SMITH ON THE LAW OF ASSIGNMENT

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Nature and Characteristics of Intangibles

A. Overview of the Chapter

Intangibles, or choses in action, are a form of property. English law prefers the label 'choses in action', but—for reasons that are considered later on in this Chapter—that label is not entirely satisfactory. Where possible—and this is not always so[1]—the term 'intangibles' is preferred in this book. **2.01**

Before considering how such property is created, transferred, and protected, it is necessary to consider the nature of property interests generally; to identify where intangibles and choses in action fit in the overall spectrum of property interests recognized by English law; and then to consider the characteristics that define and describe choses in action and intangibles. **2.02**

This chapter considers, in Section B, the fundamentals of property law generally, in particular the nature of property interests and the distinction between rights *in rem* and rights *in personam*. **2.03**

[1] Thus, the case law will typically refer to a 'chose in action' rather than an 'intangible'. Equally, s 136 explicitly refers to a 'debt or other legal thing in action'.

2.04 Section C considers the English law classification of things, and the place of choses in a within that classification. This classification derives from the procedural law of the Ages. It is a common law classification, predating—and so not taking into accou equitable rights developed by the Court of Chancery from the fifteenth century onw For that reason, the position of equitable rights within this scheme of things is unaccep for, not straightforward, and needs to be considered separately.

2.05 What is more, as the centuries have passed, the Common Law understanding as to constitutes a chose in action has undergone a dramatic expansion, from a narrow d ition based upon the right to bring an action to the much wider definition that we today, embracing not merely rights of action, but also rights under a contract, secu and intellectual property rights. There are signs that this expansion has been too great useful in terms of classification. English law now has at least one form of intangible prop that is expressly recognized to be 'personal property' without being a chose in action.[2] difficulty, and the use of the label 'intangible' which this difficulty invites, are also m considered in Section C.

2.06 Choses in action have a number of defining characteristics. First, they are interests *tangible* (as opposed to tangible) things. Secondly, they are interests in (intangible) that are recognized by English law as constituting property. Thirdly, they are *priv* opposed to public) law rights. Fourthly, choses in action can be either legal or equ Fifthly, a chose in action can either be presently subsisting or exist in the future. These acteristics are considered in Section D.

2.07 Section E considers the extent to which ownership in choses in action or intangibles can shared, divided, or otherwise fragmented.

2.08 Finally, Section F considers the importance of the question of 'territoriality', namely international aspects of intangible property. Private international law, as it relates to int gible property, is treated in Chapter 3.

B. The Law of Property

(1) The Nature of Property Interests

2.09 The law of property is concerned not with *things*, but rather with *interests* (or *rights*) things.[4] It is these interests that the law of property describes and defines and which—a lawyer at least—are to be regarded as 'property'. The distinction was described by the High Court of Australia in *Yanner v Eaton*:[5]

[2] This is the patent. Section 30(1) of the Patents Act 1977 provides that a patent is personal property (or being a thing in action.

[3] The term 'right' is generally given a rather more specific meaning in this book: see Section B(2). For reason, the term 'interest' is generally preferred.

[4] Lalive 1955, 5–6; Gray 1991, 252, 257–9; Lawson & Rudden 2002, 4–5, 19; Goode & McKendrick 2020, Gray & Gray 2009, [1.5.4]–[1.5.5].

[5] [1999] HCA 53 (HC Australia) at [17]. This was the judgment of the whole court, comprising Gaudron, McHugh, Gummow, Kirby, Hayne, and Callinan JJ.

> … 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of property may be elusive. Usually it is treated as a 'bundle of rights'. But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said, that 'the ultimate fact about property is that it does not really exist: it is mere illusion'.

2.10 A similar point was made by Smith J in *Eaton v Boston, Concord & Montreal Railroad*:[6]

> In a strict legal sense, land is not 'property', but the subject of property. The term 'property', although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it'. 'It denotes a right over a determinate thing'. Seldon J, in *Wynehamer v The People*, 13 NY 378, p433; 1 Blackstone Com 138; 2 Austin on Jurisprudence, 3rd ed, 817, 818. If property in land consists in certain essential rights, and a physical interference with land substantially subverts one of those rights, such interference 'takes', *pro tanto*, the owner's 'property'.

2.11 Property rights are not so much illusory as abstract notions given legal force by a specific legal system.[7] Whereas the *thing* itself may be (but is not always) tangible, the *interest* in (or relating to)[8] the thing is inevitably intangible or abstract. As Gray states,[9] where there is a transfer of 'property', 'I have transferred to you not a thing but a "bundle of rights", and it is the "bundle of rights" that comprises the "property."'

2.12 Where the property in question is tangible, that physicality will inform the property rights that an owner is invested with. Thus, if the property can be damaged, the owner will likely find, in their bundle of rights, a right to be compensated for such damage. If the property can be taken, then the owner will likely be invested with a right to recover. Where that physicality is absent—as is the case with intangible property—the owner's rights are less easy to extrapolate and define.

2.13 In any event, in the case of tangible property, what may appear at first to be a solid and concrete thing—land or an object—rapidly becomes much more complex. Whereas there may be only one *thing*, the *interests* in or relating to that thing can be multiple and subject to a variety of owners. The point is well put by Lawson & Rudden:[10]

> If a field is sold, or leased, or given away, or left by will, the field itself does not change at all; looking at it will not tell you whose it is. What changes is the legal relations of persons, changes expressed in the appropriate formalities. The same is true if the object is a house, a car, a cat, a share in a company, or a government bond. So one of the main difficulties the student of property law encounters at the very threshold is the presence of abstractions rather than physical objects.

[6] (1872) 51 NH 504 (SC New Hampshire) at 511, 1872 WL 4329 (NH) at [8].

[7] As Unger has noted, there is an enormous flexibility in how society organizes itself. Property rights are not *inevitable*, they are *chosen* and then *embedded*.

[8] For the purposes of this book, an interest *in* a thing is the same as an interest *relating to* a thing.

[9] Gray 1991, 259.

[10] Lawson & Rudden 2002, 4–5. See also De Soto 2001, 164: 'The crucial point to understand is that property is not a physical thing than can be photographed or mapped. Property is not a primary quality *of* assets, but the legal expression of an economically meaningful consensus *about* assets'.

