Privity: Rights, Standing, and the Road Not Taken

Timothy Liau*

Abstract: Privity is generally understood as a rule comprising a burdens limb, and a more controversial benefits or 'rights' limb. This rendition of privity is too simplistic. Privity has multiple aspects, but its underlying complexity has been obscured by an overwhelming focus on 'rights', explaining in part the persistent unclarity plaguing the area. In this article I argue that an elision of concepts has hampered our understanding of privity and its reform. The literature on contractual rights to performance and secondary rights to damages for their breach is legion. By contrast, standing, as a separate and distinct concept, has been overlooked. These are concepts that need to be more clearly differentiated. While not a panacea to resolve all issues, it is a necessary step to a firmer handle over the distinct issues at stake, and to opening up a novel angle to privity reform – third-party standing – the road not taken.

Keywords: privity, rights, standing, damages, contract

> Two roads diverged in a wood, and I—
> I took the one less traveled by,
> And that has made all the difference.
> - Robert Frost (1874-1963)[1]

1. Introduction

Guenter Treitel once wrote that '[t]he most significant doctrinal development in English contract law in the twentieth century was no doubt the outcome of … the battle over privity'.[2] Despite developments, an unclarity persists.

This article's main claim is that an elision of concepts – rights and standing – has hampered our understanding of privity and its reform. The literature on contractual rights to performance and secondary rights to damages for their breach is legion.[3] By contrast, standing, as a separate and distinct

* Assistant Professor, Faculty of Law, National University of Singapore. Email: timothy.liau@nus.edu.sg. For comments on early drafts I am grateful to Rob Stevens and Sandy Steel, my doctoral supervisors, and to Andrew Burrows and Ben McFarlane, my MPhil examiners. Thanks are also due to Michael Bridge, Rachel Leow, Jason Neyers, Josh Pike, Francis Reynolds, Andy Summers, Tham Chee Ho, Fred Wilmot-Smith, and the anonymous referees, with apologies to anyone I may have inadvertently missed out. Earlier versions were presented to audiences at the Oxford Obligations Discussion Group and Obligations IX Melbourne, and I am grateful for their engagement. Remaining errors mine alone.

1 'The Road Not Taken' in *Mountain Interval* (Henry Holt 1916)

2 Guenter Treitel, 'The Battle Over Privity', *Some Landmarks of Twentieth Century Contract Law* (Clarendon 2002) 47.

3 Daniel Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 LQR 628; Brian Coote, 'Contract Damages, Ruxley, and the Performance Interest' (1997) 56 CLJ 537; Charlie Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006)

concept, has been overlooked. These are concepts that need to be more clearly differentiated. While not a panacea to resolve all issues, it is a necessary step to a firmer handle over the distinct issues at stake, and to opening up a novel angle to privity reform – third-party standing – the road not taken.

As a less drastic reform route it would have achieved similar objectives, while causing less anomalies and normative incoherence, thus meeting concerns of reform critics and enthusiasts alike. To demonstrate the point, main problem cases motivating reform are re-examined in turn: (i) debts, (ii) liability-exempting clauses, and (iii) damages. It is furthermore argued that four major reasons mooted for privity reform might be more consonantly treated as justifications for extending standing rather than rights to third-parties, namely (i) promisee inability to sue, (ii) commercial necessity, (ii) parties' intentions, and (iv) avoiding 'blackholes'. Put together, they suggest that third-party standing could justifiably uphold a central value of contract law – that 'agreements must be kept'[4].[5]

A. 'Third-Party Rights'

Privity's multiple aspects have been obscured by an overwhelming focus on 'rights', explaining in part the persistent unclarity. Privity prevents the acquisition of 'third-party rights'. But as Wesley Hohfeld taught us,[6] the word 'right' is notoriously ambiguous. Used here it could encompass at least two fundamental legal concepts, each distinct.

First, it could refer to a *claim-right*, the correlative of a duty owed. In the contractual context this could either be a primary right to the promised performance, or after breach, a secondary right to damages for breach of contract. This use of 'right' identifies the contractual counter-party, the promisee,

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26 OJLS 41; David Pearce and Roger Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 OJLS 73; Robert Stevens, 'Damages and the Right to Performance: A Golden Victory or Not?' in Jason Neyers, Richard Bronaugh and Stephen Pitel (eds) *Exploring Contract Law* (Hart 2009); Stephen Smith, 'Substitutionary Damages' in Charles Rickett (ed) *Justifying Private Law Remedies* (Hart 2008); Stephen Smith, 'Remedies for Breach of Contract: One Principle or Two?' in Gregory Klass, George Letsas, and Prince Saprai (eds) *Philosophical Foundations of Contract Law* (OUP 2014); David Winterton, *Money Awards in Contract Law* (Hart 2015).

4 *Pacta sunt servanda.* Eg *AB v CD* [2014] EWCA Civ 229, [2015] 1 WLR 771 [21], [27]-[29] (Underhill LJ), [32] (Ryder LJ); *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67, [2016] AC 1172 [257] (Lord Hodge).

5 This paper focusses on English contract law, but the analysis could be of more general application to similarly situated common law jurisdictions.

6 Wesley Hohfeld, 'Some Fundamental Legal Conceptions as applied in Judicial Reasoning' (1913) 23 Yale LJ 16.

to whom one's primary duty of performance is owed. As victim of breach, he is owed the secondary duty to be paid damages for the civil wrong to him.[7] To distinguish this unique sense of right 'most properly called', Hohfeld labelled it 'claim-right'.[8]

Hohfeld also observed that the looser umbrella term 'right' is sometimes used to refer to a *power*. This creates ambiguity. 'Right of action' or 'right of suit'[9] are commonplace labels for standing, but standing is truly a power, correlative to the liability to be sued. 'Rights of action' or 'rights of suit' are not the sorts of things that can be breached. They have no correlative duties. They do not require of anyone an act, an outcome, or a standard of behaviour that must be complied with. Requiring no compliance, they cannot be uncomplied with.

Instead, standing is a power of enforcement. It ought to be more clearly distinguished from underlying right-duty relations, the typical subject-matters of enforcement in contract law. In the contractual context it is usually exercised by a claimant to enforce an underlying duty of the promisor, primary or secondary.[10] The claimant has a choice over whether, and if so when to sue to enforce it. In private law the court is not a roving commission, with unilateral initiative to investigate wrongs, enforce rights, and order damages awards. It will not step in to resolve a dispute or undo a wrong or injustice unless and until a claimant with standing initiates it.[11] The defendant is not subject to the court's power to make an order against him until and unless the claimant exercises his standing.[12]

B. Conceptual Elision

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7 Peter Birks, 'The Concept of a Civil Wrong' in David Owens (ed), *The Philosophical Foundations of Tort Law* (OUP 1997); John Gardner, 'Breach of Contract as a Special Case of Tort' in *Torts and Other Wrongs* (OUP 2019) 334, 336-339.

8 Hohfeld, 'Fundamental Legal Conceptions' (n 6) 33.

9 E.g. *Beswick v Beswick* [1968] AC 58 (HL) 73, 75 (Lord Reid), 80 (Lord Hodson), 87 (Lord Guest), 92-93 (Lord Pearce); *Owners of Cargo Laden on Board the Albacruz v Owners of the Albazero (The Albazero)* [1977] AC 774 (HL); s 2(1) Carriage of Goods by Sea Act 1992; Peter Kincaid, 'Third Parties: Rationalising a Right to Sue' (1989) 48 CLJ 243.

10 *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2019] AC 649 (HL) [34] (Lord Reed); *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67 [9]-[14], [32] (Lords Neuberger & Sumption), [241]-[242], [251] (Lord Hodge), [291] (Lord Clarke); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 848–50 (Lord Diplock); *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL) 1185 (Lord Diplock).

11 Arthur Ripstein, *Private Wrongs* (HUP 2016) 272.

12 A fuller account of 'standing' is advanced in Timothy Liau, 'Standing in Private Law' (DPhil, University of Oxford, 2020).

'Third-party rights' may be a convenient shorthand, but repeated loose usage risks conceptual elision. This seems to have occurred at common law, and statute.

Chitty on Contracts simply states that '[t]he common law doctrine of privity of contract means that a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it.'[13] Referring to privity's controversial limb, authoritative texts like *Anson's Law of Contract*[14] and *Treitel's The Law of Contract*[15] likewise describe it as forbidding simply the acquisition of 'rights'.

A similar ambiguity has infected the Contracts (Rights of Third Parties) Act 1999 ('CRTPA'), enacted as a 'wide-ranging' statutory exception to privity.[16] Its operative limb confers a single compound entity: a 'right' to 'enforce a term of the contract'.[17] Section 1(5) states that when this 'right' is 'exercised', 'there shall be available … any remedy that would have been available to him in an action for breach of contract as if he had been a party to the contract'. But it is powers, not claim-rights, that are truly exercisable.[18] This ambiguity comes across from the Law Commission Report behind the Act:

> '[W]e need to clarify at the outset what we mean by the 'right to enforce the contract' …. We explained that the first part of this recommendation states the central point that the third party beneficiary is to be entitled to performance of the promise, or damages for its non-performance. The second part of the recommendation allows third parties to be able to take advantage of exemption clauses agreed for their benefit, thus achieving the result reached in The Eurymedon and The New York Star more directly…'[19]

> 'We therefore recommend that: … a right to enforce the contract means (1) a right to all remedies given by the courts for breach of contract (and with the standard rules applicable to those remedies applying by analogy) that would have been available to the third party had he been a party to the contract, including damages, awards of an agreed sum, specific performance and injunctions; *and* (2) a right to take advantage of a promised exclusion or restriction of the promisor's rights as if the third party were a party to the contract. (Draft Bill, clause 1(4) and 1(5))'[20]

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13 Hugh Beale (ed) (33rd edn, Sweet & Maxwell 2018) [18-003].

14 Jack Beatson, Andrew Burrows, and John Cartwright (eds) (31st edn, OUP 2020) 613-14.

15 Edwin Peel (ed) (15th edn, Sweet & Maxwell 2020) [14-001]-[14-004].

16 Law Commission, *Privity of Contract* (Report No 242, 1996) paras 3.30-32, 5.16, 13.12.

17 S 1 CRTPA.

18 John Gardner, *From Personal Life to Private Law* (OUP 2018) 204: 'a simple case of conceptual slippage'.

19 Law Commission (n 16) para 3.30.

20 Law Commission (n 16) para 3.32 (emphasis added). NB 1(4) and 1(5) respectively enacted as s 1(5) and s 1(6) CRTPA.

The 'right to enforce' appears a mixed bag. The statutory wording equivocates between distinct concepts. (1) appears to refer to a secondary claim-right to damages 'for breach of contract', arising only at time of 'non-performance', i.e. breach. By contrast, '(2) a right to take advantage of a promised exclusion or restriction' seems to refer to a *power* to enforce an agreed restriction on a third-party's liability to suit, a problem arising from the *Eurymedon* line of carriage cases, discussed below.

