Travel Ltd*,⁷⁰⁹ a woman brought a claim under the Regulations against the tour operator with whom she had contracted for a holiday for herself and her partner. Following *Jackson*,⁷¹⁰ District Judge Young permitted her to recover damages in respect of the impact of unsuitable accommodation on her and her partner.⁷¹¹ It is likely that future holiday-makers will rely on the statutory principle in the

⁷⁰⁴ *Buckley v Lane Herdman & Co* [1977] CLY 3143.

⁷⁰⁵ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷⁰⁶ *Ibid.*

⁷⁰⁷ See discussion in subsection 5.2.8.

⁷⁰⁸ *Leitner v Tui Deutschland GmbH & Co KG* (C0168/00) [2002] ECR I-2631, March 12 2002. The relevant Directive is the Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

⁷⁰⁹ *Minhas v Imperial Travel Ltd* [2003] CLY 2043.

⁷¹⁰ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷¹¹ *Minhas v Imperial Travel Ltd* [2003] CLY 2043.

Regulations that they may recover losses suffered by external parties for whom they have contracted, rather than relying on *Jackson*.⁷¹² However, the principle from the case remains applicable to the recovery of losses suffered outwith holiday contexts, such as those identified by Lord Wilberforce.⁷¹³

The concept of contracts for the benefit of another appears to be accepted in English law, in light of its recognition in *Jackson v Horizon Holidays*⁷¹⁴ and similar cases. However, the exact scope of the concept is unclear. In *Jackson*,⁷¹⁵ Lord Denning relied on the case of *Lloyds v Harper*⁷¹⁶ for his proposition that, where two parties contract for one of them to perform in favour of a third party, the other contracting party can recover for the third party's losses stemming from defective performance, regardless of whether there is a fiduciary relationship between that party and the third party.⁷¹⁷ The claimant in *Lloyds v Harper*⁷¹⁸ was acting as a trustee for the external party for whom damages were sought. In *Woodar Investment Development Ltd. v Wimpey Construction U.K. Ltd.*,⁷¹⁹ the House of Lords did not accept that *Lloyds v Harper*⁷²⁰ supported the general proposition put forward by Lord Denning.⁷²¹ They did, however, find that *Jackson*⁷²² could be treated as an authority for the narrower proposition that the claimant could recover where its personal loss was made worse by disappointment in the fact that relevant family members did not enjoy their holiday.⁷²³

The implications of *Woodar v Wimpey*⁷²⁴ are unclear. Merkin has suggested that the judgments highlight that a contracting party can recover only if it is

⁷¹² *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷¹³ See (n 703).

⁷¹⁴ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷¹⁵ *Ibid.*

⁷¹⁶ *Lloyds v Harper* [1888] 16 CD 290.

⁷¹⁷ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 at 1473 per Lord Denning.

⁷¹⁸ *Lloyds v Harper* [1888] 16 CD 290.

⁷¹⁹ *Woodar Investment Development v Wimpey Construction UK Ltd* [1980] 1 WLR 277.

⁷²⁰ *Lloyds v Harper* [1888] 16 CD 290.

⁷²¹ *Woodar Investment Development v Wimpey Construction UK Ltd* [1980] 1 WLR 277 at 293 per Lord Russell of Killowen and at 297 per Lord Keith of Kinkel.

⁷²² *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷²³ *Lloyds v Harper* [1888] 16 CD 290. See also *Calabar Properties Ltd v Sticher* [1984] 1 WLR 287.

⁷²⁴ *Woodar Investment Development v Wimpey Construction UK Ltd* [1980] 1 WLR 277.

“affected” by the third party’s loss.⁷²⁵ This is not reflected in subsequent case law. In *Forster v Silvermere Golf and Equestrian Centre*,⁷²⁶ the defendant agreed to build a house which would be occupied rent-free by the plaintiff and her children, but did not uphold this agreement. When the defendant refused to provide the house, the plaintiff could recover for her own loss, but was not able to obtain damages in respect of her children. It is difficult to see why Mr Jackson’s suffering caused by the impact on his children’s holiday was greater than that of a mother affected by the loss of her children’s future home. However, in *Forster v Silvermere Golf and Equestrian Centre*⁷²⁷ Dillon J reasoned that the mother could not recover for her children because she had not acted as their trustee or agent,⁷²⁸ rather than considering the concept of contracts for the benefit of another. Whilst Merkin’s comment is not therefore correct, the qualifications in *Woodar v Wimpey*⁷²⁹ dilute Lord Denning’s wide-ranging principle from *Jackson*,⁷³⁰ and the scope of the concept is accordingly unclear in English law.

Contracts for the benefit of another are perhaps a remnant from the inadmissibility of third party rights in English law. In *Hohler v Aston*,⁷³¹ for example, Sargant J remarked that the:

“third parties, of course, cannot themselves enforce a contract made for their benefit, but the person with whom the contract is made is entitled to enforce the contract.”⁷³²

The relationship between contracts for the benefit of another and third party rights is discussed further below.⁷³³

⁷²⁵ Merkin (n 195) at 2.11.

⁷²⁶ *Forster v Silvermere Golf and Equestrian Centre* (1981) 125 SJ 397.

⁷²⁷ *Ibid.*

⁷²⁸ *Ibid.* at para 258 per Dillon J.

⁷²⁹ *Woodar Investment Development v Wimpey Construction UK Ltd* [1980] 1 WLR 277.

⁷³⁰ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷³¹ *Hohler v Aston* [1920] 2 Ch. 420.

⁷³² *Ibid.* at 425 per Sargant J.

⁷³³ See subsection 6.3.3.

6.2.4. Impact of English case law on Scots law

The concept of contracts for the benefit of another can certainly be said to exist in Scots law. Lord Eassie's judgment in *Blyth & Blyth v Carillion Construction Ltd*.⁷³⁴ is authority for the principle that a contractual party can recover damages for financial loss and personal injury suffered by the party for whom the contract was made in the event of defective performance. However, it cannot be said with certainty that *Jackson*⁷³⁵ would be followed in future Scots cases in which the pursuer attempts to recover contractual damages for the emotional suffering of those for whom the contract was made. There is no barrier in Scots law to the recovery of damages in respect of suffering and disappointment in disappointing holiday cases or similar situations such as Lord Denning's example of a vicar who books transportation for his choir. Scots law may thus follow English law in future by allowing damages in such cases. At present, however, the concept of contracts for the benefit of another is more fully developed and wider in scope in English law as compared to Scots.

6.3. Compatibility of contracts for the benefit of another with Scots law

This section discusses the interaction between contracts for the benefit of another and third party rights, and then considers the compatibility of contracts for the benefit of another with privity, contract theory, and delict. The final subsection addresses whether the recognition of contracts for the benefit of another is supported by relevant policy considerations.

6.3.1. Interaction between contracts for the benefit of another and third party rights

The Scottish Law Commission has recently described *Jackson v Horizon Holidays*⁷³⁶ as a "possible modern example of a contract with a third-party

⁷³⁴ *Blyth & Blyth v Carillion Construction Ltd* 2002 SLT 961 at para 36 per Lord Eassie. See above at subsection 6.2.2.

⁷³⁵ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷³⁶ *Ibid.*

right in favour of young children”.⁷³⁷ However, they distinguish between the case and third party rights as traditionally understood in Scots law, noting that there are some circumstances in which third parties have “passive capacity only,” and are unable to enforce the contracts from which they benefit.⁷³⁸ The term ‘passive’ refers to the external party’s inability to enforce the contract in its own right, rather than the party’s lack of contractual capacity. The external party’s inability to sue on the contract indicates that third party rights and contracts for the benefit of another are separate concepts. Whilst contracts for the benefit of another can be treated as a passive form of third party rights, there is however a key distinction between the two concepts. A third party can enforce a third party right in its own name, whereas the external party for whom a contract for the benefit of another is made cannot.

The question of whether the external party can enforce its benefit is determined according to the intentions of the contracting parties. The Scottish Law Commission recognises that: “third parties benefited by contracts between others may not have rights to those benefits because the contracting parties do not so intend.”⁷³⁹ In the case of both third party rights and contracts for the benefit of another, the parties intend to confer a benefit on the third/ external party. However, the parties intend for the benefit to be enforceable on the part of the third party (in the case of a third party right), but not the external party (in the case of a contract for the benefit of another). A contract for the benefit of another may arise where, for example, parents wish to agree on a child support agreement for the benefit of their child, but they do not intend for the child to have the ability to enforce this agreement at its own suit. Beale discusses the possibility of passive third parties, acknowledging that a contracting party may actively choose for the third party not to acquire a right.⁷⁴⁰ He notes that a person may, for example, engage a

⁷³⁷ Discussion Paper on *Third Party Rights* (n 63) 2.33. See also Report on *Third Party Rights* (n 241) 1.13, citing *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 and *Lougheed v On The Beach Ltd* [2014] EWCA Civ. 1538.

⁷³⁸ Discussion Paper on *Third Party Rights* (n 63) 2.33.

⁷³⁹ Report on *Third Party Rights* (n 241) 1.14.

⁷⁴⁰ Beale (n 351) at 108.

builder to repair his elderly uncle's house, without intending for the uncle to have any contractual right to enforce the contract with the builder, because the uncle can no longer manage his own affairs.⁷⁴¹ Beale submits that the person who makes the contract should be able to obtain a remedy on behalf of his uncle.⁷⁴²

The Scottish Law Commission did not make clear in their discussion of *Jackson v Horizon Holidays*⁷⁴³ that there is a sharp distinction between passive external parties and the recipients of third party rights.⁷⁴⁴ Whilst the Scottish Law Commission's reforms dealt with 'active' third party rights only, it is helpful to acknowledge that these concepts are separate. It is suggested that the terminology of third party rights should be used where the third party is intended to receive an enforceable right, and situations in which the external party has a passive capacity only are referred to as contracts for the benefit of another.

Merkin argues that, if contracting parties are able to enforce third party rights, there is no need for a separate concept of contracts for the benefit of another, because such contracts can be viewed as giving rise to enforceable third party rights.⁷⁴⁵ Allowing contracting parties to enforce third party rights would undeniably be useful. The Scottish Law Commission, for example, acknowledge situations in which a third party is willing to receive the benefit conceived in its favour, but is unable to raise an action through, for example, a lack of funds or poor health.⁷⁴⁶ However, it is not clear in Scots law whether a contracting party can enforce a third party's right or recover damages for

⁷⁴¹ Beale (n 351) at 108.

⁷⁴² Ibid.

⁷⁴³ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷⁴⁴ For example, they mention in the Report on *Third Party Rights* (n 241) 2.14 that a "contract with a third-party right in favour of young children might arise when a parent books a family holiday for him- or herself and the rest of the family." It is true that the parents and holiday company may intend to confer an enforceable right on the children. However, the Report appears to offer this example in reference to *Jackson*, in which the parties did not intend for the children to have an enforceable third party right.

⁷⁴⁵ Merkin (n 195) at 2.4.

⁷⁴⁶ Memorandum on *Stipulations in Favour of Third Parties* (n 235) 43. See also McBryde, *Contract* (n 111) 10.10.

defective performance or non-performance of the right.⁷⁴⁷ This contrasts with contracts for the benefit of another. It is clear from *Jackson v Horizon Holidays*⁷⁴⁸ and similar cases⁷⁴⁹ that the contracting party who makes the contract can recover damages for the third party's loss. Further, the crucial distinction remains that, in the case of contracts for the benefit of another, the external party cannot enforce its own right. Accordingly, third party rights and contracts for the benefit of another would remain as distinct concepts even if it was clarified that contracting parties could enforce third party rights. Contracts for the benefit of another should, however, be viewed as a passive form of third party rights.

6.3.2. Compatibility of contracts for the benefit of another with the privity doctrine

As discussed immediately above, contracts for the benefit of another are a passive form of third party rights. The Scots third party right is accepted as an exception to the privity doctrine.⁷⁵⁰ This does not necessarily lead to the conclusion, however, that contracts for the benefit of another are an exception to the privity doctrine. It is submitted that contracts for the benefit of another do not operate as an exception to privity.

As discussed in chapter 2,⁷⁵¹ privity prevents an external party from enforcing contractual obligations in contracts to which it is not party. Regarding contracts for the benefit of another, the external party cannot at any stage enforce the benefit in its favour, nor does it receive the damages recovered in respect of its loss. The cases discussed in previous chapters did not consider the impact of the privity rule on a contracting party's ability to recover damages on behalf of the person benefited by the contract. However,

⁷⁴⁷ This was not clarified in the Contract (Third Party Rights) (Scotland) Act 2017. See also MacQueen, *SME* (n 69) para 839; Memorandum on *Stipulations in Favour of Third Parties* (n 235) 42. In English law, it is clear that the contracting party not bound to perform in the third party's favour can enforce the third party right: Contracts (Rights of Third Parties) Act 1999 section 1(7).

⁷⁴⁸ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷⁴⁹ See discussion above at subsection 6.2.3.

⁷⁵⁰ This is discussed above at subsection 3.2.2.3.

⁷⁵¹ See, in particular, subsections 2.2.2 and 2.3.1.

Burrows states that privity “plainly does not prevent the contracting party... enforcing the contract even though the contract is one for the benefit of a third party.”⁷⁵² This is correct, because the purpose of the ‘benefits’ aspect of the privity doctrine is to protect the contracting parties against contractual claims from external parties to whom they did not intend to owe liability. Privity is not therefore breached when a contracting party is permitted to make a contract to benefit another and can recover damages where the contract is not properly performed.

A parallel can be drawn between contracts for the benefit of another and contracts conferring incidental benefits on third parties. Regarding the latter, completion of the contract results in a positive outcome for external parties, but the contracting parties do not intend for this incidental benefit to be enforceable on the part of the external parties or the contracting parties. This does not breach privity, because the external parties cannot enforce the incidental benefit.⁷⁵³ The benefit to the external party conferred under a contract for the benefit of another is intended to be enforceable by the party who contracts for the external party. However, this benefit is also, from the perspective of the external party, merely an incidental benefit. The external party cannot interfere in the operation of the contract, and it cannot claim damages for himself when the contract is not properly performed. The external party cannot therefore bypass privity to claim in respect of its incidental benefit.

Contracts for the benefit of another are therefore compatible with the privity doctrine. However, the concept usefully highlights the scope and boundaries of privity in Scots law, by demonstrating that privity is not breached where a contracting party can enforce a term in a contract in favour of an external party. In contrast, third party rights are an exception to privity because the third party can enforce the right in its own name. Privity permits the contracting parties to create an enforceable contractual obligation involving

⁷⁵² Burrows, *Restatement* (n 33) §46.

⁷⁵³ See also subsection 2.2.2.

performance in favour of an external party, provided that the external party can enforce this obligation only if it is the recipient of a third party right.

There is a general rule in Scots and English law that damages cannot be recovered in respect of a loss which falls on a third party.⁷⁵⁴ This reflects that damages are compensatory.⁷⁵⁵ The rule can be distinguished from the privity doctrine: privity excludes third parties from receiving enforceable benefits under the contract and from being burdened under the contract, whereas the 'third party loss' rule prevents the contracting parties from recovering losses which they do not suffer. The two rules are, however, obviously closely related, because they both reflect the general principle that contracts should not concern external parties.⁷⁵⁶

Whilst contracts for the benefit of another do not contravene privity, a secondary consideration is whether the concept is an exception to the rule that a contracting party can recover only for its own losses. This matter is relatively clear-cut in the context of financial loss. If, for example, a person books a holiday for four people, it can recover the full value of the holiday, rather than simply a quarter of the price. The financial value of the holiday is impacted by the number of people for whom the booking was made, in terms of the number of hotel rooms, flights, etc. The person who concludes the contract and has paid for the holiday is clearly the person who is 'out of pocket', and the financial loss falls entirely on the person who paid for the holiday. Where the person who made the contract receives damages in

⁷⁵⁴ *Albacruz (Cargo Owners) Respondents v Albazero (Owners) Appellants - The Albazero* [1977] AC 774 at 846 per Lord Diplock; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*; *St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85 at 114 per Lord Browne-Wilkinson. See also B Coote, "The Performance Interest, Panatown, and the Problem of Loss" 2001 117(Jan) *Law Quarterly Review* 81 at 81; GH Treitel, "Damages in respect of a third party's loss" 1998 114(Oct) *Law Quarterly Review* 527 at 527.

⁷⁵⁵ In other words, a party should not be able to recover compensation when it itself has not suffered a loss. See *Woodar Investment Development Ltd v Wimpey Construction U.K. Ltd* [1980] 1 WLR 277 at 291 per Lord Salmon.

⁷⁵⁶ See J Cartwright, "Damages, Third Parties, and Common Sense" 1996 10(3) *Journal of Contract Law* 244 at 244-245 and A Burrows, "No Damages for a Third Party's Loss" 2001 1(1) *Oxford University Commonwealth Law Journal* 107 at 107-108.

respect of all or part of its monetary value, they are therefore recovering their own financial loss.

In cases in which the contracting party is permitted to recover damages for *solatium*, as in *Jackson v Horizon Holidays*⁷⁵⁷ and the similar cases discussed above, it is less clear that the contracting party is recovering its loss only. If a person has booked a holiday for four people and suffers a breach of contract, it does not suffer four times as much disappointment as a person who booked a solo trip. Rather, the disappointment is felt by each of the group individually. The emotional impact of the loss of enjoyment of a holiday cannot realistically be said to fall solely on the contracting party. The House of Lords, as noted above, determined that *Jackson*⁷⁵⁸ applies only where the contracting party's disappointment is worsened because of its friends' or family's distress. It could therefore be argued that the contracting party is simply recovering additional damages for its own disappointment. However, the contracting party's disappointment at the failure to deliver the joint experience for which it had contracted cannot be conflated with the disappointment suffered by the external parties themselves. In *Jackson*,⁷⁵⁹ Lord Denning expressly explained that the sum awarded encompassed damages in respect of the wife and children's disappointment.⁷⁶⁰ The fact that the damages were awarded in respect of the distress of those parties, rather than the added distress suffered by Mr Jackson, demonstrates that the contracting party was permitted to recover damages on behalf of others. Whilst contracts for the benefit of another are, therefore, an exception to the rule that a contracting party cannot recover another's losses, the implications of this are unfortunately outwith the scope of the thesis.⁷⁶¹

⁷⁵⁷ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷⁵⁸ *Ibid.*

⁷⁵⁹ *Ibid.*

⁷⁶⁰ *Ibid.* at 1473 per Lord Denning.

⁷⁶¹ The potential for further research on this point is discussed at subsection 11.3.

6.3.3. Compatibility of contracts for the benefit of another with contract theory

Whilst contracts for the benefit of another differ from third party rights in that they do not constitute an exception to privity, both concepts are compatible with contract theory on the grounds of contractual intention. As noted above, enforcement of the third party right (in the case of a third party right) and the benefit to the external party (in the case of a contract for the benefit of another) depends on the intentions of the contracting parties.⁷⁶²

Contracts for the benefit of another are therefore easily framed in terms of voluntary obligations, because they involve benefits conferred on easily recognisable external parties whom both contracting parties agree should benefit from contractual performance. Additionally, the contracting parties agree that the party who contracts for the external party's benefit can recover damages in respect of defective contractual performance. Liability in respect of the external party's loss reflects the will of both contracting parties. This is compatible with will theory. It can also be said that the contracting parties have voluntarily assumed responsibility for the external party, in accordance with the assumption theory.

In terms of the promissory theory, Brownsword and Hutchison explain that this theory can account for situations involving both 'direct' promises to third parties (in which contracting party A promises contracting party B that it will confer a benefit on third party C, and A promises C that it will confer a benefit on C) and 'indirect' promises (A promises B that it will benefit C, but does not make such a promise to C).⁷⁶³ The 'direct' promises appear to describe third party rights, and the 'indirect' promises cohere with the Scots and English understanding of contracts for the benefit of another. The latter could be explained in terms of promissory theory because the promise made by one contracting party to perform in favour of the external party is upheld. In other words, the obligation to confer a benefit on the external party could be

⁷⁶² See subsections 6.3.1 and 3.2.2.1-2.

⁷⁶³ Brownsword and Hutchison (n 307) at 130.

framed as a promise made by the relevant contracting party to the party who made the contract for the external party.

In summary, contracts for the benefit of another are compatible with contract theory on the same grounds as third party rights:⁷⁶⁴ both concepts uphold contractual intention.

6.3.4. Contracts for the benefit of another and delict

According to Hodgson, *Jackson v Horizon Holidays*⁷⁶⁵ is a contractual anomaly which ought to have been decided according to the law of tort.⁷⁶⁶ However, he bases this argument on the privity doctrine, arguing that privity prevents enforceable rights on the part of third parties. Hodgson was correct, at the time his article was published, that privity in English law prevented third party claims.⁷⁶⁷ However, it has been demonstrated in this chapter that the concept does not breach the privity doctrine. It is possible to frame contracts for the benefit of another in terms of voluntary obligations, and the concept need not be examined in terms of delictual liability.

It is noted that contracts for the benefit of another can be distinguished from the disappointed beneficiary cases considered in chapter 4.⁷⁶⁸ In those cases, the relevant parties (the solicitor and the testator) did not intend to confer a benefit on the third party which was enforceable on the part of one of the contracting parties.

6.3.5. Policy considerations justifying contracts for the benefit of another

As discussed in chapter 5, third party rights reflect a policy aim of contractual efficiency.⁷⁶⁹ Contracts for the benefit of another can also be justified on this

⁷⁶⁴ Third party rights are compatible with contract theory because they arise in accordance with the intentions of the contracting parties: subsections 3.2.2.1-2.

⁷⁶⁵ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷⁶⁶ J Hodgson, "Jackson v Horizon Holidays - a case of mistaken identity?" 1992 1 *Nottingham Law Journal* 27 at 29 and 34-35.

⁷⁶⁷ Hodgson wrote the relevant article prior to the passage of the Contracts (Rights of Third Parties) Act 1999.

⁷⁶⁸ See subsection 4.2.3.4.

⁷⁶⁹ This is discussed in subsection 5.2.9.

basis. The concept allows for the contracting party to transact once for all relevant parties, and for the benefits of the contract and right of redress to accrue to it in respect of all the parties for whom the contract was made. This is more efficient than requiring separate transactions in respect of each party whom the contracting party wishes to benefit. Both third party rights and contracts for the benefit of another therefore offer an efficient means of contracting to both commercial parties and those operating outwith the course of business. The two concepts also reflect a policy aim of ensuring that the intentions of contracting parties are upheld.⁷⁷⁰

The policy aim of protecting external parties does not apply where the contracting party recovers its own financial loss. However, contracts for the benefit of another permit recovery of loss for another's distress and disappointment, demonstrating a policy consideration of protecting external parties from this type of loss. For example, the clear policy objective behind the Package Travel and Linked Travel Arrangements Regulations 2018 is the protection of consumer holiday-makers, including those for whom package holiday contracts are concluded.⁷⁷¹ The other situations outwith the context of holidays identified by Lord Denning, to which the doctrine of contracts for the benefit of another may apply (for example, a substandard meal booked by one person on behalf of a group) may not involve the same level of disappointment as a ruined holiday. However, the underlying principle is the same: where a contract made by one person on behalf of one or more others is defectively performed, the contract-maker ought to be able to recover damages in respect of disappointment and distress. This indicates a policy consideration of protecting external parties from distress and disappointment suffered due to defective performance of a contract.

The concept also reflects a policy aim of encouraging efficient means of protecting external parties more generally. This chapter has mentioned the examples of a man who contracts with a builder for repairs to his uncle's

⁷⁷⁰ See above at subsection 6.3.1.

⁷⁷¹ See the discussion on the Regulations in subsection 5.2.8.

home, and parents who make a child support agreement providing for their child.⁷⁷² In both cases, the external party is unable to enforce a contractual obligation in its own right. Contracts for the benefit of another allow for their protection without requiring, in these examples, the nephew to obtain a power of attorney when he might wish to simply provide financial assistance to his uncle, and for a parent to enforce the agreement without proceeding with an action in the child's name. As such, contracts for the benefit of another are a useful mechanism for adults with incapacity, children, and other vulnerable parties.

As discussed above, it is not entirely clear that Scots law would allow recovery for damages for distress and disappointment suffered by an external party.⁷⁷³ In future cases, however, Scots law may follow *Jackson v Horizon Holidays*⁷⁷⁴ and uphold claims for distress and disappointment suffered by external parties, in order to recognise this policy aim.

There is a lack of clarity in Scots and English law as to whether the contracting party who claims on behalf of the third party must account to the third party for the losses recovered. None of the cases discuss a duty on the part of the contracting party to return a portion of the damages recovered to the party who suffered the loss. In familial situations, such as *Jackson v Horizon Holidays*,⁷⁷⁵ this issue would generally not be controversial. It is likely that a person who recovers damages on behalf of their family would distribute the damages to its relevant family members. However, issues may arise where the contracting party recovers on behalf of friends or colleagues. The contracting party may have been reimbursed proportionally by each person for whom the contract was made (for example, each of their travel companions paid their portion of the fares directly to the contracting party). If the person who made the contract receives a sum of damages in respect of the ruined holiday, the damages should surely be returned, on a proportional

⁷⁷² See subsection 6.3.1.

⁷⁷³ See subsection 6.2.2.

⁷⁷⁴ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁷⁷⁵ *Ibid.*

basis, to the external parties. In light of the fact that the distribution of damages may not be problematic in all situations (particularly in familial contexts), it is submitted that the person who has made the contract should not automatically be required to proportionally distribute the damages. However, where a third party does not receive damages in respect of their loss from the contracting party, they should be able to claim this from the contracting party. The person who makes the claim can be treated as acting as an agent on behalf of those who suffered the loss. It is not required in Scots law that the agent and principal conclude a formal agency contract, and Scots law permits an agent to simultaneously conclude a contract on behalf of its principal and itself.⁷⁷⁶

Contracts for the benefit of another can also be said to support a policy consideration of ensuring that loss caused by breach of contract is recoverable. Recovery of damages for disappointment suffered by external parties in cases such as *Jackson*⁷⁷⁷ ensures that the contracting party in breach is held accountable for the extent of loss caused by their failure to fulfil their contractual obligations. Where the contracting party has agreed to provide a benefit to parties on whose behalf the contract is made, recovery of damages for the impact of defective performance on external parties ensures that the obligation to perform in favour of the external party is upheld. This in turn ensures that the loss caused by the breach of contract is recoverable.

These considerations are not required to justify contracts for the benefit of another as an exception to privity, because they do not breach the doctrine. However, these policy justifications could potentially be used to explain the concept's deviation from the rule against recovery of another's losses.

6.4. Concluding remarks

In this chapter, it has been shown that contracts for the benefit of another are a passive form of third party rights, although the concept should be distinguished from third party rights on the basis that the contracting parties

⁷⁷⁶ See subsection 9.2.1. and section 8.3.

⁷⁷⁷ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

do not intend for the external party to have an enforceable benefit. Contracts for the benefit of another are not an exception to the privity doctrine, and are compatible with Scots contract theory on the same grounds as third party rights. Further, contracts for the benefit of another are supported by sound policy considerations: contractual efficiency, upholding contractual intention, ensuring recovery for loss caused by breach of contract, and protecting external parties.

The concept of contracts for the benefit of another is wider in English law than Scots law, in that English law permits the recovery of damages for distress and disappointment suffered by external parties. Scots law should follow *Jackson v Horizon Holidays Ltd*⁷⁷⁸ in recognising the general principle that contracting parties can recover damages accounting for distress and disappointment as well as financial and physical loss. In both Scots and English law, the law should be clarified to ensure that an external party can claim damages recovered on its behalf from the contracting party.

⁷⁷⁸ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

Chapter 7: Transferred loss

7.1. Overview of chapter 7

This chapter defines transferred loss and summarises its development in Scots and English law. It then addresses whether transferred loss is compatible with Scots contract and delict law, whether there are sound policy considerations supporting its existence in Scots law, and whether it should continue to be recognised in Scots law.

7.2. Transferred loss in Scots and English law

This section discusses the development of transferred loss in both Scots and English law, because the case law in the two jurisdictions is closely intertwined. Firstly, transferred loss is defined. The following subsections then focus on three contentious issues in the development of the transferred loss doctrine: whether the loss falls on the contracting party or the third party; the role of contractual intention; whether a transferred loss claim must be a 'last resort'; and whether the contracting party or the third party should be able to claim in respect of the loss.

7.2.1. Definition of transferred loss

Where loss results from a breach of a contract between A and B, but the loss has somehow (wholly or partly) 'transferred' to C, there is a legal 'black hole'. The transferred loss doctrine attempts to resolve these black holes by allowing contracting party A to advance a claim against B in respect of C's loss.⁷⁷⁹ In the English House of Lords case of *Panatown Ltd v Alfred McAlpine Construction Ltd*,⁷⁸⁰ for example, McAlpine was employed by Panatown to build on land owned by UIPL. The work was defective. Although

⁷⁷⁹ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 33 per Lord Drummond Young; *J Dykes Ltd. v Littlewoods Mail Order Stores Ltd.* 1982 SC (HL) 157 at 166 per Lord Stewart; *Axon Well Intervention Products Holdings v Michael Craig* [2015] CSOH 4 at para 29 per Lord Doherty; *The Most Honourable Alexander George Gordon, Marquess of Aberdeen and Temair v Messrs Turcan Connell* 2008 [CSOH] 183 at para 45 per Lady Smith; Jackson, *SME* (n 495) para 158; Hogg, *Obligations* (n 433) 3.174; J Thomson, "Restitutionary and performance damages" 2001 8 *Scots Law Times* (News) 71 at 73-74.

⁷⁸⁰ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

Panatown did not suffer loss, the company sought to recover UIPL's expenses incurred in repairing the building.

C cannot, under the laws on transferred loss, recover damages on its own behalf. Rather, A must sue on C's behalf, and transfer any damages recovered to C.⁷⁸¹ The term 'legal black hole' was first used in Scotland by Lord Stewart in *J. Dykes Ltd. v Littlewoods Mail Order Stores Ltd.*⁷⁸²

7.2.2. The party on whom the loss falls

The relationship between transferred loss and the rule against recovery of another's loss⁷⁸³ is relevant to the question of whether transferred loss contravenes the privity doctrine.⁷⁸⁴ Whilst privity prevents the external party from accruing contractual rights under the contract, and the external party in transferred loss situations does not claim in its own right, the fact that the third party's loss is recoverable may indicate that transferred loss operates as a functional equivalent of an exception to privity. This subsection addresses the question of the party on whom the loss falls.

In both jurisdictions, transferred loss is viewed as an exception to the rule that a contracting party generally cannot recover for a third party's loss.⁷⁸⁵ The initial Scots case from which the transferred loss doctrine can be sourced is *Dunlop v Lambert*.⁷⁸⁶ The House of Lords held that where goods are lost at sea, a consignor can recover substantial damages even where the goods, when they are lost, are the property of the consignee. The case has

⁷⁸¹ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 42 per Lord Drummond Young; *J Dykes Ltd. v Littlewoods Mail Order Stores Ltd.* 1982 SC (HL) 157 at 177 per Lord Keith of Kinkel; *The Most Honourable Alexander George Gordon, Marquess of Aberdeen and Temair v Messrs Turcan Connell* 2008 [CSOH] 183 at para 46 per Lady Smith; Hogg, *Obligations* (n 433) 3.188.

⁷⁸² *J Dykes Ltd. v Littlewoods Mail Order Stores Ltd* 1982 SLT 50 at 54 per Lord Stewart. More detailed discussion of the various terminology used in transferred loss cases is found in N Davidson, "The law of black holes?" 2006 22(1) *Professional Negligence* 53 at 53-55.

⁷⁸³ This rule is discussed in subsection 6.3.2.

⁷⁸⁴ The relationship between transferred loss and privity is discussed further below at subsection 7.3.1.

⁷⁸⁵ Mason (n 26) at 96.

⁷⁸⁶ *Dunlop v Lambert* (1839) Macl. & R 663.

since been applied in situations where the consignee has neither title nor risk, and does not have a right of possession to the goods.⁷⁸⁷

*Dunlop v Lambert*⁷⁸⁸ was affirmed by the House of Lords in *The Albazero*,⁷⁸⁹ which also concerned the carriage of goods. The *Dunlop* exception was modified in *The Albazero*⁷⁹⁰ to the extent that it ought not to apply to contracts which expressly state or imply that the carrier will enter into a separate contract (for example, a bill of lading) with the future owner.⁷⁹¹ Lord Diplock's speech emphasised that the parties must have contemplated that the breach will affect a third party rather than the party which has the contractual right of recovery.⁷⁹² Where the exception applied, the parties were accordingly "treated in law" as having entered into a contract "for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged".⁷⁹³

The rule developed in *Dunlop v Lambert*⁷⁹⁴ and *The Albazero*⁷⁹⁵ was initially recognised only in the context of carriage of goods. It was later applied to building contracts in the House of Lords case of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir*

⁷⁸⁷ B Coote, "More light on *Dunlop v. Lambert*" 1988 57(2) *Cambridge Law Journal* 250 at 250. See also C Mackenzie, *The Laws of Scotland: Stair Memorial Encyclopaedia: Carriage: Carriage by Sea (Reissue)* (hereafter "SME"), (LexisNexis/ Law Society of Scotland, London/ Edinburgh, 2002) para 42.

⁷⁸⁸ *Dunlop v Lambert* (1839) Macl. & R 663.

⁷⁸⁹ *Albacruz (Cargo Owners) Respondents v Albazero (Owners) Appellants - The Albazero* [1977] AC 774.

⁷⁹⁰ *Ibid.*

⁷⁹¹ *Ibid.* at 823 per Ormrod LJ.

⁷⁹² *Ibid.* at 847 per Lord Diplock.

⁷⁹³ *Ibid.*

⁷⁹⁴ *Dunlop v* (1839) Macl. & R 663.

⁷⁹⁵ *Albacruz (Cargo Owners) Respondents v Albazero (Owners) Appellants - The Albazero* [1977] AC 774.

*Robert McAlpine & Sons Ltd*⁷⁹⁶ and by the Court of Appeal in *Darlington BC v Wiltshier Northern Ltd*.⁷⁹⁷

In *St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd*,⁷⁹⁸ *Darlington BC v Wiltshier Northern Ltd*⁷⁹⁹ and *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd*,⁸⁰⁰ the contracting parties were granted substantial damages for cost of repair in respect of losses suffered by third parties. In *St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd*,⁸⁰¹ the House of Lords offered two possible grounds for the award of substantial damages: the so-called 'broad' and 'narrow' grounds. According to the narrow ground, the loss falls on the third party, and the contracting party recovers on the third party's behalf.⁸⁰² In contrast, the broad ground provides that the loss ultimately falls on the contracting party, who recovers for its own loss.⁸⁰³

Judicial opinion diverges on whether the broad or narrow ground is the correct basis for the award of damages. The broad ground was first put forward by Lord Griffiths in *St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd*.⁸⁰⁴ The narrow ground was adopted and applied by the majorities in *Darlington BC v Wiltshier Northern Ltd*⁸⁰⁵ and *Panatown Ltd v*

⁷⁹⁶ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85 at 115 per Lord Browne-Wilkinson.

⁷⁹⁷ *Darlington BC v Wiltshier Northern Ltd* [1995] 1 WLR 68. For further discussion see M Furmston, "Damages for loss suffered by someone else" 1996 6(6) *Construction Law* 201; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85 at 115 per Lord Browne-Wilkinson.

⁷⁹⁸ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85.

⁷⁹⁹ *Ibid.* at 115 per Lord Browne-Wilkinson; *Darlington BC v Wiltshier Northern Ltd* [1995] 1 WLR 68.