Goode observes:[11]

> Most students encountering real property law for the first time go through a period of almost total mystification. What they assumed to be a solid, immovable asset speedily dissolves into abstract tenures and estates, stretched out over an infinity of time, susceptible to peculiar rules and altogether beyond the plane of normal human existence …

That mystification is all the greater where the thing that is owned is itself abstract and without physical being.

2.14 Seeing the law of property too much through the prism of the *thing*, and not through the *interests* in the thing, is known as the problem of 'reification'. 'Reification' refers to the description of property interests by reference to a thing rather than to the interests in the thing.[12] Whilst this may be a helpful shorthand in the case of tangible property ('that table is *my* table'), even then there is a risk, as in all cases of shorthand, that it can obscure more than it reveals simply because of the varied nature of interests in property. Reification is not possible in the case of intangibles. The unnuanced assertion that 'that table is my table' fails to recognize the importance of abstract interests *in* the table and so is incapable of dealing with complex matters such as priority disputes and successive interests in that property. Thus, for example, it is perfectly possible for the owner of the hypothetical table (*A*) to *lease* the table to *B* and for both *A* and *B* to have property interests in the *same* table. *A* remains the owner, but some of *A*'s rights have been transferred to *B*. Whether those transferred rights are, in and of themselves, property rights, is a difficult question. The law needs to be able to deal not only with *A*'s and *B*'s rights 'against the world' but also their rights (and obligations) *inter se*.

2.15 What is more, reification obscures the fact that it is for a legal system to define that which it considers to be property and that which it considers not to be property.[13] If a thing is not regarded as property by a particular legal system, then (as far as that legal system is concerned) it is obviously not possible to have a property interest in that thing. If a thing is regarded as property in a particular legal system, then it is for that legal system to articulate further what that interest in property actually is. In short, whilst a table will physically be the same table the world over, the nature of the interests in that table will vary according to which legal system is considering the question. Hence, the importance of the question of territoriality, considered in Section F.

2.16 When legal rights of ownership are by their very nature divorced from physical things—a right under a contract, or a duty of care (in tort), or a fiduciary duty (in equity)—the siren-call of reification recedes. The rights of ownership are much more easily seen as incorporeal rights and obligations. Whether these rights and obligations amount to property rights is a question that will arise in each case, and the distinction between multilateral and bilateral choses demonstrates that the distinction is not necessarily clear-cut.

[11] Goode & McKendrick 2020, [2.02].
[12] 'Reification' is a term coined in Gray & Gray 2009 at [1.5.4].
[13] See Bell 1989, 3–4, 13–16; Lawson & Rudden 2002, 20.

(2) An Analysis of Interests: Hohfeld

If our starting point is that all legal interests—including legal interests in property—are incorporeal, consisting of abstract legal relations, the question arises as to whether such interests are susceptible of further analysis. Hohfeld recognized that '[o]ne of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to "rights" and "duties", and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, "future" interests, corporate interests, etc.'[14] **2.17**

Hohfeld considered that treating *all* legal interests as *rights*, having as their correlative *duties*, was oversimplistic and distortive of the true position. Hohfeld classified legal interests in a fourfold way. He suggested that legal interests (including interests in property) subsisted between *persons* and were capable of a fourfold classification into 'rights',[15] 'privileges', 'powers', and 'immunities'.[16] Of course, since these interests subsist between persons, there must be a relationship between the holder (or holders) of a 'right', 'privilege', 'power', or 'immunity' and the person (or persons) in some way obliged by these interests. In other words, a legal interest will always have a correlative.[17] A legal interest, in Hohfeld's view, defines a relationship between two persons. As will be seen, in some cases Hohfeld's emphasis on correlation is a little strained—as in the case of privileges—but for present purposes the analysis will be persisted with. It is necessary to consider the definition of Hohfeld's fourfold classification of legal interests. **2.18**

'Rights'

Hohfeld considered the correlative to a 'right' to be a 'duty'. It is by defining a duty that a right or claim can best be understood. A duty is 'that which one ought or ought not to do'. A duty involves an obligation to do, or not to do, something. The correlative to a duty is a right or a claim: when a duty is violated, a right is invaded.[18] **2.19**

It is possible for a right to exist, but be uninfringed; or for a duty to exist, but be unbreached.[19] The relationship exists: it is simply that nothing has happened to entitle the holder of the right to proceed legally against the person owing the duty. There is, in short, no cause of action. **2.20**

[14] Hohfeld 1964, 35.
[15] Or, perhaps better, 'claims': Hohfeld 1964, 38. Here, the term 'right' will be used.
[16] Hohfeld 1964, 36.
[17] ibid. See the comments of Plender J in *Milk Supplies Ltd v Department for Environment, Food and Rural Affairs* [2009] EWHC 503 (QB) at [1]: 'Schooled on Hohfeld's theory of legal reasoning … common lawyers are apt to define a right as a legal entitlement to demand that another person shall perform a correlative duty. The civilian's assertion that a right must not be abused is, to a common lawyer, a contradiction in terms: it amounts to saying that there is no right to act in the manner characterised as an abuse.'
[18] Hohfeld 1964, 38. See also *Lake Shore & MS Ry Co v Kurtz* (1894) 37 NE 303 (App Ct Indiana) at 304: 'A duty or a legal obligation is that which one ought or ought not to do. "Duty" and "right" are correlative terms. When a right is invaded, a duty is violated' (*per* Lotz J).
[19] This is the distinction between a right of action—which concerns an arguably infringed right brought before a court for adjudication—and a debt or right under a contract, which exists as a chose even though it is not infringed and no claim can be brought by the owner of the right for that reason.

2.21 Hohfeld coined the term *no-right* as being the opposite of a *right*. This term is, however, potentially misleading. It suggests that something exists when there is a no-right, which is not accurate. Where there is a no-right, there is *nothing*: no duty, and so no correlative right. No-right is intended to be a description of an *absence*. The concept of a no-right is important when it comes to understanding privileges.