2. Privity's Multiple Aspects

To progress, privity's multiple aspects must be unravelled. One aspect concerns claim-rights. The other concerns standing, a power. Standing is the focus of this article, but for completeness each aspect is briefly discussed in turn.

A. Claim-rights

When textbooks introduce the doctrine by opposing its benefits limb ('rights') to its burdens limb ('duty'), this opposition naturally focusses attention upon the right-duty relation. It highlights privity's claim-rights aspect, either as a rule about primary (claim-)rights to performance, or about secondary (claim-)rights to damages for breach of contract.

(i) Formation

In the first edition of his important text, William Anson said:

> 'A contract is an agreement between two or more persons, by which an obligation is created, and those persons are bound together thereby. If the obligation takes the form of a promise, by A to X to confer a benefit on M, the legal relations of M are nonetheless unaffected by that obligation. He was not party to the agreement. He was not bound by the vinculum juris which it created and the breach of that legal bond cannot affect the rights of a party who was never included in it.'[21]

Similarly, Peter Benson has argued that:

> 'The core idea at the heart of privity is that only persons who participate in the interaction required to give rise to contractual rights and duties acquire such rights or are subject to such duties.'[22]

More recently:

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21 Sir William Anson, *Principles of the English Law of Contract* (1st edn, Clarendon 1879) 195.

22 Peter Benson, 'Should White v Jones Represent Canadian Law: A Return to First Principles' in Jason Neyers, Stephen Pitel and Erika Chamberlain (eds), *Emerging Issues in Tort Law* (Hart 2007) 184-85.

> 'contract is conceived as an intrinsically bilateral relation… it is in virtue of being participants in the formation of the contract that individuals are juridically related to each other.'[23]

These statements classify privity as a *formation* rule, preventing third-parties to a contract from acquiring primary contractual rights to performance. It is placed alongside offer and acceptance, intention to create legal relations, consideration, and certainty, as establishing a necessary condition for the acquisition of a contractual right: that one must be 'party' to the agreement.[24]

This sense of privity does little independent conceptual work. It thus risks becoming otiose. There is substantial overlap with other formation requirements. Secret, undeclared intentions do not count. It is already implicit that to constitute a contractual right to the agreed performance in someone, an intent to undertake a correlative obligation must be communicated to him. Unlike unilateral vows, bilaterally manifested communications are necessary for an agreement,[25] or for a promise to be made.[26] To paraphrase Lord Diplock in *The Albazero*, contractual rights cannot 'spring up' between parties who have had 'no contact'.[27]

In this sense, privity's main value appears cautionary, invocable by counsel as a warning to judges against deeming fictional contractual rights, even where formation requirements are unmet.

(ii) Damages

Secondly, privity could be understood as a rule about how damages for breach of contract work, preventing us from acquiring secondary rights to damages for breach of someone else's contractual right.

It is a well-known argument that if duties could be discharged simply by their breach, that would be absurd.[28] 'If I could unilaterally dissolve your entitlement to constrain my conduct, there would be no sense in which you were entitled to constrain it.'[29]

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23 Peter Benson, *Justice in Transactions: A Theory of Contract Law* (HUP 2019) 76.
24 Eg *Chitty on Contracts* (n 13) [18-004]; *Treitel* (n 15) [14-005]; s.1(1) CRTPA.
25 Stephen Smith, *Contract Theory* (Clarendon 2004) 180-83.
26 Charles Fried, *Contract as Promise* (1st edn, HUP 1981).
27 *The Albazero* [1977] AC 774 (HL) 847 (Lord Diplock).
28 Ernest Weinrib, *The Idea of Private Law* (OUP 2012) 135.
29 Arthur Ripstein, *Private Wrongs* (HUP 2016) 248.

However what is less often spelt out, yet frequently assumed, is that what remains owing post-breach is owed *only* to the victim of the breach, whether apology, reparation, restitution, or recompense. Thus where a breach of contract occurs, no one other than the promisee acquires a secondary right to damages. The primary right to the promised performance is solely his. Everyone else is a 'third-party' not entitled to damages. As this rule overlaps with some versions of what has been popularly called a 'continuity thesis' in the literature,[30] we might coin it 'directional continuity':

> if I breach your primary right, then any secondary duty I owe to pay damages is owed only to you (and to no one else).

To breach a duty I owe you is to wrong you, thus a breach of contract is a civil wrong.[31] *McGregor on Damages* rightly states that an 'essential feature of damages' is a wrong done in relation to you.[32] No wrong, no damages. It is a truism that the law of obligations is normally unconcerned with the fact alone that some third-party to the correlative right and duty has suffered a consequent loss. A relevant loss attracting the law of damages must be loss wrongfully caused. This proposition is so well-known we have reserved a convenient Latin aphorism to it; it is *damnum sine injuria*.[33]

B. A Standing Rule

Talk of 'third-party rights' casts the spotlight on privity's claim-rights aspect. Its dominance has obscured privity's second aspect, as a distinct rule about standing. Under this rule:

> it is only the primary right-holder (here the promisee) who has the standing (ie power) to sue to enforce his underlying right

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30 Terminology from John Gardner, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1. Cf Joseph Raz, 'Personal Practical Conflicts' in Peter Baumann and Monika Betler (eds), *Practical Conflicts: New Philosophical Essays* (CUP 2004). Compare 'rights-continuity' versions in eg Ernest Weinrib, 'Two Conceptions of Remedies' in Charles Rickett (ed), *Justifying Private Law Remedies* (Hart 2008); Arthur Ripstein, 'As If It Had Never Happened' (2007) 48 William & Mary Law Review 1957.

31 Peter Birks, 'Definition and Division: A Meditation on Institutes 3.13' in Peter Birks (ed), *The Classification of Obligations* (OUP 1998) 17-20; Birks, 'Concept of a Civil Wrong' (n 7); Gardner, 'Breach of Contract as a Special Case of Tort' (n 7).

32 Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) [1-004]-[1-010], [1-018]-[1-019]; Peter Cane, *An Introduction to Administrative Law* (2nd edn, OUP 1992) 44.

33 Eg *Bourhill v Young* [1943] AC 92 (HL)106 (Lord Wright); *O'Connor v Isaacs* [1956] 2 QB 288, 313 (Diplock J).

Unlike in public law judicial review,[34] an interest in seeing a right enforced will not normally suffice. No right, no standing. This standing rule entails that enforcement is left exclusively up to right-holders, and to no one else, not even the state. It is important to appreciate that this standing aspect of privity is distinct from, and cannot be reduced to, its other senses above. It is conceptually indispensable to explaining important intuitions about the doctrine's operation and significance. Four can be stated here.

The first is that it explains the conventional wisdom that private law – and by extension contract law – does not have or need standing rules. Peter Cane commented that:

> 'Standing is not normally a requirement for bringing a 'private-law claim' . . . There are certain private-law concepts that resemble rules of standing: for example, duty of care in the tort of negligence, the principle that breach of a statutory duty will be actionable in tort only if the duty is owed to the claimant as an individual (as opposed to the public generally), and the doctrine of *privity of contract*. However, these are not seen as separate from the rules that define the relevant wrong, but as part of the definition of the wrong.'[35]

The reason why 'the doctrine of privity of contract' is a 'concept' that 'resembles a rule of standing' is precisely because privity *contains* an implicit standing rule. Their relationship is not mere resemblance. The standing rule is constitutive of privity. It is one of privity's irreducible aspects, though perhaps overshadowed by others. This implicit rule, we might infer, explains the general absence of explicit standing rules duplicating its role. If we had overlooked its presence, it is likely because privity's conceptual ambiguity, coupled with our focus on 'rights', hid it in plain sight.

Second, Viscount Haldane's language in *Dunlop Pneumatic Tyre v Selfridge* expressing privity as a 'fundamental principle' that 'only a party to a contract can sue on it' supports this inference.[36] This was the first authoritative judicial recognition of privity's doctrinal independence. Historically, privity was entwined with consideration.[37] Where a third-party sought to enforce a promise, his failure could be explained on the basis of either rule.[38]

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34 s 31(3) Senior Courts Act 1981.

35 Peter Cane, *Administrative Law* (5th edn, Clarendon 2011) 281–82 (emphasis added).

36 [1915] AC 847 (HL) 853. Affirmed in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 (HL) 467 (VC Simonds).

37 Eg *Tweddle v Atkinson* (1861) 1 B & S 393, 121 ER 762; David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2006) 241. On their overlap see *Kepong Prospecting Ltd v Schmidt* [1968] AC 810 (PC) 826; *Treitel* (n 15) [14-014]; Law Commission (n 16) paras 6.1-6.8.

38 Eg *Price v Easton* (1833) 4 B&Ad 433, 110 ER 518; *Tweddle v Atkinson* (1861) 1 B&S 393.

Third, privity's standing aspect vindicates the thought that privity of contract is a 'fundamental principle'. The implicit standing rule is 'fundamental' in the sense of having taxonomical significance for contract law. The traditional view is that 'the law of contract is part of the law of obligations… English law is thus concerned with contracts as a source of obligations'.[39] This standing rule, hidden within privity of contract, is both a distinctive and unifying feature of private law as a whole. It provides strong reason for contract law's classification as part of private law, rather than public law.

The suggestion that this feature *distinguishes* private law from public law and the criminal law might be traced back to H.L.A Hart.[40] Suppose I take a hammer to your knee, simultaneously committing a tort and crime against you. As a tort victim, you are empowered with the standing to sue for damages: '[t]ort law is … plainly private law in the sense that it is about empowering private parties to initiate proceedings designed to hold tortfeasors accountable'.[41] In criminal law however, victims have no standing to charge alleged criminals. It is the state prosecutor who is so empowered.[42] This explains why in practice, alleged criminals make plea bargains with state prosecutors who have prosecutorial discretion, while in private law tortfeasors must make settlements with tort-victims, and not the state.

The rule is also a *unifying* feature of private law, applicable across all of its branches.[43] Only the victim of a threatened tort can decide to enforce his primary right by *quia timet* injunction,[44] preventing a tort, or if a tort has been committed, a secondary right to damages. Only the promisee can decide to sue and enforce his primary right to contractual performance, or, in case of breach, his secondary right

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39 *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL) 346 (Lord Diplock); Similarly *Banque Financière de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 227 (Lord Steyn).

40 HLA Hart, 'Legal Rights' in *Essays on Bentham* (Clarendon 1982) 182-86. Similarly, John Gardner, *Torts and Other Wrongs* (OUP 2019) 333.

41 John Goldberg and Benjamin Zipursky, 'Torts as Wrongs' (2010) 88 Texas LR 917, 946.

42 Goldberg and Zipursky, 'Torts as Wrongs' (n 41) 946-47; John Gardner, 'Torts and Other Wrongs' (2011) 39 Florida State University LR 43, 45; Robert Stevens, 'Private Rights and Public Wrongs' in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 118-21; Stephen Darwall and Julian Darwall, 'Civil Recourse as Mutual Accountability' [2011] Florida State University LR 17, 18-20: '[C]ivil cases are appropriately brought by plaintiffs and … criminal cases are brought by "the people" and their representatives.'

