1. What is the Doctrine of Privity?

There are two aspects to the doctrine of privity, namely: the *burden rule* and the *benefit rule*. 7.001

(1) *The burden rule* is that a third party cannot be subjected to a burden deriving from a contract to which he is not a party (or not "privy"). This is uncontroversial since, clearly, it would be wholly unreasonable if A and B could agree to impose contractual obligations on C, especially without C's knowledge.

(2) *The benefit rule* is that a third party cannot sue upon a contract to which he is not a party, even if the contract was made for his benefit. This *is* controversial because it means that if A and B agree to confer a benefit on C, then C cannot sue upon that contract to enforce that benefit. In the UK, this rule was modified by the Contracts (Rights of Third Parties) Act 1999; however, in Hong Kong, the common law rule still remains.

2. The Burden Rule

Although the burden rule is that a third party cannot be subjected to a burden deriving from a contract to which he is not a party, there are some *exceptions*. 7.002

(a) Exceptions

(i) *An obligation not to interfere with other parties' contracts*

There is an obligation on a third party (C) not to seek to persuade one contracting party (A) to break his contract with the other contracting party (B). It is a tort to interfere (intentionally or recklessly) with a contract between two parties, either by (i) persuading A to break his contract with B, or (ii) preventing A from performing his contract with B. 7.003

An example of this exception to the rule can be found in *Lumley v Gye* (1853) 2 El & Bl 216. In this case, there was a contract between an opera singer and a theatre owner (the plaintiff). For the duration of the contract period, the opera singer had agreed to perform exclusively at the plaintiff's theatre. However, the owner of *rival* theatre (the defendant) sought to persuade the opera singer to break her contract with the plaintiff by promising to pay her more money. The opera singer accepted the defendant's offer and, breaching her contract with the plaintiff, refused to perform for the plaintiff. As such, the plaintiff theatre owner brought an action against the defendant rival theatre owner for inducing the opera singer to break her contract with him which caused him loss. The court held that the defendant had committed a tort by interfering with the plaintiff's contract with the opera singer and was therefore liable to pay damages. 7.004

(ii) *Obligation to act consistently with restrictive covenants*

7.005 A third party has an obligation to act consistently with a restrictive covenant on land a third party who acquires property which is affected by a contract (or deed) between two other parties will be bound by the terms of that contract insofar as they affect the land.

7.006 An example of this exception to the rule can be found in *Tulk v Moxhay* (1848) 2 Ph 774. In this case, the plaintiff sold land subject to a restrictive covenant that the land must not be built upon and so remain in its existing condition. After a number of sales and re-sales, the land was eventually conveyed to the defendant who, despite having notice of the restrictive covenant, nevertheless sought to build on the land. The court granted the plaintiff vendor an injunction[2] to restrain the defendant's proposed building work; therefore, the defendant was bound by an agreement to which he was not privy.

7.007 Note, however, that the restrictive covenant exception is *limited* to contracts for the sale and purchase of land[3] and, even then, the plaintiff seeking to enforce the covenant must show that he holds land adjacent or in the immediate vicinity which is capable of being benefited by the restrictive covenant.

(iii) *Bound by a clause in a sub-bailment contract*

7.008 A third party bailor may be bound by a clause in a contract between a bailee and a sub-bailee.[4] This is illustrated by the following cases.

7.009 In *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, the plaintiff owner of a mink shawl (the bailor) sent the shawl to a furrier (the bailee) for cleaning. The plaintiff agreed that it could be passed on to the defendants (the sub-bailees) for cleaning. The furrier entered into a cleaning contract with the defendants on current trade terms which included that goods belonging to customers are held at the customer's risk and that the defendants were not liable for any loss or damage howsoever caused. However, when the defendants' employee stole the fur whilst in their custody, the plaintiff sued the defendants for damages.

7.010 In the Court of Appeal, Diplock and Salmon LJJ (avoiding the difficult privity question) held that the defendants were bailees for reward and therefore owed the plaintiffs a duty to take care of the fur, and that the exemption clause in defendants'

[1] A restrictive covenant is an obligation, *vis-à-vis* land, found in a deed which "runs with the land" and is binding on subsequent purchasers.

[2] See Chapter 23 on Injunctions.

[3] Though note that there are inconsistent views with regard to chattels: see *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, *Swiss Bank Corp v Lloyd's Bank Ltd* [1979] Ch 548 and *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd* [1993] 1 WLR 138.