⁸⁰⁰ *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157. In the case, the stated reason for the third party's lack of title to sue was that it was not the owner of the relevant property.

⁸⁰¹ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85.

⁸⁰² *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 529 and 535 per Lord Clyde.

⁸⁰³ *Ibid.* at 543-546 per Lord Goff of Chievely and at 586-592 per Lord Millet.

⁸⁰⁴ *St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85.

⁸⁰⁵ *Ibid.*; *Darlington BC v Wiltshier Northern Ltd* [1995] 1 WLR 68.

*Alfred McAlpine Construction Ltd.*⁸⁰⁶ In *Panatown*,⁸⁰⁷ the majority favoured the narrow ground, but Lords Goff of Chieveley and Millet's dissenting speeches indicated agreement with Lord Griffith's broad ground.⁸⁰⁸ The broad ground has found favour with some academic commentators,⁸⁰⁹ and the performance interest has been recognised in various cases.⁸¹⁰

The broad ground was rejected in both *St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd*⁸¹¹ and *Panatown Ltd v Alfred McAlpine Construction Ltd*⁸¹² because a breach of contract does not constitute loss in and of itself, and the loss was consequently viewed as falling on the third party.⁸¹³ Lord Clyde, Lord Jauncey of Tullichettle and Lord Browne-Wilkinson upheld the narrow ground as defined in *St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd*.⁸¹⁴ In a recent Supreme Court case, the court, hearing an English appeal, discussed the transferred doctrine but refrained from clarifying whether the narrow or broad ground was correct.⁸¹⁵

In Scots law, the concept of a damages 'black hole' was expressly accepted in the Outer House case of *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group*.⁸¹⁶ Lord Drummond Young's recognition of the

⁸⁰⁶ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

⁸⁰⁷ *Ibid.*

⁸⁰⁸ *Ibid.* at 543-546 per Lord Goff of Chieveley and at 586-592 per Lord Millet. See further the analysis in G Hawkes, "Emerging From a Black Hole" 2003 38 *Scots Law Times* 285 at 285.

⁸⁰⁹ Thomson (n 779); IND Wallace, "Third party damages: no legal black hole?" 1999 115(Jul) *Law Quarterly Review* 394; Coote, *Assumption II* (n 318) 50-51.

⁸¹⁰ Earlier cases recognising the performance interest include: *Woodar Investment Development Ltd. v Wimpey Construction U.K. Ltd.* [1980] 1 WLR 277; *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468; *Radford v De Froberville* [1977] 1 WLR 1262; and *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344.

⁸¹¹ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85.

⁸¹² *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518. See also Hawkes (n 808) at 285.

⁸¹³ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 533-534 per Lord Clyde.

⁸¹⁴ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85.

⁸¹⁵ *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32 at para 17 per Lord Sumption and paras 53-54 per Lord Mance. The case was not decided on the basis of transferred loss.

⁸¹⁶ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323.

doctrine in that case has been affirmed in subsequent cases.⁸¹⁷ His acceptance of transferred loss in *McLaren Murdoch*⁸¹⁸ was based on the English House of Lords case of *Panatown Ltd v Alfred McAlpine Construction Ltd*,⁸¹⁹ which Lord Drummond Young describes as “wholly consistent with principles of Scots law.”⁸²⁰ He rejected the broad ground on the basis that a contracting party cannot seek substantial damages where it has not suffered a loss.⁸²¹ The transferred loss claim is consistently referred to as a “*Panatown* claim” in *Axon Well Intervention Products Holdings v Michael Craig*,⁸²² demonstrating that *Panatown Ltd v Alfred McAlpine Construction Ltd*⁸²³ remains the leading case in both Scots and English law.

The narrow ground is therefore dominant in Scots law. English judicial opinion is more mixed, and so the question of whether the loss falls on the contracting party or the third party is not settled in English law.

7.2.3. The role of contractual intention

Following *Axon Well Intervention Products Holdings v Michael Craig*,⁸²⁴ it is unclear whether the transferred loss doctrine operates in accordance with the intentions of the contracting parties in Scots law. In the case, Lord Doherty states that the transferred loss doctrine provides that the law ought to permit redress despite the absence of privity where it can be ascertained from the “imputed intention of the contracting parties” that the contract should benefit the third party.⁸²⁵ Lord Doherty indicates that intention on the part of the

⁸¹⁷ *The Most Honourable Alexander George Gordon, Marquess of Aberdeen and Temair v Messrs Turcan Connell* 2008 [CSOH] 183 at para 45 per Lady Smith; *Axon Well Intervention Products Holdings v Michael Craig* [2015] CSOH 4 at para 29 per Lord Doherty.

⁸¹⁸ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323.

⁸¹⁹ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518. See Hawkes (n 793) at 285.

⁸²⁰ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 42 per Lord Drummond Young. See also Thomson (n 779).

⁸²¹ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at paras 40-41 per Lord Drummond Young.

⁸²² See, for example, *Axon Well Intervention Products Holdings v Michael Craig* [2015] CSOH 4 at para 25 per Lord Doherty.

⁸²³ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

⁸²⁴ *Axon Well Intervention Products Holdings v Michael Craig* [2015] CSOH 4.

⁸²⁵ *Ibid.* at para 45 per Lord Doherty. The interaction between transferred loss and the privity doctrine is discussed below at subsection 7.3.1.

contracting parties that the third party's loss is recoverable can be express or implied.⁸²⁶ However, this appears to contradict Lord Drummond Young⁸²⁷ and Lady Smith's⁸²⁸ previous judgments, in which they comment that damages in 'black hole' cases are conferred as a matter of general legal policy regardless of the intentions of the contracting parties.⁸²⁹

At the Court of Appeal stage in *Alfred McAlpine v Panatown*⁸³⁰ the court took a 'contract-based approach'. It was found that a claim for damages in respect of a third party's loss ought to be successful where the contracting parties intended or contemplated that the contracting party not in breach should have the right to make such a claim.⁸³¹ However, this was subject to academic criticism,⁸³² and English case law now recognises contractual intention is not necessary for the transferred loss doctrine to apply. For example, Lord Clyde states in *Panatown*⁸³³ in the House of Lords that transferred loss cannot be based on the contracting parties' intentions because they "may in reality not have applied their minds to the point" of whether the plaintiff contracting party should be able to recover for losses sustained by third parties.⁸³⁴

⁸²⁶ *Axon Well Intervention Products Holdings v Michael Craig* [2015] CSOH 4 at para 45 per Lord Doherty.

⁸²⁷ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 42 per Lord Drummond Young.

⁸²⁸ *The Most Honourable Alexander George Gordon, Marquess of Aberdeen and Temair v Messrs Turcan Connell* 2008 [CSOH] 183 at para 45 per Lady Smith.

⁸²⁹ See also Hogg, *Obligations* (n 433) 3.188. The contradiction between Lord Doherty's judgment and earlier Scots cases on transferred loss is discussed in L MacFarlane, "Black Holes and Revelations on the Transferred Loss Doctrine" 2015 19(3) *Edinburgh Law Review* 388.

⁸³⁰ *Alfred McAlpine v Panatown* [1998] CLC 636.

⁸³¹ *Ibid.* per Evans LJ. For discussion see Treitel (n 754) at 530 and Coote (n 787) at 251.

⁸³² Treitel (n 754) at 530-532. Treitel states that such an approach offers an "unhelpful" general principle which can only be applied following construction of the contract, and argues that this is not in coherence with cases which have previously upheld the general rule that one may not recover damages for breach of contract in respect of another's losses (such as *Beswick v Beswick* [1968] AC 58; *White v Jones* [1995] 2 AC 207; and *Carr-Glynn v Frearsons* [1997] 2 All ER 614).

⁸³³ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

⁸³⁴ *Ibid.* at 530 per Lord Clyde.

In one Scots case, *Clark Contracts Limited v The Burrell Company Construction Management Limited (No 2)*,⁸³⁵ Sheriff Taylor submitted that 'black-hole' cases could in Scots law be resolved by imposition of a *jus quaesitum tertio*. This was however dismissed in *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group*.⁸³⁶ Lord Drummond Young noted that, for a third party right to apply, the contracting parties must intend to benefit the external party in question, and this is not the case in transferred loss situations.⁸³⁷ This is reflected in recent comment from the Scottish Law Commission ('SLC'). Their recent Discussion Paper on *Remedies for Breach of Contract* recognises that third party rights may provide a solution where the contracting parties objectively intend to provide an enforceable right for the party on whom the loss falls.⁸³⁸ However, the SLC's Report on *Third Party Rights* states that transferred loss operates in cases in which third party rights could not apply.⁸³⁹ 'Black hole' situations can arise where the contracting parties do *not* intend for the party who suffers the loss to have an enforceable remedy,⁸⁴⁰ whereas a third party right is conferred only where the contracting parties so intend. Transferred loss is therefore distinct from third party rights in Scots and English law. The fact that transferred loss can apply where the contracting parties could have conferred a third party right enforces the fact that transferred loss does not operate according to the parties' intentions. If they intended to benefit the third party, they could have done so by conferring a third party right. They chose not to do so, but the law nevertheless imposes a means of recovering the third party's loss.

⁸³⁵ *Clark Contracts Limited v The Burrell Company Construction Management Limited (No 2)* 2002 SLT (Sh. Ct.) 73. Unberath has made similar comment regarding English law: H Unberath, "Third party losses and black holes: another view" 1999 115(Jul) *Law Quarterly Review* 535 at 536-537.

⁸³⁶ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323.

⁸³⁷ *Ibid.* at para 39 per Lord Drummond Young.

⁸³⁸ Scottish Law Commission, Discussion Paper on *Remedies for Breach of Contract* (Scot Law Com DP No 109, 1999) 9.5.

⁸³⁹ Report on *Third Party Rights* (n 241) 6.16.

⁸⁴⁰ *Ibid.* 1.22 and 6.16. This is discussed further below at subsection 7.3.2.

The consensus in both Scots and English law is therefore that intention on the part of the contracting parties that third party losses are recoverable is not required to apply the transferred loss doctrine.

7.2.4. Transferred loss as a ‘last resort’

The transferred loss doctrine is a ‘gap filler’ in Scots law. According to Lord Drummond Young, it does not apply where the third party has other means of redress.⁸⁴¹ Transferred loss is also viewed as a last resort in English law. For example, Lord Clyde recognises in *Panatown Ltd v Alfred McAlpine Construction Ltd*⁸⁴² that third party rights and agency are not always a fruitful means of redress in situations where a party suffers extra-contractual loss, and indicates that this was a factor in the justification for the development of the transferred loss doctrine.⁸⁴³

However, it is not clear when exactly it can be said that the third party has no other means of redress and is therefore able to rely on a transferred loss claim. In *Panatown Ltd v Alfred McAlpine Construction Ltd*,⁸⁴⁴ the transferred loss claim was unsuccessful because the third party had a right of action against the party in breach under a duty of care deed (‘DCD’) to which it was party.⁸⁴⁵ Coote notes that the contract between the contracting parties would offer the third party a far higher level of protection than the DCD if the third party could claim under the contract, raising the question of how great the difference in protection of the contracting parties and third party must be before transferred loss no longer applies.⁸⁴⁶

⁸⁴¹ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 42 per Lord Drummond Young; *Axon Well Intervention Products Holdings v Michael Craig* [2015] CSOH 4 at para 30 per Lord Doherty. See also MacQueen, *SME* (n 69) para 863.

⁸⁴² *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

⁸⁴³ *Ibid.* at 523 per Lord Clyde. See also *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*; *St Martin’s Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85 at 115 per Lord Brown-Wilkinson and Coote (n 741) at 88-89.

⁸⁴⁴ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

⁸⁴⁵ *Ibid.* at 531 per Lord Clyde; at 558 per Lord Goff of Chieveley; at 574 per Lord Jauncey of Tullichettle; at 577-8 per Lord Browne-Wilkinson; and at 582 per Lord Millet.

⁸⁴⁶ Coote (n 754) at 88.

In *Axon Well Intervention Products Holdings v Michael Craig*,⁸⁴⁷ the defender claimed that the third party in question had other non-contractual direct means of redress to recover the loss. Namely, it could make a delictual claim based on the defender causing unlawful loss,⁸⁴⁸ or a claim based on the fact that the defender had acted as a *de facto* director of the third party company and consequently owed it a fiduciary duty of care.⁸⁴⁹ Lord Doherty recognised that where the contracting parties:

“provide for or contemplate the third party being given a distinct entitlement directly to sue a defender, the parties are likely to be taken to have intended to have excluded the option of a *Panatown* claim being made.”⁸⁵⁰

He stressed that, in some circumstances, a non-contractual remedy may therefore exclude a transferred loss claim.⁸⁵¹ However, Lord Doherty also comments that, in situations where the contracting parties have made no provision for the third party, or have not contemplated potential remedies for the third party, a non-contractual remedy must provide “equivalent means of redress and equivalent prospects of success to an action for damages for breach of contract” in order to exclude a transferred loss claim.⁸⁵² He considered that the third party would achieve a more satisfactory means of redress through transferred loss than the suggested non-contractual methods, because the latter would present the company with “greater difficulty and uncertainty”.⁸⁵³ This view was based on the fact that it would prove challenging to show that the defender was acting as a *de facto* director of FZE.⁸⁵⁴ Further, a delictual claim, unlike a contractual *Panatown* claim, would not be based on strict liability.⁸⁵⁵ Lord Doherty’s reference to

⁸⁴⁷ *Axon Well Intervention Products Holdings v Michael Craig* [2015] CSOH 4.

⁸⁴⁸ *Ibid.* at para 12 per Lord Doherty.

⁸⁴⁹ *Ibid.* at para 14 per Lord Doherty.

⁸⁵⁰ *Ibid.* at para 38 per Lord Doherty, citing *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 530, 531-532, and 536 per Lord Clyde; 567-568 per Lord Jauncey of Tullichettle; 576-577 per Lord Browne-Wilkinson; and 582-583 per Lord Millet.

⁸⁵¹ *Axon Well Intervention Products Holdings v Michael Craig* [2015] CSOH 4 at para 42 per Lord Doherty.

⁸⁵² *Ibid.*

⁸⁵³ *Ibid.* at para 45 per Lord Doherty.

⁸⁵⁴ *Ibid.* at para 36 per Lord Doherty.

⁸⁵⁵ *Ibid.* at para 45 per Lord Doherty.

'equivalent' remedies is striking. This contrasts with Lord Drummond Young's view of transferred loss as a remedy of last resort.⁸⁵⁶

It is therefore accepted in Scots and English law that transferred loss ought to be used as a last resort, where the third party does not have another means of recovering the loss. However, the scope of this principle is unclear and appears to be in the process of development. The question of when the third party cannot be said to have an alternative means of redress is not yet settled given Lord Doherty's recent judgment.

7.2.5. The party who can recover the loss

As noted above, it is clear that the third party cannot recover its loss in its own name.⁸⁵⁷ This is, however, controversial. The Scottish Law Commission recently considered reform of the transferred loss doctrine.⁸⁵⁸ They found that consultees generally agreed with their view that it is preferable for the third party to have a direct claim against the contracting party responsible for the loss.⁸⁵⁹ However, it was concluded that the recommendations in their Report could not encompass:

“a satisfactory solution to the difficulties raised by [the third party's] present inability to recover transferred loss directly without much further investigation of the various commercial and other contexts in which the issue may arise.”⁸⁶⁰

They have not therefore made any recommendations as to reform of the doctrine, but have identified the need for further research.⁸⁶¹

Hawkes notes that families and companies in the same group “might have no hesitation in doing the decent thing” in terms of handing over damages recovered in respect of third party loss, but he questions the practical implications of allowing the contracting party to recover where its relationship

⁸⁵⁶ *McLaren Murdoch v The Abercromby Motor Group* 2003 SCLR 323 at para 42 per Lord Drummond Young.

⁸⁵⁷ See above at subsection 7.2.1.

⁸⁵⁸ Scottish Law Commission, Report on *Review of Contract Law: Formation Interpretation, Remedies for Breach, and Penalty Clauses* (Scot Law Com No 252, March 2018) ch 18.

⁸⁵⁹ *Ibid.* 18.36-41.

⁸⁶⁰ *Ibid.* 18.56.

⁸⁶¹ *Ibid.* 18.58.

with the third party is at arm's length.⁸⁶² He also questions what would happen if the contracting party were to become insolvent prior to transferring the damages to the third party: "are we forced into a constructive trust situation with all the difficulties that entails?"⁸⁶³ Sir Anthony Mason also notes that the third party is reliant on the promisee for damages to compensate for its loss.⁸⁶⁴ Unberath observes that the common interest identified in the majority of transferred loss cases merely evidences why the contracting party with title to sue is willing to pursue the action on the part of the third party.⁸⁶⁵ It is not satisfactory to allow the right of action as a matter of happenstance, when the interests of the contracting party and third party align – particularly as such a situation is likely to occur where both are commercial parties, and transferred loss situations may clearly arise where the third party is in a much weaker position.⁸⁶⁶ It is clearly more practicable for the third party to have the ability to recover its own loss. The transferred loss doctrine can hardly be said to solve the problem of 'black holes' if the third party's recovery is dependent on the goodwill of the contracting party. It is thus submitted that the doctrine should be reformed to permit the external party to recover in its losses in its own name. This would ensure that the transferred loss doctrine is logically coherent, and results in consistent outcomes.

7.3. Compatibility of transferred loss with Scots law

This section considers whether transferred loss is compatible with privity, contract theory, and delict, and whether there are justifiable policy considerations in support of the concept.

⁸⁶² Hawkes (n 808) at 286.

⁸⁶³ Ibid. The difficulties of constructive trusts in Scots law are discussed in GL Gretton, "Constructive Trusts: I" 1997 1(3) *Edinburgh Law Review* 281 and GL Gretton, "Constructive Trusts: II" 1997 1(4) *Edinburgh Law Review* 408. See also Coote, *Assumption II* (n 318) 42, in which Coote also briefly rules out an agency analysis of transferred loss.

⁸⁶⁴ Mason (n 27) at 96.

⁸⁶⁵ Unberath (n 835) at 540.

⁸⁶⁶ The use of exceptions to privity in protecting weaker parties is discussed in subsection 5.4.1.

7.3.1. Compatibility of transferred loss with the privity doctrine

There are two approaches to the recovery of loss using the transferred loss doctrine. According to the narrow ground, the contracting party claims against the party in breach and recovers damages for the loss suffered by the third party on the third party's behalf.⁸⁶⁷ The broad ground provides that loss caused by breach of contract falls on the contracting party, who recovers damages in respect of defective performance on its own behalf. As noted above, the narrow ground is firmly accepted in Scots law, whereas English judicial opinion is less clear.⁸⁶⁸ Subsection 7.3.1. further discusses whether the broad or narrow ground is preferable in terms of policy and pragmatic considerations. It then assesses the implications of both grounds for the compatibility of transferred loss with the privity doctrine.

7.3.1.1. The broad and narrow grounds: policy and pragmatic reasoning

Wallace favours the broad ground because there is "ample authority" against allowing a third party to recover for losses stemming from breach of obligations for which it has provided no consideration, whereas the contracting party will have done so.⁸⁶⁹ However, consideration is not a requirement in Scots contract law.⁸⁷⁰ Further, the Scots and English laws on third party rights do not impose a requirement that the third party must have paid consideration to the contracting party due to perform in its favour.⁸⁷¹ Consideration is not therefore a convincing argument for the broad ground.

Others feel that the broad ground should be recognised because it gives effect to the contracting party's performance interest,⁸⁷² i.e. "the interest of a

⁸⁶⁷ See above at subsection 7.2.1.

⁸⁶⁸ See above at subsection 7.2.2.

⁸⁶⁹ Wallace (n 808) at 403. See also *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85 at 112 per Lord Browne-Wilkinson.

⁸⁷⁰ See subsection 2.4.2.3., and in particular (n 203).

⁸⁷¹ The formation requirements of Scots and English third party rights are discussed at subsections 3.2.2.1. and 3.2.2.2. respectively.

⁸⁷² Coote (n 754) at 82.

promisee in obtaining performance”.⁸⁷³ Lord Griffiths argues that the loss falls on the contracting party because it must, following the breach, make payment in order to gain the benefit of the contract (by meeting the cost of repair and by bringing the subject of the contract in line with its contractual standard).⁸⁷⁴ This is supported by a paragraph in *Treitel’s Law of Contract*, in which it is stated that the promisee recovers for the loss it sustains in ensuring that the third party receives its benefit.⁸⁷⁵ It is thought that various cases demonstrate authority for the recognition of the performance interest.⁸⁷⁶ Thomson submits that this is consistent with Scots law, in which “the importance of performance has long been recognised.”⁸⁷⁷ He argues that the primacy of the performance obligation in Scots contract law is evidenced by the weight given to specific implement, and the fact that damages are measured by the cost of alternative performance or the cure of defective performance where specific implement is impossible or refused.⁸⁷⁸ Coote submits that the alternative approach of allowing the promisee to recover only nominal damages “offends common sense, and that usually signals a fallacy somewhere in the reasoning.”⁸⁷⁹

Whilst, in light of Thomson’s comments, it is clear that Scots law recognises the performance interest, a contracting party cannot generally recover damages where it has not suffered a loss.⁸⁸⁰ Recognition of the performance interest cannot therefore extend to awarding substantial damages where the loss falls on an external party, and so the performance interest could not justify the broad ground in Scots law. The analysis is also inadequate in

⁸⁷³ Coote, *Contract as assumption* (n 317) at 131.

⁸⁷⁴ *Alfred McAlpine v Panatown* [1998] CLC 636; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*; *St Martin’s Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85 at 96-98 per Lord Griffiths.

⁸⁷⁵ GH Treitel, *The Law of Contract* (Sweet & Maxwell, London, 9th edn 1995) 546. See also Coote (n 754) at 82-83; Unberath has stated that: “It is the contract, or at least a part of it, which is not being performed and that in itself ought to justify redress”: Unberath (n 835) at 537.

⁸⁷⁶ See, for example, *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344; *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 590-91 per Lord Millett and at 546 per Lord Goff of Chieveley; and further discussion in Coote (n 754) at 83.

⁸⁷⁷ Thomson (n 779) at 74.

⁸⁷⁸ *Ibid.* at 72 (noting *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344).

⁸⁷⁹ Coote (n 787) at 252.

⁸⁸⁰ See subsections 5.4.2. and 6.3.2.

explaining transferred loss in English law. The function of transferred loss is to prevent damages ‘black holes’,⁸⁸¹ which arise precisely because the third party suffers loss. There may be strong arguments for the recognition of the performance interest generally, but this does not resolve the fact that it is the third party, rather than the contracting party, who suffers loss. Giving effect to the performance interest recognises the interests of the contracting party, but the focus should be on the third party, because it is the party on whom the loss caused by defective performance falls. Additionally, a contracting party need not ‘make good’ the loss suffered by the third party unless it is contractually obliged to do so by the third party. As such, it cannot be said that the loss falls on the contracting party simply because it does not receive the performance due under the contract.

Wallace notes that recovery under the broad ground can be extended only to defective or incomplete performance of contracts for the supply of work and materials, excluding forms of breach or loss arising due to “some affinity of interest” between the contracting party and the third party.⁸⁸² For example, the extent of loss resulting from delay in performance will depend on the circumstances of the party affected.⁸⁸³ Similarly, Unberath notes that it is difficult to apply the broad ground in the recovery of consequential loss, because this is “not a necessary concomitant of the right to performance as such.”⁸⁸⁴ If the loss is treated as the contracting party’s, then the value of the loss recoverable must be calculated from the perspective of the contracting party. The broad ground does not permit the impact of the breach on the third party to be taken into account. Accordingly, an advantage of the narrow ground is that it allows a “more logical basis”⁸⁸⁵ for the recovery of the actual loss suffered by the third party due to factors such as losses caused by delay.

⁸⁸¹ This is discussed above at subsection 7.2.1.

⁸⁸² IND Wallace, “Defects and third parties: no peace for the wicked?” 1999 15(4) *Construction Law Journal* 245 at 260

⁸⁸³ *Ibid.* at 261.

⁸⁸⁴ Unberath (n 835) at 540; Coote (n 754) at 95.

⁸⁸⁵ Wallace (n 882) at 261. See also Mason (n 26) at 95.

Wallace suggests that the narrow ground demands a restrictive and “non-existent ‘contract basis’” for recovery of third party losses in situations where this will not have been contemplated, citing the example that a transfer of a development project to a different entity in the company group could not have been anticipated in the construction contract in *St Martin’s*.⁸⁸⁶ He further comments that allowing a contracting party to recover for a third party’s loss in ‘black hole’ situations “may open the floodgates in other areas of commerce to capricious or complicated damages claims of every kind.”⁸⁸⁷ However, as is discussed further below,⁸⁸⁸ the operation of transferred loss does not depend on whether the contracting parties have contemplated the third party’s loss. Further, the ‘floodgates’ argument is difficult to justify given that the contracting party in breach will not suffer any additional liability if the loss is treated as the third party’s. Rather, the party in breach must make good the loss only once: to the other contracting party, if it falls on it, or to the third party, if the loss has transferred.

The narrow ground is also demonstrated to be more logical on examination of the relevant case law. Coote points out that, in *Panatown*,⁸⁸⁹ the relevant land at all material times belonged to UIPL, and so Panatown could not have been said to suffer from a loss recoverable in damages either at common law or in accordance with the *Dunlop* exception.⁸⁹⁰ Additionally, Hawkes points out that the “very transaction which initiates [the third party’s] involvement – the transfer of the property – [is] at the hand of [the contracting party].”⁸⁹¹ Accordingly, he argues that the third party sustains a “distinct but related loss” at the point at which it pays the contracting party a sum greater than the building’s value.⁸⁹² In transferred loss situations, it is simply unrealistic and illogical to describe the loss as the contracting party’s when the loss clearly

⁸⁸⁶ Wallace (n 808) at 405 (citing *St Martin’s Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85).

⁸⁸⁷ Wallace (n 808) at 405.

⁸⁸⁸ See subsection 7.3.2.

⁸⁸⁹ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

⁸⁹⁰ Coote (n 754) at 89.

⁸⁹¹ Hawkes (n 808) at 286.

⁸⁹² *Ibid.* at 286.

falls on the third party. Treating the loss as the contracting party's is a legal fiction, and this is unnecessary in light of the narrow ground.

Accordingly, it appears that the most logical and pragmatic view of the transferred loss doctrine is the narrow ground, because the loss clearly falls on the third party.

7.3.1.2. The narrow ground: compatibility with privity

It has been demonstrated in this chapter that the narrow ground is firmly accepted in Scots law.⁸⁹³ Whilst there is a lack of consensus as to whether the broad or narrow ground is dominant in English law, it was shown in the immediately preceding subsection that the narrow ground provides a more logical explanation for the transferred loss doctrine.⁸⁹⁴ It is clear that the broad ground does not contravene privity: the loss is treated as the contracting party's, and so there is no question of the third party benefiting under the contract.⁸⁹⁵ The relevant issue is, however, whether the narrow ground is compatible with the privity doctrine.

There has not been a great deal of express judicial discussion on the transferred loss doctrine and the question of privity. Relevant judgments identify the potential tension between the privity doctrine and recovery of the third party's loss. Most recently, in *Axon Well Intervention Products Holdings AS v Michael Craig*,⁸⁹⁶ Lord Doherty states that the "rationale" of *Panatown* is that:

"the law will not tolerate a loss caused by a breach of that provision to go uncompensated through an absence of privity between the party suffering the loss and the party causing it".⁸⁹⁷

⁸⁹³ See subsection 7.2.2.

⁸⁹⁴ Above at subsection 7.3.1.1.

⁸⁹⁵ For further comment, see Coote (n 754) at 90.

⁸⁹⁶ *Axon Well Intervention Products Holdings AS v Michael Craig* [2015] CSOH 4.

⁸⁹⁷ *Ibid.* at para 45 per Lord Doherty, citing *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 535 per Lord Clyde.

Lord Drummond Young identifies “the significance of the doctrine of privity of contract to the problem of the legal black hole.”⁸⁹⁸ However, these judgments do not expressly describe the operation of transferred loss in accordance with the narrow ground as an exception to the privity doctrine. Academic commentators have also noted that transferred loss potentially impacts on the English understanding of privity, but have refrained from expressly describing the concept as an exception to privity. Coote, commenting on *Panatown*,⁸⁹⁹ states that “placing the loss with UIPL meant that, while a claim for damages arose, the problem was at root one of privity and the rights of third parties.”⁹⁰⁰ Unberath mentions the Court of Appeal judgment in *Panatown* as a “focus of attention in the privity debate”⁹⁰¹ and Treitel makes similar comment.⁹⁰²

Transferred loss is certainly a greater ‘threat’ to privity than contracts for the benefit of another. As discussed in the previous chapter, contracts for the benefit of another are not an exception to privity because both parties intend to confer a benefit on the third party, and one of the contracting parties can accordingly recover for the third party’s loss.⁹⁰³ In contrast, transferred loss involves the recovery of the third party’s loss where the contracting parties do not intend for the contracting party to have the ability to do so. In transferred loss situations, permitting recovery of the loss appears to confer a benefit on the third party, in that its loss is accounted for and, if the contracting party agrees, damages are returned to the third party. However, privity prevents the conferral of benefits enforceable *on the part of the third party* without the consent of the contracting parties.⁹⁰⁴ Privity impacts the third party’s rights and liabilities under a contract, rather than the contracting parties’ ability to recover for the third party’s loss. The narrow ground permits recovery of the

⁸⁹⁸ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 38 per Lord Drummond Young. See also *Gunnar Slemming v Henry A Ross* 2010 WL 3166665 per Sheriff Principal Sir Stephen ST Young Bt QC.

⁸⁹⁹ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

⁹⁰⁰ Coote (n 754) at 92. See also 81 and 83-84.

⁹⁰¹ Unberath (n 835) at 535.

⁹⁰² Treitel (n 754) at 532.

⁹⁰³ See subsection 6.3.2.

⁹⁰⁴ This is discussed in subsections 2.3.1-2 and 2.4.2.1.

third party's loss, but the third party cannot make a claim. The fact that only the contracting party can recover the loss therefore means that privity is not circumvented.

It was suggested in subsection 7.2.5. that the transferred loss doctrine should be reformed to allow the third party to recover the loss in its own name. If this was permitted, transferred loss would operate as an exception to the privity doctrine, because the third party would have the right to make a contractual claim under a contract to which it was not party. The question of whether this would be a justifiable deviation from privity is discussed further below.⁹⁰⁵

7.3.2. Compatibility of transferred loss with contract theory

It is evident from both case law and commentary that transferred loss is applied regardless of (and sometimes contrary to) the intentions of the contracting parties.⁹⁰⁶ The only exception is Lord Doherty's recent statement that transferred loss is based on the "imputed intention of the contracting parties... that a third party should benefit from a provision of the contract."⁹⁰⁷ This view is not consistent with the previous body of case law. It remains to be seen whether Lord Doherty's views will be adopted by the Inner House or the Supreme Court. Further, his judgement does not justify his finding that transferred loss may be based on the imputed intentions of the contracting parties. At any rate, he appears to recognise that transferred loss is not based on the *actual* intentions of the contracting parties. The present state of the law is that transferred loss stems from involuntary obligations. It cannot therefore be said to cohere with the will theory.

In transferred loss cases, the party who has caused the third party's loss does not make a promise (to the other contracting party or the third party) that the party not in breach will have a claim to recover damages for the third party. The party in breach does not voluntarily assume liability in respect of

⁹⁰⁵ See subsection 7.3.4.

⁹⁰⁶ See above at subsection 7.2.3.

⁹⁰⁷ *Axon Well Intervention Products Holdings v Michael Craig* [2015] CSOH 4 at para 45 per Lord Doherty.

the third party's loss. Transferred loss is therefore compatible with neither the promissory nor assumption theories of contract.⁹⁰⁸

If the transferred loss doctrine was reformed to allow the third party to recover its loss, the concept would continue to be incompatible with Scots contract theory. The contracting parties in transferred loss situations do not intend for the third party to have the right to recover its loss, and so the concept would not comply with the will theory. Similarly, it could not be said that the contracting parties made a promise to the third party to allow it to recover damages for its losses, nor that the parties voluntarily assume liability in respect of the third party. The reformed transferred loss doctrine would not therefore be compatible with promissory or assumption theory.

7.3.3. Compatibility of transferred loss with delict

Transferred loss is generally treated in commentary as a contractual concept. For example, McBryde refers to contract law as delict's "older sibling" which can address defects in the law on delict, citing transferred loss cases as an example of beneficial contractual action.⁹⁰⁹ Unberath suggests that a contractual action may be preferable where the transferred loss claim deals with a delay in performance, or is based on the plaintiff's expectation interest.⁹¹⁰ Whilst the standard of care is normally the same in contract and delict,⁹¹¹ contract is a consensual obligation, and it is therefore, in contract, possible to bind oneself to a higher standard of duty than that mandated by the delictual standard of reasonable care.⁹¹² Judicial opinion also reflects a contractual analysis. In Scots law, a transferred loss claim has been permitted where a delictual action could have been made but may not have been as lucrative as a contractual claim.⁹¹³ Accordingly, the contracting party

⁹⁰⁸ It should be noted that Coote has argued that transferred loss is compatible with the assumption theory of contract. However, this is based on his acceptance of the broad ground, which, as discussed above (subsection 7.3.1.1.) is not a logical or realistic assessment of transferred loss. See Coote, *Assumption II* (n 318) 50-51.

⁹⁰⁹ McBryde (n 449) at 46.

⁹¹⁰ Unberath (n 835) at 537.

⁹¹¹ McManus and Russell, *Delict* (n 434) 9.5.

⁹¹² *Ibid.*

⁹¹³ *Axon Well Intervention Products Holdings AS v Michael Craig* [2015] CSOH 4 at para 36 per Lord Doherty.

in breach has been forced to comply with a higher standard than that required in delict.

However, the benefits of a contractual claim do not justify treating the right to recover the third party's loss as a contractual action. Transferred loss applies, as has been discussed,⁹¹⁴ regardless of the intentions of the contracting parties, and a contractual analysis is thus not necessarily suitable. Some commentators impliedly treat transferred loss as delictual – for example, Bussani and Vernon Palmer refer to the contracting party responsible for the loss as the “tortfeasor”.⁹¹⁵ Jackson also argues that delict law should be expanded to permit recovery of the third party's loss in ‘black hole’ situations.⁹¹⁶ This subsection addresses whether transferred loss could be accounted for within the law of delict, because a contractual analysis is clearly not wholly satisfactory.

An initial point is that a delictual claim would not bypass the contractual allocation of risk. Unberath states that because tortious liability involves the imposition of original, as opposed to derivative liability, this would appear to deviate from the parties' contractual framework in transferred loss situations.⁹¹⁷ However, there is no need to construe the contract between the parties as an automatic desire to exclude any subsequent liability stemming from a foreseeable transfer of property. Whilst an exclusion clause in the contract should be upheld,⁹¹⁸ the existence of the contract should not exclude the possibility of a delictual duty of care arising in respect of those to whom the loss is transferred. Essentially, in the words of Bussani and Vernon Palmer, transferred loss claims are “liability neutral”.⁹¹⁹ the party responsible

⁹¹⁴ See above at subsections 7.2.3. and 7.3.2.

⁹¹⁵ Bussani and Palmer (n 371) at 10-12. See also Stevens, *Torts and Rights* (n 25) 595.

