- if, however, it is the call operator's fault that he did not receive the acceptance, e.g. because he did not hear it and failed to ask that it be repeated, he may be estopped or precluded from denying that he did receive it and a contract will come into being;
- it is always necessary to attend to the matter of consideration and intention to create legal relations, though these matters should not normally provide a problem in the call-centre context.

10

MAKING THE CONTRACT II

In this chapter we continue the study of those elements of contract law which go to making a mere agreement into a contract which is at least potentially binding on the parties. Consideration and intention to create legal relations are looked at here.

Consideration

Definition and related matters

Consideration, which is essential to the formation of any contract not made by deed was defined in *Currie* v *Misa* (1875) LR 10 Ex 153 as:

> Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

Paying (or promising to pay) money in return for the supply of goods or services constitutes the most common form of consideration.

Consideration may be *executory*, where the parties exchange promises to perform acts in the future, e.g. C promises to deliver goods to D and D promises to pay for the goods; or it may be *executed*, where one party promises to do something in return for the act of another, rather than for the mere promise of future performance of an act. Here the performance of the act is required before there is any liability on the promise. Where X offers a reward for the return of his lost dog, X is buying the act of the finder, and will not be liable until the dog is found and returned.

The definition in *Currie* v *Misa* suggests that consideration always refers to the type called executed consideration since it talks of 'benefit' and 'detriment', whereas in modern law executory contracts are enforceable. Perhaps the definition given by Sir Frederick Pollock is to be preferred:

> An act or forbearance of one party, or *the promise thereof*, is the price for which *the promise* of the other is bought, and *the promise* thus given for value is enforceable.

This definition, which was adopted by the House of Lords in *Dunlop* v *Selfridge* (1915), fits executory consideration as well as executed. The 'promise for a promise' concept really means that consideration can consist in a promise to act in the future, e.g. to deliver goods or to pay for goods.

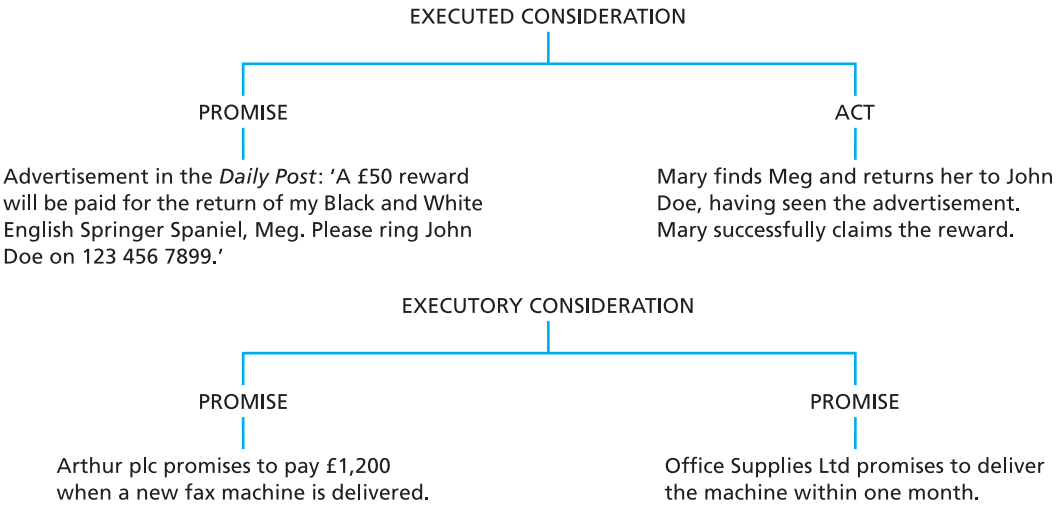

Figure 10.1 Executed and executory consideration

Consideration in relation to formation of a contract – generally

There are a number of general rules governing consideration in terms of the formation of a contract:

(a) Simple contracts must be supported by consideration. This has a long history, but in practical terms it is the common law's way of limiting the number of agreements which can be brought before the courts for enforcement. Other legal systems have required, e.g., part performance by one or other of the parties or that the contract be made in writing and, if so, no consideration is required. The effect of the consideration rule is that in English law an agreement, even if the parties intend legal relations, is not a contract unless it is supported by consideration or made by deed.