[4] Bailment refers to the delivery of goods under a contract by one party (the bailor) to another party (the bailee) for some purpose, such as dry-cleaning, repairing or safekeeping, and the subsequent return of the goods to the bailor after the purpose has been fulfilled.

contract with the furrier (the sub-bailment contract) did not extend, *on its wording*,[5] to cover liability owed to the plaintiff.

7.011 Although Lord Denning also found (at p.729) that the clause, on its wording, did not cover liability to the plaintiff, his Lordship considered that the plaintiff *impliedly* consented to the furrier contracting for the cleaning on the usual terms and, therefore, the defendants might, *in principle*, rely on the exemptions in the (head-) bailment contract:

> "Can the defendants rely, as against the plaintiff, on the exempting conditions although there was no contract directly between them and her? ... On the one hand, it is hard on the plaintiff if her just claim is defeated by exempting conditions of which she knew nothing and to which she was not a party. On the other hand, it is hard on the defendants if they are held liable to a greater responsibility than they agreed to undertake. ... The answer to the problem lies, I think, in this: the owner is bound by the conditions if he expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise."

7.012 As such, it seems that the bailor (as a third party) will be bound by terms of a sub-bailment (to which a bailee and a sub-bailee) if he had either expressly or impliedly consented to the bailee making a sub-bailment, on those terms, with the sub-bailee.

7.013 This principle was accepted and applied in *KH Enterprise v Pioneer Container (The Pioneer Container)* [1994] 2 AC 324 (a Privy Council case on appeal from Hong Kong). In this case, cargo owners (the plaintiffs) had contracted with carriers on terms which entitled the carriers to subcontract the carriage "on any terms". The carriers subcontracted with shipowners (the defendants) for the carriage of the plaintiffs' goods. Later, when the goods were lost at sea, the plaintiff cargo owners brought an action against the defendant shipowners. However, the defendants applied for a stay of the proceedings on the grounds that (*inter alia*), by virtue of an "exclusive jurisdiction clause" in the relevant contractual documents between the carriers and the defendants, the plaintiffs had agreed that any dispute would be governed by Chinese law and determined in Taiwan. Therefore, the question was whether the exclusive jurisdiction clause could bind the plaintiffs despite the absence of a contractual nexus with the defendants.

7.014 The Privy Council opined that the plaintiffs were bound by the clause because they consented to their cargo being sub-bailed on terms including such a clause. Lord Goff made the following observations (at pp.339, 341 and 342, respectively):

> (1) "... if the effect of the sub-bailment is that the sub-bailee voluntarily receives into his custody the goods of the owner and so assumes towards the

[5] The wording was strictly construed so that reference to goods belonging to "customers" referred to the furrier (a customer of the defendants), not the furrier's customers (therefore, not the plaintiff). Such a construction was particularly justified on the basis that distinctions had been made elsewhere in the sub-bailment contract between "customer" and "his own customer". Further, the sub-bailment contract also referred to compensation for loss or damage "during processing", whereas the loss which occurred was not *during* processing (but, rather, before or after).

owner the responsibility of a bailee, then to the extent that the terms of the sub-bailment are consented to by the owner, it can properly be said that the owner has authorised the bailee so to regulate the duties of the sub-bailee in respect of the goods entrusted to him, not only towards the bailee but also towards the owner."

(2) "... if the owner seeks to hold a sub-bailee responsible to him as bailee, he is to accept all the terms of the sub-bailment, warts and all; for either he will have consented to the sub-bailment on those terms or, if not, he will (by holding the sub-bailee liable to him as bailee) be held to have ratified all the terms of the sub-bailment."

(3) "... a person who voluntarily takes another person's goods into his custody holds them as bailee of that person (the owner); and he can only invoke, for example, terms of a sub-bailment under which he received the goods from an intermediate bailee as qualifying or otherwise affecting his responsibility to the owner if the owner consented to them. [This] approach ... has been adopted by English law and, with English law, the law of Hong Kong."

7.015 Further, the Privy Council thought (at p.342) that this conclusion flows from *Morris v CW Martin & Sons Ltd* and *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 WLR 1262 and "produces a result which ... is both principled and just". Lord Goff went on to state (also at p.342):

> "... a sub-bailee can only be said for these purposes to have voluntarily taken into his possession the goods of another if he has sufficient notice that a person other than the bailee is interested in the goods so that it can properly be said that (in addition to his duties to the bailee) he has, by taking the goods into his custody, assumed towards that other person the responsibility for the goods which is characteristic of a bailee. ... ... their Lordships do not consider this principle to impose obligations on the sub-bailee which are onerous or unfair, once it is recognised that he can invoke against the owner terms of the sub-bailment which the owner has actually (expressly or impliedly) or even ostensibly authorised."