43 Gardner, 'Torts and Other Wrongs' (n 42) 44-46; Stevens 'Private Rights' (n 42) 119. Conceding, see Goldberg and Zipursky, *Recognizing Wrongs* (HUP 2020) 122-23, 125.

44 *Redland Bricks v Morris* [1970] AC 652 (HL) (Lord Upjohn).

to be paid damages.[45] Only I can enforce my right to restitution from you, if I mistakenly pay you £1,000,000 thinking I owe it to you.[46] Your enrichment is 'at my expense', and not anyone else's. Privity of contract is only one instantiation of a feature applicable across the whole law of obligations, disclosing a more general structure of 'private rights of action'.[47]

Fourth, this affords an insight to the defence of privity by theoretically-inclined contract lawyers.[48] Peter Kincaid has consistently derided the CRTPA as abandoning 'private justice'.[49] For him, employing a justification based on a 'public interest in seeing the contract carried out' moves English law towards a 'mixture of public and private'.[50] Stephen Smith has similarly described privity as a feature 'basic to private law', objecting to the reform as 'sever[ing] the most important feature of private law: the link between plaintiff and the defendant'.[51] The fear might be that, if exceptions were made to privity's standing aspect without adequate reason, contract law would lose an important private law characteristic, moving another step towards becoming public or regulatory law.[52]

3. Third-Party Standing: The Road Not Taken

Focussing on privity's 'rights' aspect, it was falsely assumed that privity reform necessitated third-party claim-rights. Previous sections unveiled the underappreciated complexity in privity. The following sections interrogate a missed dimension to the debate – third-party standing only.

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45 *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20 [35] (Lord Reed).

46 *Kelly v Solari* (1841) 9 M&W 54; 152 ER 24.

47 Benjamin Zipursky, 'Philosophy of Private Law' in Jules Coleman, Kenneth Himma, and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 632-36, 645; Arthur Ripstein, *Private Wrongs* (HUP 2016) 269-75; Gardner, 'Torts and Other Wrongs' (n 42) 44-46; contrast Stevens, 'Private Rights' (n 42) 118-21.

48 Even if they lacked the conceptual apparatus to articulate their objections in these exact terms.

49 Peter Kincaid, 'Privity and Private Justice in Contract' (1997) 12 Journal of Contract Law 47.

50 Peter Kincaid, 'Theoretical Issues Raised by the Privity Question' in Peter Kincaid (ed), *Privity* (Ashgate 2001) 1-2.

51 Stephen Smith, 'The Law Commission's Proposals on Privity: Which Duty? Whose Right?' (1997) 1 Amicus Curiae 13.

52 For instance, if standing were extended wholesale to public-officials for *all* contracts, contract law would completely collapse into regulatory law. However, this does not mean that localised exceptions to standing cannot be justified. Under consumer contracts, for instance, a public regulator may be empowered with standing, and quite legitimately so: Consumer Rights Act 2015, Part 3. See also Schedule 3. But general exceptions require general justifications, and this is a distinct challenge to be met for those who would abolish privity entirely.

A. Rights

It seems relatively clear that the Act has provided the third-party a secondary right to damages, arising after breach of contract.[53] It is more ambiguous whether the statute also deems in the third-party a primary right to performance, arising from time of contractual formation.

One test is to ask whether, under a relevant contractual term, the promisor owes only one or two duties from the outset. If the latter, defective or non-performance would constitute a wrong against not just one person but two – both promisee and third-party. On its face, this goes against the bilaterality of right and duty. A statutory deeming of primary rights is also difficult for other reasons.

(i) Primary

If what is sought is to justify in the third-party his own primary right to contractual performance, then what we are really attempting is an exception to the contractual *formation rules*, a drastic move. This proved contentious, provoking forceful objections of principle.[54] Not having been a promisee, nor having given consideration, it is no easy task to justify such a right for a third-party. In a legal system that says contractual rights to performance are acquired by parties to agreements[55] who have provided consideration,[56] justifying giving such rights to parties who satisfy neither condition requires some work. At the very least, it is difficult to explain why they get the same kind of rights.

Reform critics have rightly argued that this would upset the nature of a contractual obligation.[57] The idea being, very roughly, that we are making an insufficiently justifiable exception to a necessary requirement for the acquisition of a right that reflects something fundamentally important about its

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53 S 1(5) grants 'any remedy that would have been available to him in an action for breach of contract'.

54 Eg Stephen Smith, 'Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule' (1997) 17 OJLS 643; Robert Stevens, 'The Contracts (Rights of Third Parties) Act 1999' (2004) 120 LQR 292; Peter Kincaid, 'The UK Law Commission's Privity Proposals and Contract Theory' (1995) 8 Journal of Contract Law 51; Catherine Mitchell, 'Privity Reform and the Nature of Contractual Obligations' [1999] Legal Studies 229.

55 Eg *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154 (PC) 167 (Lord Wilberforce).

56 Alive and well, even for contractual variations: *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119.

57 Eg Smith, 'In Defence' (n 54) 660; Mitchell, 'Privity Reform' (n 54) 229, 241-44; Stevens 'The CRTPA' (n 54); Kincaid, 'Privity Proposals' (n 54); cf Law Commission (n 16) para 6.13.

nature and justifying reason, for example its basis in promise,[58] agreement,[59] or a reciprocal bargain or exchange.[60]

Moreover, deeming primary rights for ad hoc remedial purposes muddies the issues at stake, and so might be criticised as obscurantist. The objection cuts further if it is accepted that primary rights and secondary rights stand in some relation, under some version of a 'continuity thesis', so that the content and scope of the latter is in some way justified or defined by that of the former.[61] The technique could even prove self-defeating.

(ii) Secondary

If however the aim is merely to re-direct damages to another, by providing a third-party with a secondary right to damages for breach of someone else's primary right to contractual performance (the promisee's), then what is attempted is really an exception to a different rule – 'directional continuity' – a rule about how *damages* for breach of contract work.

Damages are awarded for a wrong to someone else. The Fatal Accidents Act 1976 ('FAA') does this, and so is helpful comparison here. To explain its gist: suppose you knock me down on the street, instantly killing me. You have violated my primary right to bodily integrity. You have wronged only me, and not my dependants. I am the victim to your tort, not my dependants. Very exceptionally however, the FAA grants my dependants their own 'parasitic' or 'derivative' secondary right to compensatory damages, to recover their own consequential loss from you.[62]

Furthermore, it should be emphasised that under the CRTPA, said third-party may not even be a third-party-*beneficiary*. As long as the contract 'expressly provides'[63] so for an 'expressly identified'[64] person, the 'right to enforce' could even be conferred upon anyone, even someone who would not benefit at all from due performance, consequentially or otherwise. The absence of even this rather loose

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58 Charles Fried, *Contract as Promise* (1st edn, HUP 1981).

59 Stephen Smith, *Contract Theory* (Clarendon 2004).

60 Kincaid, 'Privity and Private Justice' (n 49).

61 See (n 30). Cf Craswell 'Contract Law, Default Rules, and the Philosophy of Promising' (1989) Michigan LR 489, 516.

62 Sections 1 and 3 FAA.

63 S 1(1)(a) CRTPA.

64 S 1(3) CRTPA.

nexus between duty-bearer and putative 'right-holder' amplifies the objections above. Stretched this far, it is hard to see what substance is left behind in the idea of a contractual right, whether primary right to performance, or secondary right to damages for breach of contract.[65]

These objections apply with less force to third-party standing.

B. Standing

One general implication of recognising privity's distinct aspects is that an exception could be made to one, without the other. An exception to the standing rule could be made by extending to a third-party the standing (a power) to enforce the promisee's contractual rights, without also his own free-standing or parasitic right.[66] Thus the third-party could enforce the promisor's equivalent correlative duties, owed under the contract to the promisee. No new right or duty is thereby created.

This would have elegantly solved the main problem cases motivating enactment of the Act. In each of them, simply giving third-parties the power to enforce the promisee's rights would suffice. So, if one party to a contract has agreed to pay a third-party a sum of money, giving the third-party a power of enforcement will enable him to compel payment of this sum to him. If one party has promised not to sue a third-party or has promised to limit their liability to a specified sum, all the third-party needs to stop or limit that suit is a power to enforce that promise. Upon breach of contract, a third-party beneficiary might suffer consequential losses. To recover a sum representing that loss, all the third-party needs is the power to enforce the promisee's right to damages under 'transferred loss', simultaneously enforcing the promisee's duty to account to him in respect of its proceeds.

4. Case I: Duties to Pay Liquidated Sums to a Third-Party

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65 Fodder for rights-sceptics, see eg Oliver Wendell Holmes, 'The Path of the Law' (1897) Harvard LR 457, 462.

66 Compare Melvin Eisenberg, 'Third-Party Beneficiaries' (1992) 92 Columbia LR 1358; Peter Benson, *Justice in Transactions: A Theory of Contract Law* (HUP 2019).

Suppose there is, in a contract between C and D, a term that D must pay T an agreed sum. All T needs is the power (standing) to enforce C's right against D that the agreed sum be paid to T.[67] Two canonical privity cases, *Beswick v Beswick*[68] and *Tweddle v Atkinson*,[69] illustrate this.

In *Beswick v Beswick,* Peter Beswick agreed to transfer the goodwill in his coal business to his nephew, in exchange for a promise to pay his wife £5 a week until her death. Peter died. His nephew defaulted. Peter's widow hence sued the nephew in two capacities: personally, and as administratrix of Peter's estate. The House of Lords held that privity prevented her from personally enforcing her deceased husband's right against the nephew, but she could enforce it as administratrix of his estate. Mrs Beswick could thus compel the agreed payments.[70]

Suppose however that Mrs Beswick were not so fortunately appointed administratrix of her husband's estate. The reneging nephew would have won. Reform enthusiasts allege that this near miss demonstrates privity's 'injustice':[71] it thwarts parties' intentions,[72] causing 'perverse' or 'unjust results'.[73] *Tweddle v Atkinson* has been similarly criticised.

Granting *arguendo* the objection for now, what could this justify? All that was needed, minimally, was an exception to privity's standing aspect that 'a third person cannot become entitled by the contract itself to demand the performance of any duty under the contract'.[74] If Mrs Beswick had her own standing to obtain a court order specifically compelling performance of the nephew's contractual duty, this would have achieved the desired result.[75]

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67 Cf the promisee's power to compel payment to the third-party: eg *Gurtner v Circuit* [1968] 2 QB 587. Compare *Coulls v Bagot's Executor and Trustee* [1967] HCA 3, (1967) 119 CLR 460, 502 (Windeyer J); *Treitel* (n 15) [21-058]. For specific performance, *Keenan v Handley* (1864) 2 De GJ & Sm 283, 46 ER 384; *Peel v Peel* (1869) 17 WR 586; *Hohler v Aston* [1920] 2 Ch 420.