(b) Consideration need not be adequate, but must have some value, however slight. The courts do not exist to repair bad bargains, and though consideration must be present, the parties themselves must attend to its value. However, where the consideration for a transaction is of very small value, it may raise a suspicion of fraud, duress or undue influence on the part of the person gaining the advantage. However, what is offered by way of consideration must be capable of expression in terms of economic value or at least the giving up of some right. That apart, acts or omissions even of a trivial nature may be sufficient to support a contract.

Thomas v *Thomas*, 1842 – Adequacy of consideration (**75**)
Chappell Co Ltd v *Nestlé Co Ltd*, 1959 – Adequacy: a commercial application (**76**)
White v *Bluett*, 1853 – Economic value required (**77**)

Although there were once arguments to the contrary, it is now accepted that an express or implied forbearance to sue may be adequate consideration. It is not necessary to show that the action would have succeeded but merely that if it had been brought to trial it might have done. Thus the court would be unlikely to accept that a bookmaker could supply consideration by forgoing a claim against a client for stake money. Such an action, being based on an illegal transaction, could have no hope of success.

Horton v *Horton*, 1961 – Implied forbearance to sue (**78**)

A self-seeking act in itself may not suffice, and in the case of *Carlill* v *Carbolic Smoke Ball Co* (1893) the consideration was provided not by using the smoke ball to cure influenza, but by the unpleasant method of its use. A gift promised conditionally may be binding, if the performance of the condition causes the promisee trouble or inconvenience, e.g. 'I will give you my old car if you will tow it away.' So too may a gift of property with onerous obligations attached to it, e.g. a promise to give away a lease would be binding, if the donee promised to perform the covenants to repair and pay rent. A promise to give away shares which were partly paid up would be good, if the donee promised to pay the outstanding calls.

(c) Bailment. The concept of *bailment* gives rise to problems because a person may be held liable for negligent damage to or loss of goods in his care, although he received no money or other consideration for looking after them. However, confusion can best be avoided by regarding bailment as an independent transaction, which has characteristics of contract and tort but is neither. It seems that when X hands his goods to Y under a bailment Y has certain duties in regard to the care of the goods, whether the bailment is accompanied by a contract or not.

Of course, the court may be invited to refuse a claim on the contract by a person who has given inadequate consideration by invoking the doctrine of inequality of bargaining power (see further Chapter 13). However, at the present time the basis of this doctrine, which was applied in particular by Lord Denning, is somewhat vague and has not, as yet, received much direct judicial support.

Gilchrist Watt and Sanderson Pty v *York Products Pty*, 1970 – Bailment and consideration (**79**)

(d) Consideration must be sufficient. Sufficiency of consideration is not the same thing as adequacy of consideration, at least in law. The concept of sufficiency arises in the course of deciding whether the acts in question *amount to consideration at all*. This situation arises where the consideration offered by the promisor is an act which he is already bound to carry out. Thus, the discharge of a *public duty* imposed by law is not consideration nor is the performance of a *contractual duty* already owed to the defendant. However, where the contractual duty is not precisely coincident with the public duty but is in excess of it, performance of the contractual duty may provide consideration and the actual performance of an outstanding contractual obligation may be sufficient to support a promise of a further payment by a third party.

Collins v *Godefroy*, 1831 – Sufficiency and public duties (**80**)
Stilk v *Myrick*, 1809 – Sufficiency and contractual duties (**81**)
Glasbrook Bros Ltd v *Glamorgan County Council*, 1925 – Sufficiency: public duty exceeded (**82**)
Shadwell v *Shadwell*, 1860 – Sufficiency: payments by third parties (**83**)

(e) Consideration must be legal. An illegal consideration makes the whole contract invalid (see further Chapter 16).

(f) Consideration must not be past. Sometimes the act which one party to a contract puts forward as consideration was performed before any promise of reward was made by the other. Where this is so, the act in question may be regarded as past consideration and will

not support a contractual claim. This somewhat technical rule seems to be based on the idea that the act of one party to an alleged contract can only be regarded as consideration if it was carried out in response to some promise of the other. Where this is not so, the act is regarded as gratuitous, being carried out before any promise of reward was made.

However, there are exceptions to this rule:

(i) Where services are rendered at the express or implied request of the promisor in circumstances which raise an implication of a promise to pay. This exception is not entirely a genuine one since the promisor is assumed to have given an implied undertaking to pay at the time of the request, his subsequent promise being regarded as deciding merely *the actual amount* to be paid. In this situation the act, which follows the request but precedes the settling of the reward, is more in the nature of *executed consideration* which, as we have seen, will support a contract.

