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# Privity

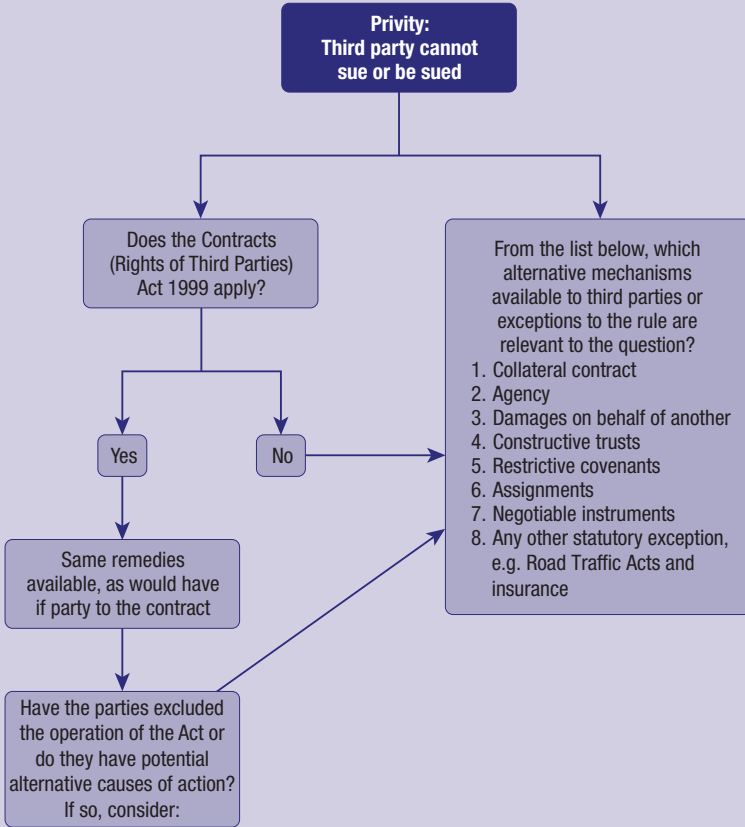
# 3

## How this topic may come up in exams

Usually the topic area is examined with an essay question surrounding the impact of the Contracts (Rights of Third Parties) Act 1999 and the effect on other common law mechanisms for avoiding the doctrine. Decisions concerning the interpretation and application of the Act have been made and the problem-style question given below will become more popular and familiar. A detailed knowledge of the Act and its interpretation will be required, together with alternative causes of action should the Act not apply or the third party wish to have a choice as to how to enforce their rights.

## Before you begin

It's a good idea to consider the following key themes of privacy before tackling a question on this topic.



A printable version of this diagram is available from [www.pearsoned.co.uk/lawexpressqa](http://www.pearsoned.co.uk/lawexpressqa)



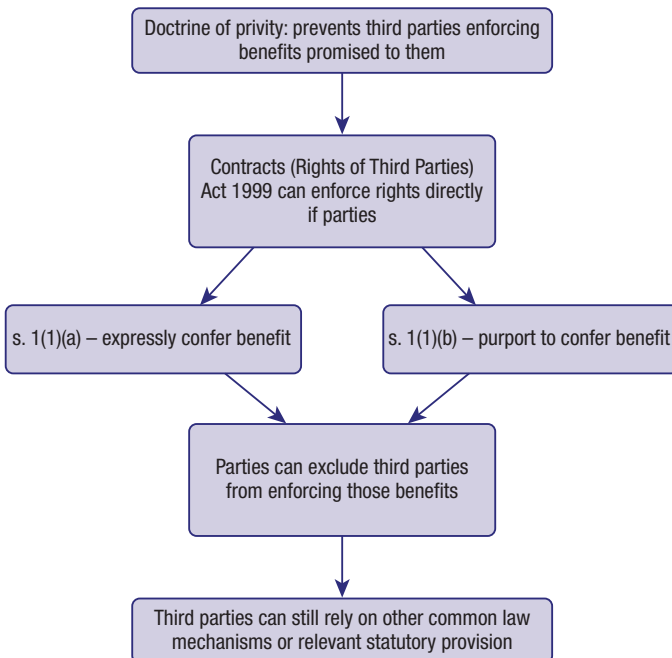
## Question 1

Examine the extent to which the Contracts (Rights of Third Parties) Act 1999 has solved the harsh repercussions of the rigid application doctrine of privity.

### Answer plan

- Define the doctrine of privity and potential unfairness that may arise from denying a third party the right to enforce a contractual term in his own name.
- Critically appraise the solutions provided by the 1999 Act with reference to specific legal rulings pre-dating the Act.
- Evaluate the continued role of common law and statutory mechanisms in the light of 1999 Act's primary purpose to fulfil the intentions of the contracting parties and the extent to which they wish the third party to have enforceable rights.