7.016 Note that, although this case concerns an "exclusive jurisdiction clause", the reasoning of the judgment could equally apply to exemption clauses.

3. The Benefit Rule

7.017 The rule that a third party cannot sue upon a contract to which he is not a party, even if the contract was made for his benefit, can possibly be justified on three grounds:

(1) *the principle of mutuality*—it would be unfair to allow a third party to sue on a contract under which that third party could not, itself, be sued;[6]

[6] See *Tweddle v Atkinson* (1861) 1 B & S 393; 121 ER 762.

(2) *freedom of the parties*—the contracting parties' freedom to amend or terminate their contract should not be restricted by the creation of third party rights under the initial agreement;[7] and

(3) *lack of consideration*—third parties are often gratuitous recipients of a benefit and provide no consideration.[8]

This last justification is probably the one most often cited. 7.018

(a) Privity and consideration

Historically, there has always been a close link between privity and consideration, as illustrated, for example, in *Tweddle v Atkinson*. In this case, John Tweddle and William Guy entered into an agreement whereby each promised to pay a sum of money to John Tweddle's son (William Tweddle) upon the son's marriage to William Guy's daughter. The agreement also stated: "it is hereby further agreed ... that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified". However, after the marriage, William Guy failed to pay the promised sum. As such, after William Guy's death, William Tweddle sued William Guy's estate for the promised amount. 7.019

The court held that William Tweddle's action could not succeed because he had provided no consideration for William Guy's promise; rather, this promise had been supported by consideration provided by William Tweddle's father, John Tweddle. 7.020

Wrightman, Crompton and Blackburn JJ all seemed to base their judgments on the rule that a stranger to consideration cannot enforce the promise, even if the contract was made for his benefit. Such reasoning meant that there was no need to base the result on the privity doctrine. However, Crompton J commented (at p.398) that it would be "a monstrous proposition" if a third party was considered to be a party to the contract for the purpose of suing upon it to his advantage, though not a party for the purpose of himself being sued upon it. 7.021

Another illustration of the link between the doctrines of privity and consideration is *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847. In this case, Dunlop sold tyres to a distributor (Dew & Co) on terms that the distributor would not sell them at a price lower than Dunlop's "List-Price" and that the distributor would obtain a similar undertaking from whomever the distributor sold them on to. The distributor sold the tyres on to Selfridge who gave the required undertaking and agreed to pay £5 liquidated damages[9] for each tyre sold at a price lower than the List-Price in breach of the undertaking. However, Selfridge later re-sold the tyres at a *lower* price 7.022

[7] See *Re Schebsman* [1944] Ch 83.
[8] See Chapter 3 on Consideration.
[9] See Chapter 25 on Liquidated Damages.

(b) Equitable relief granted

22.051 In *Beswick v Beswick*,[28] although Mrs Beswick, due to the rules on privity of contract, had no legal right to claim specific enforcement of the nephew's promise to his late uncle (Mrs Beswick's late husband), she was nevertheless able to have the promise specifically enforced in her capacity as administratrix of her late husband's estate.

22.052 Specific performance was seemingly the most logical and convenient remedy to grant because:

(1) the uncle's remedy at common law was inadequate as the damages which he (or, rather, his estate) could recover would be purely *nominal*;[29]

(2) the contract was for a series of regular payments, and so damages would have to be sought as each payment fell due;

(3) the payments were for life, in which case: how could damages, in the form of a lump sum, be measured? How many payments would have been made? How long would Mrs Beswick have lived?;

(4) the nephew had received the entire consideration for his promise as the business had already been transferred to him; and

(5) the contract *could* have been specifically enforced by the *nephew* if the uncle had failed to perform *his* promise to transfer the business (i.e. there was *mutuality* of the remedy).

22.053 Therefore, it does seem that the facts of this case make specific performance the most logical, convenient and equitable remedy. Indeed, it could be said that the decision in this case represents a classic illustration of equity in operation.

[28] For facts, see Chapter 7 on Third Parties.

[29] Note also that it was said that damages would be a less appropriate remedy since the parties to the agreement had intended an *annuity* and thus a *lump* sum of damages (if any) would not accord with this.

CHAPTER 23

INJUNCTIONS

contractual promise and, as such, can be contrasted with the remedy of specific performance which is designed to enforce a *positive* contractual promise.

23.007 A prohibitory injunction is said to be the *primary* remedy (rather than damages) for breach of a negative promise; although common law damages must be shown to be inadequate before the equitable remedy of injunction can be granted, this will not usually pose a problem since damages, in this context, will *rarely* be adequate. The prohibitory injunction as a primary remedy is supported by *Doherty v Allman* (1877–78) LR 3 App Cas 709, 720 (Lord Cairnes LC):

> "If the parties ... contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case, the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties."