(ii) A debtor or his duly authorised agent can make a written acknowledgement of the debt to the creditor or his agent (Limitation Act 1980, s 29). Time begins to run again from the date of acknowledgement. However, once a debt is statute barred it cannot be revived in this way (s 29(7) of the 1980 Act) (see further Chapter 18). Again, this exception is not wholly genuine since the Limitation Act 1980 does not provide that past consideration will support the subsequent acknowledgement of debt. The Act simply states that *no consideration of any kind* need be sought.

(iii) Section 27 of the Bills of Exchange Act 1882 provides that an antecedent debt or liability will support a bill of exchange or cheque. This genuine exception was probably based on a pre-existing commercial custom. This is essential particularly in the case of cheques many of which are based on a form of past consideration. Thus, if S sells goods to B, a debt comes into being payable in legal tender (i.e. bank notes or coins – see further Chapter 17) when the contract is made. So when B decides to pay S by cheque, which he may do provided S is agreeable, the cheque is based upon a previous or antecedent debt or liability and is for past consideration. Nevertheless, this type of consideration will support the cheque should an action be brought on it.

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Re McArdle, 1951 – Consideration must not be past (**84**)
Re Casey's Patents, Stewart v *Casey*, 1892 – The effect of a previous request (**85**)

(g) The Contracts (Rights of Third Parties) Act 1999 has no direct effect on the concepts of adequacy, sufficiency and past consideration discussed above. The 1999 Act has an effect where A contracts with B to give a benefit to C. In these circumstances C may have rights under the 1999 Act to sue A for failure to perform the contract. However, if the consideration moving between A and B does not conform with the above rules (or there is no consideration), the contract is not enforceable by B or C (or A for that matter) and the 1999 Act does not change that situation.

(h) Consideration must move from the promisee, i.e. the person to whom the promise is made (the promisee) must give some consideration for it to the promisor. From this arises the doctrine of privity of contract which is considered below.

Privity of contract

This means that in general third parties cannot sue for the carrying out of promises made by the parties to a contract. Thus, if a contract between A and B requires B to benefit C, the privity rule prevents C from suing B. However, A may sue B if B breaks the contract, and the

court may award A damages or may grant a decree of specific performance under which B must perform the contract for the benefit of C. If A and C are, in fact, both parties to the contract with B then C still cannot sue B unless he has provided some consideration. Merely being a party to the contract is not enough. Even though C may be named in the document, if any, which records and constitutes the contract between A and B, or may be a party to their oral deliberations, if he does not undertake anything in return for a promise from A or indeed from B, then he is not participating in a bargain with A and/or B and is not a party to the contract. This view is based upon the belief that the 'privity' rule is merely an aspect of the rule that 'consideration must move from the promisee'. The position is different if A, B and C are parties to a deed. C can then sue B for damages if B fails to carry out his promises in the deed. Deeds do not require consideration.

Tweddle v *Atkinson*, 1861 – Privity of contract illustrated (**86**)
Dunlop v *Selfridge*, 1915 – Privity: a further application (**87**)
Jackson v *Horizon Holidays*, 1975 – Remedies of the promisee: damages (**88**)
Beswick v *Beswick*, 1967 – Remedies of the promisee: specific performance (**89**)

Main exceptions to the privity rule

There are cases in which a person is allowed to sue upon a contract to which he is not a party as follows.

The Contracts (Rights of Third Parties) Act 1999

This important piece of legislation provides a major exception to the law of privity of contract. It received the Royal Assent on 11 November 1999. For six months from that date it only applied where its provisions were said expressly to apply in the contract. After that it applies to nearly all categories of agreement unless expressly excluded.

The Act provides for a major and far-reaching method of preventing the application of the privity rule. The Act brings English law into line with the position in Scotland, in most member states of the European Union and in many of the common law countries of the world, including the USA. The harmonisation of business law in this way is of benefit to the business community.

The Act implements the recommendations of the Law Commission in Report No 242, *Privity of Contract: Contracts for the Benefit of Third Parties*, published in July 1996. Before looking at its provisions, it should be noted that there is no change to the rule of law which states that a burden cannot be imposed on a third party without his consent. Thus, in general terms, a person can assign the right to receive money owed to him but cannot without the consent of all parties assign the burden of paying his debts. The Act deals only with the conferring of benefits on third parties.