⁹¹⁶ Jackson, *SME* (n 495) para 158, citing the results of *Caparo Industries plc v Dickman* [1990] 2 AC 605, *Murphy v Brentwood District Council* [1991] 1 AC 398, and *D & F Estates Ltd v Church Comrs for England* [1989] AC 177 as evidence that claims in respect of third party loss should be permitted where the loss is caused by a contracting party.

⁹¹⁷ Unberath (n 835) at 537. See also *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 at 817-818 per Lord Brandon of Oakbrook.

⁹¹⁸ Unberath (n 835) at 537.

⁹¹⁹ M Bussani and VV Palmer, “The notion of pure economic loss and its setting” in M Bussani and VV Palmer (eds), *Pure Economic Loss in Europe* (Cambridge University Press, Cambridge, 2003) 3 at 12.

for the loss is liable only for the amount which would have been due had the relevant property remained in the patrimony of the other contracting party.

The initial hurdle to a delictual understanding of transferred loss is that pure economic loss is only exceptionally recoverable in tort.⁹²⁰ The means of recovering pure economic loss, outlined in chapter 4,⁹²¹ are considered in turn.

Firstly, *Hedley Byrne* liability cannot apply in transferred loss situations, because this form of liability allows for recovery for loss resulting from reliance on negligent misstatements, rather than the transfer of property. *Henderson v Merrett* liability is a similarly unsuitable analysis, because transferred loss cases do not involve the third party's reliance on the contracting party's performance of a particular service.

Additionally, it is not possible to treat transferred loss as an exception to the rules on bright line liability.⁹²² The existing exceptions to this rule rest on the very narrow circumstance of the pursuer's possession or ownership of the property which is damaged. In some transferred loss cases, the damage occurs at a time at which the property is in the possession of the contracting party who is not responsible for the third party's loss, rather than the third party.⁹²³

An analysis of transferred loss based on *White v Jones* liability initially appears to be a more promising means of explaining transferred loss. In both transferred loss and disappointed beneficiary cases, the purpose of imposing liability is because it is the only means of holding the contract-breaker to account.⁹²⁴ Additionally, it has been claimed that Lord Goff of Chieveley introduced a theory of transferred rights into English law in the case of *White v Jones*.⁹²⁵ However, the transferred loss situations differ from those

⁹²⁰ Unberath (n 835) at 537.

⁹²¹ See subsection 4.2.3.

⁹²² This form of liability is defined at subsection 4.2.3.2.

⁹²³ This was the case in, for example, *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

⁹²⁴ An overview of disappointed beneficiary cases is provided at subsection 4.2.3.4.

⁹²⁵ Stevens, *Torts and Rights* (n 25) 177-178.

involving disappointed beneficiaries in that the contracting party in the former case does not contract with the objective of securing any benefits for another party. In other words, the testator contracts in order to benefit the beneficiary, and the loss results from the solicitor's failure to perform under the contract. In transferred loss cases, in contrast, the contracting party contracts for its own benefit, but the loss ultimately transfers to the third party. Further, a key policy objective of disappointed beneficiary cases is upholding the contractual intent of the testator,⁹²⁶ and transferred loss claims do not stem from the lack of realisation of the will of the contracting party who can recover for the third party's loss.

The remaining option is to consider the principle of *Junior Books v Veitchi*,⁹²⁷ the 'high point' in the recoverability of pure economic loss.⁹²⁸ For *Junior Books* liability to apply, the person who causes the loss and the person who suffers the loss must be connected by a series of contracts and it must be reasonably foreseeable that the loss will result from the careless act.⁹²⁹ Additionally, the party who causes the loss must know three things: the identity of the person who suffers the loss; that the person who has suffered the loss is in a contract with the person with whom they are also in contract; and that economic loss on the pursuer's part will follow from careless performance of the contract.⁹³⁰ The limits of this form of liability are demonstrated in *D&F Church Commissioners*.⁹³¹ In this case, there was no contractual link, because the pursuers did not have a lease until after the sub-contractor's breach, and the defenders did not know the pursuer's identity. When the contracting parties originally contract in transferred loss cases, the party responsible for the loss will likely be aware of the fact that the contract could be assigned, or that the property in question could at any stage be assigned to someone else, but it cannot know that its defective performance will result in loss to the particular person on whom the loss

⁹²⁶ See above at subsection 4.2.3.4.

⁹²⁷ *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

⁹²⁸ *Junior Books* liability is discussed in subsection 4.3.1.

⁹²⁹ *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

⁹³⁰ *Ibid.* For analysis see Thomson, *Delictual Liability* (n 357) 4.20.

⁹³¹ *D & F Estates Ltd v Church Commissioners for England and Wales* [1989] AC 177.

eventually falls. In other words, there is a lack of proximity. Accordingly, it does not appear that *Junior Books* liability could be imposed in transferred loss situations.

Extending *Junior Books* liability to cover transferred loss cases would be possible if the requirement that the contracting party is aware of the potential loss on the part of the third party was not enforced where it is foreseeable that the loss may be transferred to another. Unberath states that there is no need in such cases for a contemplation requirement, because the debtor is protected by the remoteness rule, and the risk of liability is the same regardless of whether it is subject to a claim by the promisee for his own loss or in the context of a transferred loss claim.⁹³² For example, a cost of cure rendered by the third party in a construction case would be recoverable in accordance with the remoteness rule, but it would not matter that the contracting parties had not contemplated whether a third party might suffer this loss instead of the promisee.⁹³³ The primary policy argument for allowing delictual claims in transferred loss situations is that, as stated by Bussani and Vernon Palmer, refusing such claims allows the tortfeasor responsible for the loss to “benefit from the accidental operation of rules which by pure chance exclude him from liability” against those on whom the loss falls.⁹³⁴ The principal reason for the development of transferred loss is to prevent black holes,⁹³⁵ and treating the concept as delictual could enable this policy objective to be upheld without violating contract theory.

As discussed, however, *Junior Books*⁹³⁶ itself is not highly regarded.⁹³⁷ The revival of the case, and particularly making it wider in scope, would be a controversial step. The general trend of the law of delict is that recovery of pure economic loss is permitted in circumstances where the pursuer is a “particular individual”, and their interests are “distinctly contemplated by the

⁹³² Unberath (n 835) at 544.

⁹³³ *Ibid.* at 545.

⁹³⁴ Bussani and Palmer (n 919) at 12. See also C von Bar, *The Common European Law of Torts* vol 1 (Oxford University Press, Oxford, 2000) 510-511.

⁹³⁵ See above at subsection 7.2.1.

⁹³⁶ *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

⁹³⁷ The case is discussed in subsections 4.3.1.-2.

defendant at close range”.⁹³⁸ Imposing delictual liability in transferred loss situations would not reflect this focus of delictual law. The immediately following subsection addresses whether transferred loss is supported by justifiable policy reasons, and whether a reformed transferred loss doctrine would be a justifiable exception to privity. If transferred loss could be treated as a contractual concept, this would avoid unnecessarily jeopardising the clarity and coherence of delictual liability by reviving *Junior Books*.⁹³⁹ If delict evolves in future in Scots law to return to a more positive view of *Junior Books* liability, then this form of liability could provide a logical explanation for transferred loss. Regarding the current law, however, a delictual analysis is unsuitable, regardless of whether the contracting party or the third party can recover for the loss.

7.3.4. Policy considerations justifying transferred loss

There are two dominant policy considerations reflected in the development of transferred loss: preventing third party losses from falling into damages ‘black holes’ and ensuring that the loss caused by breach of contract is recoverable, such that the contract-breaker does not escape liability. This subsection examines whether these policy considerations could support a reformed transferred loss doctrine as a justifiable exception to privity.

The first justification, that transferred loss prevents ‘black holes’, is emphasised in case law. Lord Drummond Young comments that these are “clearly undesirable; in a well-regulated legal universe black holes should not exist.”⁹⁴⁰ This was affirmed in *Axon Well Intervention Products Holdings v Michael Craig*.⁹⁴¹ English law also highlights this policy consideration. For example, Lord Clyde makes similar comment in *Panatown Ltd v Alfred*

⁹³⁸ Bussani and Palmer (n 371) at 141.

⁹³⁹ *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

⁹⁴⁰ *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group* 2003 SCLR 323 at para 33 per Lord Drummond Young.

⁹⁴¹ *Axon Well Intervention Products Holdings v Michael Craig* [2015] CSOH 4 at para 29 per Lord Doherty. See also *The Most Honourable Alexander George Gordon, Marquess of Aberdeen and Temair v Messrs Turcan Connell* 2008 [CSOH] 183 at para 45 per Lady Smith.

*McAlpine Construction Ltd.*⁹⁴² In terms of academic commentary, Jackson considers that transferred loss developed because:

“to do otherwise would leave a 'black hole' where the party suffering the loss would have no title to sue, but the party with title to sue would have suffered no loss.”⁹⁴³

The second policy consideration supporting the transferred loss doctrine is ensuring recovery of loss caused by breach of contract, even where the loss does not fall on the person with whom the contract-breaker originally contracted.⁹⁴⁴ In *Royal Insurance (UK) Ltd v Amec Construction Scotland Ltd*,⁹⁴⁵ which was not decided on the basis of transferred loss, it was noted that *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd*,⁹⁴⁶ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*,⁹⁴⁷ and *Panatown Ltd v Alfred McAlpine Construction Ltd*⁹⁴⁸ reflect a “hostility” of the common law to ‘black holes’, and that the policy of the law may be:

“moving in the direction of recognising that the day-to-day working out of ordinary family and commercial relationships should not, without good reason, be held to relieve a wrongdoer of an apparently justified liability.”⁹⁴⁹

Academic commentators have adopted similar positions. Unberath points out that awarding damages for third party loss in ‘black hole’ situations is “justified in terms of substantive justice”.⁹⁵⁰ Hawkes identifies the two main objectives of the courts in advancing the transferred loss doctrine: preserving an orderly legal universe in which those who breach contracts pay damages for their wrongdoing, and preserving the underlying fabric of contract law.⁹⁵¹

⁹⁴² *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 523 per Lord Clyde.

⁹⁴³ Jackson, *SME* (n 495) para 158.

⁹⁴⁴ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 at 587-588 and 591 per Lord Millet. See discussion in H Unberath, *Transferred Loss: Claiming Third Party Loss in Contract Law* (Hart Publishing, Oxford and Portland, 2003) 144 and 192.

⁹⁴⁵ *Royal Insurance (UK) Ltd v Amec Construction Scotland Ltd* [2005] CSOH 162

⁹⁴⁶ *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157.

⁹⁴⁷ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85.

⁹⁴⁸ *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518.

⁹⁴⁹ *Royal Insurance (UK) Ltd v Amec Construction Scotland Ltd* [2005] CSOH 162 at para 20 per Lord Emslie.

⁹⁵⁰ Unberath (n 835) at 543.

⁹⁵¹ Hawkes (n 808) at 288.

The Scottish Law Commission refers to the recognition of this policy in transferred loss contexts as “sound and rational”.⁹⁵² Todd similarly notes that imposing liability in defective building cases promotes professional accountability on the part of builders, engineers, and architects.⁹⁵³

However, as discussed in chapter 5, not all losses stemming from defective or non-performance should be accounted for in circumstances where the loss falls on a third party.⁹⁵⁴ It is not accepted in Scots law that a loss stemming from defective performance ought always to be recoverable.⁹⁵⁵ Accordingly, whilst ensuring recovery of losses caused by breach of contract is a valid consideration in the development of the transferred loss doctrine, this factor alone cannot provide a justification for the doctrine.

The commentary and case law on the avoidance of black holes does not focus on the protection of the third party from financial loss. Whilst the narrow ground is accepted in Scots law, such that it is clearly recognised that the contracting party is permitted to recover the third party’s loss, the protection of external parties does not appear to have played a significant role in the development of transferred loss. The judicial focus seems to have been on avoiding the injustice of the situation as whole, rather than protecting the affected third parties. This is surprising, because the recovery of damages in many transferred loss situations could have been based on the protection of, for example, consumer home-buyers affected by a breach of the contract between the builder and initial land owner. A particularly close parallel could be drawn between a transferred loss doctrine based on consumer protection and the latent damages and defective premises legislation discussed in chapter 5.⁹⁵⁶ The majority of transferred loss cases are between commercial parties, including many involving transfers of property within, for example,

⁹⁵² Report on *Contract Law* (n 858) 18.28.

⁹⁵³ S Todd, “Policy Issues in Defective Property Cases” in JW Neyers, E Chamberlain and SGA Pitel, *Emerging Issues in Tort Law* (Hart Publishing, Oxford and Portland, Oregon, 2007) 199 at 214.

⁹⁵⁴ See subsection 5.4.2. This is noted in reference to the development of transferred loss in Davidson (n 782) at 58.

⁹⁵⁵ This is discussed in subsection 6.3.2.

⁹⁵⁶ See, in particular, subsection 5.2.5.

company groups,⁹⁵⁷ and so consumer protection cannot provide a wholesale justification for a reformed doctrine. Additionally, consumer home-buyers will generally have protection under the National House Building Council warranty scheme.⁹⁵⁸ However, the protection of external parties is a relevant policy consideration, and the reform of transferred loss to permit third party claims could be justified on this basis. Those who are not protected by NHBC warranties should generally be able to make a claim against the party who caused their loss.

Arguably, however, transferred loss situations arise where the third party ought to have protected itself from the risk of loss. We must consider whether transferred loss could be replaced with more widespread use of collateral warranties. These operate as contracts between their granter and grantee, and may serve the same purpose as transferred loss, evading ‘black holes’ by imposing contractual duties on the granter of the warranty.⁹⁵⁹ Whilst there is some uncertainty as to the exact definition of a collateral warranty in Scots law,⁹⁶⁰ these are “an important feature of modern practice in the construction industry”.⁹⁶¹ Collateral warranties allow for a right of action between parties who, due to their choice of legal structure, are not in a contractual relationship.⁹⁶² When building works are performed defectively, the party on whom the loss falls will not generally be the employer in the building contract. This is because the employer will usually have passed on its interest in the building to the party on whom the loss falls, or the building will have belonged

⁹⁵⁷ For example, *Axon Well Intervention Products Holdings v Michael Craig* [2015] CSOH 4.

⁹⁵⁸ Further information on these schemes, see NHBC warranty and insurance cover, available at: <http://www.nhbc.co.uk/Warrantiesandcover/> and accessed 29 December 2018.

⁹⁵⁹ *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd (in liquidation)* 2010 SLT 1102 at paras 1 and 17 per Lord Drummond Young. For discussion of the law from an English perspective, see Powell and Stewart, *Professional Liability* (n 379) 9.061.

⁹⁶⁰ Report on *Third Party Rights* (n 241) 1.28, citing *Royal Bank of Scotland plc v Carlyle* [2013] CSIH 75, 2014 SC 188 (overturned [2015] UKSC 13).

⁹⁶¹ *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd (in liquidation)* 2010 SLT 1102 at para 1 per Lord Drummond Young.

⁹⁶² *Ibid.* at para 17 per Lord Drummond Young. See also *Glasgow Airport Limited v Kirkman and Bradford* [2007] CSIH 47 at para 7 per Lord Kingarth.

to that party throughout the development.⁹⁶³ *Murphy v Brentwood DC*⁹⁶⁴ curtailed the prospect of delictual liability in such situations, and privity prevents the party on whom the loss falls from a direct contractual action.⁹⁶⁵ Consequently, according to Lord Drummond Young:

“in order to ensure that the party who suffers actual loss has a right of action against any party who has provided defective work or against any member of the professional team who has acted negligently, the practice has grown up of taking collateral warranties from all of those who carry out work under the project.”⁹⁶⁶

It certainly seems that parties would be well advised to utilise collateral warranties to prevent ‘black hole’ situations.⁹⁶⁷ However, as was seen in the discussion of the relevant cases,⁹⁶⁸ contracting parties do not always use collateral warranties, and the transferred loss doctrine may be applied when they have not done so.

It is easier to justify the imposition of liability on part of the contract breaker in some situations than in others, depending on the position of the third party. Where the parties are closely related companies (for example, where the party who suffers the loss is a subsidiary of the original party to the contract) they ought to have closely considered their financial and legal obligations together, and, because they were in a position to obtain legal advice, they arguably should have had the foresight to secure a collateral warranty. Additionally, where all three parties involved in a transferred loss situation are

⁹⁶³ *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd (in liquidation)* 2010 SLT 1102 at para 1 per Lord Drummond Young. In *Macdonald Estates Plc v Regenesis (2005) Dunfermline Ltd* 2007 SLT 791, for example, collateral warranties had been used to confer on tenants in units of a shopping centre the right to claim against the developer of the site for any defects in their units, where they had a direct contractual claim only with the owner of the centre.

⁹⁶⁴ *Murphy v Brentwood District Council* [1991] 1 AC 398.

⁹⁶⁵ *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd (in liquidation)* 2010 SLT 1102 at para 1 per Lord Drummond Young.

⁹⁶⁶ *Ibid.*

⁹⁶⁷ It should be noted that collateral warranties may themselves be construed as exceptions to the privity doctrine: see further discussion in Merkin (n 195) at 2.3; Jenkins and Duckworth (n 457) at 8.69-8.73; *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854. Collateral warranties arise where the third party has actively been granted a right to enforce contractual obligations, and so they fall outwith the scope of this work. The relationship between collateral warranties and the privity doctrine is not considered further.

⁹⁶⁸ In *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518, for example, the parties did not grant a collateral warranty to the third party.

commercial entities, it is difficult to identify any particular party as the 'weaker' party who needs or deserves the law's protection. In contrast, where the third party buys a home in a personal capacity and discovers a defect, it is easier to draw a parallel between this situation and the statutory exceptions aimed at preventing loss on the part of consumers. The Carriage of Goods by Sea Act 1992 does, however, provide protection for commercial parties even where the party in question could have protected itself through insurance. Sometimes, perhaps, third parties should be protected even where they could have protected themselves. In a transferred loss context, the protection could extend to parties unconnected to the original contracting parties, even if the third party was also a commercial entity. Wallace argues that transferred loss can be explained on the basis of a close affinity of interest between the contracting party seeking to recover the loss and the third party.⁹⁶⁹ However, it appears that the opposite is true: the recovery of the loss is more easily justified where it falls upon a party who could not easily have protected itself. Indeed, as Unberath points out, the common interest of the parties identifiable in the relevant cases is coincidental.⁹⁷⁰

In terms of the requirement that the loss recovered must not be too remote,⁹⁷¹ Unberath notes that "the type and possibility and also the extent [of loss] actually suffered must be within the contemplation of the parties."⁹⁷² Further, given that the loss is essentially suffered by the third party instead of the promisee,⁹⁷³ it should not be outwith the contemplation of the contracting parties that the third party might suffer the loss which would have fallen on the promisee had it not been transferred. The recoverability requirement would not therefore be problematic.

⁹⁶⁹ Wallace (n 882) at 260.

⁹⁷⁰ Unberath (n 835) at 540.

⁹⁷¹ See subsection 5.4.1.

⁹⁷² Unberath, *Transferred Loss* (n 944) 210. See also Todd (n 953) at 225-229.

⁹⁷³ Unberath, *Transferred Loss* (n 944) 210 and 211.

In terms of the other policy justifications considered in chapter 4, transferred loss cannot be justified on the basis that it upholds the intentions of the contracting parties, because it operates regardless of their intentions.

If the third party could claim against the contracting party in breach, transferred loss would be supported by the policy considerations of protecting external parties, preventing 'black holes', and ensuring recovery for loss caused by breach of contract. As such, reforming transferred loss to permit the third party to recover in its own right allows the doctrine to be recognised as a justifiable exception to privity. This would also avoid the current conceptual difficulties⁹⁷⁴ regarding whether the contracting party who recovers the loss holds the funds for the third party in trust, and whether it has a duty to transfer the damages to the third party.

The thesis examines the privity doctrine and accordingly does not consider in-depth the rule providing that a contracting party cannot recover for another's losses. Nonetheless, it is noted that allowing the third party to recover in its own right would also remove the tension between transferred loss and this rule. If transferred loss continues to be recognised in its current form (i.e. allowing a means for the contracting party to recover the third party's loss), the policy consideration of ensuring that loss caused by breach of contract is recoverable might offer a justification for its deviation from this rule. However, the fact that the third party cannot currently recover the loss in its own right clearly does not reflect a policy consideration of protecting third parties.

7.4. Concluding remarks

Transferred loss in its current form is not an exception to privity. Whilst it is compatible with the privity doctrine, it operates regardless of the intentions of the contracting parties, and is therefore incompatible with the main theories of Scots contract law. Classifying transferred loss as a delictual remedy

⁹⁷⁴ See, for example, discussion in N Palmer and G Tolhurst, "Compensatory and Extra-compensatory Damages: Linden Gardens and the 'Lord Griffiths' Principle" 1998 13(2) *Journal of Contract Law* 143 at 149-151.

would account for the fact that the contracting parties do not consent to transferred loss liability. However, such classification would require transferred loss to be framed in terms of *Junior Books* liability. This would not be desirable, because *Junior Books* liability is controversial and no longer fully accepted by the judiciary or in academic commentary.

The transferred loss doctrine would be more logical and practicable if the third party could recover its loss in its own name. If transferred loss was reformed in this manner, it would be supported by sound policy considerations, namely, the protection of weaker parties and ensuring recovery for loss caused by breach of contract. These reasons justify deviation from the privity doctrine. The current laws on transferred loss cannot be justified by reference to a policy consideration of protecting external parties. Transferred loss should therefore continue to be recognised as a contractual remedy in Scots (and English) law, but should be reformed such that the third party can claim against the contracting party directly for losses suffered due to defective performance of the contract.

A statutory regime applying to situations which are currently resolved through the transferred loss doctrine would provide greater certainty to the contracting parties. This would also allow for the opportunity to reform the current law, which is unnecessarily restrictive in terms of allowing recovery only where the contracting party is willing to raise proceedings and return the damages recovered to the third party.

Chapter 8: Ad hoc agency

8.1. Overview of chapter 8

This chapter considers the doctrine of *ad hoc* agency, which was developed relatively recently in Scots law by Lord Drummond Young. It begins by defining *ad hoc* agency and outlining its development in Scots law. The chapter then assesses whether *ad hoc* agency is compatible with Scots contract law (in terms of its interaction with privity and contract theory), delict, and the law of agency more generally. The final sections consider the policy justifications for and against the recognition of *ad hoc* agency, and whether it should continue to be recognised in Scots law.

8.2. Definition and development of *ad hoc* agency in Scots law

The concept of *ad hoc* agency was introduced into Scots law by Lord Drummond Young in three cases: *Whitbread Group plc v Goldapple Ltd (No 2)*,⁹⁷⁵ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited*,⁹⁷⁶ and *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland*.⁹⁷⁷ This section describes the development of the law on *ad hoc* agency in these three cases. It then discusses the reception of the doctrine in more recent cases, and comments on the extent to which the doctrine can be said to be accepted in Scots law. The section also makes brief comment on English law.

8.2.1. Lord Drummond Young's introduction of *ad hoc* agency

In *Whitbread Group plc*,⁹⁷⁸ Lord Drummond Young defined *ad hoc* agency as “an agency relationship that comes into existence for the purpose of a single transaction only”.⁹⁷⁹ This can be illustrated by reference to the facts of the case in question. Whitbread was the tenant of a pub in Edinburgh. Fairbar

⁹⁷⁵ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

⁹⁷⁶ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

⁹⁷⁷ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

⁹⁷⁸ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

⁹⁷⁹ *Ibid.* at para 13 per Lord Drummond Young.

Ltd paid Whitbread's rent to the landlord, Goldapple. The issue arose as to whether this payment was a valid transaction which prevented the operation of an irritancy of the lease for non-payment of the rent. At the time of the payment, Fairbar was occupying the pub, but the obligation to pay the rent remained Whitbread's. Whilst Whitbread and Fairbar had concluded a Business Transfer Agreement to transfer Whitbread's goodwill and assets to Fairbar, this expressly recognised that Whitbread remained obliged to pay the rent. This was because the lease had not been assigned (and could not be assigned without Goldapple's consent). It was accepted that a cheque sent to Fairbar, which was credited to Goldapple's account, was intended to discharge Whitbread's obligation to pay the rent, but Goldapple sought to return the cheque. Lord Drummond Young found that Goldapple should have accepted the cheque, because Fairbar was acting as an *ad hoc* agent for Whitbread and its cheque was a valid payment of Whitbread's rent.⁹⁸⁰ As such, Goldapple was not permitted to refuse payment on the grounds that it was tendered by Fairbar rather than Whitbread.⁹⁸¹

According to Lord Drummond Young, the fact that Whitbread debts were paid using Fairbar funds and with Fairbar cheques in accordance with the Business Transfer Agreement was consistent with Fairbar acting as Whitbread's agent for such payments.⁹⁸² It was also relevant that the payment was clearly intended to discharge Whitbread's obligation to pay the rent.⁹⁸³ He clarified that *ad hoc* agency may not have been a suitable remedy had Fairbar attached any conditions to the payment of the cheque but, because it did not do so, he found that the payment of the cheque should be viewed in isolation.⁹⁸⁴ In other words, the straightforward payment of Whitbread's rent indicated that Fairbar was acting as Whitbread's agent for

⁹⁸⁰ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281 at paras 19 and 48 per Lord Drummond Young.

⁹⁸¹ *Ibid.* at para 19 per Lord Drummond Young.

⁹⁸² *Ibid.*

⁹⁸³ *Ibid.*

⁹⁸⁴ *Ibid.*

the purpose of satisfying Whitbread's obligations under the lease with Goldapple.

*Whitbread Group plc*⁹⁸⁵ applied *ad hoc* agency to a situation in which one party had paid another's debt. Lord Drummond Young applied the doctrine to situations unrelated to the payment of another's debt in two later cases, *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland*⁹⁸⁶ and *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited*.⁹⁸⁷

In *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland*,⁹⁸⁸ the pursuer was a joinery company which had originally traded as a partnership (Laurence McIntosh and Sons). In 1998 the partnership entered into a Works Contract with Balfour Beatty concerning the refurbishment of the National Library of Scotland. In 2000, the pursuer company was incorporated, and it was intended that this business would take over the business of the partnership. However, the partnership's rights and obligations were not validly transferred. The company simply sent letters concerning debts arising from the partnership's contracts in its name and with its bank details. When the company raised an action in respect of the Works Contract, Balfour Beatty argued that the company did not have title to sue under that contract. Accordingly, an assignation was effected which transferred the partnership's rights and interests under the Works Contract to the company. This was intimated to Balfour Beatty and backdated to post-date the company's action.⁹⁸⁹ However, it was found that the assignation did not retrospectively cure the company's lack of title to sue, because title to sue must usually exist at the date at which the action is raised.⁹⁹⁰

⁹⁸⁵ *Whitbread Group plc v Goldapple Ltd (No 2)* (2005 SLT 281).

⁹⁸⁶ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

⁹⁸⁷ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

⁹⁸⁸ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

⁹⁸⁹ *Ibid.* at para 11 per Lord Drummond Young.

⁹⁹⁰ *Ibid.* at para 14 per Lord Drummond Young.

Lord Drummond Young found that the fact that letters were sent in the company's name in respect of money owed to the partnership, and that a fax in respect of the Works Contract was sent on the partnership's writing paper but signed on behalf of the company, could "readily be explained through the principle of *ad hoc* agency".⁹⁹¹ He went on to explain that *ad hoc* agency could be used in situations other than remedying a lack of title to sue following the incorporation of a company, partnership, or sole trader, demonstrating his flexible view as to the applicability of the doctrine. He states that:

"Within groups of companies, it is relatively common to find one company performing tasks for another company within the group. This may take many different forms; for present purposes, an example that is relevant is that one company may perform debt collection functions on behalf of other companies within the group. In such a case, the debts do not become due to the debt-collecting company; they remain due to the original contracting party, but the debt-collecting company acts as an agent for the contracting party in obtaining payment of the debts. . . Arrangements of this nature are found not only within groups of companies. . . at the level of natural persons, they are frequently encountered within a family. Nor are *ad hoc* agency relationships confined to routine tasks such as the collection of debts; they may also extend to more complex matters such as conducting negotiations over the performance of a contract."⁹⁹²

The third case in which Lord Drummond Young developed *ad hoc* agency is *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited*.⁹⁹³ The facts of the case are similar to *Laurence McIntosh*.⁹⁹⁴ Stirling, a sole trader, had entered into a construction contract with the defenders in respect of refurbishment works at the defender's property in St Annes. After the contract was concluded, Mr Stirling formed a new company, M & S Contracts, which he intended would take over the contracts he had

⁹⁹¹ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197 at para 15 per Lord Drummond Young. He went on to say in para 17 that "all of the tasks that the present pursuers, the company, appear to have performed on behalf of the partnership can most readily be explained through the concept of *ad hoc* agency." See also para 19.

⁹⁹² *Ibid.* at paras 16-17 per Lord Drummond Young.

⁹⁹³ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

⁹⁹⁴ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

concluded as a sole trader. However, the sole trader's rights and liabilities were not validly assigned to the company. When the company attempted to refer a dispute connected with the contract to adjudication, Westminster Properties argued that the company was not party to the contract and lacked title to sue.⁹⁹⁵ Lord Drummond Young used *ad hoc* agency to allow the actions of the company (writing letters, sending invoices, etc.) to be treated as acts performed by the company as an *ad hoc* agent for the sole trader. In the case, he reiterated that the doctrine could be applied to situations involving company groups.⁹⁹⁶

8.2.2. Subsequent judicial comment on the *ad hoc* agency doctrine

Following these three cases, the concept of *ad hoc* agency has not been subject to further development in Scots law and, as is discussed further below,⁹⁹⁷ it has not been wholly welcomed by commentators. The doctrine has been mentioned only three times in subsequent cases. In *Hill v Hunter*,⁹⁹⁸ Lord Stewart stated that the petitioner:

“easily persuades me that the concept of *ad hoc* agency explains how payments by a third party, typically a company in the same group or a spouse, go to discharge another's debt”.⁹⁹⁹

However, he found that the concept did not resolve the facts of the case at hand.¹⁰⁰⁰ Whilst Lord Stewart did not expressly criticise the doctrine, these brief comments cannot be said to wholly endorse *ad hoc* agency. In the earlier case of *Fleming Builders Ltd v Mrs Jane Forrest or Hives*,¹⁰⁰¹ Lord Menzies made brief reference to *ad hoc* agency, but again did not offer substantive comment on the doctrine's merits, and the case was not decided

⁹⁹⁵ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117 at paras 1-7 per Lord Drummond Young.

⁹⁹⁶ *Ibid.* at para 16 per Lord Drummond Young.

⁹⁹⁷ See subsections 8.4.4-5.

⁹⁹⁸ *Hill v Hunter* [2015] CSOH 36.

⁹⁹⁹ *Ibid.* at para 17 per Lord Stewart.

¹⁰⁰⁰ *Ibid.* In the case, the pursuer sought suspension of two charges for payments served by his ex-wife in respect of child maintenance and spousal support.

¹⁰⁰¹ *Fleming Builders Ltd v Mrs Jane Forrest or Hives, Mr William Forrest* [2008] CSOH 103.

on the basis of the concept.¹⁰⁰² More recently, Lord McEwan allowed a proof before answer to ascertain whether one of the parties to the action before him was acting as an *ad hoc* agent in the same manner as in *Whitbread Group plc v Goldapple Ltd (No 2)*,¹⁰⁰³ although he did not give his views on the doctrine.¹⁰⁰⁴ There appears to be willingness on the part of other members of the judiciary to acknowledge and discuss *ad hoc* agency in Scots law, but it is not a deeply entrenched and universally recognised doctrine. Other judges have not, to date, offered positive comments on the merits of *ad hoc* agency.

Indeed, it appears that the concept of *ad hoc* agency has not been used in cases in which it could have allowed title to sue. In the case of *Rodewald v Taylor*,¹⁰⁰⁵ the defenders received rental payments for a property, known as the Corshellach, which was owned by the pursuer. The pursuer asserted that the defender was acting as her agent in receiving the payments. However, the defender claimed that she was not an agent, and was instead letting out and collecting rent for Corshellach in return for rent-free occupation of another property. Lord Bannatyne found that the pursuer had failed to prove that there was an agency contract between the two parties.¹⁰⁰⁶ Arguably, the case could have been addressed in terms of *ad hoc* agency, but this was raised by neither the parties to the dispute nor Lord Bannatyne.

Macgregor argues that Lord Drummond Young was clearly “using agency as a concept to achieve justice on the facts of the case”¹⁰⁰⁷ in *Whitbread*.¹⁰⁰⁸ She observes that despite the “compelling facts”¹⁰⁰⁹ of *Rodewald v*

¹⁰⁰² *Fleming Builders Ltd v Mrs Jane Forrest or Hives, Mr William Forrest* [2008] CSOH 103 at paras 102 and 106 per Lord Menzies. The part of the defender’s argument based on *ad hoc* agency is found at para 86. *Ad hoc* agency was not discussed because Lord Menzies was not satisfied that the pursuers had received the letter which had purportedly been delivered by an *ad hoc* agent.

¹⁰⁰³ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹⁰⁰⁴ *Scobie Farms v Greenyards Garden Centre Limited* [2016] CSOH 75.

¹⁰⁰⁵ *Rodewald v Taylor* [2010] CSOH 5.

¹⁰⁰⁶ *Ibid.* at paras 33 and 34 per Lord Bannatyne.

¹⁰⁰⁷ L Macgregor, “Agency” in G Black, D Cabrelli, M Hogg, and L Macgregor, *Contract law update, 2010-2012* (Trinity Law, Edinburgh, 2012) 129 at 130.

¹⁰⁰⁸ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹⁰⁰⁹ Macgregor (n 1007) at 130-131.

Taylor,¹⁰¹⁰ *ad hoc* agency was not discussed, and the case therefore indicates that the concept is “stuck on the starting blocks.”¹⁰¹¹ Macgregor has also noted that the lack of discussion of *ad hoc* agency in *Cramaso LLP v Ogilvie-Grant, Earl of Seafield and others* (in which an individual, Mr Erskine entered into a contract in his own name, then formed Cramaso LLP, which did not have title to sue on that contract).¹⁰¹² She notes that Lord Reed’s decision not to utilise *ad hoc* agency meant that there was “no... concern here that agency principles have been manipulated.”¹⁰¹³ The fact that the judges (and counsel) in these cases refrained from discussing the applicability of *ad hoc* agency does indeed indicate that the doctrine has not ‘caught on’ in Scots law.

In English law, the term ‘*ad hoc* agency’ has been used to refer to situations in which an agent is employed on a short-term basis.¹⁰¹⁴ For example, Sedley LJ mentions in *Shogun Finance v Hudson*¹⁰¹⁵ that a dealer was not a finance company’s “general” agent, but may have been the agent for “some *ad hoc* purpose.”¹⁰¹⁶ These cases make no reference to Lord Drummond

¹⁰¹⁰ *Rodewald v Taylor* [2010] CSOH 5.

¹⁰¹¹ Macgregor (n 1007) at 132. See also Macgregor’s similar comments regarding *Rodewald v Taylor* [2010] CSOH 5 in LJ Macgregor, “Establishing agency: *Rodewald v Taylor* [2010] CSOH 05”, Edinburgh Centre for Commercial Law blog, 22.04.2011, available at: <http://www.ecclblog.law.ed.ac.uk/2011/04/22/establishing-agency-rodewald-v-taylor-2010-csoh-05/>.

¹⁰¹² *Cramaso LLP v Ogilvie-Grant, Earl of Seafield and others* [2014] UKSC 9. For full discussion of the case, see L Macgregor, “Moors the pity: the case of the missing grouse. *Cramaso LLP v Ogilvie-Grant, Earl of Seafield and others*” 2015 19(1) *Edinburgh Law Review* 112.