### Diagram plan



A printable version of this diagram plan is available from [www.pearsoned.co.uk/lawexpressqa](http://www.pearsoned.co.uk/lawexpressqa)

## Answer

The doctrine of privity provides that only a party to a contract can gain rights or incur obligations (***Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co.*** [1915] AC 847). This has harsh repercussions for a third party on whom a benefit was conferred as he has no right to enforce that promise in his own name, although it would appear appropriate that burdens cannot be imposed. The primary aim of the Contracts (Rights of Third Parties) Act 1999 is to provide an exception to the doctrine of privity where benefits are intentionally conferred on a third party. Prior to the Act common law mechanisms were developed to avoid the doctrine of privity in such circumstances. These have not been abolished and have a role to play where the Act provides no remedy.<sup>1</sup>

<sup>1</sup> Good opening answers the question directly.

Section 1(1) (a) of the 1999 Act provides that where a term of a contract expressly identifies a third party, who is not a party to that contract, that third party will have a right to enforce that term(s) in their own name.<sup>2</sup> In ***Beswick v Beswick*** [1968] AC 58 Mr Beswick sold his business to his nephew in return for regular payments during his lifetime and an annuity to his wife after his death. The nephew did not honour this promise to his uncle's widow. Mrs Beswick had not provided consideration for the promise nor was she a party to the contract. Even though there was clear intention that she should benefit, the doctrine of privity meant she could not sue in her own name. Fortuitously, she was the administratrix of the estate and got an order of specific performance in that capacity. As Mrs Beswick was expressly named in the contract post the 1999 Act, she could sue in her own name under s. 1(1)(a). This would be fulfilling the contractual intentions of the parties at the time the contract was made.<sup>3</sup>

<sup>2</sup> Paraphrasing statutory provisions is fine provided you are accurate.

<sup>3</sup> You demonstrate understanding of how law would be applied now with reference to decided case law.

Prior to the 1999 Act the conferment of a benefit on a third party, such as promised commission (***Les Affréteurs Réunis SA v Walford*** [1919] AC 801) or a warranty as to the quality of paint (***Shanklin Pier Ltd v Detel Products*** [1951] 2 KB 854) required complex legal reasoning to find the existence of a trust or a collateral contract. Section 1(1)(b) provides that a third party will be able to enforce any term of a contract in his own name where that term purported to confer a benefit on him. In ***Nisshin Shipping v***

<sup>4</sup> Well-structured comparison of old to new law: *Nisshin* and *Les Affréteurs* have very similar facts.

**Cleaves** [2003] EWCH 2602 (Comm), a contract between Nisshin and hirers of ships provided that 1 per cent of the agreed price would be paid to the brokers<sup>4</sup>. Section 1(1)(b) provided the brokers could recover these payments in their own name. Third parties who have received unsatisfactory performance of a contract, for example a holiday booked by someone else, can now recover damages directly. Previously, following **Jackson v Horizon Holidays Ltd** [1975] 1 WLR 1468 the contracting party could recover an amount beyond his own losses. Section 4 protects the promisee from double recovery of losses.

The conferring of a benefit must be one of the purposes of the contract, but it does not have to be the predominant one (**Prudential Assurance Co Ltd v Ayres** [2007] 3 All ER 946). A benefit can include any performance due under the contract, but that benefit must be conferred specifically on a third party, expressly identified in the contract by name, as a member of a class, or answering to a particular description and be more than someone incidentally benefiting from performance (**Avraamides v Colwill** [2006] EWCA 1533). In **Fortress Valve Recovery Fund I LLC & Others v Blue Sky Special Opportunities Fund LP & Others** [2013] EWCA Civ 367 a third party was treated as party to the arbitration clause only where the dispute directly related to a substantive term which the third party had the benefit of.<sup>5</sup>

<sup>5</sup> Excellent knowledge of current developments in the law.

Section 1(6) provides for third parties to be able to rely directly on exclusion or limitation clauses. This has improved the situation in cases such as **New Zealand Shipping Co. Ltd v A M Satterthwaite & Co. Ltd (The Eureymedon)** [1975] AC 154 where the finding of the existence of a collateral contract or pre-existing agency relationship would be necessary.<sup>6</sup>

<sup>6</sup> Direct comparisons of old with new law focuses on question set.

Section 1(2) provides that s. 1(1) and s. 1(6) will have no application if on a proper construction of the contract the parties did not intend the term to be enforceable by the third party. Again the 1999 Act is emphasising its primary aim to fulfil the contractual intentions of the parties.<sup>7</sup> The intention to prevent such rights being enforceable will have to be clear as in conferring a benefit under s. 1(1) there is a rebuttable presumption in favour of the third party (**Nisshin Shipping v Cleaves**). Where a third party has been prevented by the contract from enforcing such a right directly the common law might provide an alternative remedy such as in tort where a duty of care is owed.

<sup>7</sup> Without commentary on the sections you are discussing your work will be descriptive rather than analytical of the law.