Section 1

This section is at the heart of the Act. It deals with the circumstances in which a third party may have the right to enforce a term of a contract. He will have that right:

- where the contract contains an express term saying so;
- where a term of the contract purports to confer a benefit on him.

This part of s 1 will not apply if it appears on a true construction of the contract that the contracting parties did not intend the third party to have a right to enforce it. Thus, if a contract confers a benefit on a child, it may also provide specifically that any claim in respect

of it should be brought by either of its parents and in such a case the child could not bring a claim under the Act. The parents would have the third-party rights. In order to acquire the third-party right, the party concerned must be expressly identified in the contract but need not be identified by name. It is enough if the third party is identified as a member of a class, e.g. 'both of my children'.

In addition, so long as the third party is adequately described, that party need not be in existence when the contract is made. It might, therefore, be in the business context, that a company as yet not incorporated but to be incorporated may take benefits under a contract made by its promoter.

Remedies available to the third party will be the same as those available to a party to a contract bringing an action for its breach and the rules relating to damages, injunctions, specific performance and other relief will apply, as will mitigation of loss. Section 1 also defines 'promisor' and 'promisee' as used in the Act. The *promisor* is the person against whom the contractual term is enforceable by the third party. The *promisee* is the contracting party by whom the term is enforceable against the promisor. Thus in a contract by A with B for the benefit of C, A is the promisor and B is the promisee. C sues under third-party rights. Section 1 also makes it clear that the third party may take *advantage* of any exclusion or limitation clause in the contract.

Section 2

This restricts the way in which the contracting parties can alter the third party's entitlement under the contract without his consent once the third party has the right to enforce the term. There may be no variation or cancellation of the contract after the third party has accepted the term as by written notice to the promisor or relied on it when the promisor knows of or can reasonably be expected to have foreseen that reliance. Suppose A, a wealthy businesswoman, sells one of the many businesses that she owns to B in return for the payment of an annuity of £15,000 a year to her favourite nephew Sam, by B. So long as Sam has not accepted the payment term, A and B could alter it to, say, £12,000 a year, but once Sam has accepted it or, say, B has made a payment under it and can be assumed to expect that Sam will rely on getting future payments, the term cannot be altered without Sam's consent. If he never accepts or if there is no evidence of reliance, Sam is still entitled to the payment, but it could be altered without his consent. Acceptance by post is not effective until received by the promisor. This is contrary to the general rules of contractual acceptance by post. In keeping with the Act's preservation of the freedom of the parties to make their own contract, the above rules relating to third-party consent may be displaced by an express term of the contract providing that the contract can be cancelled or varied without the third party's consent. Where the consent of the third party is required, the court may on the application of both parties to the contract dispense with that consent where:

- it cannot be obtained because his or her whereabouts are unknown; or
- he or she is mentally incapable of giving consent.

This will enable the parties to the contract to change the third-party beneficiary or to remove the contract term so that there are not third-party rights in it.

The courts having power to make the variation are the High Court and county court.

Section 3

This deals with the defences, set-offs and counterclaims available to the promisor in proceedings by a third party to enforce a term of the contract. Illustrations are as follows:

- The third party cannot enforce the contract if it is void as where it is affected by agreement mistake or illegality or has been discharged as where the promisor has performed the

contract, e.g. by making a payment or supplying goods under it, or is unenforceable as where the third party is given rights on a contract of guarantee which is not evidenced in writing (see Formalities in Chapter 11. This provision follows from the fact that in the circumstances the promisee could not enforce it either (s 3(2)).

- A (the promisor) contracts with B (the promisee) that B will sell goods to A, who will pay the price of the goods, to C (the third party). If B delivers sub-standard goods to A in breach of contract and A is sued by C for the price, then A is entitled to counterclaim to reduce or extinguish the price by reason of B's breach of contract. B could also be faced by this counterclaim if he or she were to sue A (s 3(2)).
- A and B make a contract under which A will pay C if B transfers his car to A. B already owes money to A under a different and unrelated contract, say, in connection with the previous sale of a van. A and B agree to an express term (as the Act requires) in the contract which states that A can raise against a claim by C any matter which would have given A a defence or set-off to a claim by B. Thus, in a claim by C for the money, A can set-off what he is owed by B (s 3(3)).