¹⁰¹³ Macgregor (n 1012) at 118. See further discussion at below at subsection 8.4.5.

¹⁰¹⁴ See, for example, *UBS AG (London Branch), UBS Global Asset Management (UK) Ltd v Kommunale Wasserwerke Leipzig GMBH* [2017] EWCA Civ. 1567 at para 88 per Lord Briggs of Westbourne; *Gaydamak v Leviev* [2012] EWHC 1740 at para 244 per Vos J; *Osteopathic Education and Research Ltd (t/a European School of Osteopathy) v Purfleet Office Systems Ltd (formerly NCS Management Ltd)* [2010] EWHC 1801 at para 29 per Judge Richard Seymour QC (sitting as a Judge of the High Court); *MBNA Europe Bank v Thorius* [2010] ECC 8 at para 39 per Judge Smart.

¹⁰¹⁵ *Shogun Finance v Hudson* [2002] QB 834.

¹⁰¹⁶ *Ibid.* at para 16 per Sedley J, citing *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552 at 573 per Lord Morris of Borth-y-Gest and *Mercantile Credit Co Ltd v Hamblin* [1965] 2 QB 242 at 269 per Pearson LJ. See also Sedley J at para 17, at which he explains that the dealer was not the agent for the purpose of the whole hire-purchase agreement, but he was the ‘*ad hoc* agent’ in respect of specific acts connected with the agreement (for example, ascertaining the hirer’s identity and sending copies of the hirer’s driving licence to provide proof of identity).

Young's dicta and simply appear to refer to cases involving agency for a single transaction or for a very short time period. Both types of agency are permissible in Scots law and are dealt with under the law of agency generally.¹⁰¹⁷ There does not appear to be an English equivalent of *ad hoc* agency as developed in Lord Drummond Young's judgments.

In summary, *ad hoc* agency enjoys only a very limited degree of recognition in Scots law. Lord Drummond Young's three Outer House judgements are not binding, and so it cannot currently be said that the doctrine is accepted in Scots law. *Ad hoc* agency has been briefly acknowledged in other cases, although it has not been subject to a great deal of judicial discussion outwith Lord Drummond Young's judgments. The Outer House judgments have not, however, been overruled. It is therefore relevant to consider whether the doctrine ought to continue to develop in Scots law, potentially as a recognised exception to the privity doctrine.

8.3. Whether agency is contractual and/ or consensual

The matter of whether *ad hoc* agency is compatible with the Scots law of agency more generally is discussed later in this chapter.¹⁰¹⁸ In order to address this issue, this subsection examines the issue of whether agency in Scots law is contractual and/ or consensual. A contractual conceptualisation of agency requires that the agency relationship between principal and agent was constituted in contract. According to a consensual definition of agency, the relationship need only be consensual and does not require a written or oral contract.

8.3.1. Contractual and consensual views of agency

It is likely that the drafters of the Commercial Agents (Council Directive) Regulations 1993 view agency as contractual. Macgregor notes that whilst there is no express statement in the Regulations on the nature of the agency

¹⁰¹⁷ Macgregor, *Agency* (n 224) 3.05.

¹⁰¹⁸ See subsection 8.4.5.

contract, individual Regulations indicate a contractual analysis.¹⁰¹⁹ The contractual nature of agency in Scots law is discussed by Bell¹⁰²⁰ and Thomas Smith.¹⁰²¹ There are also clear judicial statements providing for the contractual nature of agency,¹⁰²² for example, Lords Salvesen and Ormidale in *Graham & Co v United Turkey Red Co*,¹⁰²³ Lord Milligan in *Lothian v Jenolite*,¹⁰²⁴ Lord McCluskey in *Trans Barwil Agencies (UK) Ltd v John S Braid & Co Ltd*,¹⁰²⁵ and Lady Dorrian in *Connolly v Brown*.¹⁰²⁶

More recently, in the case of *Rodewald v Taylor*,¹⁰²⁷ the pursuer based her claim on the establishment of an agency contract. Lord Bannatyne responded with discussion of the requirements of such a contract,¹⁰²⁸ and decided that the pursuer had failed to sufficiently prove the existence of an agency contract. Macgregor notes that the case may however appear unremarkable in the context of the debate on whether agency is contractual, given that Lord Bannatyne's discussion of agency contracts reflected the pursuer's argument.¹⁰²⁹ Accordingly, Lord Bannatyne's dicta do not directly support a contractual conception of agency, but they certainly do not contradict a contractual analysis.

Macgregor further comments that there has been insufficient development in Scots law on the question of whether agency might arise in terms of a unilateral grant of authority from the principal to the agent, as opposed to a

¹⁰¹⁹ Macgregor, *Agency* (n 224) 2.16. She cites, for example, Regulation 13, which provides that both the agent and principal are "entitled to receive from the other, on request, a signed written document setting out the terms of the agency contract".

¹⁰²⁰ Bell, *Commentaries* (n 289) I, 506. See discussion in LJ Macgregor, "Defining Agency and Its Scope (I)" in L DiMatteo and M Hogg, *Comparative Contract Law: British and American Perspectives* (Oxford University Press, Oxford, 2015) 381 at 383 on the development of a contractual approach to agency in Bell's works.

¹⁰²¹ Smith, *Short Commentary* (n 36) 774.

¹⁰²² These cases are cited and discussed in Macgregor, *Agency* (n 224) 2.07.

¹⁰²³ *Graham & Co v United Turkey Red Co* 1922 SC 533 at 546 per Lord Salvesen and at 549 per Lord Ormidale.

¹⁰²⁴ *Lothian v Jenolite Ltd* 1969 SC 111 at 120 per Lord Milligan.

¹⁰²⁵ *Trans Barwil Agencies (UK) Ltd v John S Braid & Co Ltd* 1988 SC 222 at 230 per Lord McCluskey.

¹⁰²⁶ *Connolly v Brown* 2007 SLT 778 at para 54 per Lady Dorrian.

¹⁰²⁷ *Rodewald v Taylor* [2010] CSOH 5, discussed above at subsection 8.2.

¹⁰²⁸ *Ibid.* at para 33 per Lord Bannatyne.

¹⁰²⁹ Macgregor (n 1007) at 130.

bilateral contract.¹⁰³⁰ Her own definition of agency does not rule out the possibility that agency might be constituted by means other than contract: a “relationship, *usually* created by contract, in terms of which the principal instructs the agent to act on his behalf in order to produce legally binding effects for the principal”.¹⁰³¹ She concludes that, in Scots law, agency is generally but not always contractual.¹⁰³² Gow, another Scottish commentator, asserts that a contract is not required for the formation of an agency relationship.¹⁰³³ He offers the example of a father asking his son to shop for him. The son clearly does not have the contractual capacity to enter into a relationship which could be termed an ‘agency contract’ between him and his father, but the son does consent to acting as an agent.¹⁰³⁴ The fact that those without contractual capacity can act as agents appears to contradict a contractual theory of agency. Further, the modern Scots law of agency was based on mandate,¹⁰³⁵ which was consensual in nature but not contractual.¹⁰³⁶ The views of these commentators, and the historical context of mandate, cast doubt on a purely contractual conception of agency in Scots law.

The definition in the leading English text on agency does not provide that agency must be contractual:

“Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation.”¹⁰³⁷

Macgregor points out that this definition emphasises consent, rather than contract, stating that “although it is usual for agency to be created by contract

¹⁰³⁰ Macgregor, *Agency* (n 224) 2.19.

¹⁰³¹ *Ibid.* 2.01 (emphasis added).

¹⁰³² *Ibid.* 2.19.

¹⁰³³ JJ Gow, *The mercantile and industrial law of Scotland* (W Green, Edinburgh, 1964) 516.

¹⁰³⁴ *Ibid.* 516.

¹⁰³⁵ Macgregor, *Agency* (n 224) 2.07.

¹⁰³⁶ *Ibid.* Stair wrote that mandate was perfected by sole consent on the part of the mandant (matched by the mandatar’s consent or acceptance): Stair, *Institutions* (n 224) 1.12.1.

¹⁰³⁷ PG Watts (ed), *Bowstead & Reynolds on Agency*, (Sweet & Maxwell, London, 21st edn, 2018) 1.001.

in English law, a contract is not necessary.”¹⁰³⁸ McKendrick further indicates that, in English law, the principal’s consent to the exercise of authority by the agent is sufficient.¹⁰³⁹ It has also been acknowledged in an English House of Lords case that the “relationship of principal and agent can only be established by the consent of the principal and the agent.”¹⁰⁴⁰ The consent theory is accepted by McMeel.¹⁰⁴¹ He notes that the consent theory is however likely subject to a qualification: the question is not whether the agent and principal consent to their agency relationship, but whether there is an objective appearance of consent (in line with recent cases on the objective interpretation of contracts).¹⁰⁴² McMeel suggests that agency has historically been viewed as consensual in English law because agency did not develop as a standalone doctrine but, rather, evolved “hand-in-hand with the elaboration of [consensual] contractual doctrine.”¹⁰⁴³

It is thus clear in English law that agency need not be contractual, but must be consensual. This is accepted both judicially and in academic commentary. In Scots law, the consensus is that agency is always contractual, although various commentators and judges appear to permit a consensual definition of agency. Macgregor has indicated that the Scots position could change in future,¹⁰⁴⁴ and it may be that Scots law will come to firmly accept that agency does not necessarily need to be based on contract. The current state of the law, however, is that consent is required in both legal systems.

¹⁰³⁸ Macgregor, *Agency* (n 224) 2.09. See also Macgregor (n 1020) at 384.

¹⁰³⁹ E McKendrick (ed), *Goode on Commercial Law* (LexisNexis UK, London, 4th edn, 2016) 2016 182 footnote 16, relying on *Yasuda Fire and Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174 at 185 and 186 per Colman J. In the case, Colman J also states at 185 that whilst “modern commercial transactions agencies are almost invariably founded upon a contract between principal and agent, there is no necessity for such a contract to exist”. He also refers to *Garnac Grain Co. Inc. v H.M.F. Faure & Fairclough Ltd.* [1968] AC 1130 at 1137 per Lord Pearson. See further R Powell, *The law of agency* (Pitman, London, 2nd edn, 1961) 7.

¹⁰⁴⁰ *Garnac Grain Co. Inc. v H.M.F. Faure and Fairclough Ltd* [1968] AC 1130 at 1137 per Lord Pearson.

¹⁰⁴¹ G McMeel, “Philosophical foundations of the law of agency” 2000 116(Jul) *Law Quarterly Review* 387 at 388.

¹⁰⁴² *Ibid.* at 389. McMeel acknowledges that in “the vast majority of cases, the principal’s actual intention and the appearance of his intention will coincide.”

¹⁰⁴³ *Ibid.* at 402.

¹⁰⁴⁴ Macgregor, *Agency* (n 224) 2.13.

8.3.2. Non-consensual views of agency

It should be acknowledged that there is a limited body of commentary supporting the view that agency is non-consensual. This is argued by Forte and van Niekerk,¹⁰⁴⁵ who submit that consent in agency contracts is a “fiction”.¹⁰⁴⁶ Their argument focuses on South African law, but they have also applied their comments to Scots law.¹⁰⁴⁷ However, Macgregor notes that Forte and van Niekerk cite only one Scottish case in support of their proposition that agency is non-consensual.¹⁰⁴⁸ In that case, it was found that the parties had formed an implied agency contract, although it was noted that, had the court been unable to find a contract, the purported agent’s fee may have been claimed back through unjustified enrichment.¹⁰⁴⁹ Macgregor comments that whilst unjustified enrichment may have been a potential means of recovery, it “is surely unusual to use a case where the court so clearly found that a contract existed to support a non-consensual analysis of agency.”¹⁰⁵⁰ She concludes that a non-consensual view of agency “reflects neither historical development nor business practice in Scotland.”¹⁰⁵¹ Indeed, Forte and van Niekerk’s views do not represent the majority view even in South Africa. Kerr, for example, writes that in most cases, the agent’s authority will be “obtained... as a result of entry into a contract with the principal.”¹⁰⁵² He does not state categorically that agency relationships must be governed by contract, however, he views consent on the part of both parties as necessary for the grant of actual authority.¹⁰⁵³

¹⁰⁴⁵ Forte and van Niekerk (n 228) at 245-246.

¹⁰⁴⁶ *Ibid.* at 246.

¹⁰⁴⁷ *Ibid.* at 240.

¹⁰⁴⁸ Macgregor, *Agency* (n 224) 3.03. The case cited is *Barnetston v Peterson* (1902) 5 F 86.

¹⁰⁴⁹ *Barnetston v Peterson* (1902) 5 F 86 at 90 per Lord Trayner.

¹⁰⁵⁰ Macgregor, *Agency* (n 224) 3.03.

¹⁰⁵¹ *Ibid.* 2.21.

¹⁰⁵² AJ Kerr, *Law of Agency* (LexisNexis, South Africa, 4th edn, 2007) 4-5, citing *Joel Malamed and Another v Cleveland Estate Malamed and Another* [1984] 2 All SA 110 at 166C-D per Corbett JA: “An act of representation needs to be authorised by the principal. Such authorisation is usually contained in a contract.”

¹⁰⁵³ Kerr, *Agency* (n 1052) 6.

McMeel submits that the key competitor to the consent theory of agency law is the power-liability theory.¹⁰⁵⁴ This theory is sourced in Hohfeld's premise that:

"The creation of the agency relation involves, inter alia, the grant of legal powers to the so-called agent, and the creation of correlative liabilities in the principal. That is to say, one party P has the power to create agency powers in another party A - for example, the power to convey X's property, the power to impose (so-called) contractual obligations on P, the power to 'receive' title to property so that it shall vest in P, and so forth."¹⁰⁵⁵

Dowrick summarises that this refers to an agent's invested power to alter the principal's legal ties with third parties, and the principal's corresponding liability to fulfil these ties.¹⁰⁵⁶ McMeel comments that this neat analysis encompasses all types of agency, whereas the consensual theory struggles to account for agency by necessity and agency by operation of law.¹⁰⁵⁷ However, he argues that the question of whether the agent is empowered to act for the principal is one of public policy, and:

"once it is admitted that evidence of the principal's consent to the agent wielding power on his behalf is a sufficient public policy reason to recognise agency, there is serious danger of the 'power-liability' model collapsing into the qualified consensual approach."¹⁰⁵⁸

This is entirely logical. The power liability theory alone does not account for the reasons why the agent is empowered by the principal, and, in the majority of cases, the agent has the power to bind the principal in legal relationships with third parties because the principal consents to being bound. Indeed, McMeel notes that the two theories may not contradict one another: the qualified consensual theory explains the normative bedrock of agency (i.e. consent), and the power liability theory explains the triangular relationship

¹⁰⁵⁴ McMeel (n 1041) at 388.

¹⁰⁵⁵ WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, Newhaven, 1923) 51-52.

¹⁰⁵⁶ FE Dowrick, "The Relationship of Principal and Agent" 1954 17(1) *Modern Law Review* 24 at 36. McMeel lists other commentators who subscribe to this theory in McMeel (n 1041) at 393, including BS Markesinis and RJC Munday, *An Outline of the Law of Agency* (Butterworths, Oxford, 4th edn, 1998) 8-11.

¹⁰⁵⁷ McMeel (n 1041) at 392 and 395.

¹⁰⁵⁸ *Ibid.* at 396.

between the principal, agent, and third party.¹⁰⁵⁹ The theory identified as a competitor to the consent theory is in fact compatible with a consensual account of agency, because the power liability model does not expressly provide that the agent's power is not sourced in the principal's consent.

It is noted that apparent authority¹⁰⁶⁰ can operate to bind a principal where it did not consent to liability to the third party.¹⁰⁶¹ However, Macgregor explains that this simply illustrates that the generally consensual perception of Scots agency has yielded in the case of apparent authority to the interests of third party protection.¹⁰⁶² Accordingly, apparent authority is an exception to the general rule that agency contracts are consensual.

8.3.3. Summary

Whilst there is ongoing debate in Scots law as to whether agency must necessary be contractual, the majority consensus is that agency in Scots law is contractual in nature. There is a limited body of Scots commentary which indicates that it may be possible to view agency transactions as consensual in nature. In English law, the consensual theory is dominant. Neither jurisdiction accepts a non-consensual view of agency. The conclusions of this section are used to address the question of whether *ad hoc* agency is compatible with the Scots law of agency as a whole,¹⁰⁶³ which in turn informs the issue of whether the doctrine should be recognised in Scots law.

8.4. Compatibility of *ad hoc* agency with Scots law

This section examines the compatibility of *ad hoc* agency with privity, contract theory, and delict. It also examines the policy considerations for and against the recognition of *ad hoc* agency.

¹⁰⁵⁹ McMeel (n 1041) at 410 and 396-399.

¹⁰⁶⁰ Macgregor, *Agency* (n 224) 2.21.

¹⁰⁶¹ *Ibid.*

¹⁰⁶² *Ibid.*

¹⁰⁶³ See subsection 8.4.5.

8.4.1. Compatibility of *ad hoc* agency with the privity doctrine

Neither case law nor commentary considering *ad hoc* agency has commented on its interaction with privity. However, it is clear that the concept operates in certain situations as an exception to the privity doctrine. Whilst Lord Drummond Young argues that the *ad hoc* agent is making a claim for the principal, this is a legal fiction, as will be discussed further below.¹⁰⁶⁴

In reality, the *ad hoc* agents in the two later cases, *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland*¹⁰⁶⁵ and *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited*,¹⁰⁶⁶ are enforcing the contracts between the so-called principals and third parties for their own benefit. In the case of *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited*,¹⁰⁶⁷ for example, the new company was able to enforce the contract between the sole trader and the defender, despite the fact that the new company was not party to the contract. In *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland*,¹⁰⁶⁸ it is similarly clear that the company could enforce the contract made by the partnership. If *ad hoc* agency is to be recognised in Scots law, there must be valid policy reasons for its deviation from the privity doctrine.

The earliest *ad hoc* agency case, *Whitbread Group plc v Goldapple Ltd*,¹⁰⁶⁹ did not deviate from privity. Fairbar was not attempting to enforce a clause in the contract between Goldapple and Whitbread, nor did Fairbar benefit under the contract between them. However, Lord Drummond Young has developed *ad hoc* agency in a manner which contravenes privity in the later cases. By creating the *ad hoc* agency doctrine, Lord Drummond Young has therefore

¹⁰⁶⁴ See immediately below at subsection 8.4.2.

¹⁰⁶⁵ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

¹⁰⁶⁶ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

¹⁰⁶⁷ *Ibid.*

¹⁰⁶⁸ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

¹⁰⁶⁹ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

also developed a new exception to privity. He did not acknowledge this in his judgments in *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland*¹⁰⁷⁰ and *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited*.¹⁰⁷¹

8.4.2. Compatibility of *ad hoc* agency with contract theory

There is also a lack of commentary on the interaction between *ad hoc* agency and contract theory. However, Macgregor and Whitty question whether the concept complies with the requirements of agency more generally, in terms of whether the principal and *ad hoc* agent consent to the formation of an agency contract.¹⁰⁷² They describe Lord Drummond Young's views on consent in *Whitbread Group plc*¹⁰⁷³ as "unusual", because he appears to treat the payment of the debt as sufficient to create the agency contract between Whitbread and Fairbar without considering whether the two parties consent to forming such a contract.¹⁰⁷⁴ They observe that payment "in itself does not create a contract of agency – it simply acts as evidence from which inferences of intention can be made."¹⁰⁷⁵ They also note that the directors of Laurence McIntosh Ltd would have been "surprised" had they been told, prior to the case, that they were acting as agents for the inactive partnership.¹⁰⁷⁶

Essentially, in each of the cases, it is not clear that the party deemed to have acted as an *ad hoc* agent intended to do so, nor that it entered into an agency contract with the purported principals. Macgregor and Whitty note that agency can be inferred on the basis of the parties' conduct,¹⁰⁷⁷ and

¹⁰⁷⁰ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

¹⁰⁷¹ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

¹⁰⁷² The question of whether agency more generally is contractual or consensual was discussed above at section 8.3; it was concluded that agency in Scots law must be consensual but need not be contractual.

¹⁰⁷³ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹⁰⁷⁴ LJ Macgregor and Niall R Whitty, "Payment of Another's Debt, Unjustified Enrichment and *ad hoc* Agency" 2011 15(1) *Edinburgh Law Review* 57 at 79.

¹⁰⁷⁵ *Ibid.*

¹⁰⁷⁶ *Ibid.* at 80.

¹⁰⁷⁷ *Ibid.* at 77-78. See also above at section 8.3.

Scots law recognises agency relationships created for one-off or limited purposes.¹⁰⁷⁸ However, they stress that there was no conduct or agency contract in the *ad hoc* agency cases which could be said to give rise to an agency relationship.¹⁰⁷⁹ There is no presumption in favour of agency, and, where the agency relationship is implied, a high standard of proof is imposed.¹⁰⁸⁰ They comment that the approach to the requisite standard of proof seems, in the cases they cite, to be “much stricter than Lord Drummond Young’s approach.”¹⁰⁸¹ Indeed, Lord Drummond Young recognised in *Whitbread*¹⁰⁸² that there was “no actual intention on the part of the persons who issued the cheque that Fairbar should act as agent for Whitbread.”¹⁰⁸³ In *Laurence McIntosh*¹⁰⁸⁴ it was similarly accepted that the claim document was prepared by a party who had not considered whether the company had title to sue.¹⁰⁸⁵ Lord Drummond Young indicates that this:

“reinforces the inferences that no assignation was intended and that the claim document was presented by the company as an *ad hoc* agent for the partnership.”¹⁰⁸⁶

Neither the partnership nor the company could be said to have intended to conclude an assignation, and it is doubtful that either can be said to have intended to enter into an agency agreement. There is no logical reason to bypass the requirement that agency in Scots law is consensual, but protect the formalities of assignation. In *John Stirling*,¹⁰⁸⁷ Lord Drummond Young justified his *ad hoc* agency analysis on the basis that it allowed the original contracting party to:

¹⁰⁷⁸ Macgregor and Whitty (n 1074) at 77-78.

¹⁰⁷⁹ *Ibid.* at 78.

¹⁰⁸⁰ *Ibid.* (citing a number of cases including *Eastern Marine Services (and Supplies) Ltd v Dickson Motors Ltd* 1981 SC 355 at 357-359 per Lord Grieve).

¹⁰⁸¹ Macgregor and Whitty (n 1074) at 78.

¹⁰⁸² *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹⁰⁸³ *Ibid.* at para 19 per Lord Drummond Young. See also Macgregor and Whitty (n 1074) at 80.

¹⁰⁸⁴ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

¹⁰⁸⁵ *Ibid.* at para 18 per Lord Drummond Young.

¹⁰⁸⁶ *Ibid.*

¹⁰⁸⁷ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

“remain in place as the subject of the contractual rights and obligations, whilst the correspondence bears the meaning that was obviously intended by the parties regarding the rights and obligations arising under the contract.”¹⁰⁸⁸

Whilst both the company and sole trader in the case can be said to have intended to transfer the rights and liabilities of the former to the latter, neither intended to enter into an agency relationship. Any such intention is artificially implied. Rather, they intended to transfer the rights and liabilities under the contract and failed to properly do so.

Macgregor and Whitty recognise that the manipulation of the requirement that the principal and agent must consent, through contract or otherwise, to an agency relationship might “threaten the role of consent in the formation of agency relationships.”¹⁰⁸⁹ It thus appears that the development of the doctrine has created a new exception to the formation requirements of agency law,¹⁰⁹⁰ and cannot be explained on the basis of the intentions of the parties to the so-called agency contract.

The lack of consent to form an agency contract has implications for the compatibility of *ad hoc* agency with the will theory. The theory requires consent on the part of the contracting parties, and it is clear that the principal and *ad hoc* agent do not consent to form an agency contract, or for the *ad hoc* agent to act as an agent for the principal. The lack of consent means that there is no theoretically valid basis for forcing the third party to perform in favour of the *ad hoc* agent, and that *ad hoc* agency is not compatible with the will theory. Similarly, it cannot be said that the *ad hoc* agent promised to conclude any transactions for the principal, nor that it voluntarily assumed the responsibilities of an agent in respect of the principal. *Ad hoc* agency cannot therefore be explained in terms of promissory or assumption theory.

¹⁰⁸⁸ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117 at paras 16 and 20, at which Lord Drummond Young distinguished between the parties’ general correspondence and a letter of intention to refer the dispute to adjudication.

¹⁰⁸⁹ Macgregor and Whitty (n 1074) at 80.

¹⁰⁹⁰ The implications of this are discussed further below at subsection 8.4.5.

The interaction between *ad hoc* agency and contract theory is also problematic from the perspective of the third party. The third party initially intended to contract with the principal only, and *ad hoc* agency forces the third party to perform in favour of the agent, with whom it has not consented to contract. This contravenes the will theory. In terms of the promissory theory, it cannot be said that the third party has made a promise to the *ad hoc* agent, because it did not have knowledge of the agent's existence at the time at which it entered into the contract with the principal. For the same reason, it cannot be argued that the third party has voluntarily assumed an obligation to perform in favour of the principal. The concept is not therefore compatible with assumption theory.

In summary, *ad hoc* agency is incompatible with contract theory as well as the requirements of agency law more generally. *Ad hoc* agency cannot therefore, in the contexts in which it contradicts privity, be justified on the basis that it upholds the intentions of the contracting parties.

8.4.3. Compatibility of *ad hoc* agency with delict

The third party's liability to the *ad hoc* agent cannot stem from an agency contract meeting the consent requirement of agency law, or the third party's own consent to contract with the agent. The liability on the part of the third party is involuntary, and it is therefore relevant to ascertain whether the third party's liability could be classed as delictual.

A delictual classification would require that there is a duty of care on the part of the third party in respect of the *ad hoc* agent. There is no legal basis for such a duty of care. When the third party contracts with the principal, it does not assume responsibility for the *ad hoc* agent in terms of *Hedley Byrne* liability.¹⁰⁹¹ This is because the third party had no reason to believe at the point it contracted with the principal that its performance under the contract may impact on the *ad hoc* agent, and so there can be neither an assumption

¹⁰⁹¹ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

of responsibility nor a 'special relationship' as required under *Hedley Byrne*¹⁰⁹² liability.

In chapter 7,¹⁰⁹³ it is submitted that *Junior Books* liability could potentially be imposed in transferred loss situations, if that form of liability was extended to allow for recovery where the contracting party not aware of the specific third party. This could not be extended to *ad hoc* agency. In each of the *ad hoc* agency cases, the third party was engaged to provide a particular service to the principal. It is not foreseeable to the third party that the entire contract could be transferred to the *ad hoc* agent. The concept is not therefore compatible with delictual liability.

8.4.4. Policy considerations justifying *ad hoc* agency

The development of *ad hoc* agency has been justified on the basis that this reflects commercial reality. According to Lord Drummond Young, the facts of *Whitbread*¹⁰⁹⁴ demonstrate that:

“the acts of large companies are frequently performed by the relatively junior employees acting under the corporate structures that have been set up to govern a multiplicity of transactions, with no regard to any particular transaction. In those circumstances it is in my opinion quite unrealistic to attempt to attribute a specific intention to any individual or group of individuals. The corporate intention must be determined objectively, by examining both the individual transaction and the corporate structures under which it was effected.”¹⁰⁹⁵

This led Lord Drummond Young to conclude that there was, in *Whitbread Group plc*,¹⁰⁹⁶ a “clear corporate intention” that Fairbar would act for Whitbread for the purposes of paying Whitbread’s debt. In *Laurence McIntosh*,¹⁰⁹⁷ he stated that a reasonable person would construe the claim document in that case as:

¹⁰⁹² *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

¹⁰⁹³ See subsection 7.3.3.

¹⁰⁹⁴ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹⁰⁹⁵ *Ibid.* at para 19 per Lord Drummond Young.

¹⁰⁹⁶ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹⁰⁹⁷ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

“being presented through the company but acting as agent for the true contracting party, the partnership. As a matter of commercial reality, that would plainly be a sensible way to proceed, avoiding the need for a formal assignation but permitting the active trading entity, the company, to progress matters on behalf of the true contracting party.”¹⁰⁹⁸

In *John Stirling*,¹⁰⁹⁹ he similarly commented that commercial contracts must be given a “commercially sensible construction”.¹¹⁰⁰ Lord Drummond Young’s motivation for developing *ad hoc* agency is, accordingly, ensuring a commercially sensible and fair outcome.

This is reflected in the views of other commentators. Warrender, for example, notes that Lord Drummond Young’s finding of *ad hoc* agency in *John Stirling*¹¹⁰¹ reflected that the arrangement between the parties “constituted normal commercial practice”.¹¹⁰² This would adhere to the justification of commercial necessity underpinning some of the statutory exceptions.

However, it is not clear that *ad hoc* agency is commercially convenient for all parties concerned. In the cases which contravene privity, the operation of *ad hoc* agency was certainly convenient for the new commercial entities (the new companies in *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland*¹¹⁰³ and *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited*¹¹⁰⁴). However, the benefits of *ad hoc* agency to the respective defenders are unclear. In both cases, the defenders would not have expected to owe liability to the new

¹⁰⁹⁸ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197 at para 18 per Lord Drummond Young.

¹⁰⁹⁹ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

¹¹⁰⁰ *Ibid.* at para 17 per Lord Drummond Young.

¹¹⁰¹ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

¹¹⁰² A Warrender, “The name of the game” September 19 2007 *Contract Journal* 47 at 47. See also T Bingham, “It ain’t necessarily so” 2007 41 *Building* 82 and “Dispute or difference’ and corporate personality” 2007(Nov) *Building Law Monthly* 1, which discuss *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117 and *ad hoc* agency in neutral terms, seemingly accepting the doctrine without comment or criticism as a justifiable part of Scots law.

¹¹⁰³ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

¹¹⁰⁴ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

entities, and the operation of *ad hoc* agency results in an adverse outcome for these parties, as they are forced to uphold contracts with the new entities. Indeed, it cannot be said that *ad hoc* agency is of benefit to the original partnership and sole trader (in in *Laurence McIntosh Ltd*¹¹⁰⁵ and *John Stirling*¹¹⁰⁶ respectively), because these parties were not in existence at the time at which the case was decided. On examination of the operation of *ad hoc* agency in the relevant cases, it is not therefore possible to justify the concept's deviation from privity on the grounds of commercial convenience.

Whilst it is not relevant to the question of whether the concept is justifiable as an exception to privity, it is also submitted that *Whitbread*¹¹⁰⁷ fails to reflect a policy of fairness and commercial convenience. In the case, Goldapple sought to return the cheque because it was concerned that acceptance of payment from Fairbar would be construed as consent to Whitbread's assignation of the lease.¹¹⁰⁸ Lord Drummond Young recognises that this was a reasonable concern, but states that this could have been addressed by writing to either Fairbar or Whitbread to clarify that payment could not be treated as acceptance that the lease had been assigned.¹¹⁰⁹ Goldapple was in this case seeking to protect its own interests, and, given that *Whitbread*¹¹¹⁰ was the first case in which *ad hoc* agency was introduced, it could not have foreseen that it would be perceived by Lord Drummond Young as refusing to interact with an agent. The outcome seems neither fair¹¹¹¹ nor commercially convenient from Goldapple's perspective.

¹¹⁰⁵ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

¹¹⁰⁶ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

¹¹⁰⁷ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹¹⁰⁸ *Ibid.* at para 17 per Lord Drummond Young. Goldapple did not wish to permit assignation because it had little information on Fairbar's financial position and suitability as a tenant, whereas Whitbread was a large, well-known company whom Goldapple felt it could trust. Accordingly, the Managing Director of Goldapple instructed his employees not to do anything which could be perceived as acceptance of Fairbar as a new tenant.

¹¹⁰⁹ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281 at para 19 per Lord Drummond Young.

¹¹¹⁰ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹¹¹¹ It is acknowledged that the outcome would have been fair if the decision was based on the law relating to payment of another's debt. The case did not consider this issue. See below at subsection 8.4.5.

It is true that Scottish courts have, in recent years, recognised interpretations of contracts reflecting commercial common sense.¹¹¹² However, the meaning of commercial common sense in the context of contractual interpretation reflects, as noted by Lorna Richardson,¹¹¹³ Lord Neuberger's dicta in *Arnold v Britton*¹¹¹⁴ that the meaning of any contractual clause must be assessed in light of "the facts and circumstances known or assumed by the parties at the time that the document was executed".¹¹¹⁵ The parties to the relevant contracts in the *ad hoc* agency cases would not have known that the contracts would later be relied upon by a different party seeking to step into the shoes of the original contracting party. The construction favoured by Lord Drummond Young does not therefore reflect a principle of commercial common sense but, rather, an unrealistic manipulation of the facts at hand.

8.4.5. Policy considerations against the recognition of *ad hoc* agency

This subsection examines the interaction between *ad hoc* agency and the law of agency more generally, as well as addressing the doctrine's impact on the laws of assignation and separate legal personality. It also examines whether *ad hoc* agency was in fact a necessary development to achieve the result in *Whitbread*.¹¹¹⁶ These issues are considered in turn.

As discussed above,¹¹¹⁷ *ad hoc* agency is an exception to the general rules of agency as well as an exception to privity, because the *ad hoc* agent and the principal cannot be said to consent to an agency contract. Macgregor cautions against the manipulation of agency in this respect, stating that whilst agency can be inferred from relevant facts and circumstances, it would be:

"dangerous... to over-emphasise the ease with which agency can be created in a modern context... The litigation involving *ad hoc* agency illustrates that the ease with which agency can be established leaves it

¹¹¹² L Richardson, "Commercial Common Sense Revisited: Further Developments in Contract Interpretation and Commercial Leasing" 2016 20(3) *Edinburgh Law Review* 348; L Richardson, "Commercial Common Sense in Contract Interpretation: Further Views from the Inner House" 21(3) *Edinburgh Law Review* 2017 423.

¹¹¹³ Richardson, "Common Sense Revisited" (n 1112) at 344.

¹¹¹⁴ *Arnold v Britton* [2015] 2 WLR 1593.

¹¹¹⁵ *Ibid.* at para 15 per Lord Neuberger.

¹¹¹⁶ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹¹¹⁷ See subsection 8.4.2.

open to abuse for wider policy aims. This is unfortunate, and will inevitably add confusion to the legal rules governing the creation of agency.”¹¹¹⁸

It is correct that *ad hoc* agency’s disregard for the general principles of consent in agency law creates unnecessary confusion and jeopardises the theoretical clarity of agency law. Further, the concept contradicts other aspects of the law of agency. Lord Drummond Young indicates in *John Stirling*¹¹¹⁹ that *ad hoc* agency could only apply to legal acts which did not require formality (such as entering into correspondence, delivering invoices, and giving contractual notice). The correct party would, according to Lord Drummond Young, be required for matters involving formal processes including litigation and adjudication.¹¹²⁰ It is not clear why there should be such a distinction. Agents are normally restricted within the confines of their authority, rather than whether the acts they undertake require legal formality. Macgregor and Whitty note that this ‘formality limitation’ means that an *ad hoc* agent’s authority is more restricted than that of a normal agent, which means that *ad hoc* agency is a “new and different species of agency.”¹¹²¹ This limitation does not therefore reflect the normal rules of agency law. This high degree of judicial creativity further jeopardises the clarity of the law of agency. The law should be accessible to contractual parties and doctrinally clear. *Ad hoc* agency contradicts these policy aims because it casts confusion on the law of agency as a whole.