'Privileges'

2.22 A privilege is the freedom or right to do something. It is, *pace* Hohfeld,[20] the opposite of a duty. Suppose *A* is the owner of some land. They have the right—against the world, but for present purposes let us say against actual infringer *B*[21]—to prevent *B* from entering their property, and *B* has a duty not to enter. But as regards their *own* property, *A* has the privilege of entering their land. They do not have to do so—*A* has no *duty* to enter the land. But they may do so, without infringing someone else's right.[22]

2.23 In the context of privileges, it appears artificial to speak of a correlative relationship, as exists in the case of right and duty. Nevertheless, Hohfeld does identify a correlative for a privilege. On Hohfeld's understanding, the correlative to a privilege is a no-right.[23] Anyone who does not have the privilege has no right to prevent the privileged person from exercising their privilege. Equally, anyone who does not have the privilege has no right to do what the privileged person can do. If one may respectfully say so, it is here that the rigour of the Hohfeldian analysis becomes potentially misleading. The point about a privilege is that within the scope of the privilege, the privilege is *unconstrained*. There is no correlative, beyond the owner's ability to prevent infringement of the privilege.[24] Lawyers tend to become restless at the notion of unconstrained rights (particularly in the public sphere, but also in the private). However, if property rights are to be meaningful, it is the privilege (or freedom) to use property as the owner wills, within the scope of the privilege conferred by law, that is (in both human and economic terms) enabling.

2.24 It is important to appreciate the interrelationship that can exist between rights/duties and privileges/no-rights. It may well be that my privilege to go where I please is circumscribed by the rights of others. I do have the privilege to go where I please, *provided* I do not

[20] Hohfeld 1964, 38.

[21] The right against the rest of the world is an unbreached duty; only *B* has in this case breached the duty and exposed themselves to a claim by *A*.

[22] See Cave J in *Allen v Flood* [1898] 1 AC 1 (HL) at 34: 'it is said that a man has a perfect right to fire off a gun, when all that was meant, apparently, was that a man has a freedom or a liberty to fire off a gun so long as he does not violate or infringe any one's rights in doing so, which is a very different thing from a right the violation or disturbance of which can be remedied or prevented by legal process'.

[23] Hohfeld 1964, 39: 'Passing now to the question of "correlatives", it will be remembered, of course, that a duty is the invariable correlative of that legal relation which is most properly called a right or claim. That being so, if further evidence be needed as to the fundamental and important difference between a right (or claim) and a privilege, surely it is found in the fact that the correlative of the latter relation is a "no-right", there being no single term available to express the latter conception. Thus, the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter'.

[24] It is better to see the privilege as doing no more than conferring on the owner of the privilege the ability to prevent infringements of it. Thus, the owner of a patent or of copyright acting within their privileges will only be involved in litigation and the assertion of 'correlative' rights where either (i) there is a dispute about the scope of the privilege or (ii) someone has infringed the privilege, such that the owner should be recompensed in damages and/or seek to enjoin further infringement. In short, the correlative to the privilege is a contingency which only arises in one or other of these two cases.

trespass on other people's land. This point was very well made by Lord Lindley in *Quinn v Leathem*:[25]

> As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of everyone not to prevent the free-exercise of this liberty, except so far as his own liberty of action may justify him in doing so. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress…

Lord Lindley's 'liberty' is plainly Hohfeld's 'privilege' and our 'freedom'.

2.25 There can be an interaction between duty and privilege. Suppose *A* contracts with *B* to paint the inside of *A*'s house. *B* has the privilege of entering *A*'s property, but also the duty to do so. *A* has no right to stop them and an obligation to allow them. Or, to take another example, suppose *A* grants *B* a right of way over *A*'s land. As against all the world, save *B*, *A* has the contingent right to prevent access over their land, and the contingency becomes satisfied as and when a third party infringes that privilege. As regards *B*, *B* has the privilege of entering *A*'s land and the right of doing so—for *A* has a duty to allow them to enter. As these examples demonstrate, the distinction between rights and privileges is a difficult one, and it is dangerous to insist too strictly on the distinction.

'Powers'

2.26 A power is a legal power to affect legal relations or to effect a particular change in legal relations.[26] In the words of Hohfeld:[27]

> Many examples of legal powers may readily be given. Thus, X, the owner of ordinary personal property 'in a tangible object' has the power to extinguish his own legal interest (rights, powers, immunities, etc) through that totality of operative facts known as abandonment; and—simultaneously and correlatively—to create in other persons privileges and powers relating to the abandoned object—e.g., the power to acquire title to the latter by appropriating it. *Similarly*, X has the power to transfer his interest to Y,—that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest. So also X has the power to create contractual obligations of various kinds.

2.27 According to Hohfeld, the correlative to a power is a liability.[28] In some cases, this correlation is easily recognized. For instance, *A* may have the power to make *B* bankrupt, because

[25] [1901] AC 495 (HL) at 534.

[26] Hohfeld 1964, 51.

[27] ibid, 51–2.

[28] Note that Hohfeld applies a special meaning to the word 'liability' in this context; see the observations of Megarry J in *Bromilow & Edwards Ltd v Inland Revenue Commissioners* [1969] 1 WLR 1180, 1189: '"liability"

it is intangible and (because it lacks a *locus*) it often has international aspects, which a capable of *ex ante* structuring by the parties to those transactions. Thus:

(1) Questions of territoriality fundamentally affect the law that is applied to the pro erty in question. Territoriality goes to both jurisdiction (which courts of which co have the competence to hear the claim?) and applicable law (assuming jurisdictio what law will the court having jurisdiction apply?).

(2) Under the English rules of private international law, significant weight is given party autonomy. Where bilateral agreement is possible, the parties to the transa tion may choose (within limits) both jurisdiction and applicable law and so—whe and if a dispute comes to court—affect in the most fundamental way the manner which the dispute is resolved.

(3) Questions of applicable law go to every question of intangible property, including as to the nature of the property itself (is it property at all?). These aspects affect n only if and how an English court determines a dispute concerning an intangible wi transnational dimensions, but also our understanding of the intangible itself.

2.142 The aspects are thus quite fundamental to an understanding of intangible property; broad-brush terms, the international aspects of disputes concerning intangible proper are considered under three broad heads:

(1) *Jurisdiction.* Questions of jurisdiction refer to the rules that determine whethe or not an English court will assume jurisdiction over a particular dispute, that whether an English court can assume jurisdiction over a particular dispute.