23.008 However, although a prohibitory injunction may be said to be the *primary* remedy for breach of a *negative* promise, it may still, nevertheless, be refused. For example, where the plaintiff's own conduct debars him (see later), or where the harm suffered by the plaintiff is trivial (*Harrison v Good* (1870–71) LR 11 Eq 338, 352), or where the granting of such an injunction would effectively amount to *indirect* specific performance of the contractual promise in circumstances where the remedy of specific performance would not be granted.

(b) Indirect specific performance

23.009 A prohibitory injunction which enforces a negative promise is, *in effect*, specific performance of a *positive* promise. In other words, an order to restrain someone from *breaching* their negative obligation is effectively the same as an order to *carry out* the corresponding positive obligation.[3] In this sense, it could be argued that the rules relating to specific performance should apply.

23.010 Although this, in itself, is not a ground for refusing to grant a prohibitory injunction, if specific performance of the corresponding *positive* promise would be refused, then so too should a prohibitory injunction which *enforces* the corresponding *negative* promise. Whether a prohibitory injunction amounts to indirect specific performance, and is therefore subject to the rules relating to specific performance, seems to be a question of whether compliance with the injunction would result in a *choice* for the defendant as to either perform his positive obligation *or* not be able to work or carry on business at all. In such a case, there would be no real choice at all and so there may be said to be specific performance. This situation may arise, for example, in relation to contracts for a personal service or contracts for the sale of goods.

[3] See, for example, *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 576 where the plaintiff sought an injunction to restrain the defendants from withholding petrol supplies: although it was a prohibitory injunction (to enforce a negative promise) in *form*, it was clearly specific performance (to enforce a positive promise) in *substance*.

(i) *Contracts for a personal service*

23.011 Since *specific performance* will not be granted to order someone to perform a personal service, it is important to identify whether an order of a *prohibitory injunction* would amount to the same.

23.012 In *Lumley v Wagner* (1852) 1 De GM & G 604, the defendant promised to sing at the plaintiff's theatre, twice a week for three months, and not to sing at any other theatre without the plaintiff's written consent. However, the defendant later agreed to sing for a third party (at a rival theatre) for more money. The plaintiff was granted an injunction to restrain the defendant from singing at theatres other than the plaintiff's; the court believed that such an injunction did *not* amount to indirect specific performance of the defendant's obligation to sing for the plaintiff (which the court accepted could not be granted in the circumstances).

23.013 According to Lord St Leonards LC (at p.619):

> "It is true, that I have no means of compelling [the defendant] to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do ...".

23.014 In ordering the injunction, the judge disclaimed that he was effectively ordering specific performance or doing *in*directly that which could not be done directly.[4]

23.015 In *Warner Brothers Pictures Inc v Nelson* [1937] 1 KB 209, the defendant had agreed to render acting services to the plaintiffs for a particular period of time, during which she would not perform such services for anyone else. However, the defendant breached the contract by agreeing to act for another film company. Therefore, the plaintiffs were granted an injunction to restrain her for three years from acting for any film company other than the plaintiffs.

23.016 The court believed that such an injunction did not amount to indirect specific performance of her contract with the plaintiffs since, although she could not work as an actress, she was free to work in any other capacity for any other company.

23.017 According to Branson J (at pp.219–220):

> "... no evidence was adduced to show that, if enjoined from doing the specified acts otherwise than for the plaintiffs, she will not be able to employ herself both usefully and remuneratively in other spheres of activity ... She will not be driven, although she may be tempted, to perform the contract, and the fact that she may be so tempted is no objection to the grant of an injunction."

23.018 In *Warren v Mendy* [1989] 1 WLR 853, 865, Nourse LJ commented that Banson J's view that such a young, up-coming actress might employ herself both usefully and remuneratively in other spheres, for three years, seems to be "extraordinarily unrealistic".

[4] *Ibid.*

23.019 However, there are cases where prohibitory injunctions *have* been held to constitute specific performance of personal performance obligations if they were so ordered. For example, in *Mortimer v Beckett* [1920] 1 Ch 571, the defendant agreed to employ the plaintiff as his boxing manager with exclusive control over the defendant's boxing contracts. Later, after the defendant had agreed to box for somebody else, the plaintiff sought an interim injunction to restrain the defendant from so boxing for anybody else; in effect, to enforce the defendant's (implied) promise not to box for anyone else. However, although the injunction sought only related to boxing, the remedy was refused since, inter alia,[5] the court believed that such an injunction would amount to indirect specific performance of the defendant's *personal* performance obligations.