Ad hoc agency also contradicts the law on assignation and separate legal personality. In *Laurence McIntosh*,¹¹²² Lord Drummond Young expressly refrained from taking a “liberal view” of the law on assignation, because the question of whether assignation was successful impacted upon the parties’ rights of retention and set-off.¹¹²³ However, the operation of *ad hoc* agency in

¹¹¹⁸ Macgregor, *Agency* (n 224) 3.05. See also Macgregor (n 1020) at 381-382.

¹¹¹⁹ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

¹¹²⁰ *Ibid.* at para 16 per Lord Drummond Young.

¹¹²¹ Macgregor and Whitty (n 1074) at 82.

¹¹²² *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

¹¹²³ *Ibid.* at para 17 per Lord Drummond Young.

*Laurence McIntosh*¹¹²⁴ and *John Stirling*¹¹²⁵ allows a person the right to claim on a contract to which it is not party despite the fact that it has failed to comply with the requirements of assignation. Macgregor and Whitty comment that assignation is “an important part of the law of obligations, [and so this] is highly questionable.”¹¹²⁶ As such, Lord Drummond Young has unjustifiably created confusion in the law of assignation. Further, it is illogical to justify deviation from the requirements of assignation on the grounds that doing so by other means (*ad hoc* agency) does not involve contravention of the law of assignation.

Regarding the interaction between *ad hoc* agency and the law on separate legal personality, Lord Drummond Young accepts in *John Stirling*¹¹²⁷ that if the “doctrine of separate corporate personality is applied with its full rigour, the defenders' argument is clearly correct”.¹¹²⁸ He justified the imposition of *ad hoc* agency on the grounds that in “commercial practice, it is not unusual to discover that the niceties of the doctrine of separate corporate personality are ignored.”¹¹²⁹ This doctrine has indeed been circumvented in accordance with, for example, the well-established law on ‘piercing the corporate veil’,¹¹³⁰ and parties may choose to ignore the technicalities of separate legal personality in commercial practice. However, this does not justify circumventing the law on separate legal personality more generally, particularly when doing so also contravenes the law on agency. The “common thread” unifying Lord Drummond Young’s three cases is the effect of the separate legal personality of the companies.¹¹³¹ *Whitbread*¹¹³² is unproblematic in this respect. Fairbar was not seeking to act as an agent for

¹¹²⁴ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

¹¹²⁵ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

¹¹²⁶ Macgregor and Whitty (n 1074) at 80.

¹¹²⁷ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

¹¹²⁸ *Ibid.* at para 16 per Lord Drummond Young.

¹¹²⁹ *Ibid.*

¹¹³⁰ Macgregor and Whitty note that a solution based on this analysis could not have applied in the *ad hoc* agency cases: Macgregor and Whitty (n 1074) at 74.

¹¹³¹ *Ibid.*

¹¹³² *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

Whitbread; it simply wished to discharge the company's rent which is, as discussed further below,¹¹³³ permissible in Scots law. In *John Stirling*¹¹³⁴ and *Laurence McIntosh*,¹¹³⁵ on the other hand, there existed no legal means by which the relevant parties ought to have been entitled to claim debt or raise legal proceedings related to another company. Accordingly, the imposition of *ad hoc* agency necessarily involved deviation from the laws on separate legal personality.

Utilising the law of agency to bypass the separate legal personality of companies is not uncontroversial. Macgregor notes, in relation to the reasoning in *Cramaso LLP*,¹¹³⁶ that Mr Erskine's creation of the company prevented him from obtaining a remedy in the company's name.¹¹³⁷ She comments that whilst strict application of the law on separate legal personality may seem unfair, "arguably Mr Erskine should not have been able to pursue rights which he held individually."¹¹³⁸ She and Whitty comment that in both *Laurence McIntosh*¹¹³⁹ and *John Stirling*,¹¹⁴⁰ the relevant parties were either ignorant of the importance of proper incorporation, or they were aware that they technically ought to ensure that the proper legal procedures were completed, in order to correctly transfer the rights and liabilities, but they chose not to spend time and money dealing with this issue.¹¹⁴¹ As such, the doctrine of *ad hoc* agency "operates in these cases as a 'get out of jail free' card, available to parties who have failed properly to regulate their legal affairs."¹¹⁴² Macgregor and Whitty question whether the "distortion" of the law

¹¹³³ This is discussed below in this subsection.

¹¹³⁴ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

¹¹³⁵ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

¹¹³⁶ *Cramaso LLP v Ogilvie-Grant and others* [2014] UKSC 9. The facts of this case are discussed above at section 8.2.

¹¹³⁷ The case was however resolved in Mr Erskine's favour in terms of continuing liability for a negligent misstatement.

¹¹³⁸ Macgregor (n 1012) at 117.

¹¹³⁹ *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

¹¹⁴⁰ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

¹¹⁴¹ Macgregor and Whitty (n 1074) at 80.

¹¹⁴² *Ibid.*

on agency and the doctrine of separate legal personality is justified on the grounds of providing remedies to those who do not properly protect their own legal interests.¹¹⁴³ As they point out, if the relevant parties had not made sure to properly incorporate the new company or partnership due to legal advice to the effect that this was unnecessary, they could potentially have claimed against their solicitors, given that such advice would have been negligent.¹¹⁴⁴

The doctrine of *ad hoc* agency accordingly seems to exist to protect only those who have either failed to follow legal advice to properly assign contracts to relevant persons, complete incorporation of new legal entities, or have failed to seek legal advice. *Ad hoc* agency could arguably support the policy aim of protecting extra-contractual parties. However, as discussed in chapter 5, such protection ought only to arise where the extra-contractual party did not have the means to protect themselves, or where the party could not reasonably be expected to protect themselves.¹¹⁴⁵ Commercial parties ought to properly manage their own legal affairs. *Ad hoc* agency cannot therefore be justified on the basis of the protection of weaker parties.

Whilst the case did not contravene privity, it should be acknowledged that the development of *ad hoc* agency was not in fact necessary to achieve the outcome in *Whitbread*.¹¹⁴⁶ Macgregor and Whitty point out that the development of *ad hoc* agency may have resulted from the failure of counsel in the case to cite the main Scots authorities dealing with payment of another's debt.¹¹⁴⁷ The key question was whether payment of another's debt distinguishes the debt, and it was not the case, as counsel assumed, that

¹¹⁴³ Macgregor and Whitty (n 1074) at 80-81.

¹¹⁴⁴ *Ibid.* at 86. In *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197, there had been no formal transfer of the partnership's assets and liabilities to the company because the partners had been told that this was not necessary (at para 15 per Lord Drummond Young). Lord Drummond Young indicates that this advice was unsurprising given the formalities required for assignation (at para 17), but it is submitted that this is illogical given that the case itself illustrates the problems which can arise when a new company does not ensure that it has title to sue in respect of contracts for which it takes responsibility.

¹¹⁴⁵ See subsection 5.4.1.

¹¹⁴⁶ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹¹⁴⁷ Macgregor and Whitty (n 1074) at 59.

Scots law did not have a position on this matter.¹¹⁴⁸ A full discussion on the relevant law is found in Macgregor and Whitty's article on the case.¹¹⁴⁹ Essentially, the case could and should have been resolved using existing law on the payment of another's debt.¹¹⁵⁰ Accordingly, the development of a new exception to agency law in *Whitbread*¹¹⁵¹ cannot be justified, because there was no reason to deviate from the normal principles governing the payment of another's debt. The existence of a current body of law on the payment of another's debt would not however have aided Lord Drummond Young in *Laurence McIntosh*¹¹⁵² or *John Stirling*,¹¹⁵³ both of which concern the recovery of debt due under another's contract rather than the payment of debt. Nonetheless, these cases unjustifiably breach privity, contract theory, the principles of agency, and the law of assignation and separate legal personality. The cases are therefore also incorrectly decided.

8.5. Concluding remarks

Ad hoc agency is doubtless an interesting development, but it is compatible with neither Scots contract nor delict law. Its operation in cases involving the transfer of obligations between separate legal entities contravenes the privity doctrine, and this cannot be justified on the basis of the contracting parties' intentions. Further, it violates the law of agency, assignation, and separate legal personality. In light of the lack of sound policy considerations in support of *ad hoc* agency, the uncertainty in agency law created by the concept, and the impact it has on the doctrinal clarity of assignation and separate legal personality, it cannot be justified as an exception to privity. Therefore, Macgregor and Whitty are correct in their conclusion that the doctrine should

¹¹⁴⁸ Macgregor and Whitty (n 1074) at 59-60.

¹¹⁴⁹ *Ibid.* at 62-74.

¹¹⁵⁰ *Ibid.* at 79-80.

¹¹⁵¹ *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281.

¹¹⁵² *Laurence McIntosh Ltd v Balfour Beatty Group Ltd and the Trustees of the National Library of Scotland* [2006] CSOH 197.

¹¹⁵³ *John Stirling t/a M & S Contracts v Westminster Properties Scotland Limited* [2007] CSOH 117.

be “nipped in the bud”.¹¹⁵⁴ *Ad hoc* agency should not continue to be recognised in Scots law.

Fortunately, the concept is in its relative infancy, and does not require statutory abolition, because it has only thus far been recognised in the Outer House. Ideally, the development of the doctrine should be halted by Inner House (or Supreme Court) dicta should a case arise with similar facts to the *ad hoc* agency cases.

¹¹⁵⁴ Macgregor and Whitty (n 1074) at 86.

Chapter 9: Undisclosed agency

9.1. Overview of chapter 9

This chapter defines undisclosed agency and provides an overview of its development in Scots and English law. It addresses undisclosed agency's compatibility with the privity doctrine, comparing the direct contract thesis and the intervention thesis, examines its relationship with the main theories of contract law, and determines whether undisclosed agency can be explained in terms of delictual liability. The final subsections analyse whether the policy considerations put forward in commentary justify the continued existence of undisclosed agency, offers arguments against the recognition of undisclosed agency, and discusses whether undisclosed agency ought to be abolished in Scots law.

9.2. Undisclosed agency in Scots and English law

This section defines undisclosed agency and outlines its development in Scots and English law.

9.2.1. Definition of undisclosed agency in Scots law

In the context of disclosed agency, an agent will negotiate with the third party on behalf of its principal, in order to facilitate transactions between the principal and the third party, and the third party will know that the agent is acting in a representative capacity.¹¹⁵⁵ Disclosed agency is the norm in agency transactions.¹¹⁵⁶ In contrast, undisclosed agency applies where the agent is instructed by the principal not to disclose to the third party that it is acting in a representative capacity.¹¹⁵⁷ The existence and identity of the principal is not revealed to the third party.¹¹⁵⁸ In *Lockhart v Moodie*,¹¹⁵⁹ for example, the defender, D. Moodie and Company, entered into a joint venture

¹¹⁵⁵ LJ Macgregor, *The Laws of Scotland: Stair Memorial Encyclopaedia: Agency and Mandate (Reissue)* (hereafter "SME"), (LexisNexis/ Law Society of Scotland, London/ Edinburgh, 2001) para 1.

¹¹⁵⁶ Ibid.

¹¹⁵⁷ Macgregor, *Agency* (n 224) 12.25; Gloag, *Contract* (n 65) 127; JJH Pearson, "Agency" in ADM Forte (ed), *Scots Commercial Law* (Butterworths, Edinburgh 1997) 272 at 289.

¹¹⁵⁸ Macgregor, *Agency* (n 224) 12.25.

¹¹⁵⁹ *Lockhart v Moodie* 1877 4 R 859.

with a merchant based in Dundee. The company authorised the merchant to purchase yarn from Lockhart for the purposes of the joint venture, and the merchant did so without disclosing that he was working on behalf of the company. It was found that there was an undisclosed agency contract between the company (the principal) and the merchant (the agent). Lockhart, the third party, could sue the company directly when he became aware of the joint venture.

Assuming that the agent has acted within the limits of its authority, the undisclosed principal can “sue or be sued by the third party as if the principal had been bound in a contract with the third party from the outset”¹¹⁶⁰ after the third party is made aware of the principal’s existence. This contrasts with disclosed agency transactions, in which the agent is generally not a party to the contract (although the agent can be liable if the contracting parties so intend).¹¹⁶¹

The liability of both the principal and third party is alternative, not joint-and-several.¹¹⁶² The third party chooses which party to sue by expressly informing the agent and principal of its choice,¹¹⁶³ or the third party’s selection may be inferred from its conduct.¹¹⁶⁴ Lord Young states in *Meier & Co v Küchenmeister*¹¹⁶⁵ that a third party “cannot have two principals to deal with, and no double remedy is allowed”.¹¹⁶⁶ The third party is treated as having chosen between suing the principal and agent only after the principal is disclosed, and must be in possession of the knowledge necessary to make this choice.¹¹⁶⁷ The third party can claim against the principal regardless of

¹¹⁶⁰ Macgregor, *SME* (n 1155) para 147, citing *Hutton v Bulloch* (1874) LR 9 QB 572. See also Macgregor, *Agency* (n 224) 12.34; Bell, *Principles 1889* (n 52) 224A; Smith, *Short Commentary* (n 36) 777; Gloag, *Contract* (n 65) 128 and 133; *Thomson v Davenport* 1829 9 B & C 78; *Bennet v Inveresk Paper Co* 1891 18 R 975.

¹¹⁶¹ Bell, *Principles 1889* (n 52) 224A.

¹¹⁶² Macgregor, *Agency* (n 224) 12.34; Gloag, *Contract* (n 65) 140; Pearson (n 1157) at 289.

¹¹⁶³ Macgregor, *SME* (n 1155) para 155; Macgregor, *Agency* (n 224) 12.34; *Meier & Co v Küchenmeister* (1881) 8 R 642.

¹¹⁶⁴ Macgregor, *Agency* (n 224) 12.40-42.

¹¹⁶⁵ *Meier & Co v Küchenmeister* (1881) 8 R 642.

¹¹⁶⁶ *Ibid.* at 646 per Lord Young.

¹¹⁶⁷ *Stevenson v Campbell* (1836) 14 S 562; *A F Craig & Co v Blackater* 1923 SC 472; Gloag, *Contract* (n 65) 140.

whether the principal has paid the agent.¹¹⁶⁸ Gloag rationalises this on the basis that “if [the principal] chooses to trust his agent, [he] must bear the loss if his trust prove misplaced.”¹¹⁶⁹ Once the third party elects to sue either the principal or the agent, the other is liberated and cannot be sued if the third party changes its mind.¹¹⁷⁰ Following disclosure of the principal, the agent remains capable of suing the third party.¹¹⁷¹

If the principal discloses itself and attempts to make a claim against the third party, it is subject to any defences which the third party could have used against the agent.¹¹⁷² This is because the third party “cannot be deprived of the benefit of the securities which he could fairly contemplate as resulting from the contract.”¹¹⁷³ Further, the third party can, if sued by the principal, claim compensation on any debt owed to it by the agent where the debt was incurred prior to the third party’s notice of the existence of the undisclosed principal.¹¹⁷⁴ Macgregor explains that this rule reflects that the third party was under the impression that its contract was with the agent, and so the entirety of the third party’s claim against the agent must be upheld regardless of the principal’s disclosure.¹¹⁷⁵ This protects the third party from being prejudiced by the disclosure of the principal.¹¹⁷⁶ Similarly, the third party cannot be forced to make a payment to the principal if it has already settled the debt due under the contract with the agent.¹¹⁷⁷ The third party cannot, however,

¹¹⁶⁸ Bell, *Principles 1889* (n 52) 224A.

¹¹⁶⁹ Gloag, *Contract* (n 65) 129-130.

¹¹⁷⁰ Bell, *Principles 1889* (n 52) 224A; Macgregor, *SME* (n 1155) para 147. See also para 152: “If the third party elects to claim against the principal, he or she effectively indicates to the agent that the agent is released from the obligation. Having elected, the third party cannot change his mind and choose instead to claim against the agent.”

¹¹⁷¹ *A F Craig & Co v Blackater* 1923 SC 472; Macgregor, *SME* (n 1155) para 157; Smith, *Short Commentary* (n 36) 777.

¹¹⁷² Macgregor, *Agency* (n 224) 12.46, citing *Bennet v Inveresk Paper Co* (1891) 18 R 975. See also Bell, *Principles 1889* (n 52) 224A.

¹¹⁷³ Bell, *Commentaries* (n 289) I, 527-529. See also I, 537.

¹¹⁷⁴ Macgregor, *Agency* (n 224) 12.46; Bell, *Commentaries* (n 289) I, 527-9 and I, 537; Bell, *Principles 1889* (n 52) 224A; *Gall v Murdoch* (1821) 1 S 77; *Bennet v Inveresk Paper Co* (1891) 18 R 975 at 985 per Lord McLaren; *Wester Moffat Colliery Co Ltd v A Jeffrey & Co* 1911 SC 346.

¹¹⁷⁵ Macgregor, *Agency* (n 224) 12.46.

¹¹⁷⁶ *Ibid.*

¹¹⁷⁷ Macgregor, *SME* (n 1155) para 162; *International Sponge Importers Ltd v Andrew Watt & Sons* 1911 SC (HL) 57.

use defences which the agent has against the principal, or assert compensation on debt owed by the principal to the agent.¹¹⁷⁸

Generally, the undisclosed agent cannot act as such where the contract between the agent and third party provides that the party with whom the third party contracts is not acting for an undisclosed principal.¹¹⁷⁹ Such provision can be express¹¹⁸⁰ or implied.¹¹⁸¹ Further, undisclosed agency cannot operate in respect of contracts where *delectus personae* applies.¹¹⁸²

9.2.2. Development of undisclosed agency in Scots law

Scots law has recognised undisclosed agency from at least the late seventeenth century.¹¹⁸³ Macgregor stresses that English law has influenced the development of the Scots law on undisclosed agency.¹¹⁸⁴ Bell, for example, cites the English case of *Paterson v Gandasequi*¹¹⁸⁵ in his writing on the Scots law of agency.¹¹⁸⁶ Macgregor notes, however, that it is uncertain whether undisclosed agency is a “native development” or wholly sourced from English law.¹¹⁸⁷ There is a dearth of Scottish case law on undisclosed agency, perhaps due to the fact that there is no impetus on the part of the principal to disclose itself when the third party makes a claim against the agent.¹¹⁸⁸

Article 46 of the Council Directive 2006/112/EC on the common system of value added tax applies to “intermediaries” including undisclosed agents,¹¹⁸⁹

¹¹⁷⁸ Macgregor, *Agency* (n 224) 12.46.

¹¹⁷⁹ Macgregor, *SME* (n 1155) para 153.

¹¹⁸⁰ *Ibid.*

¹¹⁸¹ *JA Salton & Co v Clydesdale Bank Ltd* (1898) 1 F 110.

¹¹⁸² Macgregor, *Agency* (n 224) 12.37.

¹¹⁸³ See *Street v Hume and Bruntfield* (1699) Mor. 15122 and *Sterly v Spence* (1687) Mor. 15127. These cases do not expressly use the term ‘undisclosed principal’, but the factual matrixes match the present-day undisclosed agency doctrine. See also CGH Paton (ed), *Baron David Hume’s lectures, 1786-1822* vol II (The Stair Society, Edinburgh, 1939-58) 160.

¹¹⁸⁴ Macgregor, *Agency* (n 224) 12.28.

¹¹⁸⁵ *Paterson v Gandasequi* (1812) 15 East. 62.

¹¹⁸⁶ Bell, *Principles 1889* (n 52) 224A; Bell, *Commentaries* (n 289) I, 537.

¹¹⁸⁷ Macgregor, *Agency* (n 224) 12.26. She cites Smith, *Short Commentary* (n 36) 775, and notes that Smith concludes that the concept of undisclosed agency was likely adopted from England. English law is discussed further below at subsection 9.2.3.

¹¹⁸⁸ Macgregor, *SME* (n 1155) para 160.

¹¹⁸⁹ J Paterson, “International Services” 2014 104(Aug) *VAT Digest* 4 at 23.

and section 47 of the Value Added Tax Act 1994 specifically applies to undisclosed agents. There are no other statutory provisions which recognise the existence of undisclosed agency. The Commercial Agents (Council Directive) Regulations 1993 apply only where the commercial agent acts in the principal's name, on a disclosed basis.¹¹⁹⁰ Consequently, these Regulations do not cover the actions of an undisclosed agent. Macgregor explains that undisclosed agency was omitted because, unlike Scots and English law, continental systems do not distinguish between internal and external agency relationships.¹¹⁹¹

9.2.3. Undisclosed agency in English law

English law has recognised the doctrine of undisclosed agency since at least the eighteenth century.¹¹⁹² It operates as an exception to the general rule in English law that, as in Scots law, agents are not generally bound in agency structures but, rather, only the principal is bound.¹¹⁹³

According to Munday¹¹⁹⁴ and Whittaker,¹¹⁹⁵ factors may have influenced the development of undisclosed agency. The term 'factor' has had various meanings in English law. The 'original' factors, a type of mercantile agent defined under the Factors Act 1889, are "now practically extinct".¹¹⁹⁶ It was, however, the development of the function of these factors which impacted on undisclosed agency. These factors sold goods for owners who did not reside

¹¹⁹⁰ Commercial Agents (Council Directive) Regulations 1993 Regulation 2.

¹¹⁹¹ Macgregor, *SME* (n 1155) para 164.

¹¹⁹² CH Tan, "Undisclosed principals and contract" 2004 120(Jul) *Law Quarterly Review* 480 at 481. See also Whittaker (n 113) at 269; Powell, *Agency* (n 1039) 34; *Scrimshire v Alderton* (1743) 2 Stra. 1192; *Duke of Norfolk v Worthy* (1808) 1 Camp. 227; *Skinner v Stocks* (1821) 4 B & Ald. 437; *Armstrong v Stokes and Others* (1872) LR 598; *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199; *Greer v Downs Supply Co* [1926] All ER Rep. 675.

¹¹⁹³ M Conaglen and R Nolan, "Contracts and knowing receipt: principles and application" 2013 129(Jul) *Law Quarterly Review* 359 at 363; Watts (ed), *Bowstead and Reynolds* (n 1037) 8.071 and 9.012.

¹¹⁹⁴ R Munday, "A Legal History of the Factor" 1977 6(4) *Anglo-American Law Review* 221 at 244.

¹¹⁹⁵ Whittaker (n 113) at 271. See also G Fridman, "Undisclosed Principals and the Sale of Goods" in D Busch, L Macgregor, and P Watts, *Agency Law in Commercial Practice* (Oxford University Press, Oxford, 2016) 70 at 70-71.

¹¹⁹⁶ Munday (n 1194) at 221, at which Munday also explains the difference between these factors and more modern commercial financiers, who sometimes refer to themselves as factors. The function of modern factors is described at 221-222.

at the place of sale,¹¹⁹⁷ usually selling in their own names without disclosing that they were working on behalf of principals.¹¹⁹⁸ In the context of factoring, the use of undisclosed agency structures appears to have arisen due to changes in trading methods which led to greater financial demands on the factor.¹¹⁹⁹ This was recognised in the law by allowing greater flexibility in the factor's authority.¹²⁰⁰ The courts recognised the ability of factors to sell their principals' goods in their own names (i.e. as undisclosed agents), for reasons of commercial convenience on the part of the factors and principals, despite the fact that "persons with whom goods were pledged by a factor might suffer great hardship when it subsequently emerged that he was not the true owner of the goods."¹²⁰¹ The development of undisclosed agency in this context was thus a response to greater demands on the factor which resulted in the law allowing greater flexibility in its and the principal's powers.

In accordance with Lord Lloyd's summary of the relevant English law in *Siu Yin Kwan v Eastern Insurance Co Ltd*,¹²⁰² both the undisclosed principal and agent acting within the scope of its actual authority can sue and be sued on the contract.¹²⁰³ As in Scots law, the third party can only be treated as having chosen to sue the agent or principal after the latter's disclosure.¹²⁰⁴ The third party does not have a duty to ascertain whether the agent is acting as such.¹²⁰⁵ This also correlates with Scots law. Undisclosed agency cannot

¹¹⁹⁷ Munday (n 1194) at 244.

¹¹⁹⁸ *Baring v Corrie* (1818) 106 ER 317 at 320 per Abbott CJ.

¹¹⁹⁹ Munday (n 1194) at 243.

¹²⁰⁰ *Ibid.*

¹²⁰¹ *Ibid.* at 244. See also *Baring v Corie* (1818) 106 ER 317; *Montagu v Forwood* [1893] 2 QB 350.

¹²⁰² *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199.

¹²⁰³ *Ibid.* at 207 per Lord Lloyd. See further T Krebs, "Some Thoughts on Undisclosed Agency" in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart Publishing, Oxford, 2014) 161 at 165; Powell, *Agency* (n 1039) 27; R Munday, *Agency: Law and Principles* (Oxford University Press, Oxford, 3rd edn, 2016) 10.27.

¹²⁰⁴ *Kendall v Hamilton* 1849 4 App. Cas. 504 at 542 per Lord Blackburn; *Muldoon v Wood* [1998] EWCA Civ. 588 per Sir John Knox; Munday, *Agency* (n 1203) 10.28.

¹²⁰⁵ Powell, *Agency* (n 1039) 176. See also *Greer v Downs Supply Co* [1926] All ER Rep. 675.

operate in personal contracts.¹²⁰⁶ Additionally, *Said v Butt*¹²⁰⁷ provides that an undisclosed principal may not sue the third party where the identity of the contracting party was a material factor in the formation of the contract between the agent and third party.¹²⁰⁸ Undisclosed agency can, as in Scots law, be excluded by express or implied contractual provision.¹²⁰⁹

The third party has a wider range of defences available when sued by the principal in English law than in Scots law. It can use any defences against the principal which it would have had if the principal had formed the contract.¹²¹⁰ Macgregor notes that the contrast between Scots and English law can be explained by the fact that, in English law, the initial contract in the undisclosed agency transaction is between the principal and third party, despite it being made by the agent.¹²¹¹ Like Scots law, however, the principal may not use the defences which it has against the agent in a claim against the third party,¹²¹² nor can it apply set-off to a debt owed by the agent in respect of the third party.¹²¹³ The principal can however use the agent's non-personal defences against the third party.¹²¹⁴ The liability of the agent and principal is, as in Scots law, alternative rather than joint-and-several.¹²¹⁵

¹²⁰⁶ Munday, *Agency* (n 1203) 10.50; citing *Barrett v Universal-Island Records Ltd* [2006] EMLR 21 at para 233 per Lewison J.

¹²⁰⁷ *Said v Butt* [1920] 3 KB 497.

¹²⁰⁸ The case is discussed further below at subsection 9.4.4. See also *Rolls-Royce Power Engineering v Ricardo* [2004] 2 All ER (Comm.) 129 at paras 50 and 56 per Judge Richard Seymour QC; *Collins v Associated Greyhound Racecourses Limited* [1930] 1 Ch. 1 at 18 per Luxmoore J; *Teheran-Europe Co. Ltd. v ST Belton (Tractors) Ltd.* [1968] 2 QB 545 at 555 per Lord Diplock; Unnamed author, "Agency, 'No Loss' and Legal Black Holes" 2004 21(7) *Building Law Monthly* 1 at 2-3; H Bennett, *Principles of the Law of Agency* (Hart Publishing, Oxford, 2013). Macgregor notes the lack of Scots authority on this point: Macgregor, *Agency* (n 224) 12.38.

¹²⁰⁹ *Mutual Steamship Assurance Association v Nevill* 19 (1887) QBD 110; *JA Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 516 per Lord Oliver of Aylmerton; Munday, *Agency* (n 1203) 10.39-48.

¹²¹⁰ Watts (ed), *Bowstead and Reynolds* (n 1037) 8.099; Powell, *Agency* (n 1039) 175; Munday, *Agency* (n 1203) 10.65.

¹²¹¹ Macgregor, *Agency* (n 224) 12.46. The question of whether it can be said that the contracting parties are the principal and agent at the point of conclusion of the contract is discussed further below at subsection 9.3.1.

¹²¹² *Waring v Favenck* (1807) 1 Camp. 85; *Kymer v Suwercropp* (1807) 1 Camp 109.

¹²¹³ Macgregor, *Agency* (n 224) 12.46.

¹²¹⁴ Powell, *Agency* (n 1039) 173.

¹²¹⁵ *Morel v Earl of Westmoreland* [1904] AC 11 at 14 per Lord Chancellor Halsbury.

Although undisclosed agency does not appear to have been judicially discussed before the eighteenth century,¹²¹⁶ Lord Mansfield comments in *Rabone v Williams*¹²¹⁷ that the rules on the doctrine “are long settled”.¹²¹⁸ Ames remarks that undisclosed agency is “so firmly established” in England that it would be “quixotic to attack it in the courts.”¹²¹⁹

9.2.4. Classification of undisclosed agency

Whilst the general attitude towards the law on undisclosed agency in England is “liberal”,¹²²⁰ it is viewed as “an anomaly... out of harmony with basic legal principles.”¹²²¹ Tettenborn describes it as “tricky and unpredictable... embodying as it does a volatile cocktail of legal anomaly and commercial expediency.”¹²²² Commentators have attempted to explain undisclosed agency in terms of third party rights, assignation, trust, and equity.¹²²³ These attempts have been unsuccessful. Undisclosed agency cannot be treated as a form of assignation because the principal does not, at the point of its disclosure or otherwise, become the agent’s assignee. An assignor cannot be sued on a contract once it has been validly assigned, whereas the third

¹²¹⁶ Müller-Freienfels (n 206) at 302; R Powell, “Contractual Agency in Roman Law and English Law” 1956 *South African Law Review* 41 at 49. See also above subsection 9.2.2.

¹²¹⁷ *Rabone v Williams* (1785) 7 TR 360.

¹²¹⁸ *Ibid.* per Lord Mansfield.

¹²¹⁹ JB Ames, “The Undisclosed Principal – His Rights and Liabilities” 1909 18(7) *Yale Law Journal* 443 at 443. See also Powell, *Agency* (n 1039) 152.

¹²²⁰ KCF Loi, “Quistclose trusts and Romalpa clauses: substance and nemo dat in corporate insolvency” 2012 128(Jul) *Law Quarterly Review* 412 at 437.

¹²²¹ Müller-Freienfels (n 206) at 299. See also Lord Lindley and Lord Davey’s speeches in *Keighley, Maxstead & Co v Durant* [1901] AC 240; and *Durant v Roberts* [1901] 1 QB 629 at 635 per Smith LJ.

¹²²² A Tettenborn, “Insurers and Undisclosed Agency—Rough Justice and Commercial Expediency” 1994 53(2) *Cambridge Law Journal* 223 at 223. See also Smith, *Short Commentary* (n 36) 777; R Barnett, “Squaring Undisclosed Agency Law with Contract Theory” 1987 75(6) *California Law Review* 1969 at 1970; DJ Hill, “Some Problems of the Undisclosed Principal” 1967 *Journal of Business Law* 122 at 124; Ames (n 1219) at 443. Lord Lindley noted at 261 in *Keighley, Maxsted & Co v Durant* [1901] AC 240 that “there is an anomaly in holding one person bound to another of whom he knows nothing and with whom he did not intend to contract.”

¹²²³ See generally Ames (n 1219); A Lang, “Unexpected Contracts versus Unexpected Remedies: The Conceptual Basis of the Undisclosed Principal Doctrine” 2012 18 *Auckland University Law Review* 114 at 120-123. Goodhart and Hamsom claimed that undisclosed agency could be explained in terms of assignment, and was therefore compatible with privity, in AL Goodhart and CJ Hamson, “Undisclosed Principals in Contract” 1932 4(3) *Cambridge Law Journal* 320 at 378. However, this analysis was ruled out by Tan (n 1192) at 496 (see also *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199).

party in an undisclosed agency transaction can (at the point of disclosure) elect to sue either the principal or agent.¹²²⁴ An explanation in terms of third party rights, such that the principal is the recipient of a third party right under the contract between the agent and third party, is also unsound. The formation of a third party right requires that both contracting parties intend to benefit the third party,¹²²⁵ and it cannot be said that the third party intends to confer an enforceable benefit on the principal.¹²²⁶ In light of the lack of coherent doctrinal classification for undisclosed agency, the doctrine can likely be classified as a *sui generis* obligation.¹²²⁷

9.3. Compatibility of undisclosed agency with Scots law

This section considers the interaction between undisclosed agency and privity, contract theory, and delict.

9.3.1. Compatibility of undisclosed agency with the privity doctrine

There is no potential conflict with the privity doctrine in the internal relationship of undisclosed agency, i.e., the contract between the principal and agent. This relationship is established by the principal and agent, and the agency contract itself, in the sense of the mutual rights and obligations of agent and principal, has no bearing on any third parties.¹²²⁸ The ‘privity problem’ lies in the external aspect: whether the contract is between the third party and undisclosed principal, or third party and agent.

In terms of the external relationship, between the principal and third party, various commentators have suggested that undisclosed agency does not operate as an exception to the privity doctrine.¹²²⁹ However, it is accepted by others that undisclosed agency is an exception to privity. Macgregor states

¹²²⁴ Macgregor, *Agency* (n 224) 12.29.

¹²²⁵ See subsections 3.2.2.1.-2.

¹²²⁶ Macgregor, *Agency* (n 224) 12.29. The relevance of the third party’s (lack of) intention to benefit the principal is discussed further below at subsection 9.3.2.

¹²²⁷ Macgregor, *Agency* (n 224) 12.29, citing Smith, *Short Commentary* (n 36) 777.

¹²²⁸ Lang (n 1223) at 117; *Garnac Grain Co. Inc. v H.M.F. Faure & Fairclough Ltd.* [1968] AC 1130 at 1137 per Lord Pearson; section 3.3.1.

¹²²⁹ Müller-Freienfels (n 206) at 300; CH Tan, “Undisclosed agency and damages” 2013 8 *Journal of Business Law* 799 at 816.

that the fact that the “concept should be developed in English law is particularly surprising” in light of the traditionally strict approach to privity.¹²³⁰ She further comments that it is:

“contrary to the central role of consent in contract that the third party may find that he has contractual rights and duties in a contract with a stranger. Normally, privity of contract dictates that individuals, through agreement, cannot affect third parties.”¹²³¹

Similarly, Whittaker stresses that undisclosed agency is a “clear exception at common law to both aspects of privity of contract”,¹²³² and Merkin comments that the doctrine of undisclosed agency is “[p]erhaps the greatest challenge to privity from the rules of agency”.¹²³³

Lang recognises two principal theories of undisclosed agency.¹²³⁴ According to the intervention thesis, the parties to the contract formed by the agent with the third party are the agent and third party. In contrast, the direct contract thesis purports that the true contracting parties are the third party and principal. Barnett claims that the difference between the two is merely academic.¹²³⁵ Lang disagrees, arguing that the failure of the judiciary and contract theorists in distinguishing between the two has prevented the clear and consistent application of the undisclosed principal doctrine.¹²³⁶ Lang’s view appears more logical, because the question of whom the third party contracts with determines matters such as the party against whom it should bring a claim if the principal refuses to perform under the contract.

Regardless, however, of the practical consequences of the appropriate categorisation of the concept, the distinction has great bearing on whether undisclosed agency is compatible with the privity doctrine. If the contract is between the undisclosed principal and third party from the point at which the

¹²³⁰ Macgregor, *Agency* (n 224) 12.29. See also Burrows, *Restatement* (n 33) §48.

¹²³¹ Macgregor, *SME* (n 1155) para 148.

¹²³² Whittaker (n 113) at 269. See also Müller-Freienfels (n 206) at 301.