(2) *Choice of law.* Choice of law questions arise where an English court (having jur diction to determine a dispute) is presented with a dispute, or issues arising out a dispute, having a foreign law element. Choice of law rules provide the mechanis for determining what law should apply to which issue.

(3) *Enforcement.* Obviously, the question of whether the judgment of an English court enforceable in a foreign jurisdiction is a matter for that (foreign) jurisdiction and not a matter that can be explored, save in the most general of terms, in this book. The converse question—the enforceability of foreign judgments in English courts—is however, a matter of English law.

2.143 These three aspects are considered, in general terms, in Chapter 3. The analysis is then carried on as a seam that runs throughout this work. The private international law questions that arise in relation to intangible property are not only of importance to practitioners advising on and litigating such questions in England; these questions also assist in defining the precise nature of the property under examination. The law of property is concerned with *interests* in things. Factors that go to the jurisdiction of the English court, the laws that they apply, and the way in which foreign judgments are enforced are as much a defining part of the nature of these interests as the provisions of English municipal law[212] that form the vast bulk of the consideration in this work.

[212] By which we mean the rules of English law excluding the rules of private international law or the English conflict of law rules.

3
Private International Law

A. Overview of the Chapter

The private law applied to resolve a given legal question is affected by the territorial limits of the jurisdiction out of which that private law springs. Unlike with the criminal law, where jurisdiction, applicable law, and territory[1] tend to align, in civil law cases a court or tribunal may very well end up hearing and determining issues that are either transnational (ie they involve questions that cross borders) or concerned with the affairs of another jurisdiction altogether (ie a foreign territory). Thus, rules of jurisdiction are not so closely aligned with territory so as to preclude a domestic court hearing foreign or transnational issues. The rules of private international law serve not merely to offer up rules allocating jurisdiction but also rules governing the applicable private law. Rules of private international law also serve to indicate where a domestic court will recognize and/or enforce the judgment of a foreign court. Again, there is in civil actions a palpable non-alignment between territory and the law enforced or applied in that territory. In the case of the English territory, whilst English courts will (and very frequently do) accept jurisdiction over disputes that are transnational or foreign, they are assiduous in seeking to ensure that the law applied **3.01**

[1] By which is meant a territory within which a given law system applies. The term 'law district' can also be used. The law system here under consideration is private law. The case will be very different where public law, or criminal law, or regulatory law is in issue.

in the resolution of these transnational or foreign issues is the appropriate law which very often will not be English law. Similarly, the judgments of foreign court are regularly enforced within the English territory.

Glossary
Territory or *law district* The geographic territory within which a given system of private law operates. There can (and frequently will) be an imperfect alignment between the geographic territory and the law by which disputes in court within that territory are resolved.
Domestic law The law by which disputes are resolved within a given law territory, on the basis that there is no applicable *foreign* or *transnational law*.

3.02 The rules of 'private international law' or the 'conflict of laws' are actually rules of domestic law, governing how domestic courts treat issues of foreign or transactional law in terms of jurisdiction (whether the domestic court has jurisdiction to hear a case or an issue in a case), applicable law (where the domestic court has jurisdiction, what law is applied to that issue), and recognition and enforcement of foreign judgments (where instead of deciding a dispute afresh, the domestic court accords primacy to the decision of a foreign court). It is for this reason the definition of *domestic law* used in this book needs to make clear that whilst it includes the rules of private international law it does not include the (foreign or transnational) law that these rules might say should apply to any given dispute. In short, the definition seeks to maintain a clear distinction between one law district and another.

3.03 It was noted in para 1.07 that 'although it may be said that all choses in action are property rights, some choses in action are more proprietary in nature than others'. A distinction was drawn between bilateral intangible property—which involves a right of claim against a single debtor/obligee—and multilateral intangible property—where the right is enforceable against 'all the world' or (much more accurately) a defined class of third persons.[2] In the case of bilateral choses, a 'contractual' analysis of the questions of jurisdiction and choice of law is possible and indicated.[3] In such cases, the parties to the transaction—whether it be a contract or a debt (as subset of contracts)—may, to a considerable but not unlimited extent, determine the jurisdiction before which disputes are to be determined and the law governing such disputes.

3.04 In the case of multilateral choses, there is no possibility of the parties agreeing the applicable jurisdiction or applicable law. That is because there is no counterparty with whom such an agreement can be made. It is not possible, for instance, for a person to determine

[2] See Chapter 1 Section A(3).
[3] See Häcker 2013, 7: 'This book avowedly adopts Birks' scheme as the basic framework of the "system" of English private law. It is hence premised on the assumption that rights—whether personal or proprietary—are generated by events, the three nominate categories of events being "consent", "wrongs" and "unjust enrichment". This works well for the law of obligations. It leaves something to be desired when *property* and *property rights* are considered, but consent is helpful when considering bilateral choses. Of course, not all bilateral choses are amenable to party agreement. Contracts are, and debts are: but a right of action in tort or delict comes into being through the defendant doing certain acts to a claimant which generate a claim in the claimant which may involve no anterior dealings between defendant and claimant at all'.

(whether unilaterally or in agreement with others) the jurisdiction competent to hear a dispute arising out of a patent or a copyright dispute.

3.05 The same is true of the question of choice of law. As will be seen, in those cases where some form of party-and-party agreement can be discerned, it is possible for the parties to such a transaction to select the applicable law. But such party autonomy is not available—or much less so—in the case of multilateral choses.

3.06 It is first necessary to describe—in broad-brush terms—the relevant rules regarding jurisdiction, choice of law, and enforcement of judgments. This is done in Section C (jurisdiction), Section D (choice of applicable law), and Section E (recognition and enforcement of judgments). Before, however, even commencing such a broad-brush overview, it must be recognized that even now, years after the event, the departure of the UK from the European Union has caused these rules to change quite fundamentally. For this edition at least—the first written 'post-Brexit'—full treatment must be given to this fracturing of our legal order.

3.07 It is, therefore, necessary to say something about 'Brexit' and its implications, which are felt most fundamentally in relation to the rules described in this chapter. This is the subject matter of Section B.