23.020 According to Russell J (at p.581):

> "The effect will be to force the defendant to employ a particular person as his agent, so far as his boxing engagements are concerned, and to accept the agent's services."

23.021 Another example of a prohibitory injunction being refused on the grounds of it amounting, if granted, to indirect specific performance of a personal obligation can be found in *Page One Records Ltd v Britton* [1968] 1 WLR 157. In this case, a music group employed the plaintiff as their sole agent and manager for five years, during which the group agreed not to record songs for anybody else.

23.022 The plaintiff later sought an interim injunction to restrain the group from the breach of this undertaking but the remedy was refused on the grounds that it would amount to indirect specific performance of the group's personal obligations.

23.023 According to Stamp J (at pp.166–167):

> "... I entertain no doubt that [the group] would be compelled if the injunction were granted, ... to continue to employ the plaintiff as their manager and agent ... I should if I granted the injunction, be enforcing a contract for personal services, in which personal services are to be performed by the plaintiff."

(A) Analysis of the different approaches

23.024 A noted difference between *Mortimer v Beckett* and *Page One Records Ltd v Britton* on the one hand, and *Lumley v Wagner* and *Warner Bros Pictures Inc v Nelson* on the other, is the fact that, in the former two cases, it was the employee (i.e. the manager or agent) who sought the injunction, not the employer. However, it is questionable as to why this should be sufficient to lead to a different conclusion. Rather, it seems more likely that the difference is that the courts in *Mortimer v Beckett* and *Page One Records Ltd v Britton* were considering: what would be the *practical reality* of the injunction?

[5] Also, it seems, the absence of an *express* stipulation not to box for anybody else was an important factor taken into account by the court; *Cf Lumley v Wagner* where an injunction was granted pursuant to an *express* stipulation not to sing for anybody else.

23.025 On this analysis, it would be possible to see how *Warner Bros Pictures Inc v Nelson* would have been decided differently since it is unlikely that the defendant (a famous film actress) would take up employment in a different capacity (i.e. other than being an actress) for a period of three years.[6]

23.026 This approach is supported by *Warren v Mendy*, where the Court of Appeal preferred the analysis in *Page One Records Ltd v Britton*, over that in *Warner Bros Pictures Inc v Nelson*, on the bases of "realism and practicality".[7] In *Warren v Mendy*, although the dispute arose over the management of a boxer, the actual injunction sought by the plaintiff manager was not against the boxer (for breach of contract) but, rather, against *another* manager for the tort of inducing the boxer's breach of his agreement with the plaintiff manager.

23.027 Nevertheless, the court believed that since the injunction sought was against anyone who tried to manage the boxer, the same principles should apply as if the injunction was being sought against the boxer himself for breach of contract. Based on this reasoning, the court refused the injunction, believing it to constitute indirect specific performance of the boxer's contract to be solely managed by the plaintiff for the duration of the contract period.

23.028 Although the court disapproved of the approach taken in *Warner Bros Pictures Inc v Nelson*, it did accept the decision in *Lumley v Wagner* due to the much shorter restraining period in that case. According to Nourse LJ (at pp.865–866):

> "Although it is impossible to state in general terms where the line between short-and long-term engagements ought to be drawn, it is obvious that an injunction lasting for two years or more ... may practically compel performance of the contract."

(ii) *A Hong Kong case illustration*

23.029 In *Beacon College Ltd v Yiu Man Hau* [2001] 3 HKLRD 558, the plaintiff operated a private tutorial school and the defendants were employed as tutors at the school. However, these tutors later resigned in favour of joining a rival school. Therefore, the plaintiff sought and obtained an *interim* injunction to prohibit the defendants from breaching a clause in the defendants' employment contact with the plaintiff. The clause in question was designed, in part, to prevent an employee of the plaintiff college from joining and working for another, rival college for a specified time (i.e. for the duration of the agreement, which remained extant at all material times).

(A) The arguments

23.030 The plaintiff simply argued that the injunctions were sought to merely enforce a negative covenant. It accepted that the defendants cannot be legally compelled to teach for the plaintiff college, nor did the plaintiff seek to so compel them.

[6] As noted by Nourse LJ in *Warren v Mendy*, 865. However, it could be argued that the court in *Lumley v Wagner* would have still come to the same conclusion since the defendant singer was only being restrained for three months, it therefore being likely that she would choose to do something else, or nothing at all, for such a short period.

[7] At p.865.