¹²³³ Merkin (n 195) at 2.33. He writes that: “if the law is not prepared to grant rights to third parties, it seems inconsistent to allow a third party to jump in and assert that he was always the intended beneficiary of the contract.”

¹²³⁴ Lang (n 1223) at 115.

¹²³⁵ Barnett (n 1222) at 1983

¹²³⁶ Lang (n 1223) at 115.

contract is concluded, then there is no breach of privity. If, however, the contract is between the third party and the agent, and the principal can benefit from this contract by suing the third party, undisclosed agency breaches the privity doctrine.

The intervention thesis and the direct contract thesis are considered in turn in the remainder of this subsection, in order to ascertain which is the more persuasive theory of undisclosed agency. This finding is then applied to the question of whether undisclosed agency contravenes privity.

9.3.1.1. The direct contract thesis

The direct contract thesis is supported in academic commentary. Müller-Freienfels argues that the doctrine of undisclosed agency may be compatible with privity because the undisclosed principal is not truly in the position of a stranger to the contract, because it receives the benefits and burdens of the contract.¹²³⁷ Similarly, Lord Lindley asserts that a contract between an undisclosed agent and third party is “in truth, although not in form, that of the undisclosed principal himself.”¹²³⁸ Goodhart and Hamson comment that the undisclosed principal has privity of contract because it can sue and be sued.¹²³⁹ The logical fallacy in this is that the undisclosed principal receives the benefits and burdens *because* of the doctrine of undisclosed agency. These statements simply point out that the principal is benefited and burdened by the contract. They do not explain why the principal is the true contracting party. Further, these statements alone do not adequately exclude the possibility that the contracting parties are the third party and agent, and that the principal can sue and be sued despite this.

A more vociferous proponent of the direct contract thesis is Tan.¹²⁴⁰ His position is that the general rule of damages (that one can sue only for one’s

¹²³⁷ Müller-Freienfels (n 206) at 300.

¹²³⁸ *Keighley v Durant* [1901] AC 240 at 261 per Lord Lindley. See also Ames (n 1219) at 447.

¹²³⁹ Goodhart and Hamson (n 1223) at 352

¹²⁴⁰ Tan (n 1229). Tan arrived at the opposite conclusion in an earlier article: Tan (n 1192) at 509. This chapter focuses on his more recent work on the assumption that this represents his current views.

own loss¹²⁴¹) is not violated by undisclosed agency, because the agent does not recover its own loss, but instead recovers on the principal's behalf.¹²⁴² The agent's right to claim against the third party is "implicit in the relationship between the undisclosed principal, the agent, and the third party."¹²⁴³ He acknowledges that the agent always contracts in a personal capacity, because the third party is unaware of the existence of the principal,¹²⁴⁴ but argues that the agent intends at all times to conclude the contract for the principal, and does so only on the principal's authority.¹²⁴⁵ Tan argues that, when the principal is revealed, the third party should be viewed as having contracted directly with the principal, rather than with the agent.¹²⁴⁶ This, he submits, avoids doctrinal inconsistency with the principles of disclosed agency, and recognises that the agent is subordinate to the principal.¹²⁴⁷ Tan suggests that the fact that the contract is between the undisclosed principal and third party is recognised judicially.¹²⁴⁸ He also cites in his favour Diplock LJ's statement that:

"Although the agent is entitled to enforce the contract in his own name, at least until the principal intervenes, he nevertheless does so on behalf of the principal and is accountable to the principal for the fruits of the action."¹²⁴⁹

Lang, disagreeing with Tan, claims that the third party's ability to choose whether to sue the agent or principal "significantly minimises the anomalous consequences of the undisclosed principal doctrine against the rules of agency law".¹²⁵⁰ She points out that offering the third party the choice to sue

¹²⁴¹ See discussion on this rule in subsection 6.3.2.

¹²⁴² Tan (n 1229) at 800.

¹²⁴³ *Ibid.*

¹²⁴⁴ *Ibid.* at 801.

¹²⁴⁵ *Ibid.* at 801-2.

¹²⁴⁶ *Ibid.* at 802. Tan also discounts the possibility that the third party concluded two contracts – one with the agent, and one with the principal.

¹²⁴⁷ *Ibid.*

¹²⁴⁸ *Ibid.* citing *Keighley, Maxsted & Co v Durant* [1901] AC 240 at 261 per Lord Robertson. See also *Gardiner v Heading* [1928] 2 KB 284 at 290 per Scrutton LJ and *Said v Butt* [1920] 3 KB 497 at 503 per McCardie J.

¹²⁴⁹ *Garnac Grain Co Inc v H M F Faure & Fairclough Ltd* [1966] 1 QB 650 at 685 per Diplock LJ. See also *AF Craig & Co v Blackater* 1923 SLT 472; *James Laidlaw & Sons v Griffin* 1968 SLT 278; *Corfield v Grant* (1992) 29 Con. LR 58.

¹²⁵⁰ Lang (n 1223) at 118. In other words, this rule protects the third party, rather than reflecting which party is the 'true' party to the contract.

either the agent or the principal does not make the contract any less that of the agent than the principal.¹²⁵¹ It is submitted that Lang is correct. The fact that the agent was engaged by the principal does not automatically mean that contracts concluded between the agent and the third party must be those of the principal - this ignores the perspective of the third party. The agent and the principal's alternative liability, at the choice of the third party, indicates that either can be treated as full contracting parties, depending on the third party's choice of contracting partner. In other words, the agent's rights and liabilities continue following disclosure of the principal, and this clearly demonstrates that the agent is a party to the contract with the third party.

Further, Lang also notes that there can only be an objective manifestation of intention to enter into a contract on the part of the agent and third party.¹²⁵² Krebs indicates that he views undisclosed agency as "a glaring exception to privity" because it cannot realistically be said that the principal and third party objectively intend to be contractually bound.¹²⁵³ These commentators are correct: the third party cannot realistically be said to intend to contract with a person of whom it is not aware. The implications of the third party's intention to contract with the agent, rather than the undisclosed principal, are further discussed below.¹²⁵⁴ However, the third party's contractual intentions further demonstrate that the contracting parties (at least at the point at which the contract is concluded) are the third party and agent.

In summary, the direct contract thesis does not explain the third party's lack of intention to contract with the principal or reflect the fact that the third party is able to sue the agent following the principal's disclosure. It is not therefore a logical view of undisclosed agency.

¹²⁵¹ Lang (n 1223) at 118.

¹²⁵² Ibid.

¹²⁵³ Krebs (n 1203) at 161. See also *Armstrong v Stokes and Others* (1872) LR 598 per Blackburn J. At 604, he comments that his doubts as to whether an undisclosed principal should be liable to the third party were too late, because the doctrine of undisclosed agency was already well-settled. See also Müller-Freienfels (n 206) at 301; Macgregor, *Agency* (n 224) 12.29.

¹²⁵⁴ See subsection 9.3.2.

9.3.1.2. The intervention thesis

Lang argues that the rules governing the operation of undisclosed agency reflect the intervention thesis. For example, she notes that the fact that the third party may use any defences against the principal that it has against the agent is the logical consequence of the contract being concluded by the agent.¹²⁵⁵ Further, the most recent edition of *Bowstead and Reynolds on Agency* suggests that it “is difficult to deny that the undisclosed principal is really a third party intervening on a contract which he did not make.”¹²⁵⁶

The intervention thesis also accounts for the fact that, from the third party’s perspective, it intends to contract with the agent only. At the point at which the contract is concluded, it cannot be said that there is an objective contract between the principal and the third party. The principal should therefore be viewed as a third party to contracts concluded by the agent.¹²⁵⁷ It is accepted that the agent will at all times intend to contract for the principal, and, if it sues the third party, it does so in order to return the proceeds of the claim to the principal. However, the third party’s perspective is of equal relevance and, in accordance with the intervention thesis, the agent must be viewed as the party who concluded the contract with the third party.

Confusingly, Lang states that undisclosed agency requires that the agent is able to “create privity” between the principal and third party without disclosing to the third party that it is doing so.¹²⁵⁸ However, she also comments that it is not clear whether privity ought to exist between the principal and third party as a result of the agent’s actions, noting that privity in this context could arise without, or contrary to, the intention of the third party.¹²⁵⁹ Essentially, she acknowledges that allowing the principal to sue “means that privity of contract and certainty of parties cede to commercial convenience.”¹²⁶⁰ The intervention thesis leads to the conclusion that there is no privity between

¹²⁵⁵ Lang (n 1223) at 132.

¹²⁵⁶ Watts (ed), *Bowstead and Reynolds* (n 1037) 8.071.

¹²⁵⁷ Report on *Privity of contract* (n 182) 2.15.

¹²⁵⁸ Lang (n 1223) at 119.

¹²⁵⁹ *Ibid.*

¹²⁶⁰ *Ibid.*

principal and third party until the principal's existence is known to the third party.¹²⁶¹ As such, Lang's comments regarding the creation of privity between the principal and third party are perhaps a minor misuse of the term 'privity'.

9.3.1.3. Summary

The justifications for the direct contract thesis are insufficient, whereas the intervention thesis is logically coherent. It is submitted that the intervention thesis is therefore an accurate account of undisclosed agency. This means that the contracting parties to the contract between the agent and third party are the agent and third party. The principal can sue and be sued under this contract, and so undisclosed agency operates as an exception to privity.

It is acknowledged that there is a limited body of commentary supporting the view that the agent creates privity between the principal and the third party from the outset.¹²⁶² However, this analysis can be swiftly ruled out as a means of explaining undisclosed agency's compatibility with the privity doctrine. This is because the third party clearly does not consent to the creation of privity (i.e. the creation of a contractual relationship) between itself and the undisclosed principal, and privity operates subject to the intentions of the contracting parties.¹²⁶³

9.3.2. Compatibility of undisclosed agency with contract theory

As discussed above, it cannot be said that the third party intends to contract with the principal.¹²⁶⁴ This subsection explores the implications of this for the compatibility of undisclosed agency with contract theory.

Müller-Freienfels notes that:

¹²⁶¹ Lang (n 1223) at 119.

¹²⁶² Munday (n 1194); Goodhart and Hamson (n 1223). See also discussion in S Todd, "Privity and Agency" in J Burrows, J Finn, and S Todd, *Law of Contract in New Zealand* (5th edn, LexisNexis NZ Limited, Wellington, 2016) 591 at 608.

¹²⁶³ See subsection 3.3.1.1.

¹²⁶⁴ See subsection 9.3.1.

“[u]ndoubtedly no theory of contract based on the liberal idea of mutual assent can explain how the third party can make a contract with a person whose existence he does not even know.”¹²⁶⁵

He explains that undisclosed agency’s lack of coherence with contract theory is due to the fact that the doctrine developed before the current dominant theories of contract.¹²⁶⁶ Reynolds similarly comments that the doctrine is “anomalous, in that a person intervenes on a contract who was not at the time of contracting in the contemplation of one of the parties at all”.¹²⁶⁷ Lang,¹²⁶⁸ Tan,¹²⁶⁹ Merkin,¹²⁷⁰ and Lord Blackburn¹²⁷¹ take a similar view. Krebs further comments that undisclosed agency “has nothing to do with consent.”¹²⁷² Macgregor writes that it is not possible to base the concept on third party rights, because the *jus quaesitum tertio* rests on the intention of the contracting parties, and the agent and third party cannot be said to expressly or impliedly intend for the principal to acquire a right to enforce the contract.¹²⁷³ She writes that the claim that the contract is “formed from the outset between principal and third party strains the principle of consent in contract to an unacceptable degree.”¹²⁷⁴ Even if the undisclosed principal only becomes a full contracting party upon disclosure, the third party cannot be viewed as consenting to the contract with the principal at this point, because it has no advance warning of this. As such, consent on the part of the third party can at best only be artificially implied. Gloag states that the question of whether an individual has the right to enforce a contract, or a term of a contract, is determined by the intention of the contracting parties, other than one “special case.”¹²⁷⁵ The ‘special case’ is undisclosed

¹²⁶⁵ Müller-Freienfels (n 206) at 301.

¹²⁶⁶ *Ibid.*

¹²⁶⁷ FMB Reynolds, “Agency: Theory and Practice” 1978 94(Apr) *Law Quarterly Review* 224 at 225.

¹²⁶⁸ Lang (n 1223) at 119.

¹²⁶⁹ Tan (n 1229) at 799; Tan (n 1192) at 481.

¹²⁷⁰ Merkin (n 195) at 2.1.

¹²⁷¹ *Armstrong v Stokes and Others* (1872) LR 598 at 603-604 per Lord Blackburn.

¹²⁷² Krebs (n 1203) at 180. See also 161 and 169.

¹²⁷³ Macgregor, *Agency* (n 224) 12.29. See also Müller-Freienfels (n 206) at 308 and Whittaker (n 113) at 270-271.

¹²⁷⁴ Macgregor, *SME* (n 1155) para 149. See also Macgregor, *Agency* (n 224) 12.29.

¹²⁷⁵ Gloag, *Contract* (n 65) 218.

agency.¹²⁷⁶ These statements lead to the conclusion that undisclosed agency is not compatible with will theory, because the third party clearly does not intend to benefit the principal in its contract with the agent, and it does not intend for the principal to accrue an enforceable contractual benefit under this contract.

It is potentially arguable that undisclosed agency is compatible with will theory if it is accepted that the third party consents to the risk that the person with whom it contracts is acting for an undisclosed principal.¹²⁷⁷ Barnett argues that undisclosed agency is in fact best explained in terms of will theory. He suggests that whilst the third party does not actively consent to contract with a particular undisclosed principal, it accepts the risk that anyone with whom it might deal may be an agent acting for another.¹²⁷⁸ There is no difference, he asserts, between this situation and circumstances in which a buyer has exclusive knowledge of the resale value of a particular item.¹²⁷⁹ As such, undisclosed agency does not “undermine the moral significance of consent.”¹²⁸⁰ This view is also reflected in a number of English cases.¹²⁸¹

These comments are to some extent convincing. The third party may not consent to contracting with the undisclosed principal in question, but it could be viewed as impliedly consenting to contract with any undisclosed principal. This is because, in an ordinary commercial contract, it runs the risk of doing so if this is not excluded in the contract with the agent. However, this appears to misuse the concept of contractual consent, especially in cases where the third party would have negotiated differently had it been aware of the identity

¹²⁷⁶ Gloag, *Contract* (n 65) 219.

¹²⁷⁷ This would apply subject to the restrictions on the operation of undisclosed agency discussed above at subsections 9.2.1. and 9.2.3. See also Tan (n 1192) at 486.

¹²⁷⁸ Barnett (n 1222) at 1989-1991.

¹²⁷⁹ *Ibid.* at 1991.

¹²⁸⁰ *Ibid.* at 1991-1992. See also Tettenborn (n 1222) at 224-225.

¹²⁸¹ It was said, for example, in *Talbot Underwriting Ltd v Nausch, Hogan & Murray Inc* [2006] EWCA Civ. 889 at para 27 per Moore-Bick LJ that: “The mere identification, whether by name or description, of certain persons as assureds cannot be sufficient of itself to demonstrate an unwillingness on the part of the insurer to contract with any other person.” See also *Teheran-Europe Co. Ltd. v ST Belton (Tractors) Ltd.* [1968] 2 QB 545 at 555 per Lord Diplock.

of the undisclosed principal.¹²⁸² The contract cannot truly be said to be for the benefit of the undisclosed principal because the third party's consent and intention to benefit the principal does not exist. Regarding Barnett's comparison with situations in which a buyer has knowledge of the resale value of an item which the seller does not, the parties to a sales transaction will be fully aware that they are operating in a competitive economy which does not (generally) require disclosure of the seller's intended purpose and profits from the transaction. Parties to sales transactions run the risk that they will make a bad bargain, and they have full knowledge of this. However, they will generally assume that the person with whom they deal is in fact the person with whom they are entering into a contractual agreement. Consequently, in line with the commentary discussed immediately above, it appears that undisclosed agency cannot be explained by the will theory in Scots or English law.

It is also noted that undisclosed agency cannot be justified by analogy with assignation. Glog notes that where A and B contract, and the contract is assignable, A can become liable to B's assignee with whom it has not contracted, and this is justified on the basis that by entering into an assignable contract, A undertakes to be bound to an assignee if and when the contract is assigned.¹²⁸³ Similarly, undisclosed agency may involve the implied acceptance of the risk of contracting with an undisclosed agent. However, a contract which is assigned does not initially involve the limitation of a party's ability to fully exercise its contractual intention simply on the grounds of commercial convenience on the part of another party.¹²⁸⁴ If the agent was bound to reveal that it was acting as such, this would allow the third party to decide whether it wished to enter into the contract without knowing the identity of its contractual partner. Undisclosed agency, however, denies this choice, and is not therefore compatible with consensual theories of contract law.

¹²⁸² Such cases are discussed further below in subsection 9.4.1. and 9.4.4.

¹²⁸³ Glog, *Contract* (n 65) 257.

¹²⁸⁴ The rules of assignation are discussed at subsection 5.5.1.1.

In terms of promissory theory, there is a limited body of commentary which argues that undisclosed agency is compatible with the privity doctrine because undisclosed agency enforces promises made by one party to another. Müller-Freienfels comments, for example, that the undisclosed principal should be bound to perform to the third party, because it authorised the agent to bind it by promise to the third party.¹²⁸⁵ This is logical, and compatible with promissory theory – allowing the third party to sue the principal upholds the principal’s promise to fulfil contracts concluded by the agent. It is less clear, however, that the third party can be said to have made a promise in favour of the principal. In *Smith & Snipes Hall Farm Ltd v River Douglas Catchment Board*,¹²⁸⁶ Lord Denning states that the privity ought not to overcome the principle that:

“a man who makes a deliberate promise which is intended to be binding, that is to say under seal or for good consideration, must keep his promise; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it; subject always, of course, to any defences that may be open on the merits. It is upon this principle, implicit if not expressed ... that Lord Mansfield held [in *Rabone v Williams*¹²⁸⁷] that an undisclosed principal is entitled to sue on a contract made by his agent for his benefit, even though nothing was said about agency in the contract.”¹²⁸⁸

Undisclosed agency could, according to this statement, be justified as an exception to privity on the grounds that it gives effects to the intentions of the contracting parties by enforcing the promise made by the third party to the principal. However, this does not counter the argument that the third party does not intend to be bound to perform in favour of the undisclosed principal. The third party cannot therefore be said to have voluntarily promised to perform in favour of the principal. The third party can only be said to have promised to uphold its obligations in respect of the agent.

¹²⁸⁵ Müller-Freienfels (n 206) at 307.

¹²⁸⁶ *Smith and Snipes Hall Farm LD v River Douglas Catchment Board* [1949] 2 KB 500.

¹²⁸⁷ *Rabone v Williams* (1785) 7 TR 360 per Lord Mansfield.

¹²⁸⁸ *Smith and Snipes Hall Farm LD v River Douglas Catchment Board* [1949] 2 KB 500 at 514-515 per Lord Denning.

Undisclosed agency is also incompatible with assumption theory. It is unrealistic to argue that the third party voluntarily assumes liability in respect of the undisclosed principal, because it was unaware of the principal's existence until the point of disclosure. The third party has not intentionally assumed any liability in respect of the undisclosed principal.

In summary, undisclosed agency is incompatible with will theory, promissory theory, and assumption theory.

9.3.3. Compatibility of undisclosed agency with delict

An explanation of undisclosed agency in terms of delictual liability would depend on the imposition of a duty of care on the part of the third party in respect of the undisclosed principal. In other words, the third party would be liable to the principal in respect of loss stemming from its failure to fulfil the obligations entered into in the contract concluded with the agent. It is not immediately obvious why this should be the case because there is, in Scots law, no delictual duty of care to fulfil contractual obligations entered into with undisclosed principals. The undisclosed principal and third party are subject to contractual obligations to one another based on the contract made between the agent and third party, and the liability of the third party ought therefore to be contractual. Further, it would be illogical to require undisclosed principals to sue the third party in delict whilst their agents are able to sue in contract. The scope of their respective claims would be different. For example, the principal would need to prove fault on the part of the third party to make a delictual claim, whereas this would not be necessary for the agent's contractual claim.¹²⁸⁹

Regarding *Hedley Byrne* liability,¹²⁹⁰ the operation of this form of liability requires that the relevant party has a specific individual in mind, in that it must know the identity of the person on whom the loss will fall.¹²⁹¹ In the case of undisclosed agency, the third party for obvious reasons be unaware of the

¹²⁸⁹ Hogg, *Obligations* (n 433) 3.66.

¹²⁹⁰ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

¹²⁹¹ See above at subsection 4.2.3.1.

identity of the undisclosed principal. Indeed, it was confirmed in the recent Supreme Court case of *Banca Nazionale del Lavoro SPA v Playboy Club London Limited*¹²⁹² that an undisclosed agent could not rely on a credit reference supplied by a bank which was addressed to the agent's principal. Lord Sumption distinguished the case at hand from *Hedley Byrne*¹²⁹³ on the grounds that the bank could not have known that the reference would be relied on by any party other than the principal, whereas in *Hedley Byrne*¹²⁹⁴ it was known that the statement would be relied on by an unidentified client on whose behalf the statement was requested.¹²⁹⁵ *Hedley Byrne* liability cannot therefore apply.

In chapter 7,¹²⁹⁶ it was submitted that *Junior Books* liability¹²⁹⁷ could potentially be imposed in transferred loss situations if that form of liability was extended to allow for recovery where the contracting party was not aware of the specific third party. This would be justified on the basis that the contracting party responsible for the breach could reasonably foresee that the loss may be transferred to another. This could not, however, apply in the context of undisclosed agency. The third party in such cases has been led to believe that it has contracted with the agent, and has no reason to consider otherwise. Finding such 'contemplation' on the part of the third party would be entirely artificial. Even if the third party was specifically asked to consider the scope of those who may be affected by its defective performance of the contract, it would name only the agent.

The application of *Henderson v Merrett*¹²⁹⁸ or *White v Jones*¹²⁹⁹ liability to undisclosed agency cases is also unsatisfactory. In terms of the former, this form of liability requires that the person claiming damages has relied on an undertaking on the part of the person who caused the loss. The principal can

¹²⁹² *Banca Nazionale del Lavoro SPA v Playboy Club London Limited* [2018] UKSC 43.

¹²⁹³ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

¹²⁹⁴ *Ibid.*

¹²⁹⁵ *Banca Nazionale del Lavoro SPA v Playboy Club London Limited* [2018] UKSC 43 at para 10 per Lord Sumption.

¹²⁹⁶ See subsection 7.3.3.

¹²⁹⁷ *Junior Books* liability is discussed in subsection 4.3.1.

¹²⁹⁸ A description of this form of liability is provided in subsection 4.2.3.3.

¹²⁹⁹ *White v Jones* liability is defined at subsection 4.2.3.4.

indeed be said to have relied on the third party's undertaking to perform under the contract concluded with the agent. However, *Henderson v Merrett* liability also requires an assumption of responsibility on the part of the person who owes the duty of care in respect of the person who has suffered a loss. There is no such assumption of responsibility on the part of the third party in respect of the undisclosed principal, because the third party was not aware of the principal's existence. As such, the third party cannot realistically be said to have assumed responsibility for the principal. It may be suggested that the third party can be deemed to have assumed responsibility for any undisclosed principals with whom it may contract. However, the assumption of responsibility must be actually undertaken, not deemed to be undertaken.¹³⁰⁰ This means that *Henderson v Merrett* liability cannot be imposed in undisclosed agency transactions.

In terms of *White v Jones* liability, it is arguable that, in undisclosed agency cases, the agent contracts with the intention of creating a benefit in favour of the principal, just as the testator contracts with the aim of securing the conferral of an inheritance upon the intended legatee in disappointed beneficiary cases. However, the third party in the context of undisclosed agency does not, unlike the careless solicitors, have any knowledge of this purpose of the contract. Imposing *White v Jones* liability in such cases forces the third party to uphold and protect the interests of parties of which it had no knowledge at the time of formation of contract. An analysis of undisclosed agency based on this form of liability is therefore unsuitable.

It is not, therefore, possible to explain undisclosed agency in terms of delictual liability.

9.4. Policy considerations justifying undisclosed agency

This section first provides an overview of relevant commentary on undisclosed agency to identify the key arguments raised in justification of the existence of the doctrine. These justifications are assessed to determine

¹³⁰⁰ *Her Majesty's Commissioners of Customs and Excise v Barclays Bank Plc* [2006] UKHL 28.

whether they do in fact offer sound policy considerations in support of undisclosed agency. The section then examines whether the policy considerations supporting statutory exceptions to privity can be applied to undisclosed agency.

Policy considerations in favour of recognising undisclosed agency which have not been considered in commentary are also presented in this section. These arguments highlight a narrow set of circumstances in which undisclosed agency can be supported by valid policy considerations. The final part of this section considers policy arguments against the recognition of undisclosed agency.

9.4.1. Justifications offered in commentary

Whilst the doctrine of undisclosed agency developed due to concerns regarding the insolvency of intermediaries acting in their own names on behalf others, it is said to be “useful, and commercially convenient” in other contexts.¹³⁰¹ Commentary on undisclosed agency generally casts the concept in a positive light. It is said that the law represents:

“a compromise between the commercial convenience of allowing an undisclosed principal to intervene in a contract made by an undisclosed agent, and the interest of the third party not to be prejudiced in any way by such intervention.”¹³⁰²

This subsection examines whether the reasons why undisclosed agency is said to be commercially convenient are in fact correct.

Müller-Freienfels comments that undisclosed agency valuably allows for bipartite relationships to be transformed into multi-party relationships.¹³⁰³ This point does not, however, justify undisclosed agency. Tri- or multi-party contractual situations can be effectuated in disclosed agency transactions. This is not, as Müller-Freienfels suggests, a benefit solely associated with undisclosed agency. Similarly, Tan argues that “efficient channels of

¹³⁰¹ Krebs (n 1203) at 164. See also Whittaker (n 113) at 271 and Lang (n 1223) at 114.

¹³⁰² Krebs (n 1203) at 165. See also Watts (ed), *Bowstead and Reynolds* (n 1037) 8.071; Tan (n 1229) at 800-801; EJ Weinrib, “The Undisclosed Principle of Undisclosed Principals” 1975 21 *McGill Law Journal* 298 at 298.

¹³⁰³ Müller-Freienfels (n 206) at 300.

distribution” involving “specialist middlemen” are “essential to a modern economy”.¹³⁰⁴ However, he does not identify any benefits in terms of the commercial efficiency of undisclosed agency as opposed to disclosed agency. Whilst he is correct that using middlemen allows, for example, producers to delegate distribution activities so that they can dedicate greater resources to production,¹³⁰⁵ this benefit arises through disclosed as well as undisclosed agency.

Undisclosed agency is also thought of as useful because it protects principals where the agent becomes bankrupt, allowing the principal to claim property or money due to it by circumventing the bankruptcy proceedings.¹³⁰⁶ Krebs explains that undisclosed agency protects the principal and third party from the impact of the agent’s insolvency, in situations in which the agent would otherwise be liable to the third party.¹³⁰⁷ Similarly, Tan notes that the earliest English cases on undisclosed agency concern the bankruptcy of factors, and the principal’s consequent need to intervene.¹³⁰⁸ It is unclear in the modern law why such protection against the agent’s bankruptcy or insolvency should be necessary. The principal and agent should have separate patrimonies, meaning that sums transferred from the principal to the agent and intended for the third party should not be included in the agent’s patrimony during bankruptcy proceedings. This would also be the case if the principal’s existence and identity were disclosed.

Another justification is that undisclosed agency allows the principal to avoid adverse conditions and higher prices which it would face if the third parties knew with whom they were dealing.¹³⁰⁹ For example, the purchase of the

¹³⁰⁴ Tan (n 1192) at 482. See also *Keighley, Maxsted & Co v Durant* [1901] AC 240 at 261 per Lord Lindley.

¹³⁰⁵ Tan (n 1192) at 482.

¹³⁰⁶ Goodhart and Hamson (n 1223) at 352; Todd (n 1262) at 605; Bennett, *Agency* (n 1208) 9.20.

¹³⁰⁷ T Krebs, “Agency Law for Muggles: Why There is no Magic in Agency” in A Burrows and E Peel (eds), *Contract Formation and Parties* (Oxford University Press, Oxford, 2010) 205 at 212; Bennett, *Agency* (n 1208) 9.23.

¹³⁰⁸ Tan (n 1192) at 482.

¹³⁰⁹ Lang (n 1223) at 115; A Barak, “On the Nature of Undisclosed Agency” 1976 8(2) *Tel Aviv University Studies in Law* 45 at 47; Tan (n 1192) at 483; Barnett (n 1222) at 1976-1977; Fridman (n 1195) at 79.

land for the site of Walt Disney World in Florida was completed by undisclosed agents working for Walt Disney Productions.¹³¹⁰ The agents were employed to ensure that the landowners did not ask for a higher price for their land in light of its intended purpose. Undisclosed agency does indeed allow a principal to avoid adverse conditions it might face if it contracts in its own name. It is submitted that this factor alone is insufficient to justify the continued recognition of undisclosed agency. Similarly, undisclosed agency allows a principal to contract with a third party who would not have entered the contract had it known the principal's identity (provided that the contract is an ordinary commercial contract).¹³¹¹ Undisclosed agency in both situations offers commercial benefit to the principal, however, the third party's interests are not taken into account. The third party ought to be able to make an informed choice regarding the identity of its contracting partners, or at least to voluntarily assume the risk of contracting with someone with whom it may not wish to contract where the principal's existence is disclosed (and identity hidden). In cases where undisclosed agency is used to circumvent a third party's unwillingness to contract with the principal in question, this is undoubtedly inconsistent with a will-based account of contract law. The third party is forced, under the current law on undisclosed agency, to fulfil a contract to which it would not have consented, had it known the identity of the other contracting party. A principal could seek to avoid adverse conditions by instructing the agent to reveal its existence but conceal its identity – where the identity of the contracting party does not matter to the third party, this arrangement would be mutually satisfactory. The third party may refuse to proceed unless the principal's identity is revealed, in which case the principal may indeed encounter adverse conditions. This is, however, simply the consequence of the third party having an opportunity to contract on an informed basis. Allowing this choice provides a fairer balance between the interests of the third party and the principal.

¹³¹⁰ R Mann and B Roberts, *Business Law and the Regulation of Business* (South Western College Publishers, Chula Vista, 12th edn, 2016) 624.

¹³¹¹ Macgregor, *Agency* (n 224) 12.31.

Additionally, an agent might wish to hide the fact that it is working for a principal to avoid the third party bypassing it to negotiate directly with the principal in future dealings, which may cause inconvenience to both agent and principal.¹³¹² It is true that a principal may have engaged an agent to save time and expense in directly managing its own transactions, and may wish to remain undisclosed to avoid the inconvenience of being contacted directly by the third party. However, this is not a strong argument for the recognition of undisclosed agency. It is not burdensome for the agent to refuse to pass on the contact details of a principal, nor for the principal, if contacted directly, to refer the third party to its agent and refuse to deal with the third party directly. The minor inconvenience of a third party seeking to bypass the agency structure chosen by the parties does not justify circumventing contractual doctrine and theory. Further, practical convenience is not a significant policy consideration compared with those discussed in chapter 5.¹³¹³

From the agent's perspective, Tan also argues that the agent might distribute goods which it owns as well as those of its principal, and it may not wish third parties to distinguish transactions involving the agent's goods and those of principals.¹³¹⁴ Whilst this may be advantageous for the agent in some circumstances, this factor alone does not outweigh the disadvantages to the third party. It is not particularly onerous for the agent to adequately communicate whether the third party is transacting with itself or a principal, nor is a commercial third party likely to become confused by the fact that it has made certain transactions directly with the agent, and others with a principal.

Macgregor also notes that a principal might be motivated by the protection of personal information.¹³¹⁵ She cites *MacPhail & Son v Maclean's Trustee*,¹³¹⁶

¹³¹² Lang (n 1223) at 115; Tan (n 1192) at 482-3.

¹³¹³ The policy considerations which justify deviation from privity in the case of certain statutory exceptions are summarised in section 5.4.

¹³¹⁴ Tan (n 1192) at 482-3.

¹³¹⁵ Macgregor, *Agency* (n 224) 12.31. The potential value of undisclosed agency in protecting anonymity is discussed further below at subsection 9.4.3.

¹³¹⁶ *MacPhail & Son v Maclean's Trustee* (1887) 15 R 4.

in which a creditor (Mr Scott) appointed his debtor (Mr Maclean) as the manager on his farm without disclosing to the pursuer that he was the owner. Mr Maclean had previously owned the farm, but had conveyed it to the Mr Scott, as his trustee, to meet his debts. The pursuer, MacPhail & Son, had entered into a contract with Mr Maclean for the supply of goods, believing that Mr Maclean was the owner of the farm. It was found that Mr Scott was liable on the contract, because Mr Maclean was acting as his undisclosed agent. It was recognised that Mr Scott did not communicate that Mr Maclean was no longer the owner, and reveal himself as the principal, due to “considerations of delicacy towards his client and debtor”.¹³¹⁷ Whilst this consideration is understandable, permitting the operation of undisclosed agency in this circumstance does not account for the interests of the third party, MacPhail & Sons, which did not have the opportunity to assess whether it wished to contract with Mr Scott.

As discussed above, the third party must, at the point of disclosure, elect to sue either the agent or the principal.¹³¹⁸ It could be said that undisclosed agency offers the third party the option of suing two people, when it thought, at the point of contracting with the agent, that it could sue only one person (i.e. the agent). This “possible advantage” is noted by Fridman.¹³¹⁹ However, given that undisclosed agency is used as a means of engaging a third party in a contractual relationship with a party with whom it may not otherwise have contracted, this is not a realistic benefit to the third party. The third party was content to contract with the agent only, and, where the principal has used an undisclosed agent to contract with a third party who would not otherwise have contracted with it, the third party is unlikely to view the ability to sue the principal positively. In other words, the ‘benefit’ of having the option of suing the principal is cancelled out by the third party’s liability towards the principal, with whom it has not chosen to contract.

¹³¹⁷ *MacPhail & Son v Maclean’s Trustee* (1887) 15 R 47 at 54 per Lord Young

¹³¹⁸ See subsections 9.2.1. (Scots law) and 9.2.3. (English law).

¹³¹⁹ Fridman (n 1195) at 79. See also Bennett, *Agency* (n 1208) 9.21.

Tan identifies that higher prices encountered by the principal if it must be disclosed may impact third parties such as consumers.¹³²⁰ It is acknowledged that there may be a degree of truth in this. However, empirical research is required to demonstrate whether abolishing undisclosed agency would in fact negatively impact consumers. It is also possible that a price adjustment would not be necessary if the principal's existence was disclosed, but its identity remained confidential. Disclosure of unnamed principals may offer a compromise between deceiving the third party and ensuring that particular principals, and their customers, are not unnecessarily penalised. Accordingly, it cannot be said that the potential impact on external parties currently justifies the continued recognition of undisclosed agency.

In summary, undisclosed agency is viewed as commercially convenient for various reasons. However, none of these justifications stand up to scrutiny, primarily because they generally consider only the perspective of the agent and principal. As such, none of reasons offered in commentary provide a satisfactory justification for the continued existence of undisclosed agency.

9.4.2. Policy considerations supporting the statutory exceptions

Undisclosed agency is difficult to justify on the grounds of protecting weaker parties. The party who benefits from bypassing the privity doctrine in undisclosed agency situations is the principal, which is not protected from any adverse situation, but rather is able to circumvent the doctrine to achieve commercial gain. It is unrealistic to argue that undisclosed agency ought to be recognised to protect the principal from having to contract in its own name.