68 [1968] AC 58 (HL).

69 121 ER 762.

70 [1968] AC 58, 81-82 (Lord Hodson).

71 Eg *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL) 300 (Lord Scarman).

72 Eg Law Commission (n 16) paras 3.1-3.4; *Darlington BC v Wiltshire Northern Ltd* [1995] 1 WLR 68 (CA) 76 (Steyn LJ).

73 Eg Law Commission (n 16) paras 2.47, 3.3; *Beswick v Beswick* [1968] AC 58, 73 (Lord Reid).

74 Arthur Corbin, 'Contracts for the Benefit of Third Persons' (1930) 46 LQR 12, 12 citing from Salmond & Winfield, *Principles of the Law of Contracts* (1st edn, Sweet & Maxwell 1927).

75 Compare *Beswick v Beswick* [1966] Ch 538 (CA) 557 (Denning LJ).

In *Tweddle v Atkinson* the claimant was less fortunate. The fathers of a couple to-be-married had agreed between themselves that each would pay marriage portions to the groom, a third-party. Suing his father-in-law, the groom attempted to enforce this debt. Despite written agreement to the contrary, his action failed:

> 'It is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified.'[76]

A closer look at the case demonstrates that third-party standing was, again, all that was required to achieve the desired result, adequately implementing the contracting parties' intentions. In fact, no one in *Tweddle* had even mentioned or envisaged the creation of third-party claim-rights – a much more drastic move. All the parties had ever intended was the 'full power to sue.'

5. Case II: Terms Restricting a Third-Party's Liability to Suit

The same resolution applies to the carriage of goods cases involving exemption clauses. Prominent judges had expressed hostility towards privity,[77] proving crucial to the motivation for reform.

The true obstacle lay in privity's standing aspect. Courts however created artificial third-party rights at common law, causing anomalies which third-party standing could have easily avoided. Statutory reform did not straightforwardly rectify the problem, instead creating ambiguously broad 'right[s] to enforce a term'.[78]

A. Himalaya Clauses: Agency and Collateral Contracts

Midland Silicones[79] concerned shippers suing third-party stevedores in tort, for negligent damage to cargo. Privity denied the stevedores enforcement of a liability-limiting clause, agreed for their benefit, in the bill of lading contract. This was thought to cause a 'serious gap in our commercial law'.[80] Simply

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76 121 ER 762, 762.

77 *Midland Silicones* [1962] AC 446 (HL) (Lord Denning); *The Eurymedon* [1975] AC 154 (HL) (Lord Wilberforce); *The Mahkutai* [1996] AC 650 (PC) (Lord Goff).

78 S 1 CRTPA.

79 [1962] AC 446.

80 [1962] AC 446, 491 (Lord Denning).

by suing the carrier's servants or independent contractors, shippers could easily circumvent the clause.[81] This would upset agreed allocations of risk, reflected in the rates of freight, and any insurance arrangements premised upon it.[82] It was thus generally thought that 'commercial necessity'[83] justified a 'fully-fledged exception'[84] to privity.

The Eurymedon was a pivotal case, popularising the use of 'Himalaya'[85] clauses.[86] Third-party stevedores were again sued in tort, this time for negligently damaging an expensive drilling machine during unloading. The question was whether they could enforce any of the liability-limiting terms extended to them under the bill of lading contract, including the Art III r 6 one year time limitation.[87] To find for the stevedores, contractual rights were artificially created. Building upon Lord Reid's dictum in *Midland Silicones,*[88] the key step involved creating a collateral contract between the shipper and stevedores through agency, giving the stevedores a right under that contract.

'A search for fine distinctions' was explicitly discouraged.[89] The formation rules were stretched to find an agreement and consideration.[90] The problems are well-known.[91] Reading in an offer to the stevedores is fictitious,[92] the timing of the acceptance may make it ineffective,[93] and the stevedores may

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81 *Paterson Zochonis v Elder Dempster* [1923] 1 KB 420 (CA) 441–42 (Scrutton LJ); *Midland Silicones* (n 77) 491-92 (Lord Denning); *London Drugs v Kuehne & Nagel International* [1992] 3 SCR 299 (Supreme Court of Canada) 441 (Iacobucci J); *Carver on Bills of Lading,* Guenter Treitel and Francis Reynolds (eds) (4th edn, Sweet & Maxwell 2017) [7-049].

82 *The Eurymedon* (n 77) 169 (Lord Wilberforce); *The Mahkutai* (n 77) 661 (Lord Goff).

83 Law Commission (n 16) para 2.34; *Elder Dempster* [1923] 1 KB 420 (CA) 441–42 (Scrutton LJ); *Midland Silicones* (n 77) 491 (Lord Denning); *The Eurymedon* (n 77) 169 (Lord Wilberforce); *The Mahkutai* (n 77) 664 (Lord Goff).

84 *The Mahkutai* (n 77) (Lord Goff).

85 The ship's name in *Adler v Dickson* [1955] 1 QB 158 (CA).

86 *Port Jackson Stevedoring Pte Ltd v Salmond and Spraggon (Australia) Pte Ltd (The New York Star)* [1981] 1 WLR 138 (PC) 144; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715. Law Commission (n 16) para 2.27: 'the reasoning of Lord Wilberforce in The Eurymedon has been criticised as artificial, primarily because it effectively rewrites the Himalaya clause'.

87 Schedule, Carriage of Goods by Sea Act 1971.

88 [1962] AC 446, 474.

89 *The New York Star* [1981] 1 WLR 138 (Lord Wilberforce).

90 *The Eurymedon* (n 77) 167 (Lord Wilberforce).

91 Law Commission (n 16) para 2.27. See also *Southern Water Authority v Carey* [1985] 2 All ER 1077 (QB) 1084; *The Starsin* (n 86) [34] (Lord Bingham).

92 *The Eurymedon* (n 77) 170 -72 (VC Dilhorne).

93 Eg *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep 155.

not have the requisite knowledge of the offer to accept it. Problems about authority may arise.[94] Tellingly, the collateral contract contained only a single term – the exemption clause – existing solely to protect the stevedores.[95] It contained no executory obligations, as '[t]he stevedore had never promised to do anything'.[96] Accommodating it even required a novel category of formation rules, devised in *The Starsin*.[97]

B. Statute: Persisting Artificiality

The Law Commission criticised the situation as artificial, complex, and prone to technical challenge, creating commercial uncertainty. One important goal of statutory reform was hence to 'sweep away the technicalities',[98] to achieve 'commercially workable results'[99] in *The Eurymedon* and *The New York Star*, but without the 'artificial stratagems and structures in order to give third-parties enforceable rights'.[100]

An exception to privity was needed.[101] However, there seemed little awareness of the underlying conceptual complexity behind privity. As the title – Contracts (*Rights* of Third Parties) Act – might suggest, the drafters appeared to think that an exception necessarily entailed third-party rights, replicating the artifice in statutory form.

If the goal was to 'sweep away the technicalities', allowing enforcement 'more directly',[102] the neater solution would be to give third-party stevedores the *power* to enforce the liability-limiting term in the main contract, when sued by the shippers. In a more straightforward and transparent way, third-

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94 Eg *The New York Star* [1981] 1 WLR 138; *Southern Water Authority* [1985] 2 All ER 1077, 1084-85.

95 *The Eurymedon* (n 77) 179 (Lord Simon); *The Starsin* (n 86) [59] (Lord Steyn), [205] (Lord Millett).

96 *The Starsin* (n 86) [34] (Lord Bingham), [59] (Lord Steyn), [153] (Lord Hobhouse).

97 It is neither a unilateral nor bilateral contract, but instead a tertium quid: an inchoate contract or 'arrangement' enforceable only upon actual performance of the stevedores' pre-existing obligation to the carrier: *The New York Star* [1979] 1 Lloyd's Rep 298 (High Court of Australia) 304 (Barwick CJ). Similarly see *The Starsin* (n 86) [153] (Lord Hobhouse), and Stevens, 'The CRTPA' (n 54) 304. At no stage are the third-party stevedores under an *obligation* to perform to the shipper: *Carver on Bills of Lading* (n 81) [7-052]. Cf *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA) where acceptance simultaneously provides consideration. Contrast *The Eurymedon* (n 77) 167 (Lord Wilberforce).

98 Law Commission (n 16) para 2.35.

99 Law Commission (n 16) para 2.30.

100 Law Commission (n 16) para 3.6.

101 Law Commission (n 16) paras 2.34-35.

102 Law Commission (n 16) para 3.30.

parties could stop the claim brought against them, or limit their liability only to the extent specified in the term. The complexity would be reduced, avoiding the artificiality of a collateral contract through straining agency law, or a deeming of fictional third-party rights.

C. Promises Not to Sue

Analogous cases could be similarly resolved. A parallel line of cases concerning carriage of passengers recognised that a promisee could enforce a 'contractual promise not to sue' his third-party employee or independent contractor in tort.[103] Francis Reynolds once suggested that a carrier who wished that the bill of lading holder not sue his employees or sub-contractors might simply procure from them a promise not to do so. Relying on their authority, the carrier might apply for a joinder to stay tort suits against his employees, specifically enforcing that promise.[104]

In *The Elbe Maru*[105] such a clause was given effect. However it was held following *Gore v Van der Lann* that the carrier, as promisee, needed to show 'sufficient interest' in enforcing the promise owed to him.[106] Were the carriers' employees extended a power of enforcement, this superfluous requirement could perhaps be dispensed with; clearly the employees would have a 'sufficient interest' in protecting themselves.[107]

D. Knock-on Anomalies: Himalaya Clauses and Hague Rules

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103 *Corsgrove v Horsfall* [1946] 62 TLR 140 (CA); *Gore v Van der Lann* [1967] 2 QB 31 (CA) 45 (Salmon LJ). Followed *in Snelling v John G Snelling Ltd* [1973] QB 87; *Nippon Yusen Kaisha v International Import and Export Co (The Elbe Maru)* [1978] 1 Lloyd's Rep 206; *The Starsin* [1999] 2 All ER (Comm) 591 (QB (Comm)); and *The Starsin* [2001] EWCA Civ 56, [2001] 1 All ER (Comm) 455.

104 Francis Reynolds, 'Himalaya Clause Resurgent' (1974) 90 LQR 301, 304. And also indemnify the third-parties to dispel doubt about 'sufficient interest'.

105 [1978] 1 Lloyd's Rep 206.