Section 3 also makes it clear that the promisor also has available any defence or set-off and any counterclaim not arising from the contract with B but which is specific to the third party. Illustrations are as follows:

- A contracts with B to pay C £2,000, C already owes A £600. A may set-off against any claim by C the £600 and need only pay C £1,400.
- C induces a contract between A and B by misrepresentation of which B is unaware. A has a defence or a counterclaim for damages when sued by C which he or she would not have had against B (s 3(4)).

The agreement may specifically provide e.g. that A will not raise set-off or counterclaim in an action by C (s 3(5)).

Section 4

This states that the Act does not affect the rights of the promisee A to enforce any term of the contract including the term which benefits the third party. Thus B can sue on behalf of C.

Section 5

This states that if the promisee B has already recovered a sum by way of damages for the promisor's breach, then in a claim by the third party C this sum will be taken into account in terms of any sum recovered by C. This is to prevent A from suffering a double liability.

Section 6

This excludes certain types of contract from the operation of the Act. Main examples are:

- A third party is prevented from suing an employee for a breach of his contract of employment. Without this exception there could be a risk that workers taking lawful industrial action might be sued and restricted from doing so in unexpected ways. It is worth noting here that the Trade Union and Labour Relations (Consolidation) Act 1992 gives individuals the right to bring proceedings to halt *unlawful* industrial action which deprives them of goods and services.
- The s 6 provisions also prevent third-party rights arising from the 'deemed' contracts under s 14(1) of the Companies Act 1985 under which the memorandum and articles of a registered company constitute a contract between the company and its members in respect of their rights as such. The special nature of these deemed contracts makes them unsuitable for enforcement by a third party under the 1999 Act, which is a general reform.

Also excluded are contracts for the carriage of goods by sea, as are contracts for the international carriage of goods by road, rail or air, which are covered by international conventions. Nevertheless, the Act allows third parties to enforce exclusion or limitation of liability clauses in the above contracts. For example, the person who charters a ship may make a contract with the owner of the goods being carried that the shipowner is not liable for damage resulting from negligent stowage. The Act enables the shipowner as a third party to rely on that exclusion clause should the owner of the goods sue him. The business application is that the price of the carriage will be cheaper if the shipowner knows he can rely on the clause. In a similar way, exclusions and defences available to the carrier of goods can be extended to employees' agents and independent contractors such as stevedores engaged in loading and unloading, and will be effective without the legal gymnastics seen in *New Zealand Shipping Co Ltd* v *A M Satterthwaite & Co Ltd* (1975) (Case **181**).

Contracts contained in a bill of exchange, promissory note or other negotiable instrument are also excluded.

Section 7

This preserves any rights or remedies which may be available to a party at common law or by statute apart from the Act, for example, by making ineffective a contractual provision which tries to exclude liability for personal injury or death. However, the section ensures that a third party cannot use the 'reasonableness' test under s 2(2) of the Unfair Contract Terms Act 1977 to try to defeat a clause excluding liability for other damage caused by negligence on the ground that the exclusion is unreasonable. (See Chapter 15.) The policy of the Act is to let the parties decide to what extent they should be sued by the third party. The opposing view that the policy of the law should be against unreasonable terms in contracts whoever relies on them and in whatever situation did not prevail.

Effect on business

The Act has significant implications for almost all kinds of contract. All businesses should review their standard form and other contracts to see where advantage may be taken of the new law and to decide where its effects might be excluded for it is possible to opt out. In particular businesses may wish to look again at those contracts where devices such as agency and trust law have been used to get round the privity rule.

The following areas will be of benefit in company law and company formation:

- ***Group purchasing companies***. In many situations one company in a group of companies will enter into a contract to purchase goods or services which will be used by other companies in the group. Formerly the other group companies had no right to enforce the contract directly and it was difficult for the contracting group company to recover for loss suffered by other group companies (see *Jackson* v *Horizon Holidays* (1975) (Case **88**)). The contracting group company can now use the Act to give the other group companies a right to enforce the contract directly.
- ***Directors' and officers' insurance***. Companies are allowed by the Companies Act 1999 to take out insurance against liability of directors and officers. The 1999 Act allows the company to confer direct rights on the directors and officers concerned to enforce the insurance contract themselves instead of the company having to do so on their behalf.
- ***Pre-incorporation contracts***. The promoters of companies may use the Act to give direct rights to newly formed companies to enforce contracts made on their behalf prior to their incorporation. Under the 1999 Act the third party does not have to be in existence when the contract is made.
- ***Exclusion***. The effects of the Act are likely to be uncertain and far-reaching and until there is defining case law it is likely (and sensible) for those in business to exclude, at least in the generality of contracts, the application of the Act as the Act permits.