Undisclosed agency cannot be justified on the basis that it ensures recovery of damages for loss caused by breach of contract. The only reason the contract is not initially concluded between the principal and the third party is because the principal did not wish to disclose its identity. Justifying the imposition of liability on the third party's part on the grounds that this ensures

¹³²⁰ Tan (n 1192) at 483.

its contractual obligations are upheld allows the principal to 'have its cake and eat it': the principal circumvents the privity doctrine purely for its own convenience, and then ensures that it can enforce the resulting contract because the third party ought to uphold its obligations.

In terms of upholding the intentions of the contracting parties, undisclosed agency allows the principal's chosen contractual structure to be upheld. However, it is difficult to support the undisclosed agency doctrine on this ground, because the third party who finds itself contractually bound to the principal does not intend to participate in an undisclosed agency transaction. There is no reason to assume that the principal's contractual freedom should outweigh that of the third party.

In summary, undisclosed agency cannot be justified in accordance with any of the considerations underlying the statutory exceptions to privity.

9.4.3. Other potential justifications for the recognition of undisclosed agency

Undisclosed agency is not justified by the arguments offered in commentary, and it cannot be explained in line with any of the policy considerations upholding the statutory exceptions to privity. This subsection considers whether there may be any other justifications which may provide good reason for continuing to uphold the concept in Scots law.

One potential argument for the recognition of undisclosed agency is that it protects against discrimination. Whilst this should not of course be necessary, it is understandable that a person may wish to employ an undisclosed agent to enter into a contract on its behalf if it knows that it will face adverse conditions if it contracts in its own name. If undisclosed agency was to be permitted in cases where the principal had used an undisclosed agency structure to protect itself against discrimination, any such potential discrimination considered in ascertaining the permissibility of the structure ought to fall within the scope of protection under the Equality Act 2010. This Act prevents discrimination against a closed list of protected

characteristics.¹³²¹ Those who have experienced discrimination based on a protected characteristic, such that they have been unable to access goods or services, or access goods or services at a fair price, may wish to contract through an undisclosed agent. For example, it has been shown in a US study that car dealers tend to quote lower prices to white males than female and black test buyers,¹³²² demonstrating that favourable contractual conditions are more readily available to white males in this context. The founder of Innclusive, a home sharing platform providing rented accommodation primarily to people of colour, created the website after he struggled to secure Airbnb bookings in his own name, but found that hosts immediately accepted bookings for the same property on the same dates from a profile with a picture of a white man.¹³²³ A court procedure is a costly, lengthy process, and, whilst those who have experienced discrimination should not be forced to contract through agents, undisclosed agency arguably offers a useful means of avoiding discrimination without expending time and money on a claim under the Equality Act 2010. If undisclosed agency were to be abolished generally, an exception could exist to allow the doctrine to be used to avoid discrimination. This would only apply to characteristics protected under the Equality Act 2010. The Walt Disney Company,¹³²⁴ for example, was protecting itself from being subject to unfavourable prices, and was arguably therefore using undisclosed agents to protect against discrimination. Corporate identity is not, however, a protected characteristic under equalities legislation, and so this would not be classified as a justified use of undisclosed agency. If, however, a woman asked a male acquaintance to purchase a car for her to secure favourable rates at a dealership, this ought

¹³²¹ These characteristics are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. See Equality Act 2010 section 4.

¹³²² The study, and difficulties reconciling the market economy with anti-discrimination policies more generally, are discussed in I Ayres, "Fair Driving: Gender and Race Discrimination in Retail Car Negotiations" 1991 104(4) *Harvard Law Review* 817. The results of the study are detailed at 819 - most strikingly, black women were asked to pay three times the mark-up of white male test drivers.

¹³²³ R Gilkes, Innclusive, "Our Story", available at: <https://www.innclusive.com/our-story> and accessed 3 July 2018.

¹³²⁴ See above at subsection 9.4.1.

to be a permissible undisclosed agency transaction because the woman was protecting herself from being discriminated against on the grounds of a protected class (sex). Whilst the acquaintance could purchase the car in his own name and then resell it to the woman, undisclosed agency provides a more efficient solution.

If undisclosed agency was to be recognised in such cases, this would be subject to the current laws on the situations in which undisclosed agency is not permissible, namely, unassignable contracts,¹³²⁵ as well as the rule from *Said v Butt*¹³²⁶ that undisclosed agency cannot apply where the identity of the contracting parties is a material factor.¹³²⁷ A simple consumer contract for the exchange of goods and services (such as the sale of a car) would not fall within either category.

It could also be argued that undisclosed agency protects a contracting party's privacy. However, this is not a strong argument. Whilst the principal can sue only on the point at which its identity is revealed, the anonymity provided by undisclosed agency is not necessarily temporary – the lack of relevant case law¹³²⁸ indicates that the principal rarely needs to enforce the contract against the third party, who may remain unaware of the principal's existence. However, there is no reason to assume that the principal's interest in anonymity should outweigh the third party's interest in exercising its ability to make informed choices as to the identify of its contracting partners.

It may be suggested that abolishing undisclosed agency will not improve the third party's position, because the principal can simply engage someone to purchase property in its own name and then resell it to the principal. In *Nash v Dix*,¹³²⁹ a Roman Catholic committee had tried unsuccessfully to purchase a Congregationalist chapel to use for Catholic worship. Realising that the vendor did not wish to sell to them, the committee engaged the plaintiff to

¹³²⁵ This restriction on the operation of undisclosed agency is noted above at subsections 9.2.1. (Scots law) and 9.2.3. (English law).

¹³²⁶ *Said v Butt* [1920] 3 KB 497.

¹³²⁷ See subsection 9.2.3.

¹³²⁸ See above at (n 1188).

¹³²⁹ *Nash v Dix* (1898) 78 LT 445.

purchase the chapel and resell it to them at a profit. It was found that the plaintiff was not acting as an agent, but, rather, had purchased in his own name for the purpose of re-sale. The fact that the plaintiff was aware that the defendants would not have wished to negotiate with a person acting as an agent for the Roman Catholics, “did not touch the case if he were buying... on his own account.”¹³³⁰ If, on the facts of the case, the purchaser was not acting as an agent, then the law of agency ought not to prevent resale. However, the fact that cases such as *Nash v Dix*¹³³¹ are correctly decided does not mean that the abolition of undisclosed agency would have no effect. Rather, this would prevent cases in which the third party was forced to perform in favour of the principal, and/or enter into a continuing contractual relationship with the principal. Additionally, transaction costs associated with resale are likely higher than those incurred through agency, particularly in cases concerning immovable property. If a principal is faced with the choice between operating as a disclosed but unnamed principal or encouraging someone to buy property and resell the property to it, it may be disinclined to incur the transaction costs of the second sale and the purchaser’s profit.

A final potential advantage is that, although it is clearly difficult to justify undisclosed agency from a doctrinal, theoretical, or policy perspective, the doctrine ought to remain in Scots law for reasons of commercial competitiveness of the jurisdiction as a whole. In general terms, Continental jurisprudence “esteems the institution of undisclosed agency very highly”,¹³³² and undisclosed agency is recognised in both the DCFR¹³³³ (in a limited form) and PECL.¹³³⁴ In order for Scots law to be viewed as a modern, commercial, and competitive legal system, it arguably must continue to

¹³³⁰ *Nash v Dix* (1898) 78 LT 445 at 488 per North J.

¹³³¹ *Nash v Dix* (1898) 78 LT 445.

¹³³² Müller-Freienfels (n 206) at 300. See also H Verhagen and L Macgregor, “Agency and representation” in JM Smits (ed), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar, Cheltenham/ Northampton, 2nd edn, 2012) 37 at 54-56.

¹³³³ DCFR Book IV.D.-1:101 allows for agency transactions generally (referred to as “Mandate contracts”). Book IV.D.-1:102(e) specifically mentions that “a mandate for indirect representation is a mandate under which the agent is to act in the agent’s own name or otherwise in such a way as not to indicate an intention to affect the principal’s legal position”.

¹³³⁴ PECL Article 3:102(2) provides that where an agent acts on behalf of, but not in the name of a principal, the rules on indirect representation apply.

recognise a concept deemed sufficiently important to merit inclusion in the DCFR and PECL. That said, however, Reynolds has praised the lack of recognition of undisclosed agency in the UNIDROIT Principles.¹³³⁵ According to Article 2.2.4(1), an agent acting with authority but without the third party's knowledge that it is acting as an agent (essentially, an undisclosed agent) can sue and be sued under the contract, but the principal cannot make a claim against the third party. Reynolds describes the provision as "a specific rejection of the common law undisclosed principal doctrine".¹³³⁶ Commenting on the UNIDROIT Principles Working Group's potential omission of undisclosed agency in 1999, DeMott noted that "I do not think that deleting this aspect of the doctrine represents a major loss."¹³³⁷ Lord Sumption recently commented that, in English law, undisclosed agency "survives in the modern law on account of its antiquity rather than its coherence."¹³³⁸ Further, civilian systems do not generally recognise undisclosed agency.¹³³⁹ Thus, undisclosed agency is recognised in some jurisdictions and cross-border instruments, but it enjoys neither widespread recognition nor full academic support. Such limited recognition in proposed harmonisation measures does not justify its continued recognition in Scots or English law.

In essence, there are no convincing policy reasons justifying the continued recognition of undisclosed agency. Its abolition ought to seriously be considered. If undisclosed agency was to be abolished, an exception could,

¹³³⁵ FMB Reynolds, "Authority of Agents" in *ICC International Court of Arbitration Bulletin*, Special Supplement on UNIDROIT Principles: New Developments and Applications (2005) 9 at 10. See also F Reynolds, Letter dated 12 December 1999, in D DeMott and F Reynolds, *Comments on the Revised draft Chapter on Authority of Agents (Study L – Doc. 63)* (International Institute for the Unification of Private Law, Rome, 1999) para 4, available at: <https://www.unidroit.org/english/publications/proceedings/1999/study/50/s-50-63add1-e.pdf>.

¹³³⁶ Reynolds, "Authority" (n 1335) at 11.

¹³³⁷ D DeMott, Letter dated September 23 1999, in D DeMott and F Reynolds, *Comments on the Revised draft Chapter on Authority of Agents (Study L – Doc. 63)* (International Institute for the Unification of Private Law, Rome, 1999), available at: <https://www.unidroit.org/english/publications/proceedings/1999/study/50/s-50-63add1-e.pdf>.

¹³³⁸ *Banca Nazionale del Lavoro SPA v Playboy Club London Limited* [2018] UKSC 43 at para 12 per Lord Sumption.

¹³³⁹ Verhagen and Macgregor (n 1332) at 54-55 and 58-61. Many civilian systems do recognise the similar concept of undisclosed indirect representation, which is discussed in S Kortmann and J Kortmann, "Undisclosed Indirect Representation—Protecting the Principal, the Third Party, or Both?" in D Busch, L Macgregor, and P Watts, *Agency Law in Commercial Practice* (Oxford University Press, Oxford, 2016) 83 at 85-87.

however, remain to allow undisclosed agency to be used to protect against discriminatory practices, because this is justified by reference to the policy consideration of protecting weaker parties.

9.4.4. Arguments against the recognition of undisclosed agency

Firstly, undisclosed agency does not offer an adequate balance between the principal's convenience and protection of the third party. *Said v Butt*¹³⁴⁰ provides that an undisclosed principal may not sue the third party where the identity of the contracting parties was a material factor in the formation of the contract. In that case, the plaintiff wished to attend the opening night of a play, but he had had a personal disagreement with the owner of the theatre and knew that he would be unable to purchase a ticket in his own name. He thus instructed a friend to buy his ticket for him, but was refused admission on the night of the play. It was determined that the identity of ticket-holders is a material factor in contracting for the purchase of tickets for a play's opening night, because this is a special occasion. The purchaser's identity was therefore material in determining whether a contract between the undisclosed principal and the third party owner should be upheld. It was found that the theatre was entitled to refuse entry to the plaintiff because the management would not have contracted with the plaintiff or his representative had they known his true identity. This is a somewhat narrow judgment, resting upon both the importance of the identity of ticket holders in the particular circumstance of the opening night of a play. In other undisclosed agency cases, it may be that the third party had not considered whether it would like to contract with the undisclosed principal in question – in which case, the requirement that undisclosed agency was being used to bypass a conflict between principal and third party would not be met. The Disney Land example above clearly illustrates the consequences of the loss of the third party's bargaining position, and in land transactions the identity of the buyer is not generally considered to be a material factor. In other words, the requirement of materiality of identity is unjustifiably weighted more heavily

¹³⁴⁰ *Said v Butt* [1920] 3 KB 497. See above at subsection 9.2.3.

than the third party's freedom not to contract with those with whom it does not wish to enter a contractual relationship. The principle of *Said v Butt*¹³⁴¹ is accordingly too narrow to properly protect the third party from the principal's deception.

A further policy consideration against the recognition of undisclosed agency is that it allows parties to act in a deliberately deceptive manner. In *Dyster v Randall and Sons*,¹³⁴² for example, a plaintiff sought to contract through an undisclosed agent to purchase two plots of land. The plaintiff had formerly worked for the defendant landowner, and had been discharged "from his office... under circumstances which to his knowledge caused the defendants profoundly to distrust him".¹³⁴³ The contract was upheld. This case provides an example of the use of undisclosed agency for the purposes of deception. Whilst the position of good faith in Scots contract law is tenuous,¹³⁴⁴ a doctrine which achieves little other than allowing parties to act in a deceptive manner is difficult to justify. The law ought not to facilitate deception at the expense of the interests of other contracting parties. If a stronger concept of good faith is to be recognised in Scots law, undisclosed agency will undoubtedly breach this principle.

As noted above, allowing principals to use undisclosed agents interferes with a third party's ability to fully inform itself of its contractual partner.¹³⁴⁵ Collins submits that the right to choose a contractual partner reflects individual liberty and personal autonomy ("values that lie at the core of a liberal society") and allows individuals to achieve their aims through contractual transactions.¹³⁴⁶

¹³⁴¹ *Said v Butt* [1920] 3 KB 497.

¹³⁴² *Dyster v Randall and Sons* [1926] Ch. 932.

¹³⁴³ *Ibid.* at 933 (Witness Action).

¹³⁴⁴ Whilst Scots law does not expressly recognise an obligation to contract in good faith, the concept is arguably reflected in a number of contractual rules. See further HL MacQueen, "Good Faith in the Scots Law of Contract: An Undisclosed Principle?" in ADM Forte (ed), *Good Faith in Contract and Property Law* (Hart Publishing, Oxford, 1999) 5. Further, a contract will be voidable if one party is under an error in motive which is known and not corrected by the other: *Steuart's Trs v Hart* (1875) 3 R 192 (although see Gloag, *Contract* (n 65) 438).

¹³⁴⁵ See subsection 9.3.2.

¹³⁴⁶ H Collins, "The vanishing freedom to choose a contractual partner" 2013 76(2) *Law and Contemporary Problems* Spring 71 at 71. See also 77.

He submits that the exceptions to a general freedom to choose one's contractual partner reflect the public policy considerations of equal opportunities and preventing social exclusion.¹³⁴⁷ For example, Collins accepts that the right to choose a contractual partner should be restricted such that a party operating in the public market ought not to refuse to contract with another on grounds of (for example) sex, race, or religion.¹³⁴⁸ In the case of undisclosed agency, however, the third party's ability to choose a contractual partner is restricted by the principal's ability to bypass its wishes by using an undisclosed agent. Collins notes that:

“in general the law invalidates agreements when there has not been consent to the choice of contractual partner... Exceptions to the principle such as... the doctrine of undisclosed agency are strictly confined and treated as anomalous.”¹³⁴⁹

Courts, according to Collins, tend to explain this on the basis that the contract has been “agreed and relied upon”, and this outweighs the infringement of the third party's ability to choose its contractual partner.¹³⁵⁰ Collins does not indicate whether he agrees with this reasoning, and it is submitted that this justification is inadequate. Contracts concluded by undisclosed agency are only agreed upon following deception on the part of the agent and principal, which is not an adequate reason to usurp the third party's right to choose a contractual partner. This reasoning certainly does not cohere with the other existing restrictions on the right to choose a contractual partner, which are aimed at promoting a more equal market society, other than situations in which the agent is used to bypass discrimination which would otherwise be experienced by the principal, as discussed above.¹³⁵¹ Undisclosed agency is thus incompatible with the right to choose a contractual partner, particularly in light of the fact that exceptions to this right reflect considerations of equal opportunities. Bennett justifies undisclosed agency by reference to a general policy that “personal scruples should not outweigh efficient business”.¹³⁵²

¹³⁴⁷ Collins (n 1346) at 71-74.

¹³⁴⁸ *Ibid.* at 72.

¹³⁴⁹ *Ibid.* at 80.

¹³⁵⁰ *Ibid.* at 78.

¹³⁵¹ See subsection 9.4.3.

¹³⁵² Bennett, *Agency* (n 1208) 9.22.

However, this choice of language belittles what could be significant issues of morals or conscience on the part of the third party, and the law certainly does not actively prevent any party, commercial or consumer, from making informed decisions about their transactions. This further supports the conclusion that undisclosed agency should be abolished, save for its use in protecting against discrimination.

9.5. Concluding remarks

Undisclosed agency is an exception to the privity doctrine. It is not compatible with Scots contract theory because it cannot be explained on the basis of the intentions of the contracting parties. The concept cannot be accounted for in terms of delictual liability. Whilst Tan submits that undisclosed agency is a “well recognised exception to the privity doctrine and need[s] no further justification”,¹³⁵³ it is shown in previous chapters that exceptions to privity must be clear, well-defined, and based on sound policy considerations.

The justifications offered for the existence of undisclosed agency in commentary are inadequate, and undisclosed agency is not supported by any of the policy considerations underlying the statutory exceptions to privity. Whilst the justifications for the statutory exceptions ought not to be viewed as the only possible benchmarks for satisfactory exceptions to privity, there are no other defensible arguments in favour of the recognition of undisclosed agency. The only exception to this is situations in which undisclosed agency is used to avoid discrimination. Undisclosed agency ought to be permitted in such contexts, subject to restrictions where undisclosed agency is expressly or impliedly excluded, and the identity of the contracting party is a material factor in the formation of the contract.

¹³⁵³ Tan (n 1192) at 481.

Chapter 10: External network liability

10.1. Overview of chapter 10

The previous four chapters have examined whether various existing concepts ought to continue to exist in Scots contract law. This chapter examines whether a normative concept, external network liability, should be doctrinally recognised in Scots contract law.

The chapter defines network theory and the concepts of internal and external network liability. The latter forms the focus of the chapter. Network theory is not currently recognised in Scots or English law, however, a brief discussion of the recognition of networks in other jurisdictions is provided. The chapter then explains how external network liability deviates from the privity doctrine, and examines its relationship with contract theory and delictual liability. The final subsections assess whether there are justifiable policy reasons for the recognition of external network liability as a new exception to privity.

10.2. Network theory

This section defines network theory, explains the difference between internal and external network liability, and provides brief comment on relevant comparative law.

10.2.1. Defining network theory

According to network theorists, a business network arises where a number of independent economic entities enter into a series of interrelated contracts.¹³⁵⁴ In other words, a network is “a cluster of contracts set up to serve a principal organising purpose.”¹³⁵⁵ The definitions of networks reflect the cooperation of network actors and mutual pursuit of common goals within a network. Walter Powell describes “lateral or horizontal patterns of exchange, interdependent

¹³⁵⁴ H Collins, “Introduction” in G Teubner, *Networks as Connected Contracts* (Hart Publishing, Oxford, 2011) 1 at 1.

¹³⁵⁵ JN Adams and R Brownsword, “Privity of Contract – That Pestilential Nuisance” 1993 56(5) *Modern Law Review* 722 at 727.

flows of resources, and reciprocal lines of communication”,¹³⁵⁶ and Sydow refers to networks as:

“modes of organising economic activities that bind formally independent firms who are more or less economically dependent upon one another through stable relationships and a complex reciprocity that is more co-operative than competitive in form.”¹³⁵⁷

In Teubner’s words, “business networks pursue common projects making use of co-operation between autonomous firms.”¹³⁵⁸ A further important element of networks is the trust between the various network members – Teubner draws a comparison between commercial networks and the Mafia.¹³⁵⁹

Networks take numerous forms, ranging from ‘stars’ in the case of franchises (with the franchisor as the central figure, surrounded by numerous franchisees which constitute the spokes), to hubs with ‘arms’ of contractual chains (for example, large construction projects).¹³⁶⁰ Indeed, Brownsword has commented that “once we start thinking about networks... we see them everywhere”.¹³⁶¹ Network structures arise primarily in commercial situations.¹³⁶² Teubner notes their use in contexts including energy and telecommunications markets, banking structures, and transport networks.¹³⁶³ He also refers to “information networks”, of which the internet is the most

¹³⁵⁶ WW Powell, “Neither market nor hierarchy: Network forms or organization” 1990 12 *Research in Organizational Behaviour* 295 at 296.

¹³⁵⁷ J Sydow, *Strategische Netzwerke: Evolution und Organisation* (Gabler Verlag, Wiesbaden, 1992) 82.

¹³⁵⁸ Teubner, *Networks* (n 24) 92.

¹³⁵⁹ *Ibid.* 91-92.

¹³⁶⁰ M Wellenhofer, “Third Party Effect of Bilateral Contracts within the Network” in M Amstutz and G Teubner (eds), *Networks: Legal Issues of Multilateral Co-operation* (Hart Publishing, Oxford, 2009) 119 at 119; A Schwartz and RE Scott, “Third party beneficiaries and contractual networks”, 2015 working paper, 13-14, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2550436; B Lomfeld and D Wielsch, “The public dimension of contract: contractual pluralism beyond privity” 2013 76(2) *Law & Contemporary Problems* 1 at 11.

¹³⁶¹ R Brownsword, “Review: Networks as Connected Contracts” 2012 75(3) *Modern Law Review* 455 at 455.

¹³⁶² Brownsword (n 462) at 48; Adams and Brownsword (n 1355) at 727-728.

¹³⁶³ G Teubner, “And if I by Beelzebub cast out Devils, ...”: An Essay on the Diabolics of Network Failure” 2009 10(4) *German Law Journal* 395 at 398; Teubner, *Networks* (n 24) 90.

prominent.¹³⁶⁴ ‘Business networks’ includes supply networks, innovation networks, producer networks, and distribution networks.¹³⁶⁵

Networks are not easily explained in terms of currently recognised legal concepts. Whilst they share similarities with other competitive market structures and hierarchical businesses, Walter Powell outlines three competitive advantages which networks have over these forms: they possess collective know-how, enjoy mutual trust, and demand speed of transaction.¹³⁶⁶ Additionally, George Richardson points out that networks are distinguishable from other business forms and markets because the latter do not reflect “the dense network of co-operation and affiliation by which firms are inter-related.”¹³⁶⁷ It is also thought that networks are multilateral, whereas firms are unilateral.¹³⁶⁸ Teubner writes that networks are “extraordinarily confusing phenomena”, which cannot be accounted for by existing definitions of markets or organisations.¹³⁶⁹ Whilst he acknowledges the parallels between networks and corporate groups (both involve the dual elements of cooperation and competition), he feels that the complex regulatory context of corporate groups is unsuitable for the flexibility currently reflected in the concept of networks.¹³⁷⁰

Prior to Teubner’s seminal work on network theory,¹³⁷¹ legal discussion of networks was sparse.¹³⁷² There were only pockets of commentary, such as Buxbaum’s remarks that ‘network’ is a “fashionable” term denoting a “construct in autopoietic theory”.¹³⁷³ However, networks have recently been

¹³⁶⁴ Teubner, *Networks* (n 24) 90-91.

¹³⁶⁵ *Ibid.* 98-99.

¹³⁶⁶ Powell (n 1356) at 324.

¹³⁶⁷ GB Richardson, “The Organisation of Industry” 1972 82(327) *The Economic Journal* 883 at 883.

¹³⁶⁸ RM Buxbaum, “Is ‘Network’ a Legal Concept?” 1993 149(4) *Journal of Institutional and Theoretical Economics* 698 at 703.

¹³⁶⁹ Teubner, *Networks* (n 24) 73.

¹³⁷⁰ *Ibid.* 133-136.

¹³⁷¹ Teubner, *Networks* (n 24).

¹³⁷² Collins (n 1354) at 2.

¹³⁷³ Buxbaum (n 1368) at 698. Buxbaum recognises the prevalence of networks in many situations, although his analysis in this article is limited to production networks.

increasingly discussed and recognised. Teubner (writing in 2009) comments that:

“[t]he last thirty years have seen a network revolution that resulted in a thorough erosion of organizational hierarchies in both the private and the public sector.”¹³⁷⁴

Brownsword notes that the popularity of networks in the early twenty-first century is due in part to the trend of increased consumer activity in networked electronic environments.¹³⁷⁵ There is a “growing European interest in the regulation of contractual networks”,¹³⁷⁶ and some say that the world is now a “network society.”¹³⁷⁷ Accordingly, networks are likely to become an increasingly prominent topic in private law, and research on whether the concept should be recognised in Scots law is timely.

10.2.2. Distinguishing internal and external network liability

Network liability allows for the recovery of damages for losses suffered by both those within a network (internal network liability) and those outwith a network (external network liability), regardless of whether the relevant parties are connected by contract.¹³⁷⁸ The difference between these two forms of liability is illustrated through an example.

If a customer at a fast-food restaurant falls seriously ill after eating an improperly prepared hamburger, this will have a negative impact on the reputation of the restaurant franchise as a whole.¹³⁷⁹ The individual franchisees are unlikely to be in direct contractual relationships with one another. However, the franchisees and the central franchisor might be in a

¹³⁷⁴ Teubner (n 24) at 396.

¹³⁷⁵ R Brownsword, “Contracts in a Networked World” in LA DiMatteo and Q Zhou (eds), *Commercial Contract Law: Transatlantic Perspectives* (Cambridge University Press, Cambridge, 2013) 116 at 116. See also Collins (n 1354) at 71 and M Amstutz, V Karavas, G Teubner, “Preface” in M Amstutz and G Teubner (eds), *Networks: Legal Issues of Multilateral Co-operation* (Hart Publishing, Oxford, 2009) vii at vii.

¹³⁷⁶ Brownsword (n 1361) at 455.

¹³⁷⁷ Teubner (n 1363) at 396. Castells similarly comments that networks “are the fundamental stuff of which new organizations are and will be made”: M Castells, *The Rise of the Network Society: Economy, Society and Culture* vol 1 (Wiley Blackwell, Hoboken, 2000) 180.

¹³⁷⁸ Teubner, *Networks* (n 24) ch 5 (internal network liability) and ch 6 (external network liability).

¹³⁷⁹ This example is outlined in Collins (n 1354) at 14

business network. Internal network liability allows for network parties to sue one another to recover losses caused when one party breaches the network purpose. In this example, the network purpose is the maximisation of the franchise's profits, and other franchisees could sue the franchisee responsible for the customer's illness for profits lost as a result of the damage to the franchise's reputation.¹³⁸⁰

The customer, on the other hand, may have recourse through external network liability. This applies where a third party suffers loss as a result of the actions of a network party, but cannot sufficiently recover for those losses in an action against that network party. The customer is a party external to the network, and may wish to sue the franchisor directly, despite not being in a contractual relationship with it. External network liability allows third parties to bypass the contractual structure of the network, in order to recover their losses caused by a member of the network.¹³⁸¹

10.2.3. Comparative law

Neither Scots nor English law explicitly recognises networks. This contrasts with the situation in, for example, Germany¹³⁸² and the USA, where courts have enforced credit card networks,¹³⁸³ networks involving hospitals, hospital service providers, patients, and insurers,¹³⁸⁴ and franchise networks.¹³⁸⁵ The German notion of connected contracts, which is similar to network theory, was developed in response to the specific problem of finance purchasing,

¹³⁸⁰ Teubner, *Networks* (n 24) 235.

¹³⁸¹ *Ibid.* 207-209.

¹³⁸² Connected contracts are recognised at §358 BGB in the context of revocation of consumer contracts. See further G Teubner, "Coincidentia Oppositorum: Hybrid Networks Beyond Contract and Organisation" in M Amstutz and G Teubner (eds), *Networks: Legal Issues of Multilateral Co-operation* (Hart Publishing, Oxford, 2009) 3 at 20.

¹³⁸³ *Sovereign Bank v BJs Wholesale* 533 F 3d 162 (2008); Schwartz and Scott (n 1360) at 13-15.

¹³⁸⁴ *Joseph v Hospital Service District No. 2 of Parish of St Mary* 939 So. 2d 1206 (2006); Schwartz and Scott (n 1360) at 17.

¹³⁸⁵ *Chu v Dunkin' Donuts Inc* 27 F Supp. 2d 171 (1998); Schwartz and Scott (n 1360) at 17-18.

and was later applied to other forms of financed property transactions.¹³⁸⁶

Italy has recently adopted new legislation on business networks.¹³⁸⁷

Networks are analogous to the concept of linked contracts. The latter term denotes “a plurality of separately concluded contracts that are somehow interrelated.”¹³⁸⁸ Linked contracts are recognised in Dutch law. Van Dongen refers to “groups of contracts, i.e., linked or connected contracts.”¹³⁸⁹ This refers to “all situations in which several contracts are not independent, but rather form part of a ‘larger whole’.”¹³⁹⁰ Linked contracts arise in a wide variety of contexts: Samoy and Loos mention, for example, purchase financing, contracts linked in large construction projects, chains of contracts between producers and consumers, and cartel agreements.¹³⁹¹ In order for the linked contracts to be legally recognised, the contracts within the group must be “factually and economically connected.”¹³⁹² In the thesis, the concepts of linked contracts and contract networks are treated as equivalents. Linked contracts are not explicitly recognised in Scots or English contract law.

As noted above,¹³⁹³ network theory is likely to be of increasing prominence in future academic research. Reform in Scots and English law could perhaps draw upon the current doctrine and commentary in Germany, the

¹³⁸⁶ Teubner, *Networks* (n 24) 74. Teubner addresses whether networks can be explained in terms of connected contracts. This is outwith the scope of the thesis, because Scots law does not recognise this concept. See further Teubner, *Networks* (n 24) ch 3.

¹³⁸⁷ C Ferrari, “The Italian ‘Network Contract’: A New Tool for the Growth of Enterprises within the Framework of the ‘Small Business Act’?; Brief Comments on the Italian Law” 2010 16(1) *Columbia Journal of European Law* 77. Ferrari is critical of the new Italian law, but comments that doctrinal recognition of networks is to be “welcomed positively” (at 81-82).

¹³⁸⁸ I Samoy and MBM Loos, “Introduction” in I Samoy and MBM Loos (eds), *Linked Contracts* (Intersentia, Cambridge, 2012) 1 at 1.

¹³⁸⁹ S van Dongen, “Groups of contracts. An exploration of types and the archetype from a Dutch legal perspective” in I Samoy and MBM Loos (eds), *Linked Contracts* (Intersentia, Cambridge, 2012) 9 at 9.

¹³⁹⁰ *Ibid.* at 10.

¹³⁹¹ *Ibid.* at 11. See also R Momberg Uribe, “Linked contracts: Elements for a general regulation” in I Samoy and MBM Loos (eds), *Linked Contracts* (Intersentia, Cambridge, 2012) 153 at 155.

¹³⁹² van Dongen (n 1389) at 10.

¹³⁹³ See subsection 10.2.1.

Netherlands, Italy, and the USA in enacting laws on networks in a manner suitable for modern commerce.

10.3. Could external network liability be recognised as a normative exception to privity in Scots law?

This section examines whether external network liability, if it was recognised in Scots contract law, would constitute an exception to the privity doctrine, and whether the concept would be compatible with Scots contract theory. The section also considers whether external network liability ought instead to be explained in terms of delict, or as a form of hybrid liability. The final subsection examines whether there are compelling policy reasons for the doctrinal recognition of external network liability.

10.3.1. External network liability and the privity doctrine

External network liability would, if it was recognised in Scots law, operate as an exception to the privity doctrine. In the example concerning the improperly prepared hamburger discussed above,¹³⁹⁴ for example, the customer can make a claim to recover its losses in reliance on the contract between the franchisee and the franchisor, to which it is not party.

The tension between external network liability and privity is also recognised in commentary. In the US, MacDonald has identified that consumers are unable to bring successful claims against the manufacturers of foods falsely labelled as ‘all natural’ due to a lack of privity between them. She argues that consumers should have the ability to bypass privity by applying network liability in such cases, so that they can recover damages in respect of harm suffered, such as unintentionally ingesting high amounts of artificial ingredients.¹³⁹⁵ Samoy and Loos mention that Europe’s traditional civil codes were produced in a far less complex society than today’s, at a time when great weight was placed on the “traditional pillars” of contract law, such as

¹³⁹⁴ See above at subsection 10.2.2.

¹³⁹⁵ C MacDonald, “Not ‘All Natural’: Modernizing Privity to Allow Breach of Contract Claims for Mislabeled Food Products” 2018 103(2) *Iowa Law Review* 785 at 786 and 793-801.

freedom of contract and privity of contract.¹³⁹⁶ They contrast the development of historical law with the fact that contractual structures in modern commerce mirror the increasing complexity of society, explaining that private law has not been able to keep up with network trends.¹³⁹⁷ Momberg Uribe argues that privity is the main principle of traditional contract law preventing recognition of the multi-party contexts in which bilateral agreements are concluded.¹³⁹⁸ He suggests that the multi-party context of transactions ought to be reflected in the obligations and expectations between parties to a bilateral agreement.¹³⁹⁹ In particular, he stresses that current contract doctrine, including privity, is outdated because linked contracts:

“are products of contemporary economic external requirements such as the division of labour, specialisation, supply chains, technological complexity and high flexibility of the production process.”¹⁴⁰⁰

Teubner similarly argues that legal doctrine must be reformed to allow for a “social model” of networks which takes into account their risks and provides a “normative perspective within which they may be combated.”¹⁴⁰¹ It is thus accepted in commentary that external network liability would be an exception to privity, and this commentary is correct. The question of whether it would be a justifiable exception is discussed further below.¹⁴⁰²

10.3.2. External network liability and contract theory

Network parties might expressly agree to confer rights on third parties. For example, a franchisor and franchisee might agree that those who contract with the franchisee can claim against the franchisor in the event of breach of contract. In such a case, the liability of the franchisor to the external party would be based on third party rights.¹⁴⁰³ However, network parties will sometimes have chosen network structures to limit means of redress for

¹³⁹⁶ Samoy and Loos (n 1388) at 2. For example, the Napoleonic Civil Code clearly provides in Articles 1134 and 1165 that separate contracts cannot be treated as interlinked.

¹³⁹⁷ Samoy and Loos (n 1388) at 2.

¹³⁹⁸ Momberg Uribe (n 1391) at 153.

¹³⁹⁹ *Ibid.*

¹⁴⁰⁰ *Ibid.* at 154.

¹⁴⁰¹ Teubner, *Networks* (n 24) 74.

¹⁴⁰² See subsection 10.3.4. below.

¹⁴⁰³ See subsection 3.2.2.1.

those external to the network. In such cases, the imposition of external network liability will directly contradict the intentions of the relevant network parties. External network liability cannot therefore be explained in terms of the will theory.