106 Prompting circular indemnity clauses.

107 Perhaps this was overlooked because it was insufficiently appreciated that promises not to sue were conceptually related to terms limiting one's liability to be sued, the Hohfeldian correlative of one's power to sue. In *Gore v Van der Lann,* Salmon LJ thought that such a promise would 'negative or restrict the plaintiff's right to sue': [1967] 2 QB 31 (CA) 42, 45. Similarly, Willmer LJ spoke of the promise not to sue as a 'promise by the plaintiff not to institute proceedings': [1967] 2 QB 31 (CA) 42. In *Gore* the clause attempted complete exclusion of the third-party's liability to be sued. If effective it would completely exclude the tort victim's correlative power to enforce the tortfeasor's duty. If liability is limited to a partial extent, for instance by quantum or type of loss, the enforceability of the duty is restricted only to that extent.

The Starsin,[108] a problematic case from which a ratio is difficult to discern,[109] demonstrates how the elision of rights and standing contributed to unexpected knock-on anomalies. The case involved a third-party actual carrier,[110] the shipowner. A cargo of timber and plywood had deteriorated due to negligent stowage. A group of cargo owners with title at the time of damage sued the actual carriers in tort.[111] To determine the extent of their liability, one question was whether a 'Himalaya clause' in the bill of lading applied to protect them, and if so what the impact of the Hague Rules would be.

The House of Lords had two distinguishable aims. First, to establish the commercially desirable position that third-parties could take advantage of immunities expressed to cover them in the main contract of carriage, evidenced by the bill of lading. Second, to subject these immunities to statutory controls preventing their abuse: Art III r 8 of the Hague Rules.[112] The Rules set a ceiling on the immunities that a carrier can stipulate against a shipper.[113] Previous cases involved third-party stevedores invoking one year time-limitations, available also to the carrier.[114] It was only in *The Starsin* when it was noticed that a Himalaya clause came in two parts,[115] and that the first part could extend to a third-party actual carrier exemptions beyond that permitted by the Hague Rules.[116] This presented 'a route for evading' the scheme, providing even 'total exemption'. [117]

To achieve the first aim, the House of Lords followed *The Eurymedon,* creating a separate collateral 'Himalaya' contract between the cargo owners and the third-party actual carriers. However, a complication arose because the Hague Rules would only apply to a 'contract of carriage', and it was impossible to say that this 'Himalaya' contract was indeed such a thing.

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108 [2004] 1 AC 715 (HL).

109 Edwin Peel, 'Actual carriers and the Hague Rules' (2004) 120 LQR 11, 16; Francis Reynolds, 'Tangling in the Undergrowth' in Paul Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart 2015).

110 The counterparty being the charterer/contracting carrier.

111 *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] 1 AC 785 (HL).

112 Schedule, Carriage of Goods by Sea Act 1971.

113 Carriage of Goods by Sea Act 1971, ss 1(1)-1(2). The Hague Rules, as contained in the Schedule to the COGSA 1971, have 'force of law'.

114 Art III r 6, COGSA 1971; *The Eurymedon* [1975] AC 154; *The New York Star* [1981] 1 WLR 138.

115 [2004] 1 AC 715 [20] (Lord Bingham).

116 Art III r 8, COGSA 1971.

117 [2004] 1 AC 715 [140] (Lord Hobhouse)

Thus, achieving the second aim required strained reasoning. Each judge recorded difficulty in reaching their decision.[118] Lord Bingham thought that not applying the Rules would 'elevate form over substance and… invest what is essentially a legal device with a wholly disproportionate legal significance'.[119] Lord Hobhouse deemed it a 'contract of carriage' once the actual carrier took possession of the goods.[120] Lords Hoffmann and Millett latched onto a clause deeming them parties to the bill of lading contract.[121] Only Lord Steyn, in dissent, was prepared to bite the bullet, giving the actual carriers a complete exemption. He followed through the logic that a 'separate and independent contract' arose under the Himalaya clause, aimed at upholding allocated risks between commercial men.[122] It was simply an agreement for exemption, not an agreement to carry, even though the consideration for it involved performance by the vessel.[123] In no way could it be a 'contract of carriage' to which the Art III r 8 of the Hague Rules applied.[124]

The *Eurymedon* technique created the anomaly. It artificially duplicates in the third-party a right under a separate collateral contract, splitting it up from the main contract of carriage. Had we simply extended to third-parties a power to enforce the exemption clause in the main contract, only one contract would be involved. The Rules, as with other statutory regulations, would straightforwardly apply. The anomalies disappear.

6. Case III: Damages for Breach of Contract

A third distinct reform goal was to allow a third-party to recover a sum representing his own consequential losses from a breach of contract.[125] Free-standing third-party rights were, again, unnecessary to achieve this. A more moderate and conceptually neater alternative was available. A promisee's remedy for breach, the 'narrow ground', known today synonymously as 'transferred loss',

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118 ibid [34] (Lord Bingham), [59] (Lord Steyn), [113] (Lord Hoffmann), [211] (Lord Millett).
119 ibid [24].
120 ibid [153].
121 ibid [114] (Lord Hoffmann), [210]-[212] (Lord Millett).
122 ibid [57]-[59].
123 ibid [60].
124 ibid [59]-[62].
125 Law Commission (n 16) para 3.30.

could have been refined for this purpose. As will be argued, a key defining feature of 'transferred loss' is precisely to re-direct damages towards a third-party beneficiary.

However, the Law Commission thought that 'even if the promisee can obtain a satisfactory remedy for the third party, the promisee may not be able to, or wish to, sue',[126] thus overlooking this alternative. With respect, this masked distinct issues at stake. Privity's standing aspect was the obstacle, not its rights aspect.

If a defect with 'transferred loss' was that only the promisee could sue to enforce it, fixing it required simply extending to the third-party a power to enforce this promisee remedy. Had we done so, its conditions of application, an outstanding issue today, could perhaps also have been clarified.

A. Distinguishing Two Promisee Remedies

To clarify 'transferred loss', two promisee remedies must be distinguished from the outset.

(i) 'Broad' versus 'narrow' grounds

The first is the promisee's secondary right to 'performance damages'.[127] This was first hinted at by Lord Griffiths as a 'broader ground' in *St Martins,* on joint appeal with *Linden Gardens*,[128] later developed as a 'performance interest' approach by Brian Coote.[129] It proved highly influential on the dissentients Lords Goff and Millett in *McAlpine Construction Ltd v Panatown Ltd*,[130] a famous case that split the House of Lords.

'Transferred loss' is a second conceptually distinct remedy. Based on a generalisation from the carriage of goods[131] to contracts for building services in *St Martins*,[132] it is commonly known as the 'narrower ground'. Hannes Unberath has extensively argued that the 'narrow ground' is truly based

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126 Law Commission (n 16) para 3.4.

127 Friedmann, 'Performance Interest' (n 3) 630. Similarly Charlie Webb, 'Performance Damages' in Sarah Worthington and Graham Virgo (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017).

128 *St Martins v McAlpine; Linden Gardens v Lenesta Sludge Disposal* [1994] 1 AC 85 (HL).

129 Coote, 'Performance Interest' (n 3), adopting Daniel Friedmann's terminology.

130 [2001] 1 AC 518 (HL).

131 *Dunlop v Lambert* (1839) 6 Cl & F 600; 7 ER 824; *The Albazero* [1977] AC 774 (HL). Now statutorily enshrined: s 2(4) Carriage of Goods by Sea Act 1992.

132 [1994] 1 AC 85 (HL).

upon a wider principle of 'transferred loss'.[133] Its precise boundaries remain uncertain. Lord Diplock had confined it in *The Albazero* to situations where (i) the contracting parties contemplate that property in goods might be transferred to a third-party before the breach, and (ii) that third-party had no direct 'right of action' against the contract-breaker in respect of his consequential losses. Since *Darlington BC v Wiltshire Northern Ltd*,[134] a case in which no such transfer was present, criterion (i) was thought to no longer exist, expanding the scope of 'transferred loss'. However, some of the dicta in *Swynson Ltd v Lowick Rose LLP*,[135] a case discussed later, appears to revive it.[136] The status of criterion (ii), that it will not apply if the 'third-party has a direct right of action for the same loss, on whatever basis',[137] appears clearer. In *Panatown,* substantial damages were denied due to a duty-of-care-deed between the third-party landowner UIPL and the defendant builders McAlpine.[138] This result shows that a relevant 'right of action' or 'remedy' need not be co-extensive with the recovery provided by 'transferred loss' to entirely exclude its application. A third-party might be left worse off than if it applied.[139] Specifically, it might be inferred that if the CRTPA applies, then transferred loss cannot, despite the statute's wording implying quite the contrary.[140]

(ii) Performance damages

Two key features distinguish performance damages from 'transferred loss'. First, it is not based on consequential loss. Second, the promisee owes no duty to account in respect of sums so recovered.

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133 Hannes Unberath, *Transferred Loss: Claiming Third Party Loss in Contract Law* (Hart 2003); Hannes Unberath, 'Third Party Losses and Black Holes: Another View' (1999) 115 LQR 535. *Panatown* [2001] 1 AC 518, 529 (Lord Clyde), 557 (Lord Goff). Cf the 'tort' version raised in *The Aliakmon* [1985] QB 350 (CA), rejected on appeal in *The Aliakmon* [1986] 1 AC 785 (HL).

134 [1995] 1 WLR 68 (CA).

135 [2017] UKSC 32, [2018] AC 313. Noting the case see Peter Watts, 'Lucky Escapes' (2017) 133 LQR 542; for criticism see Andrew Trotter, 'Reconsidering Transferred Loss' (2019) 82 MLR 727, 728: 'leaves its scope and basis uncertain'.

136 [2017] UKSC 32 [14] (Lord Sumption), [52] (Lord Mance), [104] (Lord Neuberger).

137 [2017] UKSC 32 [16] (Lord Sumption). By 'right of action' what Lord Sumption appears to be referring to is an enforceable claim-right to damages, by shorthand.

138 Contractually replicating the old tort law in *Anns v Merton LBC* [1978] AC 728 (HL), overruled *D&F Estates v Church Commissioners* [1989] AC 177 (HL) and *Murphy v Brentwood DC* [1991] 1 AC 398 (HL).

139 For criticism, see Andrew Burrows, 'No Damages for a Third Party's Loss' (2001) 1 OUCLJ 107, 112.

140 S 5(1)(a), s 4 CRTPA.

The 'performance interest' is distinct from one's 'compensatory interest'.[141] Performance damages vindicates the promisee's 'performance interest',[142] independent and regardless of any consequential losses that he might suffer as an effect of breach. He might decide to incur the cost of conferring the initially intended benefit through alternative means. But the promisee can recover 'performance damages' independently of whether he actually incurs, or intends to incur, any expense in consequence of the breach. Unlike 'transferred loss', performance damages are not based on a claim that the contract-breaker make good one's consequential losses,[143] flowing from the breach.