B. Exit from the European Union

(1) Entry into the EU and EU Law in the UK

3.08 The UK became a member of the European Economic Community (EEC), which subsequently became the European Union (EU) on 1 January 1973. The term 'EU' will be used throughout this book, in preference to the EEC, simply for the sake of convenience. Because the UK adopts a 'dualist' approach to international obligations, international obligations have no domestic effect until and unless enacted into domestic law by Parliament. EU law was implemented into the law of the UK by the European Communities Act 1972 (the 1972 Act).

Glossary
EU (and, when used) EEC The European Union and European Economic Community.
1972 Act The European Communities Act 1972.

3.09 Section 2(1) of the 1972 Act provided for the general implementation of '[a]ll such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly …'. The 1972 Act—as amended[4]—refers to such directly enforceable rights (ie law in the UK without further

[4] By the European Union (Amendment) Act 2008.

statutory intervention) as enforceable EU rights. The 1972 Act thus served as a 'conduit' or 'funnel' for EU law to have effect as the law of the UK, part of and superior to, that law without further statutory intervention. It is an interesting question to ask whether such EU law was also English domestic law. The answer is clearly not, from both the EU and UK perspectives. EU lawyers regard the body of EU law—the *acquis*—as a separate and superior body of law that prevails even over domestic (Member State) law even where there is indirect or potential conflict. Lawyers in the UK—and in particular the courts—view EU law similarly, and for similar reasons. The treaties to which the UK subscribed were (back in 1972/3) the Treaty establishing the European Coal and Steel Community 1951, the Treaty establishing the European Economic Community 1957, and the Treaty establishing the European Atomic Energy Community 1957. Over time, these treaties were amended and varied and expanded by other treaties and agreements, which it is unnecessary to list here. For present purposes, it is sufficient to note that at the time of the exit of the UK from the EU, there were materially two constitutive treaties of the EU, the Treaty on European Union 2012 (TEU) and the Treaty on the Functioning of the European Union 2012 (TFEU). These treaties—like other forms of enforceable EU rights—required no other form of domestic implementation beyond the provisions of the 1972 Act.

Glossary

TEU is the Treaty on European Union 2012.

TFEU is the Treaty on the Functioning of the European Union 2012.

Member State is a state that is presently a Member State of the EU. For the purposes of this book, the UK is not a Member State, having left the EU at the time of writing. Of course, the UK was a Member State for many years, and there are many references (including in this book) to the UK as a Member State.

3.10 In addition to enforceable EU rights arising out of the treaties, it is important to note three other types of EU law, 'Regulations', 'Directives', and 'Decisions'. As to these:

(1) *Regulations.* A Regulation has general application, is binding in its entirety, and is directly applicable in all Member States of the EU.[5]

(2) *Directives.* A Directive is binding as to the result to be achieved upon Member States but is implemented by the Member States themselves by way of domestic legislation.[6] However, even particular provisions of Directives are capable of having direct effect.

(3) *Decisions of the European Commission.* Such Decisions are binding on addressees, whether they are specific persons or Member States.

3.11 The Court of Justice of the European Union (CJEU)—which, for the sake of convenience shall, for the purposes of this book, also be referred to under its previous name of the European Court of Justice, as well as to the General Court and other EU specialist courts—has final jurisdiction over the interpretation of EU law and exclusive jurisdiction

[5] Article 288 TFEU.
[6] Article 288 TFEU.

over questions of validity. The CJEU may review EU law directly under Article 263 TFEU or by way of a 'preliminary ruling' referred to the CJEU by a court or tribunal in a Member State pursuant to Article 267 TFEU. Decisions of the CJEU are thus themselves both directly effective and supreme, EU law prevailing over any conflict with the national law of a Member State.

Glossary

CJEU is the Court of Justice of the EU, including a reference to its previous titles and incarnations, and also including the General Court and any other EU specialist courts.

(2) Withdrawal from the EU

3.12 Following a referendum on the UK's continued membership of the EU, just under 52 per cent of the votes cast were in favour of leaving the EU on a turnout of just over 72 per cent. Withdrawal from the EU is governed by Article 50 TEU and, following the passage of the EU (Notification of Withdrawal) Act 2017, the Prime Minister of the UK (Theresa May) notified the EU of the UK's decision to leave under Article 50(2) TEU. On triggering Article 50 TEU, a withdrawal agreement is sought to be negotiated, and '[t]he Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification' referred to in Article 50(2) TEU unless that period is extended by agreement.[7]

3.13 The two-year period in Article 50 TEU was extended twice by agreement.[8] Prior to the end of the second extension, the UK and the EU concluded a withdrawal agreement on 24 January 2020 (the Withdrawal Agreement 2020).[9] The Withdrawal Agreement 2020 was implemented into the law of the UK by the European Union (Withdrawal) Act 2018 (the 2018 EU Withdrawal Act) and the European Union (Withdrawal Agreement) Act 2020 (the 2020 EU Withdrawal Act). The 2020 EU Withdrawal Act substantially amended the 2018 EU Withdrawal Act. This law was further amended by the Retained EU Law (Revocation and Reform) Act 2023 (the Retained EU Law Act 2023). Save where the contrary is stated or the context otherwise requires, all references in this chapter are to the latest amended legislation in force as at the date identified in the Preface.

Glossary

The *Withdrawal Agreement* 2020 is the treaty by which the UK withdrew from the EU. It was implemented into the law of the UK by the *2018 Withdrawal Act*, as amended by

[7] Article 50(3) TEU.
[8] Implemented into the law of the UK by the EU (Withdrawal) Act 2019 and the EU (Withdrawal) (No 2) Act 2019.
[9] The full title of the treaty is the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. The text of the Withdrawal Agreement 2020 was published on 17 October 2019. This was not the first withdrawal agreement: a withdrawal agreement was concluded between the UK and the EU in November 2018, but that agreement failed to obtain the approval of Parliament.

the *2020 Withdrawal Act*. Further amendments are contained in the *Retained EU Law Act 2023*.

3.14 Part IV of the Withdrawal Agreement 2020 provides for a 'transition period' or—to use the language of the UK implementing legislation—an 'implementation period'. That implementation period expired on 31 December 2020,[10] during which time, broadly speaking, EU law continued to apply to the UK in exactly the same way as it had done prior to the coming into effect of the Withdrawal Agreement 2020.[11]

(3) Retained EU Law and the Modification and Replacement of EU Law

3.15 The 'implementation period'—defined in s 1A(6) of the 2018 EU Withdrawal Act—ended on 'IP completion day', which describes the end of the implementation period and was 11:00 pm on 31 December 2020.[12]

> **Glossary**
> *IP completion day* refers to the end of the *implementation period* put in place by the Withdrawal Agreement 2020.