Hogg notes that the view that contractual structures are always adopted for the purpose of distancing particular contracting parties from external parties “superimposes” onto network actors a “sophistication of intention which may hardly, if ever, be present.”¹⁴⁰⁴ Rather, networks may be adopted simply for reasons of convenience.¹⁴⁰⁵ However, even where the network has not been set up with the aim of evading external liability, the relevant parties do not intend to allow external parties to bypass the network structure to recover for losses they suffer because of network activity. External network liability is not compatible with the will theory because the network parties are liable to external parties with whom they have not contracted regardless of whether they consent to such liability.

External network liability is also incompatible with promissory theory because the network actors have not voluntarily promised any benefits to external parties. Assumption theory does not account for external network liability, because this form of network liability does not involve the voluntary assumption of network actors of liability towards external parties.

10.3.3. Theoretical classification of external network liability

This subsection explores whether external network liability should be classed as a contractual, delictual, or hybrid form of liability.

Whilst, as discussed above,¹⁴⁰⁶ external network theory is not compatible with will-based theories of contract law, it is possible that the concept could be justified as an exception to privity based on justifiable policy considerations. Potential policy justifications are discussed below.¹⁴⁰⁷ It is

¹⁴⁰⁴ Hogg, *Obligations* (n 433) 3.133. See also Whittaker (n 273) at 199.

¹⁴⁰⁵ Hogg, *Obligations* (n 433) 3.133.

¹⁴⁰⁶ See subsection 10.3.2.

¹⁴⁰⁷ See subsection 10.3.4.

noted at this stage that a contractual analysis of external network liability is recognised by commentators including Teubner and Wellenhofer. Contract, according to Teubner, is the “correct systematic arena”, although he comments that contract law requires reform in order to fully recognise the benefits and burdens of networks.¹⁴⁰⁸ Wellenhofer remarks that networks can be placed schematically between contract law and the law of corporations.¹⁴⁰⁹ There is no immediate barrier to the classification of external network liability as an exception to privity, provided that it reflects justifiable policy considerations. If external network liability is to be recognised in Scots law, its boundaries must be defined such that not all network parties are liable for the impact of one party’s behaviour on an external party.¹⁴¹⁰ Permitting the external party’s ability to sue only network parties which are in a contractual relationship with the party who caused the loss (for example, the franchisor in a direct contractual relationship with the franchisee) would assist in limiting the liability of those within the network. This would be a key benefit of a contractual analysis of external network liability.

Given that the imposition of external network liability is ultimately involuntary, it is also relevant to consider whether a delictual analysis is suitable. An initial point is that the external party may have a direct delictual claim against the party who caused the loss. However, whilst the customer in Collins’ ‘snail in a burger’ scenario may be able to sue the franchisee in delict, the franchisee may be bankrupt or insolvent, or lack liability insurance.¹⁴¹¹ External parties are not therefore necessarily fully protected by the fact that they may in some circumstances have a delictual claim against the party with whom they contract, because the network may have been set up so as to ensure that network members which contract externally have little funds to offer

¹⁴⁰⁸ Teubner (n 1382) at 14. See also JN Druey, “The Path to the Law - The Difficult Legal Access of Networks” in M Amstutz and G Teubner (eds), *Networks: Legal Issues of Multilateral Co-operation* (Hart Publishing, Oxford, 2009) 87 at 87.

¹⁴⁰⁹ Wellenhofer (n 1360) at 120. Wellenhofer notes that corporate law alone does not adequately account for networks (at 120).

¹⁴¹⁰ This is also discussed in subsection 10.3.4.

¹⁴¹¹ Collins (n 1354) at 16-18.

recompense for any claims by those external parties. Accordingly, it may be necessary for the external party to consider a claim against another network party. The current law does not provide scope for a delictual claim against a network actor connected to the party who caused the loss. In the case of franchising, a delictual claim against the franchisor is unlikely to be successful,¹⁴¹² because franchisors are not usually liable for the negligence of franchisees in respect of the latter's customers.¹⁴¹³ Vicarious liability cannot generally be applied to "pierce through contracts between independent businesses."¹⁴¹⁴ This would prevent a claim against a separate legal entity in a network structure. A delictual classification of external network liability would therefore require significant reform of the law on delict to permit recovery by the external party.

Some commentators have specifically argued that delictual claims ought not to subvert network structures. Hutchison and van Heerden state that where there is "a contractual web or matrix," delictual claims which undermine the deliberate arrangements chosen by the contracting parties ought not to be permitted.¹⁴¹⁵ They assert that imposing delictual duties on the agreements of network actors unjustifiably disturbs their business activities.¹⁴¹⁶ However, as discussed in chapter 4,¹⁴¹⁷ parties ought not to have the ability to deliberately evade delictual liability in respect of third parties if the requirements of a delictual claim are present. The expectations of the external party should not be altered by the network structure chosen by the network parties.

Brownsword suggested prior to *Murphy v Brentwood District Council*¹⁴¹⁸ that the perceived confusion between contract and tort could be resolved by viewing groups of cognate contracts as networks, and that such contracts

¹⁴¹² Collins (n 1354) at 14-17; Wellenhofer (n 1360) at 124.

¹⁴¹³ Collins (n 1354) at 18.

¹⁴¹⁴ *Ibid.* at 17.

¹⁴¹⁵ Hutchison and van Heerden (n 479) at 114.

¹⁴¹⁶ *Ibid.*

¹⁴¹⁷ See subsection 4.3.2.

¹⁴¹⁸ *Murphy v Brentwood District Council* [1991] 1 AC 398.

could be subject to a “focused relaxation” of privity.¹⁴¹⁹ The literature on this issue is scarce, and does not specifically address the use of network theory in cases in which the boundary between contract and delict is unclear. Brownsword does not explain whether the network liability imposed would be in terms of contract or delict. As discussed in chapter 4,¹⁴²⁰ privity is a contractual concept which should not be used to prevent the imposition of delictual liability. We can perhaps therefore assume that Brownsword meant for privity to be relaxed to allow network liability to operate as a contractual exception to the doctrine.

A delictual classification of external network liability would require significant reform to the current laws of delictual liability, whereas a contractual analysis would require only the creation of an isolated exception to privity. A contractual classification of external network liability is therefore preferable.

It is of course possible that external network liability could be classified as a *sui generis* form of liability. Teubner questions whether networks are “*sui generis* legal institutions sailing in the Bermuda-triangle between contracts, torts and corporations.”¹⁴²¹ He rules out company law, because the systematised and centralised process of decision-making in corporations is not compatible with decentralised networks, and he states that agency is an unsuitable analysis due to its similar inability to recognise the decision-making processes in networks.¹⁴²² Future research must examine further whether external network liability ought to be classed as *sui generis*.¹⁴²³ As has been discussed above, however, a contractual analysis is potentially feasible, and is preferable to a delictual analysis. The remainder of this chapter addresses whether external network would be a justifiable exception to the privity doctrine in Scots law.

¹⁴¹⁹ Brownsword (n 462) at 32. Brownsword submits that similar reasoning can be seen in *Marc Rich and Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211, although in the case the judges ultimately relied on contractual liability to prevent a tortious claim.

¹⁴²⁰ See subsection 4.3.2.

¹⁴²¹ Teubner (n 1382) at 13-14. See also Teubner, *Networks* (n 24) 130-131 and 139.

¹⁴²² Teubner (n 1382) at 14.

¹⁴²³ This is further discussed in subsection 11.2.3.

10.3.4. Policy considerations justifying the recognition of external network liability

Numerous commentators suggest that the law ought to explicitly recognise networks.¹⁴²⁴ This section explores whether external network liability could be recognised as a justifiable exception to the privity doctrine in Scots contract law.

The first policy justification to consider is the protection of weaker parties.¹⁴²⁵ If an external party is injured by the actions of a network party, it may not be able to fully account for its losses by pursuing that network party in delict.¹⁴²⁶ In such cases, enabling the external party to bypass the network structure and pursue a claim against a network party who is able to compensate for the losses is undoubtedly practically useful from the external party's perspective. In cases where the franchisee does not have sufficient funds to compensate the customer for its injuries, for example, external network liability protects the external party in the event of loss caused by the franchisee by allowing it to claim against the franchisor.

Amstutz, Karavas, and Teubner have specifically recommended that the law is reformed to minimise the risks of network activity to third parties.¹⁴²⁷ Collins has also recognised that the lack of recognition of network responsibility causes hardship to external parties,¹⁴²⁸ noting that firms are able to exert a great deal of freedom as to how they structure themselves, such that they can determine the limits of their liabilities towards external parties.¹⁴²⁹ Teubner recognises that networks generate profit because of their ability to present themselves as highly organised and efficient entities, with a strong

¹⁴²⁴ See, for example: Brownsword (n 1375) at 116-117; Collins (n 1346) at 71; Amstutz, Karavas, and Teubner (n 1375) at vii. Further views are mentioned above in subsection 10.2.1.

¹⁴²⁵ This is discussed in depth at subsection 5.4.1.

¹⁴²⁶ This is noted above at subsection 10.3.3. Similarly, if the external party is in a contractual relationship with the network party, a contract claim is of little use if the network party does not have the funds to meet this claim.

¹⁴²⁷ Amstutz, Karavas, and Teubner (n 1375) at viii.

¹⁴²⁸ H Collins, "Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration" 1990 53(6) *Modern Law Review* 731 at 734.

¹⁴²⁹ *Ibid.* at 736. See also 732. He refers to this as the 'capital boundary problem' (at 737).

sense of corporate identity and continuity between branches or offices.¹⁴³⁰ He contrasts this aspect of networks with the fact that networks can ‘self-dissolve’ into bilateral contracts, and this dissolution also means that external parties may be prevented from recovering damages from appropriate network members.¹⁴³¹ This “room for manoeuvre” allows networks to act irresponsibly, with little regard for external parties.¹⁴³² External network liability could redistribute liability in transactions with external parties, so as to limit the ability of networks to escape external liability through network structures. This would reflect a policy consideration of protecting external parties.

In chapter 5,¹⁴³³ it was ascertained that this policy justification should be upheld, and the external party’s loss should be recoverable, where the third party could not have reasonably been expected to protect itself, and the loss was reasonably foreseeable to the relevant contracting party.

Dealing firstly with the question of whether the loss was reasonably foreseeable, one can view the activities of the entire network as the actions of the network party or parties in control of the network purpose. For example, the franchisees are ultimately acting for the benefit of the franchisor and can be viewed as carrying out the actions of the franchisor. Collins stresses that where a defective product is the result of teamwork, “it should be the responsibility of the group to establish an organisation which prevents such defects”.¹⁴³⁴ Similarly, Schwartz and Scott comment that where network goals are furthered by the participation of third parties, the interests of those third parties should be recognised through network liability.¹⁴³⁵ In the instances of both franchise networks and production networks, it is foreseeable to parties other than the party which transacts with the consumer that the consumer will be harmed by, for example, improperly prepared food

¹⁴³⁰ Teubner, *Networks* (n 24) 100.

¹⁴³¹ *Ibid.*

¹⁴³² *Ibid.* 108.

¹⁴³³ See subsection 5.4.1.

¹⁴³⁴ Collins (n 1428) at 731. See also MacDonald (n 1395) at 806.

¹⁴³⁵ Schwartz and Scott (n 1360) at 3 and 28.

or a defective product. The foreseeability requirement is met, because the network parties which share responsibility for the experience of the consumer can foresee the impact of defective network behaviour to the consumer. Further, in cases where the network is set up with the deliberate aim of restricting liability to third parties, the effects on the third party are foreseeable, because the network parties have contemplated the harm which the third party might suffer and they have actively chosen to evade this.

In terms of whether the third party should have protected itself, the relevant factors are: whether the party is a consumer or commercial entity; the third party's bargaining position; whether the third party expected the loss to be recoverable; and whether the third party had access to legal advice.¹⁴³⁶

Parties external to networks are diverse, and so the question of whether a third party should be expected to protect itself would be dealt with on a case-by-case basis. Where the third party is a consumer, this will greatly increase the likelihood that it should be protected. A consumer, such as a customer of a franchise, will have a weak bargaining position. Everyday consumers do not have the power to negotiate the distribution of liability for any loss they might suffer at the point at which they contract with a franchisee. The average consumer would lack both the time and requisite legal knowledge to do so. It is however likely that a consumer would expect that it would be able to obtain full legal redress against the network party with whom it contracted. A consumer will have an impression of the size and reputation of any business with which it interacts. In the case of a franchisee, the customer would, it is submitted,¹⁴³⁷ assume that the responsibility for any loss it suffers lies with the franchisor. Finally, a consumer is extremely unlikely to obtain legal advice prior to interacting with network entities. It is unrealistic to expect a consumer to ascertain the intended liability distribution across a business network with which it will interact. Accordingly, the requirements for

¹⁴³⁶ See subsection 5.4.1.

¹⁴³⁷ The need for empirical research on this point is discussed in subsection 11.3.

protecting the third party will be met in some cases, particularly where the third party is a consumer.

As noted above, network parties will not always deliberately have structured the network so as to limit liability towards external parties. It is accepted that the difficulties faced by external parties in recovering for their losses or injuries may be an incidental consequence of a network structure set up for reasons other than the evasion of external liability. Nonetheless, network structures may result in unjust consequences for external parties regardless of the intentions of the relevant network actors, and external network liability avoids these unfair consequences. The third party's 'worthiness' of protection should not be determined according to whether the network parties intended to limit a customer's means of redress against a particular network party.

Alongside the policy justification of third-party protection, recognition of external network liability would help adjust the 'image problem' currently encountered by networks. Amstutz, Karavas, and Teubner suggest that networks do not enjoy a positive reputation, due to their "organised irresponsibility" and the risks their "chameleon-like character" pose to third parties.¹⁴³⁸ If we are truly living in a 'network society', it is worth pursuing a set of legal rules which enable consumers to have fair redress against networks when they suffer harm at the hands of network actors. This would ensure that consumers have sufficient trust in networks to transact with them, and do not live in a society in which they feel they are taken advantage of by large network structures. If Amstutz, Karavas, and Teubner are correct that networks are not viewed positively, then proper recognition of the effects of networks would perhaps lead to an adjustment in public, academic, and legal perception of networks. Doctrinal recognition of networks would thus achieve the policy justification of ensuring that the law reflects developments in how businesses are structured, and would lead to workable laws on networks. Brownsword comments that we must "set limits to self-governance; business

¹⁴³⁸ Amstutz, Karavas, and Teubner (n 1375) at viii.

networks cannot be permitted to rule the world.”¹⁴³⁹ The current situation is that networks operate without legal recognition in numerous jurisdictions, and the activities of networks are therefore not properly kept in check. Teubner summarises that the law’s failure to recognise network liability for the negative impact of network behaviour on third parties is a “major hang-up, as a consequence of which private law is co-responsible for the failure of networks.”¹⁴⁴⁰ Whilst the prevalence of networks in today’s society¹⁴⁴¹ demonstrates that networks have not yet failed, doctrinal recognition of networks and coherent laws determining their liabilities in respect of external parties are necessary to ensure that networks are properly regulated.

Once it is accepted that the external party should be protected, the next question is to narrow down the scope of network parties who might be liable to the external party under the principles of external network liability. A franchise network, for example, might encompass hundreds of franchisees across an international business model. External network liability ought not to allow the external party to sue *any* of the franchisees with sufficient funds to compensate its loss or injury. It is submitted that any statutory or judicial reforms of network liability should distinguish between network actors ‘vertical’ to the party responsible for the loss, and those who are ‘horizontal’ to that party. For example, a fellow franchisee is at the same ‘level’ of the network structure and has no authority over the restaurant which served the improperly prepared hamburger in Collins’ example. The customer ought not to be able to sue parties horizontal to the restaurant, such as other franchisees. However, the franchisor is a network party ‘vertical’ or senior to the restaurant, which has authority over the franchisees. The customer should be able to use external network liability to sue ‘vertical’ network actors, but not those who are ‘horizontal’ to the party with whom it is in a contractual relationship. This ensures that only the network actors who are directly benefiting from the actions of the network party responsible for the

¹⁴³⁹ Brownsword (n 1342) at 460.

¹⁴⁴⁰ Teubner (n 1361) at 413.

¹⁴⁴¹ See above at subsection 10.2.1.

loss are forced to bear the burdens of their wrongful actions, whilst those in the network who are merely contributing to the overall purpose are not obliged to compensate external parties for the actions of those at the same 'level.'

As noted above,¹⁴⁴² a contractual analysis of external network liability would assist in narrowing the scope of network parties liable in accordance with external network liability. Doctrinal rules on external network liability could therefore provide that the third party could sue network actors vertical to the entity which caused the loss, and with whom the entity which caused the loss is connected to by contract.

It is therefore possible to justify the imposition of external network liability in certain situations. Brownsword stresses that a regulatory environment sensitive to the public interest is necessary where networks interface with their clients.¹⁴⁴³ Accordingly, external network liability could be a useful tool in balancing the freedom of commercial actors with the need to protect external parties (usually consumers and other economically weaker individuals and entities).

10.4. Concluding remarks

Networks are increasingly prevalent in today's commercial landscape. Legal systems must recognise networks if they are to remain efficient and commercially competitive. Whilst networks raise questions regarding both internal and external liability, this chapter has focused on the latter. It has been shown that external liability could be explained in terms of contract or delict, or it may be a form of hybrid liability. A delictual classification of external network liability is not desirable, because this would necessitate significant reform of delictual law. If external network liability was to be treated as a contractual concept, it would operate as an exception to privity. External network liability cannot be explained on the basis of the intentions of the contracting parties and is therefore incompatible with Scots contract

¹⁴⁴² See subsection 10.3.2.

¹⁴⁴³ Brownsword (n 1361) at 460.

theory. The concept is, however, supported by justifiable policy considerations, namely, protecting weaker parties, ensuring that the law is fair, and ensuring that private law adequately reflects developments in commercial practice. Doctrinal recognition of networks would also increase trust in networks, such that further regulation and legal recognition would be well-received. The current law allows networks full flexibility to evade responsibility for their wrongful actions which impact on external parties. Doctrinal recognition of external network liability could allow losses and injuries caused by network actors to be fully accounted for, by overcoming obstacles created by artificial network structures, and would avoid unfair outcomes.

Chapter 11: Conclusion

11.1. Overview of chapter 11

This chapter provides a summary of the conclusions of the thesis and discusses potential areas for future research leading on from this work.

11.2. Summary of findings

This section summarises the findings of the thesis on the privity doctrine, the concepts examined in the thesis (contracts for the benefit of another, transferred loss, *ad hoc* agency, and undisclosed agency), and potential future exceptions to privity, including external network liability.

11.2.1. The privity doctrine

A historic examination of relevant case law revealed that Scots law has recognised the privity doctrine from at least the nineteenth century, although there is a dearth of judicial comment on the precise scope and meaning of the doctrine. It is, however, clear that Scots law recognises both aspects of privity: preventing third parties from accruing enforceable contractual rights under contracts to which they are not party, and preventing contracting parties from conferring burdens on extra-contractual parties. The 'benefits' aspect of privity does not prevent the conferral of incidental benefits on third parties.

Scots law has historically upheld privity alongside its recognition of the *jus quaesitum tertio*. The continued recognition of third party rights demonstrates that privity operates in Scots law subject to the intentions of the contracting parties. Privity is compatible with will-based theories of contract, which are dominant in Scots law, because it applies in accordance with the intentions of the contracting parties. The doctrine is also compatible with freedom to contract, because privity upholds the parties' freedom to not become liable to those with whom they do not intend to contract. Third party rights are a voluntary curtailment of freedom of contract, and so privity is also compatible with freedom of contract.

Regarding the relationship between privity and delictual liability, a claim in delict is sometimes successful where a contractual claim was not possible due to the privity doctrine. This is a natural consequence of the permissibility of concurrent liability in Scots law. Various commentators and judges have viewed this as problematic and have asserted that delictual liability in such cases is contravening privity. However, delict and contract are different types of liability. The fact that particular conduct on the part of a contracting party might constitute a breach of contract does not, and should not, prevent a third party from making a delictual claim against the contracting party if the third party suffers loss as a result of the conduct. Delict cannot operate as an exception to privity.

There are numerous statutory exceptions to privity. The number and range of these exceptions demonstrate that privity is a porous doctrine. However, rather than abolishing privity in light of its exceptions, the doctrine should generally continue to be upheld. If privity was abolished, third parties could enforce contracts as they chose, and could always recover for losses sustained as a result of breach of contract. This would result in an unacceptable degree of uncertainty for contracting parties. Privity should therefore be upheld, subject to exceptions justified by sound policy reasons.

There are accordingly two 'classes' of exceptions to privity. The first are those justified by contractual intention – for example, third party rights. The second are those justified by policy reasoning. The protection of weaker parties justifies deviation from privity where the third party could not reasonably have been expected to protect itself, and where the loss was reasonably foreseeable to the contracting parties. Ensuring recovery for loss caused by breach of contract is a desirable policy objective, which can support exceptions to privity. However, this consideration alone would not justify the development of a new exception. Finally, an exception can be justified on the grounds that it is commercially convenient for both the contracting parties and the third party.

The 'no burdens' rule (i.e. the second aspect of privity) should also continue to be enforced in Scots law. Exceptions to this aspect of privity are justified where the burden is commercially convenient for the contracting parties without undue hardship for the third party.

11.2.2. The concepts which permit recovery of extra-contractual loss

The thesis provides an in-depth examination of four concepts: contracts for the benefit of another, transferred loss, *ad hoc* agency, and undisclosed agency.

Contracts for the benefit of another are not an exception to privity, because the external party cannot enforce the benefit conferred on it in its own name. The concept is also compatible with contract theory, because it operates in accordance with the intentions of the contracting parties. Both (or all) parties to the contract intend for the contract to confer a benefit on the external party, and they intend for the party who contracts on the external party's behalf to have the ability to recover in respect of the external party's loss if the contract is not properly performed. These contracts are compatible with will-based contract theories, because the contracting parties' intentions are upheld. Accordingly, a contract for the benefit of another can be treated as a passive form of third party rights. The key distinction between a contract conferring a third party right and a contract for the benefit of another is that the recipient of a third party right can enforce the contractual benefit in its own name, whereas the beneficiary under a contract for the benefit of another cannot. As well as upholding the intentions of the contracting parties, contracts for the benefit of another can also, depending on the situations in which they are used, reflect a policy consideration of protecting external parties from financial and physical harm, and the concept ensures recovery for loss caused by breach of contract. It is recommended for these reasons that contracts for the benefit of another continue to be recognised in Scots law. Whilst the concept is not an exception to privity, these policy considerations may justify contracts for the benefit of another as an exception to the rule

against recovery for damages in respect of another's loss. In Scots law, expansion of the concept should be permitted to encompass the recovery of damages for distress and disappointment experienced by the external party in the event of defective contractual performance. Commentators examining this concept in future should reflect that contracts for the benefit of another are a distinct form of third party rights, rather than treating authorities on contracts for the benefit of another (for example, *Jackson v Horizon Holidays Ltd*¹⁴⁴⁴) as third party rights cases. In both jurisdictions, the law should be clarified to allow the external party to claim damages recovered on its behalf from the contracting party.

According to the current law on transferred loss, the third party cannot make a claim against the party in breach in its own right. As such, transferred loss does not currently operate as an exception to privity. However, preventing the third party from recovering its loss is illogical, and transferred loss should be reformed to permit such recovery. A reformed transferred loss doctrine would deviate from the privity doctrine, because this would allow the third party to recover under the contract between the original contracting parties. Transferred loss allows for the recovery of third-party losses regardless of the intentions of the contracting parties. It is therefore not compatible with Scots contract theory (and would not be compatible if it was reformed). Transferred loss could potentially be explained as an extended form of *Junior Books*¹⁴⁴⁵ liability, however, this form of liability is controversial. Consequently, recognition of transferred loss in delictual terms would not aid doctrinal clarity. Transferred loss is also said to protect third parties, but this policy objective is not currently consistently recognised in the operation of the doctrine. This is because the contracting party which did not cause the loss must pursue a claim against the responsible contracting party on the third party's behalf. In order for the transferred loss doctrine to be justified by reference to the protection of weaker parties, it must be reformed such that the third party is able to bring a claim against the relevant contracting party in

¹⁴⁴⁴ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

¹⁴⁴⁵ *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

its own name. Such reform would allow for transferred loss to be recognised as a justifiable exception to privity. Transferred loss should also be reformed such that the third party is protected only where it could not reasonably have been expected to protect itself. This means that the transferred loss doctrine will mainly be applicable where the third party is a consumer – for example, an individual purchaser of a residential property – and where it was not feasible to obtain a collateral warranty. Transferred loss also reflects a policy consideration of ensuring recovery of loss caused by breach of contract. However, this factor alone does not justify deviation from privity. The thesis recommends that transferred loss continues to be recognised in Scots law subject to reform providing that the third party can recover its loss in a direct contractual claim against the contracting party which caused the loss.

Ad hoc agency has not contravened privity in all of the cases in which the concept is recognised. However, it does operate as an exception in cases in which it is used to transfer rights and obligation between separate legal entities, such that a new entity can enforce a contract previously concluded between two other parties. The original entity is no longer in existence, and so cannot consent to the ‘new’ party’s claim under the contract. As such, *ad hoc* agency cannot be justified as an exception to privity based on contractual intention. It cannot be explained in terms of delictual liability. There are no policy objectives which can support *ad hoc* agency as a justifiable exception to privity, and its existence also creates uncertainty within the laws of agency, assignation, and separate legal personality. Additionally, the case in which concept did not violate privity was incorrectly decided. Therefore, there is no reason to continue to recognise the concept in Scots law. It is recommended that *ad hoc* agency is abolished.

Undisclosed agency is also problematic. It is an exception to the privity doctrine, because the principal can enforce contractual rights under the contract between the third party and the undisclosed agent. The principal can sue the third party despite the fact that the third party did not intend to contract with it, and so undisclosed agency is incompatible with contract theory. Undisclosed agency is not a form of delictual liability. It cannot be

justified by reference to the considerations behind the recognition of the statutory exceptions to privity. Whilst the doctrine is commercially convenient from the perspective of the principal and agent, this justification does not extend to the third party, who may be detrimentally affected by the undisclosed agency transaction. The principal is not generally a weaker party which the law should protect. In terms of ensuring recovery for breach of contract, it is the principal's choice of contractual structure which leads to the contract between the third party and principal, rather than the third party's choice, and so this justification is also unrealistic. Recognition of undisclosed agency also contravenes the principles of good faith and freedom of contract. However, in cases where undisclosed agency is used to protect the principal against discrimination based on characteristics recognised under equalities legislation, undisclosed agency does uphold the justifiable policy consideration of protecting weaker parties. It is therefore recommended that undisclosed agency is abolished, other than in situations in which it is used to protect against discrimination.

In summary, contracts for the benefit of another can be recognised in Scots law as a passive form of third party rights. A reformed transferred loss doctrine should, where this protects weaker third parties, be recognised as a 'second class' (i.e. policy-based) exception to privity. Undisclosed agency can be justified in very narrow circumstances and should otherwise be abolished. *Ad hoc* agency should not continue to be recognised in Scots law.

11.2.3. Future exceptions to the privity doctrine

It is possible to justify new exceptions to privity. For example, Chapter 10 demonstrated that doctrinal recognition of external network liability would reflect a policy consideration of protecting third parties and would ensure that Scots law was sufficiently modernised to account for the increasing prevalence of business networks. However, the manner in which external network liability, or any other new exception to privity, is introduced into Scots law must protect and uphold the privity doctrine, contract theory, and justifiable policy considerations. If the law on the privity doctrine and its

exceptions is to be clear and intelligible, the creation of new exceptions must align with well-defined policy objectives.

The Law Commission has stated that, despite its contribution to the Contracts (Rights of Third Parties) Act 1999, it has “no desire to hamper judicial creativity” regarding the privity doctrine.¹⁴⁴⁶ However, the ‘creativity’ which has occurred in Scots law in the creation of *ad hoc* agency has not fully taken into account the underlying privity doctrine or contract theory. The development of this concept has further failed to reflect adequate policy considerations which justify deviation from privity and contract theory. This demonstrates the importance of ensuring that new exceptions to privity uphold sound policy justifications, in order to protect underlying contract doctrine and to ensure that the law is clear and workable.

Judge Richard Seymour QC warns that:

“Although the law is always capable of development, it is, in my judgment, necessary to proceed with particular caution in the area of developing novel ways of providing remedies. The implications of the proposed new way of permitting a recovery to be made are unlikely to be readily apparent beyond the circumstances of the particular case. Moreover, unless the law is moving to a stage in which there is to be a remedy for every perceived wrong, there must be some justification in policy for developing the law in favour of a particular claimant beyond that he contends that he has suffered a loss which will otherwise go uncompensated unless the law is developed.”¹⁴⁴⁷

This can certainly be applied to the expansion of common law exceptions to privity. *Ad hoc* agency was developed with good intentions, and Lord Drummond Young was no doubt seeking to ensure a fair outcome in the case at hand. However, it is not possible to taxonomise this concept as a justifiable exception to privity. The creation of new exceptions to privity should not arise in individual cases as ‘sticking plasters’ to prevent losses in particular situations. Scots law does not reflect a principle that all losses should be compensated. Implementing such a rule would result in an unacceptable

¹⁴⁴⁶ Report on *Privity of contract* (n 182) 1.10.

¹⁴⁴⁷ *Rolls-Royce Power Engineering v Ricardo* [2004] 2 All ER (Comm.) 129 at para 103 per Judge Richard Seymour QC.

degree of uncertainty and make it impossible for contracting parties to accurately predict their liabilities. Sometimes, cases will arise in which losses should be recoverable. However, those responsible for deciding such cases should not create new legal concepts which are not grounded in contract doctrine and sound policy. The creation of new exceptions should instead be the result of extensive deliberation on whether the exception reflects justifiable policy considerations. This may have allowed for the creation of a transferred loss doctrine as a justifiable exception to privity which protects third parties in a consistent manner,¹⁴⁴⁸ and would have curtailed the development of *ad hoc* agency, which is not supported by any reasonable justifications.

The simplest way to ensure that new exceptions to privity are sufficiently clear and well-supported by policy reasoning is for reform to be left in the hands of the legislature and Law Commissions. If the exceptions are enshrined in statute, then the intentions of the contracting parties are not violated when the third party's entitlements are upheld.¹⁴⁴⁹ *Ad hoc* judicial reform of privity has jeopardised doctrinal and commercial certainty. However, if privity is to be reformed at common law, new exceptions should only be recognised following full consideration of privity itself, contract theory, and policy considerations. Whittaker observed, prior to the enactment of the Contracts (Rights of Third Parties) Act 1999, that:

“any creation of exceptions to privity of contract requires clear justification by the courts, taking into account all the relevant factors which apply in the particular context”.¹⁴⁵⁰

This sentiment ought to continue to apply to the development of any further exceptions. MacQueen argues that the progress of Scots common law relies on judicial development “as principle and pragmatism suggest.”¹⁴⁵¹ The

¹⁴⁴⁸ According to the current law on transferred loss, the third party's ability to recover the loss depends on whether the relevant contracting party is willing to make a claim on the third party's behalf. This results in inconsistent outcomes for third parties. See subsection 7.2.5.

¹⁴⁴⁹ This is because the contracting parties impliedly consent to contracting in accordance with the law. This is discussed in subsection 3.2.3.

¹⁴⁵⁰ Whittaker (n 273) at 216.

¹⁴⁵¹ HL MacQueen, “Judicial Reform of Private Law”, 2017 research paper at 29, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035202.

concepts considered in this thesis provide clear examples of legal doctrine justified by pragmatism, but which do not reflect underlying principles of Scots contract law. They are a useful illustration of the need for judicial reform to reflect both pragmatism and doctrinal principle, as MacQueen suggests.

11.3. Areas for further research

Various issues raised in this thesis would benefit from further examination and research in future works. These are: the potential positive impact of undisclosed agency on consumers; the rationale for the use of undisclosed agency in legal practice; developing clear and workable laws on networks; the rule against the recovery of another's loss; and the 'no burdens' aspect of privity. The remainder of this section considers these issues in turn.

Chapter 9 mentioned Tan's view that higher prices encountered by a principal if it must contract in its own name will impact third parties such as consumers.¹⁴⁵² Empirical research on the use of undisclosed agency would be beneficial in clarifying whether this is correct. One such avenue of research may be the use of undisclosed agency in the purchase of 'ransom strips'.¹⁴⁵³ This refers to a small piece of land that is crucial to the completion of a proposed development. For example, a ransom strip might constitute part of an area of land on which a road must be built to access a supermarket development.¹⁴⁵⁴ Analysing the difference in price between the sale of ransom strips encountered by undisclosed agents and entities which contract in their own names, and any consequent impact on consumers, may confirm

¹⁴⁵² See subsection 9.4.1.

¹⁴⁵³ The key English case is *Stokes v Cambridge Corp* [1961] 180 EG 839. Two relevant Scottish cases are *Morton Whitecross Limited v Falkirk Council* [2012] CSOH 97 and *Elmford Limited for Judicial Review of Actings by Glasgow City Council (No. 2)* (Outer House, 12 September 2000, Unreported). These cases do not discuss undisclosed agency, but they provide an overview of the law on ransom strips and the practical problems associated with their sale. In Scotland, there is an ongoing dispute concerning the building of a wall on a ransom strip owned by the Grange Trust, but over which the Edinburgh Academical Club have the right to control development: *Trustees of the Grange Trust v City of Edinburgh Council* [2017] CSOH 102.

¹⁴⁵⁴ See further J Sidders, "A small piece of real estate in the right place can make its owner millions" *Estates Gazette* (7 June 2014) 754.

or disprove Tan's claims. This research may influence the question of whether limited forms of undisclosed agency should continue to exist in Scots law.

The dearth of case law on undisclosed agency perhaps reflects the fact that the principal's existence is often not revealed. This means that examining case law and commentary cannot offer a complete perspective of the reasons why undisclosed agency is used in practice. Further empirical research on undisclosed agency more generally would therefore be beneficial in attempting to ascertain the rationale behind the use of undisclosed agency structures in legal practice. This in turn may identify any remaining policy considerations that could justify undisclosed agency.

Chapter 10 discussed the increasing prevalence of networks. It is imperative that the phenomenon of legal networks is subject to both doctrinal and empirical study. This will ensure that networks are properly understood by policymakers, and that the law on networks is workable and up-to-date. In particular, doctrinal research on networks could usefully ascertain whether networks ought to be treated as contractual or *sui generis*. Empirical research on consumer perspectives of networks could influence potential reforms aimed at protecting consumers from the impact of network behaviour.

The thesis has briefly addressed the interaction between the privity doctrine and the rule that a contracting party cannot recover for another's loss.¹⁴⁵⁵ This rule, like privity, is subject to a number of exceptions – for example, transferred loss and contracts for the benefit of another. Historical examination of this rule and the policy rationale behind its exceptions would ensure that the law on cases where contracting parties can recover for another's losses is doctrinally coherent. Both rules concern the interaction between contracting parties and external parties, and so future work on the

¹⁴⁵⁵ See subsections 5.4.2 and 6.3.2.

intersection of these two rules would contribute to doctrinal clarity in Scots law.

Finally, this thesis has focused on the 'benefits' aspect of the privity doctrine. It has however identified that exceptions to the 'no burdens' rule are permissible where the contractual arrangement is commercially convenient for the contracting parties as well as the third party.¹⁴⁵⁶ The exceptions to this aspect of privity are limited in comparison to the 'benefits' aspect of the doctrine, and the 'no burdens' rule is relatively uncontroversial. Nonetheless, future research on further potential exceptions to this rule would allow for a fuller understanding of this aspect of privity.

¹⁴⁵⁶ See subsection 5.5.3.

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