The second feature follows from the first. The promisee may accordingly retain such damages beneficially, for his own uses and purposes. Unlike 'transferred loss', where a duty to account is an 'essential feature',[144] the promisee is under no duty to account to another for sums so recovered. He might wish to put them towards executing initial plans to benefit the third-party. But if their relationship has changed significantly, he might justifiably not. As Windeyer J said in *Coulls v Bagot*:

> 'Suppose that A does recover substantial damages for B's failure to perform his promise to A to pay C $500—the next question is does he recover these damages for himself or for C. Notwithstanding the statements in Beswick v. Beswick suggesting that he would recover them for C, I do not see why this should be. On the hypothesis of a purely contractual right with no trust attached, why should A hold for C the proceeds of his action? He sued at law for damages he himself suffered, not as the representative of C. …. Why then is it said that proceedings brought by A to enforce his legal right give C a right against A when previously he had none?... Of course A, whose purpose had miscarried because of B's breach of contract, might make over any damages he recovered to C: but that would not be because C had a right to them, but because A still wished to give effect to his plan to confer a benefit on him.'[145]

There is admittedly some 'division of opinion'[146] over whether a promisee owes a duty to account for 'performance damages', or whether he must first intend to apply them to cure the breach. This is due, I suspect, to a muddying of the waters by an erroneous tendency to describe this species of damages as 'loss'-based. Lord Griffiths in *St Martins* and Brian Coote recognised as a distinct species of 'loss' what

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141 Webb, 'Performance and Compensation' (n 3).

142 Friedmann, 'Performance Interest' (n 3); Coote, 'Performance Interest' (n 3).

143 [2017] UKSC 32 [53] (Lord Mance); *Panatown* [2001] 1 AC 518, 533-34 (Lord Clyde), 573 (Lord Jauncey), cf 587 (Lord Millett).

144 [2017] UKSC 32 [14], [16] (Lord Sumption), [52] (Lord Mance); *Panatown* [2001] 1 AC 518, 580 (Lord Millett).

145 (1967) 119 CLR 460 (HCA) 502.

146 *Panatown* [2001] 1 AC 518, 577 (Lord Browne-Wilkinson). Compare eg *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468, 1473 (Denning LJ); *St Martins* [1994] 1 AC 85, 97 (Lord Griffiths); *Darlington BC* [1995] 1 WLR 68 (Lord Steyn).

occurs simply in virtue of a 'lost… performance of the bargain',[147] expanding the traditional concept of loss in contract law beyond a balance-sheet or patrimonial loss.[148] But this is 'loss' in an importantly different sense from consequential loss. As Lord Clyde had recognised in *Panatown*, saying that the right itself is lost by breach amounts simply to recognising that we are awarding damages for the breach of contract itself, ie the civil wrong.[149] A lively debate exists over whether such damages are better described as non-compensatory but 'substitutive' or 'substitutionary' for the infringed right to performance,[150] aimed at redressing the infringement of the right itself rather than making good its consequences.[151]

B. Re-directing Damages through 'Transferred Loss'

In contrast, 'transferred loss' re-directs damages towards a third-party beneficiary. To unpack its operation, four points might be made.

First, what kind of right is being enforced? As 'transferred *loss*' suggests, the secondary right is to compensatory damages for consequential losses.

Second, whose rights are they? They are the promisee's and not the third-party's. The 'narrow ground' is conventionally classified a promisee's 'remedy', 'remedy' here referring to and locating both claim-right and power of enforcement. Thus only the promisee can sue to enforce it, under privity's standing aspect.

Third, how is this right to damages quantified? This is the doctrine's special feature. Unusually, consequential loss is quantified not by reference to the right-holder (promisee's) financial position, but instead, by reference to the third-party's financial position. This is the relevant sense in which the law of damages 'transfers' a 'loss' – here the law looks not to the right-holder's balance-sheet, but the

147 [1994] 1 AC 85, 97 (Lord Griffiths); Coote, 'Performance Interest' (n 3) 549: 'the right to performance… ha[s] intrinsic economic worth'.

148 *Panatown* [2001] 1 AC 518, 587-88 (Lord Millett), cf 534 (Lord Clyde).

149 [2001] 1 AC 518, 534 (Lord Clyde).

150 Eg Webb, 'Performance and Compensation' (n 3); Stevens, 'Damages and the Right to Performance (n 3); Smith, 'Substitutionary Damages' (n 3); Pearce and Halson, 'Damages' (n 3).

151 Affecting their prima facie quantification. Most think cost of cure eg Coote, 'Performance Interest' (n 3). Some, difference in value: *Panatown* [2001] 1 AC 518, 534 (Lord Clyde); Stevens, 'Damages and the Right to Performance' (n 3). And also what limiting rules should apply eg mitigation, 'reasonableness', remoteness.

balance-sheet of another. This is implicit in Lord Clyde's majority judgment in *Panatown*, that through a 'juristic subterfuge… If the entitlement to sue is not to be permitted to the party who has suffered the loss, the law has to treat the person who is entitle[d] to sue as doing so on behalf of the third-party.'[152] 'Attributed loss' may be the better label in future.

Fourth and crucially, *Swynson* clarifies that the promisee's right to damages is encumbered with a duty to account for its proceeds to the third-party, an 'essential feature'[153] of the doctrine. The promisee cannot retain them beneficially.[154] Thus, regardless of what was later added on by the CRTPA, through 'transferred loss' the third-party had already possessed a correlative claim-right to an account from the promisee, in respect of the promisee's own claim-right to damages. This seemed overlooked. What the third-party truly lacked and needed was not another claim-right, but the power (standing) to enforce both these rights simultaneously.

Extending to the third-party standing would have elegantly short-circuited an otherwise circuitous process. Rather than having to wait for the promisee to sue, then insisting upon the promisee's duty to account for its proceeds to him, the third-party would be able to directly enforce both rights. The main shortcoming of 'transferred loss' was, in the Law Commission's phrasing, that the 'promisee may not be able to sue'.[155] This could have been neatly and surgically overcome without further complicating the law of damages, an already convoluted area.

C. Avoiding Remedial Complexity and Anomalies

The Act however added on more rights, introducing further layers of remedial complexity. This rather more drastic move produced 'anomalous results'.[156] Consider two examples. First:

> D agrees to build a house for C for £1m, the going market rate for work of that kind. Upon completion, the building would enhance the value of C's land by £1m. In breach of contract, D fails to do the work.

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152 [2001] 1 AC 518, 535.

153 *Swynson* [2017] UKSC 32 [14], [16] (Lord Sumption), [52] (Lord Mance); *Panatown* [2001] 1 AC 518, 580 (Lord Millett).

154 *Panatown* [2001] 1 AC 518, 580 (Lord Millett).

155 Law Commission (n 16) para 3.4.

156 Stevens, 'The CRTPA' (n 54) 301-03; Smith, 'In Defence' (n 54) 661-62; cf Hugh Beale, 'A Review of the Contracts (Rights of Third Parties) Act 1999' in Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (OUP 2010) 229-30.

The normal measure of damages is the sum that will make the aggrieved party's position as nearly as possible what it would have been had the contract been duly performed.[157] Here, damages are on its face nominal. C has not received a building that would have been worth £1m, but as a result he has not had to pay £1m. His net position is no worse off (although he may potentially suffer some consequential loss in arranging for another to do the work).

Contrast:

> D agrees with C to build a house for T for £1m, the going market rate for work of that kind. Upon completion, the building would enhance the value of T's land by £1m. In breach of contract, D fails to do the work.

What is the position T would have been in had the contract been performed? He would have acquired a building worth £1m, for nothing. He is therefore £1m worse off than he would have been if the contract had been performed. Is he therefore entitled to damages of £1m? If T has a free-standing right the answer would appear to be 'yes'.

No anomaly arises, however, if C's promisee remedy of transferred loss can be enforced here. As argued the 'transfer' within 'transferred loss' operates by attributing T's consequential losses to C for quantification purposes. But since C would have had to pay £1m, we end up again with nominal damages, the correct result.

The same result obtains if T had the standing to enforce C's transferred loss remedy. Once it is clarified that powers of enforcement (standing) are conceptually distinct from their subject-matters of enforcement, it becomes evident that underlying right-duty relations remain invariant across different enforcers. The post-enforcement result should not change with an enforcer's identity. Whether enforced by a public regulator, the attorney-general, or some other third-party individual does not alter the fact that it is a *promisee's* right to damages that is being enforced.

D. Case-law Confusion Today

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157 *Robinson v Harman* (1848) 1 Ex Rep 850, 154 ER 363. Law Commission (n 16) para 9.33: 'expectation measure', 'the normal contractual measure of recovery'.

A critic once predicted that an overlapping statute could potentially obscure the need for further judicial development of the law of damages here.[158] Regardless, the case-law in this area remains difficult. It needs to be addressed. Two recent cases, *Swynson Ltd v Lowick Rose LLP*,[159] and *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises*,[160] indicate a persistent confusion over 'transferred loss' and its relation to the 'broad' ground, i.e. performance damages.

Swynson was a business engaged in high-risk lending. Swynson's controlling shareholder, Hunt, attempted to sue Swynson's accountants in breach of contract. They had negligently prepared a due diligence report, which Swynson had relied on to make a bad loan. As Hunt eventually paid the borrower to take the bad debt off Swynson's books, he argued that he ought to recover his own loss on the basis of 'transferred loss', amongst other grounds.[161] The Supreme Court rejected Hunt's argument, unanimously holding that Swynson did not contract with their accountants intending to or for the object of benefitting Hunt, a third-party.[162]

In doing so the UKSC briefly reviewed *Panatown*. There are hints in the reasoning of Lords Sumption, Mance, and Neuberger that the two promisee remedies are different versions of a principle of 'transferred loss', one broader and the other narrower.[163] Lord Sumption even stated, controversially, that *both* broad ground and narrow ground were 'limited exceptions' to a 'fundamental principle of the law of obligations' – the 'general rule that a claimant can recover only loss which he has himself suffered'.[164]

Respectfully, to put these conceptually distinct promisee remedies under one umbrella of 'transferred loss' would be highly distortionary. Performance-based damages under the broad ground

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158 Stevens, 'The CRTPA' (n 54) 299. On the overlap, see text to nn 131-140.

159 [2017] UKSC 32, [2018] AC 313.

160 [2019] EWCA Civ 596, [2020] QB 551.

161 That it was to be ignored in assessing Swynson's loss as a 'collateral benefit', or that to prevent the accountants' unjust enrichment at his expense Hunt could be subrogated to Swynson's rights against the accountants.

162 (n 159) [17] (Lord Sumption), [54] (Lord Mance), [108] (Lord Neuberger).

163 (n 159) [16] (Lord Sumption), [54] (Lord Mance), [106] (Lord Neuberger).