3.16 Broadly speaking, there are two[13] savings of prior law contained in the legislation:

(1) *Saving of EU-derived domestic legislation.* According to s 2(1) of the 2018 EU Withdrawal Act, 'EU-derived domestic legislation, as it has effect in domestic law immediately before IP completion day, continues to have effect in domestic law on and after IP completion day'. This is subject to various exceptions, which it is (for the purposes of this book) immaterial to describe in detail.[14] Thus, by way of example, legislation in place as a result of an EU Directive will continue as the law of the UK. This is unsurprising: by its nature, such EU-derived law will be specific to the UK or jurisdictions within the UK and will not have transnational implications concerning relations between the UK and the EU.

(2) *Incorporation of direct EU legislation.* This refers to enforceable EU rights, which (as long as the 1972 Act remained in force) was law in the UK. Such law will often have transnational implications of one sort or another and whilst wholesale deletion would result in serious *lacunae* in the fabric of the law of the UK, uncritical adoption

[10] Article 126 of the Withdrawal Agreement 2020. Specifically, the period ended at midnight in the EU and—because of the time difference—11:00 pm in the UK.
[11] Article 127 of the Withdrawal Agreement 2020.
[12] Section 1A(6) of the 2018 EU Withdrawal Act.
[13] There is also a third saving—a 'catch-all' relating to other 'rights, powers, liabilities, obligations, restrictions, remedies and procedures', contained in s 4 of the EU(W)A 2018—which it is not necessary to consider further. This section of the 2018 EU Withdrawal Act was repealed at the end of 2023 by s 2 of the Retained EU Law Act 2023, with the result that anything which was retained EU law by that section is not recognized or available in English law at or after that time.
[14] See s 2(3) of the 2018 EU Withdrawal Act.

is equally impractical. The provisions regarding the incorporation of direct EU legislation are accordingly complex:

(i) Section 3 of the 2018 EU Withdrawal Act provides (in s 3(1)) that '[d]irect EU legislation, so far as operative immediately before IP completion day, forms part of domestic law on and after IP completion day'. That is subject to many qualifications and exceptions.

(ii) Retained EU law is now construed according to the rules of domestic law contained in s 6 of the 2018 EU Withdrawal Act (as amended by s 6 of the Retained EU Law Act 2023), and its status is described in s 7 of the 2018 EU Withdrawal Act. Section 5 of the Retained EU Law Act 2023 provides that, as regards all times after the end of 2023, 'Retained EU law' is to be known as 'Assimilated law'.

(iii) There are extensive powers (in ss 8, 8A, 8B, 8C of the 2018 EU Withdrawal Act) for the modification and amendment of EU law retained as part of the law of the UK.

> **Glossary**
> *Assimilated law* is what was EU law that has been retained as the domestic law of the UK following the UK's exit from the EU. It was previously known as *Retained EU law* but that label is avoided so far as possible.

3.17 Thus, in extremely broad-brush terms, the relevant rules regarding jurisdiction, choice of law, and enforcement of judgments must be regarded in four, distinct, temporal phases:

(1) *Phase 1: the UK as a Member State.* This is the law as it applied whilst the UK was a Member State of the EU. This includes the two-year-plus period under Article 50 TEU: for this time, the UK remained a Member State, albeit 'on its way out'.

(2) *Phase 2: the implementation period.* This is the law as it applied after the UK's exit from the EU, during the implementation period. During this period, EU law continued as before, although the juridical basis for its legality was very different. In substance, however, the detail of the law remained the same.

(3) *Phase 3: from 1 January 2020.* This is the law after the end of the implementation period, where there are substantial parts of EU law operating as retained EU law (as originally labelled) and since the end of 2023 known as assimilated EU law, but with substantial changes resulting from the use of powers delegated under the 2018 EU Withdrawal Act and the 2020 EU Withdrawal Act. These changes—albeit wide-ranging—essentially derive from the consequences of the UK's departure from the EU. Thus, as will be described in greater detail, it has not been possible to retain in place the 'Brussels' jurisdictional regime. That is not for lack of desire on the part of the UK, but simply because the EU regard this regime as an aspect of the EU 'internal market' rather than as an aspect of transnational judicial cooperation. For this reason, the 'Brussels Regime' has been displaced and the 'old' common law rules on jurisdiction—themselves once displaced but not extinguished by the Brussels Regime—have undergone significant revival and will

action. If the latter was the case, then a further question arose—were the 'fruits' of an action a present or a future chose? Vaughan Williams LJ held that this was an assignment not of the action but of its fruits, and that such fruits represented a present and not a future chose.[63]

it is said that the consideration for the assignment was a cause of action, and that the cause of action was a tort, namely a slander. I think that all that was assigned was the fruits of an action. I know of no rule which prevents the assignment of the fruits of an action. Such an assignment does not give the assignee any right to interfere in the proceedings in the action. The assignee has no right to insist on the action being carried on; in fact, the result of a compromise is actually included as a subject of the assignment. There is in my opinion nothing resembling maintenance or champerty in the deed of assignment. The second point is this. It has been said that this is an assignment of an expectancy within the meaning of the rule laid down in *In re Ellenborough*. I think this was an assignment of property, and not of an expectancy. It is an assignment of property in the shape of the fruits of an action.

4.43 Fletcher Moulton LJ reached a similar conclusion.[64] Parker J agreed that the assignment was of the fruits of the action and not of the action but considered the fruits to be a future chose or mere expectancy, assignable only where there is an agreement to assign that is supported by consideration.[65] In this view, however, he was in the minority.[66]

4.44 There is, therefore, a clear distinction between the assignment of a right of action—bringing with it all the control over the (potential) litigation that entails—and the assignment of the fruits of such an action, which implies no control at all and relates to something that may (or may not) be receivable in the future but which is nevertheless a present chose in action.