164 (n 159) [14]-[16] (Lord Sumption), [53] (Lord Mance): 'the normal principle', [102] (Lord Neuberger): 'well-established conventional rule'. Compare Lord Sumption's recent minority judgement in *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20 at [106]-[109], [123].

cannot be sensibly forced within 'transferred loss'.[165] Moreover it may be doubted how 'fundamental' this supposed 'general rule' really is; not too long ago its very existence was doubted.[166]

These difficult propositions were picked up in *Rembrandt*, resulting in further confusion. US-based Rembrandt contracted to buy egg-white powder from Netherlands supplier NIVE during a domestic shortage, caused by the US Avian Flu epidemic.[167] Six months later, the price dropped. Rembrandt repudiated.[168] The supplier NIVE sued, running a *Swynson*-style argument, attempting also to recover the profits a third-party sister company would have earned had the contract been performed.[169] Teare J rejected the claim at trial.[170] Rembrandt did even not know of this sister-company's existence at time of contracting.[171] Teare J's judgment was unanimously affirmed on appeal,[172] Coulson LJ giving sole reasoned judgment on the issue. After an extensive review, Coulson LJ held that 'following the clear guidance in *Swynson*', 'the broader ground was still good law, notwithstanding what was said about it in *Panatown*'.[173] Confusion was evident in his statement that he had:

> 'no hesitation in concluding that, as a matter of law, *for a successful claim for transferred loss that seeks to rely on the so-called broader ground*, as explained in Linden Gardens and Panatown, the claimant must show that, at the time that the underlying contract was made, there was a common intention and/or a known object to benefit the third party or a class of persons to which the third party belonged.'[174]

To reiterate, we cannot force the 'broad ground' within the umbrella of 'transferred *loss*'. The whole point of the 'broad ground' is in contradistinction to consequential loss. Indeed, Coulson LJ himself acknowledged that the '"performance interest" of party A… is no more than the obverse of the positive obligations assumed by the other party B', and that 'it is the benefit inherent in the performance of those

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165 *Panatown* [2001] 1 AC 518, 594-95 (Lord Millett), 544-48 (Lord Goff)

166 Guenter Treitel, 'Damages in Respect of a Third Party's Loss' (1998) 114 LQR 527; *Panatown* [2001] 1 AC 518, 538-39 (Lord Goff), 580-81 (Lord Millett). The first statement of this supposed rule was only in *The Albazero* itself [1977] AC 774.

167 (n 160) [3].

168 (n 160) [4]-[7].

169 (n 160) [55]-[56].

170 [2019] 1 All ER (Comm) 543 [161]-[164]. See also (n 160) [11], [57].

171 (n 160) [53]-[55], [73]-[74], [80].

172 (n 160) [50] (Longmore LJ), [51] (Peter Jackson LJ), [81] (Coulson LJ).

173 (n 160) [58-[69], [70]. Including *And So To Bed Limited v Dixon* [2001] FSR 47; *Smithkline Beecham PLC v Apotex Europe Limited* [2006] EWCA Civ 658, [2007] Ch 71; *DRC Distribution Limited v Ulva Limited* [2007] EWHC 1716 (QB).

174 (n 160) [73] (emphasis added).

obligations itself to the exclusion of any further consequential loss'.[175] As argued, 'transferred loss' applies only to a generalised version of the 'narrow ground'.

7. Justifying Reform

It is a minimal threshold for normative coherence that justificans must match justificandum. Conceptual elision meant a persistent unclarity over what exactly law reformers were attempting to justify. Was the object-of-justification third-party standing, or third-party rights? 'Rights to enforce' could plausibly refer to either. The wording of the CRTPA glides between the two. This may have created a justificatory mis-match.

Unlike third-party rights to performance, or damages, it is much easier to justify extending standing to third-parties on pragmatic, regulatory grounds. Doing so leaves underlying private law rights and duties intact. This final section reviews four mooted reform justifications, to consider whether they better support third-party standing, rather than third-party rights. If so, reform could have been less drastic, meeting the concerns of principle raised by reform critics. Normative incoherence, and a dilution of fundamental legal concepts, could have been avoided. It is argued that these four reasons might be more consonantly treated as justifications for extending standing to third-parties, rather than rights. Put together, these reasons for third-party enforcement would also further a value central to contract law – that 'agreements must be kept'. By shoring up 'enforcement gaps', legitimate agreements would be better upheld, preventing the reneging and circumvention of risks allocated by such agreements.

As to scope, the 'expectation' argument has been convincingly debunked elsewhere.[176] It is implausible to claim that because a third-party 'expects' a right, or even lesser, 'expects' to be benefitted as a consequence of the contract's due performance, that somehow then justifies him having that very right. The stronger articulation is circular, assuming the existence of the right it seeks to prove. The weaker proves too much, including rights to 'incidental benefits'.[177] Reliance by the third-party upon

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175 (n 160) [68]. Citing *And So To Bed* [2001] FSR 47 [54] (Donaldson QC). In fact, Coulson LJ explicitly decided *Rembrandt* on analogous grounds (n 160) [74]: 'the present claim for transferred loss is perhaps closest to the claim for loss of profits in *And So To Bed*. It must fail for the same underlying reasons.'

176 Mitchell, 'Privity Reform' (n 54); Stevens, 'The CRTPA' (n 54) 296.

177 Law Commission (n 16) paras 4.16-4.19; compare s 302 *US Restatement (Second) of Contracts*.

this 'expectation' does not add much to the case for a contractual right, especially if non-detrimental.[178] If the 'expectation' is unreasonable it needs no protecting, reliance irrespective. If the expectation is 'reasonable', then 'reasonable' is what does any justificatory work, albeit unsatisfactorily. Reliance-based arguments more closely resemble misrepresentation claims,[179] or estoppel as a sword.[180]

A. Promisee's Inability to Sue

Recall how the Law Commission had prematurely ruled out the option of strengthening the promisee's remedies on the basis that 'even if the promisee can obtain a satisfactory remedy for the third party, the promisee may not be able to, or wish to, sue'.[181] But if the promisee is unable to sue because he is bankrupt and unable to finance enforcement, or is 'ill or outside the jurisdiction', or 'has died',[182] these are strange justifications for someone else acquiring contractual rights. The relevant complaint here lies with privity's standing aspect. More plausibly, it justifies extending standing to third-parties.

Consider for instance a promisee who subsequently dies. Referencing a variation on *Beswick*, discussed above,[183] the Law Commission was concerned that 'if the promisee has died, his or her personal representatives may reasonably take the view that it is not in the interests of the estate to seek to enforce a contract for the benefit of the third party.'[184] The fear here seems to be that these contractual rights, now belonging to the deceased's estate, would go unenforced by its personal representatives.[185] Duty-bearers could then escape 'scot-free'.[186] Third-party enforcement of the promisee's right is most compelling where it can be shown that, had the promisee been alive, he would still have wished his right to be enforced; likely the case in *Beswick*.

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178 Similarly Smith, 'In Defence' (n 54) 654-57, fn 60 at 659.

179 *Derry v Peek* (1889) 14 App Cas 337 (HL) (deceit)*; Hedley Byrne v Heller* [1964] AC 465 (HL) 575 (negligent misstatement)*;* s 2(1) Misrepresentation Act 1967 (entering contract after misrepresentation).

180 *Waltons Stores v Maher* [1988] HCA 7, 164 CLR 387.

181 Law Commission (n 16) para 3.4.

182 Law Commission (n 16) para 3.4.

183 Text to n 68.

184 Law Commission (n 16) para 3.4.

185 So, if in *Beswick*, someone else other than Peter Beswick's surviving widow was appointed personal representative of his estate, his reneging nephew might well have triumphed.

186 *G.U.S. Property Management v Littlewoods Mail Order Stores* (1982) SLT 533, 538 (Lord Keith).

What if the promisee is alive and able to sue, yet now decides that he wishes for his right not to be enforced, whether by himself or the third-party? Such a situation looks to me to be normatively distinct. It suggests that where promisee and third-party both have standing to enforce the same right, but differ on its enforcement, the promisee should generally prevail.[187]

B. Commercial Necessity

Facilitating easy enforcement by third-parties of liability-limiting clauses agreed for their protection was a key justification motivating reform.[188] Sections 1(6), 3(6), and 6(5) of the CRTPA were enacted solely to stress this reform aim. In *The Mahkutai*, Lord Goff had said that 'there can be no doubt of the commercial need of some such principle as this', and so a 'fully-fledged exception' to privity of contract is needed.[189] Which aspect of privity, however?

Where the clause has allocated risks like property damage in transit and the incidence of insurance, its exceptional enforcement by a third-party might well be justified on pragmatic grounds, as a policy against anti-circumvention. Scrutton LJ, one of the most influential commercial lawyers, noted that:

> 'Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods would simply sue the owner of the ship and ignore the bill of lading exceptions, though he had contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the charterer.'[190]

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187 Even if the parties had agreed to extend standing to a third-party at time of contractual formation, the promisee may later on have all sorts of reasons, many legitimate, for not wanting his right enforced. For instance, a substantial change in their relationship may have occurred, and/or the promisee may have only intended a conditional gift. It seems to me that in the typical case, for a right to be justifiably enforced by another the right-holder's consent must, where possible, be sought. The promisee would thus retain a prerogative over enforcement. Here it may be convenient to contrast the position taken under the CRTPA. Under section 2, if the parties do not expressly reserve their power to revoke or vary any third-party claim-right conferred, the Act by default strips them of that power once the third-party communicates an acceptance, or has relied on it. This 'crystallisation' aspect of the Act is well-known to be controversial, and difficult to justify: see eg Stevens, 'The CRTPA' (n 54) 293-94, 296, 309; Mitchell, 'Privity Reform' (n 54) 238-43. For some recent discussion see also Paul S Davies, 'Excluding the Contracts (Rights of Third Parties) Act 1999' (2021) 137 LQR 101, 102-03. It should be noted that there are other, possibly better ways for a promisee to pre-commit an irrevocable gift to a third-party, eg an outright assignment of his contractual right to said third-party.

188 Law Commission (n 16) paras 2.34-2.35, 3.6.

189 *The Mahkutai* [1996] AC 650 (PC), 663-65.

190 *Elder Dempster* [1923] 1 KB 420 (CA) 441–42. Similarly *Midland Silicones* [1962] AC 446 (HL) 491-92 (Lord Denning) ; *London Drugs* [1992] 3 SCR 299, 441 (Iacobucci J); *Carver on Bills of Lading* (n 81) [7-049].

'Commercial necessity' more appropriately justifies third-party standing.[191] It is a straightforward way of ensuring that legitimate agreements are upheld. Here it would justify the independent contractor enforcing what was agreed under the main contract, preventing circumvention of allocated risks.

As purported justification for contractual rights, however, it is wanting. It is difficult to justify ad hoc contractual rights on basis of a 'gap', or 'commercial necessity'. This would require creating contractual rights in the absence of agreement, either by artificially discovering an agreement where none existed, or more radically, by outright resort to legislative fiction. This cannot avoid doing violence to the normative coherence of English contract law.[192] If its justificatory basis in a genuine agreement is removed, it is doubtful whether any justification exists for remedying its breach as if it were a genuine contractual right.