4.45 The assignability of the fruits of the litigation, derived from *Glegg v Bromley*, has received modern-day attention in the context of third-party litigation funding. Where a funded claimant successfully obtains judgment against a defendant, a litigation funder which has supported the claimant's action may have the judgment assigned to it (that representing the fruits of the litigation) and thereafter stand in the shoes of the claimant (the assignor) in order to enforce the judgment against the defendant, and so recover its success fee.[67]

[63] [1912] 3 KB 474 (CA) at 484.
[64] ibid 488–9.
[65] ibid 490. In this passage, the reasons for the non-application of the doctrines of maintenance and champerty to the fruits of an action are explained very clearly.
[66] However, for recent affirmation of Parker J's view, see *Frischmann v Vaxeal Holdings SA* [2023] EWHC 2698 (Ch) at [64] (*per* Master McQuail).
[67] As occurred in the case of *Harbour Fund III LP v Kazakhstan Kagazy plc* (BPC, Robin Knowles J, 30 July 2018), referenced in *Harbour Fund III, LP v Kazakhstan Kagazy Plc* [2021] EWHC 1128 (Comm), and discussed further in Mulheron 2023a, 187.

5

Rights Under a Contract

A. Overview of the Chapter

Rights under a contract clearly embrace an enormous range of rights. It is not the purpose of this book to discuss the mechanics of contract creation nor to duplicate the detail of books on the law of contract. However, in order to understand the nature of the chose in action, and how it can be transferred and dealt with, some consideration of contract law is necessary. It might be said that the subject matter of the next chapter, Chapter 6 on debts, properly falls within this chapter. There is force in this: however, the law of debt or receivables sits uncomfortably between contractual right, property *stricta sensu* and money, and warrants the separate consideration it receives in Chapter 6. **5.01**

Section B considers the jurisdictional and choice of law rules that arise when *A* seeks to vindicate a contractual right of action against *B*. The nature of contractual rights—in particular, their fundamentally bilateral or personal nature—is considered in Section C. Contractual rights exist between, and are only enforceable by, the parties to the contract. Whilst this is a rule that can readily be understood in the context of obligations—why, after all, should the **5.02**

parties to a contract be able to foist an *obligation* onto a third party?—it is much less clear why the parties to a contract cannot agree to confer a *benefit* on a stranger to the contract. Yet this is the position in the English common law.

5.03 Section D considers the rule that a promise for the benefit of a third party cannot be enforced *directly* by that party, and Section E considers the statutory exception to that rule that exists in the shape of the Contracts (Rights of Third Parties) Act 1999. Section F considers the rule that a promise for the benefit of a third party cannot be enforced *indirectly* for the benefit of the third party by one of the parties to the contract. This rule has a number of important Common Law exceptions, which are also considered in Section F. Section G considers the very limited ways in which contractual obligations may be imposed on third parties. Section H considers the nature of contractual rights as property, and stands in contradistinction with Section I, which treats leases, and focuses on leases of land. Leases of land are analytically problematic, effectively classified as *sui generis* in the Common Law classification of property.[1] The reason leases of land are problematic is because they are both contractual *and* constitute interests in land, capable of conveyance. In the third edition of this work, leases received separate treatment in Chapters 8 and 18. The contractual aspect of leases is now dealt with in this chapter. The proprietary implications, and in particular what leases over land teach as regards leases over other forms of property, are considered in Chapter 5 Section I and Chapter 34 Section B.

B. Private International Law

(1) Jurisdiction

5.04 As addressed in Chapter 3, the Common Law regime on jurisdiction applies in all cases since the end of the implementation period on 31 December 2020 (Phases 3 and 4). Under the Common Law regime, there is a fundamental distinction between a defendant who is within the jurisdiction and a defendant who is outside the jurisdiction. Applying this distinction, a party who is within the jurisdiction can be served as of right without more. This will include a party who is located abroad but has appointed an agent for service for process in England under the contract. On being served with the claim form, a defendant can seek to challenge the jurisdiction of the English court by applying for a stay of the proceedings on the basis of *forum non conveniens*. Where the proceedings involve a claim relating to contract, matters which are likely to be relevant in assessing whether or not there is another more appropriate forum for the dispute include: the law applicable to the contract, the place where the contract was to be performed, the place where any breach of contract occurred, and the existence, if any, of a jurisdiction agreement.

5.05 Where the party is outside the jurisdiction, a claimant will need permission to serve the claim form outside the jurisdiction unless any of the exceptions in CPR 6.32 and 6.33 apply.[2] Pursuant to those exceptions, permission is not required (inter alia) in respect of a claim

[1] See para 2.55.
[2] CPR 6.32 is concerned with service of claim forms in Scotland and Northern Ireland, with CPR 6.33 addressing the position as to service of claim forms outside the UK.

where: (i) the court has power to determine the claim under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention (CPR 6.33(2B)(a)) or (ii) a contract contains a term to the effect that the court shall have jurisdiction to determine the claim or the claim is in respect of such a contract (CPR 6.33(2B)(b) and (c)).

5.06 The requirements which will need to be established for permission to serve the claim form outside the jurisdiction are identified in Chapter 3. The gateways for establishing the jurisdiction of the English court where a claim is made in respect of a contract are as follows:

(1) Where the contract: (a) was made within the jurisdiction or concluded by the acceptance of an offer, which offer was received within the jurisdiction; (b) was made by or through an agent trading or residing within the jurisdiction; or (c) is governed by the law of England and Wales (para 3.1(6) of CPR Practice Direction 6B).
(2) Where the claim is made in respect of a breach of contract committed, or likely to be committed, within the jurisdiction (para 3.1(7) of CPR Practice Direction 6B).
(3) Where the claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in para 3.1(6) of CPR Practice Direction 6B, set out at para (1) above (para 3.1(8) of CPR Practice Direction 6B).
(4) Where the claim is for unlawfully causing or assisting in a breach of a contract and the contract falls within either (i) one of (a), (b), or (c) of CPR Practice Direction 6B or (ii) CPR 6.33(2B) (para 3.1(8A)(a) of CPR Practice Direction 6B).
(5) Where the claim is for unlawfully causing or assisting in a breach of contract and the breach of contract was committed or is likely to be committed within the jurisdiction (para 3.1(8A)(b) of CPR Practice Direction 6B).