C. Parties' Intentions

It was a central claim of the Law Commission that 'the general justifying theory of contract' is 'the intention of the contracting parties'.[193] But the mere coincidence of intentions in the minds of two persons is insufficient to justify a contractual right. More is required. The coincidence must be brought about by externally manifested communications between them, hence 'offer', and 'acceptance', indicating bilateral *agreement* between right-holder and duty-bearer. Other formation requirements exist. Consideration insists on reciprocity between right-holder and duty-bearer. But law reformers deferred 'deeper policy questions' about its 'relaxation' for a future day on 'practical' grounds,[194] trading on the conceptual ambiguity surrounding privity.

Today the debate is at an impasse. Critics argue that reform was ad hoc, and that it introduced greater incoherence into contract law.[195] For instance, even though the law reformers claim the third-

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191 Law Commission (n 16) para 2.34.

192 Smith, 'In Defence' (n 54); Peter Kincaid, 'Privity Reform in England' (2000) 116 LQR.43.

193 Law Commission (n 16) para 3.1. Similarly, *Darlington BC v Wiltshire Northern Ltd* [1995] 1 WLR 68, 75 (Steyn LJ). Famously, this drew objections of principle about the role of 'parties' intentions' in English contract law: Smith, 'In Defence' (n 16) 648; Kincaid, 'Reform' (n 192) 46-47; Stevens, 'The CRTPA' (n 54) 293.

194 Law Commission (n 16) paras 6.1-6.17.

195 Stevens, 'The CRTPA' (n 54) 323; Smith, 'in Defence' (n 54) 661; Mitchell, 'Privity Reform' (n 54) 230-31; Kincaid, 'Private Justice' (n 49) 61-63.

party is not conferred a 'full contractual right',[196] for remedial purposes it is fictionally treated as such,[197] creating anomalous results such as windfall damages for the third-party, discussed above.[198] If the right is non-contractual, why should a rational legal system award damages for breach of contract, apply contractual limiting rules, time-bar it as though a genuine contractual right, et cetera?[199] Like should be treated alike. It is irrational, even unjust, to treat as alike what is unlike.[200] Concerns of principle have however been dismissed as the peculiar anxieties of theorists. It is said that a *sui generis* third-party claim-right could be justified as a 'will-based exception to the bargain principle', and that 'practicality' and 'pragmatism' justifies this.[201] But the purportedly 'pragmatic' pay-offs appear questionable now. There is empirical evidence that parties have displayed limited appetite for the CRTPA, routinely excluding its operation wholesale.[202] It may be that the price was not worth paying.

A way out of this stalemate might be suggested here. Perhaps 'parties' intentions' more appropriately relates to justifying third-party standing. Three points might be made.

First, extending standing seems justifiable if both contractual parties had agreed so, thus removing objections each party might raise. The promisor must meet increased prospects of enforcement, while the promisee must give up exclusive standing. Raz's distinction between negative and positive justificatory roles is helpful here:

> 'Customs duties are… justified only if those who incur them know that they incur them. But that knowledge fulfills a negative justificatory role. It provides no reason for imposing a duty. The positive reason for the duty is, let us say, the need to protect local industries or local wages. The state of mind of those who incur the duties is relevant only to remove a reason against the existence of the duties.'[203]

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196 Law Commission (n 16) paras 13.2, 13.4, 14.6.

197 Law Commission (n 16) para 14.6; *Treitel* (n 15) [14-111].

198 Text to sub-section 6C: 'Avoiding Remedial Complexity and Anomalies'.

199 Necessitating s 7(3) CRTPA, a 'supplementary provision', referring to s 5 and s 8 of the Limitation Act 1980. See Law Commission (n 15) paras 13.14-13.15.

200 Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78 CLJ 521, 524: '[an] indisputable proposition…. a fundamental principle of justice'.

201 Beale, 'A Review of the CRTPA' (n 156) 247; Anthony Mason, 'Privity - A Rule in Search of Decent Burial?' in Peter Kincaid (ed), *Privity* (Ashgate 2001) 98-99, 103.

202 Beale 'A Review' (n 156) 230-31, 241, 243, 250. For recent discussion see also Davies, 'Excluding the CRTPA' (n 187), analysing *Chudley v Clydesdale Bank Plc* [2019] EWCA Civ 344, [2020] QB 284.

203 Joseph Raz, 'Promises in Morality and Law' (1981) 95 Harvard LR 916, 930.

Second, whether parties' agreement positively justifies third-party standing is a distinct issue.[204] Pragmatic or regulatory grounds, not based in agreement, could also positively justify third-party enforcement. These could include a policy of anti-circumvention. The value that 'agreements must be kept'[205] supports this policy. To preserve the valuable practice of agreement-keeping, it may be necessary for a legal system to facilitate enforcement of agreements, even by enforcers other than the promisee. In certain situations, empowering someone else with better incentives to enforce the contractual agreement may be necessary to uphold this value.[206]

Third, it is one thing to fill an 'enforcement gap', leaving pre-existing rights and duties intact. It is a different thing, much more drastic, to declare a 'rights gap' as a basis for deeming or conjuring up rights and duties. it is easier to see how parties' agreement could play a justificatory role for localised exceptions to the general standing rule. It is much harder – even paradoxical – to justify how persons who are not parties to an agreement can somehow acquire agreement-based rights. It is contradictory to assert that parties can somehow by agreement, opt-out of the need for agreement to acquire an agreement-based right.

D. Avoiding Blackholes

'Blackholes' have surfaced as substitute language for 'gap' or 'lacuna'. A 'blackhole' exists because 'the third-party suffers the loss but cannot sue, while the promisee who can sue suffers no loss',[207] leaving the promisee only a right to nominal damages from the promisor. This was thought to follow from privity, combined with the quantification method for breach of contract damages.[208]

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204 Talk of 'default rules' obfuscates this distinction. On which see Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 Yale LJ 87.

205 *Pacta sunt servanda.* Eg *AB v CD* [2014] EWCA Civ 229 [21], [27]-[29] (Underhill LJ), [32] (Ryder LJ); *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67 [257] (Lord Hodge).

206 Helpful analogies could perhaps be drawn to the statute-facilitated option of appointing additional trust enforcers under a trust deed in some jurisdictions, to police the trustees: see eg David Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117 LQR 96.

207 Law Commission (n 15) para 3.3.

208 If *Robinson v Harman* (1848) 1 Ex Rep 850 is narrowly read as permitting only compensatory damages for consequential loss. Discussed Coote, 'Performance Interest' (n 3) 540.

The orthodox justification for transferred loss rests upon avoiding a 'blackhole'.[209] Avoiding 'blackholes' has pragmatic flavour, like 'commercial necessity', connoting anti-circumvention. It could justify third-party standing, which as argued was the defect with transferred loss. After *Swynson*, it has been argued that if transferred loss is a 'principle designed as a remedy for the injustice caused by privity of contract, then the 'blackhole' it is intended to cover' requires applying it wherever 'the promisee has covenanted for the benefit of a third party'.[210] In conjunction with third-party standing, this would readily achieve the reform goal of giving every agreed and sufficiently identified third-party beneficiary damages for his consequential losses.

We conclude by entering two caveats. The first is that some have doubted whether this reform goal was justifiable in the first place. Above, I had assumed for the sake of argument that it was, and that the only relevant question was how best to achieve that goal. But there is a strong case for the contrary view that clearer, authoritative recognition of a promisee's right to 'performance damages' or 'substitutive damages' was and is what is truly needed to avoid any 'blackhole'.[211]

Second and finally, a caution must be sounded about using 'blackhole' as the modern term for 'lacuna'.[212] *Rembrandt* reveals that they are only placeholder words. They may be better abandoned. Why a lacuna exists must be articulated. After denying the supplier's transferred loss claim, Coulson LJ acknowledged that it could well be argued both ways whether there is 'the necessary blackhole for these purposes'. He prescinded from deciding this sub-issue, concluding (correctly) that 'the position is far from clear-cut'.[213]

Participants in the dispute over the relative merits of 'narrow' versus 'broad' ground in avoiding 'blackholes' may be firing at cross-purposes. The disagreement may reflect different presuppositions about why a 'blackhole' exists. Those who believe the third-party should be given damages are subscribing to a loss-based version, focussing on the incidence of consequential losses flowing from

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209 *Swynson* (n 159) [16] (Lord Sumption), [104] (Lord Neuberger); *St Martins* [1994] 1 AC 85, 97 (Lord Griffiths), 114-15 (Lord Browne-Wilkinson).

210 Trotter, 'Reconsidering Transferred Loss' (n 135) 735. Cf *Rembrandt* (n 160) [75].

211 Eg Stevens, 'The CRTPA' (n 54) 297-302; compare Brian Coote, 'The Performance Interest, Panatown, and the Problem of Loss' (2001) 117 LQR 81.

212 Nicholas Davidson, 'The Law of Black Holes?' (2006) 22 Professional Negligence 53.

213 [2020] QB 551 [79].

breach.[214] Thus, damages must be directed to the third-party, and paying damages to the promisee is not enough. But there is a second kind of 'blackhole'. Lord Keith's original formulation of a 'blackhole' 'is that the claim to damages would disappear… into some legal black hole, so that the wrongdoer escaped scot-free',[215] breaching 'with impunity'.[216] It does not appear to matter who damages are paid to, only that substantial damages are paid by a contract-breaker. Loss-based damages are not the only means of avoiding Lord Keith's blackhole. Why not punitive? Or gain-based? Or perhaps, neither? If the promisee had a more clearly recognised right to substantial 'performance-damages',[217] it would cease to exist.

8. Conclusion

A century before Treitel, Williston commented that '[n]o one who examines the cases carefully can fail to note how much confusion has been caused by neglect of important distinctions.'[218] One such distinction is that between rights and standing. Everything should be made as simple as possible, but no simpler.[219] We may have set off the path, but it is never too late to make amendments.[220]

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214 *Panatown* [2001] 1 AC 518, 535 (Lord Clyde); *St Martins* [1994] 1 AC 85, 114 (Lord Browne-Wilkinson); *The Albazero* [1977] AC 774, 847 (Lord Diplock).

215 *G.U.S. Property Management v Littlewoods Mail Order Stores* (1982) SLT 533, 538.

216 Eg *Panatown* [2001] 1 AC 518, 546 (Lord Goff).

217 Friedmann, 'Performance Interest' (n 3); Stevens, 'Damages and the Right to Performance' (n 3); Pearce and Halson, 'Damages' (n 3).

218 Samuel Williston, 'Contracts for the Benefit of a Third Person' (1902) 15 Harvard LR 767, 767.

219 A saying attributed to Albert Einstein.

220 There exists some precedent for this practice. E.g. in 2014 Singapore amended its Frustrated Contracts Act, previously in pari materia to the UK Law Reform (Frustrated Contracts) Act 1943, in an attempt to improve its wording. Singapore also has a Contracts (Rights of Third Parties) Act 2002, in pari materia to the English 1999 Act.