(2) Choice of Law

5.07 The choice of law rules for contractual obligations are contained in the Rome I Regulation. They are addressed in Chapter 3 Section D(2). In summary:

(1) The parties' freedom of choice is given primacy, with a choice of law capable of being made expressly or implied from the terms of the contract or the circumstances (Art 3). This is subject to qualifications for the application of mandatory provisions of law, namely that:
   (i) where all the elements relevant to the situation at the time of the parties' choice are located in a country other than the country whose law has been chosen, it is not open to the parties to agree to derogate from the application of the mandatory provisions of the law of that country; and
   (ii) where all other elements relevant to the situation at the time of the parties' choice are located in one or more Member States, the parties cannot by their choice of law agree to derogate from the application of provisions of Community law where appropriate as implemented in forum jurisdiction.

(2) Where there is no express or implied choice of law, the applicable law is identified by applying the rules in Articles 4 to 8. Articles 5 to 8 govern the position in respect of certain types of contracts, namely, contracts of carriage (Art 5), consumer contracts (Art 6), insurance contracts (Art 7), and individual employment contracts (Art 8). Article 4 sets out the general rules for other contracts not covered by these rules, according to which (in summary) the applicable law will be the law of the place of the habitual residence of the party which is to carry out the characteristic performance of the contract (such as the seller of goods or the service provider).

(3) Each of the above choice of rules is subject to the qualifications that:

(i) where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than indicated by the rule, the law of that country should apply to the contract instead;

(ii) they do not restrict the application of the overriding mandatory provisions of the law of the forum; and

(iii) effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed insofar as those overriding mandatory provisions render the performance of the contract unlawful.

C. Nature of Contractual Rights

(1) Contractual Rights and Obligations Are Essentially Bilateral

5.08 Under English law, contracts affect only the parties to them and do not affect third parties. Contractual rights and obligations are essentially bilateral, subsisting between the parties to the contract. As with apparently trite points, the matter is more complicated than it at first sight seems. Much of this chapter is concerned with the circumstances where third parties *do* have rights under a contract.

5.09 At the very outset, it is necessary to draw a clear distinction between rights and obligations. It would be a curious principle that allowed the two parties to a contract to agree to impose an obligation on a third party not involved in the contract without that party's consent. Unsurprisingly, the only way in which such an obligation can be imposed is with the third party's agreement. Two different situations can be distinguished:

(1) First, 'novation', which involves either the cancellation and replacement of the original contract or the agreement of an additional, and supplemental, contract. In either case, the aim of the replacement or supplemental contract is to provide for a change in the rights and obligations of the parties so that one contracting party is replaced by a newcomer to the contract, who assumes the obligations of the exiting party. Novation is considered in Section G(1).

(2) Secondly, there may be 'vicarious performance' by the person obliged under the contract. Suppose *A* and *B* have entered into a contract. In many cases, contracting party *A* can enter into an arrangement by which some other person, *C*, performs *their* (*A*'s) obligations under the contract, and the other contracting party, *B*, will be obliged to accept that performance (provided it is in accordance with the terms of

the contract). This principle is known as *vicarious performance*, and in terms of its operation, it can look as if *A*'s obligation has been transferred to *C*. This is a mistaken analysis,[3] for contracting party *A* remains liable for any breach that may happen and *B* has no contractual right to sue *C* directly.[4] The original contract between *A* and *B* remains in place, unchanged (which is not the case in a novation). Vicarious performance is considered in Section G(2).

5.10 Less self-evident is the rule of the Common Law that, generally speaking, a contract for the benefit of a third party cannot be enforced, directly or indirectly, by that party. As a matter of principle, it is not clear why the parties to a contract cannot confer a benefit on a stranger to the contract, enforceable by the stranger,[5] and it is perhaps not surprising that the general rule in English law is not an absolute one but hedged by a number of exceptions and qualifications.

5.11 Two principles of the common law tend to prevent the third party from enforcing the contract. They are as follows:

(1) *A contract for the benefit of a third party cannot be enforced directly by that party.* The rule (known as the rule in *Tweddle v Atkinson*[6] or privity of contract) is that no stranger to the consideration can take advantage of the contract, even if the contract is specifically made for their benefit. The suggestion that a promise made for the benefit of a stranger to the contract cannot effectively be enforced by either the contractual counterparty or the third-party promisee has been criticized on a number of occasions.[7] Some attempt was made (particularly by Lord Denning MR) to change the law so that a stranger to the contract could themselves sue,[8] but there can be no doubt that (absent the statutory exception contained in the Contracts (Rights of Third Parties) Act 1999) the rule that a stranger cannot directly enforce a promise made for their benefit represents the law today.[9] The rule is considered in Section D. The statutory exception to that rule—contained in the 1999 Act—is considered in Section E.

(2) *The promise cannot be indirectly enforced by the contracting party.* Apart from nominal damages, a claimant can only recover in an action for breach of contract the actual loss they have themselves sustained. Where *A* and *B* have made a contract, whereby *A* promises *B* that they (*A*) will confer a benefit on *C*, should *A* not perform their promise, then whilst *B* will be able to sue *A* for breach of contract, *B*'s damages will be calculated by reference to their own loss (which may well be nominal) and not *C*'s. There are, however, exceptions to this rule:

[3] *Davis v Collins* [1945] 1 All ER 247 (CA) at 249.

[4] Although a right of action in tort may arise.

[5] Both French and German law make provision for contracts for the benefit of third parties: Zweigert & Kötz 1998, ch 34.

[6] [1861] 1 B & S 393, 121 ER 762. The rule and the exceptions to it are considered in Corbin 1930.

[7] eg *Beswick v Beswick* [1968] AC 58 (HL) at 71–2 (*per* Lord Reid); *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL). Indeed, it was these criticisms that led to the enactment of the Contracts (Rights of Third Parties) Act 1999.

[8] *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 (CA) at 514–16 (*per* Denning LJ); *White v John Warwick & Co Ltd* [1953] 1 WLR 1285 (CA) at 1294 (*per* Denning LJ); *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250 (CA) at 272 (*per* Denning LJ); *Beswick v Beswick* [1966] Ch 538, reversed on this point in the House of Lords: [1968] AC 58 (HL) at 79.

[9] See, eg, the conclusion expressed in Law Comm 121 (1991), [2.16].