Agency

A principal, even if undisclosed, may sue on a contract made by an agent. This exception is perhaps more apparent than real, because in fact the principal is the contracting party who has merely acted through the instrumentality of the agent.

Cheques and bills of exchange

Bills of exchange provide an exception. Suppose A buys goods from B but does not wish to pay immediately; then, if B agrees, a period of credit can be achieved by using a bill of exchange. A takes the goods and B draws up a bill of exchange on a standard form under which A (the drawee) agrees to pay the bill at some time in the future, say three months from the date on the bill. B (the drawer) can make himself or another person the payee. Let us suppose he makes himself the payee. B has now a choice: he can wait three months and get the money from A; or he can discount the bill with a bank, so that the bank will present the bill for payment by A after three months; or B can sign it (indorse it) over to someone else. Suppose he indorses it over to his daughter C as a birthday present. Can C sue A if she presents him with the bill for payment on the due date and he does not pay it? The answer is 'yes' because, although C gave no consideration to A or B, s 27 of the Bills of Exchange Act 1882 gives C a statutory right to sue. In order to make bills as negotiable as possible, the technical rule of privity is not applied. C could not sue B on the bill because, as between immediate parties, consideration is required.

It used to be possible to give an indorsed cheque as an example but this is impractical since the passing of the Cheques Act 1992. This makes clear that a cheque crossed 'account payee' or 'a/c payee', with or without the word 'only', is not transferable. The banks are now printing these words on cheques issued to customers and reinforcing the non-transferability rule by removing the words 'or order' after the payee's name and inserting 'only'. However, the example given is quite valid as regards bills of exchange other than cheques, since these remain transferable unless crossed 'a/c payee', but this is a matter for the parties and bills of exchange which are not so crossed remain transferable.

The Contracts (Rights of Third Parties) Act 1999 does not apply to these instruments.

Insurance

Section 11 of the Married Women's Property Act 1882 provides that if a man insures his life for the benefit of his wife and/or children, or a woman insures her life for the benefit of her husband and/or children, a trust is created in favour of the objects of the policy, who, although they are not parties to the contract with the insurance company, can sue upon it. In addition the policy moneys are not liable for the deceased's debts.

Bankers' commercial credits and performance bonds

As regards bankers' commercial credits, it is common commercial practice for an exporter, E, to ask the buyer of the goods, B, to open, with his banker, a credit in favour of E, the credit to remain irrevocable for a specified time. B agrees with his banker that the credit should be opened and, in return, promises to repay the banker, and usually gives him a lien over the shipping documents. The banker will also require a commission for his services. B's banker then notifies E that a credit has been opened in his favour, and E can draw upon it on presentation of the shipping documents.

It will be seen that E and B's banker are not in privity of contract. It might be thought that this could give rise to problems in the unlikely event that the banker did not pay. However, this is not so. In fact the buyer/customer of the bank cannot stop payment. In *Malas* (*Hamzeh*) v *British Imex* [1958] 1 All ER 262 the claimants, who were buyers of goods, applied

to the court for an injunction restraining the sellers (who were the defendants in the case) from drawing under a credit established by the buyer's bankers. The Court of Appeal refused to grant this injunction and Jenkins, LJ said: 'The opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods which imposes on the banker an absolute obligation to pay . . .'. Sellers, LJ said that there could well be exceptions where the court could exercise a jurisdiction to grant an injunction, as where there was a fraudulent transaction. However, in other situations the binding nature of the banker's commercial credit is an exception to the doctrine of privity of contract.

There have been similar developments making performance bonds enforceable by commercial custom so that where a bank guarantees performance of an export contract by the supplier a claim may be made against the bank if the contract is not performed. The leading authority for this is *Edward Owen Engineering Ltd* v *Barclays Bank International Ltd* [1978] 1 All ER 976.

There is no reason why the right of exporters to sue the relevant bank should not be contained in the contract between B and his banker providing the credit under the Contracts (Rights of Third Parties) Act 1999. However, the rule that the bank always pays (fraud apart) is such a part of international commerce that the case law rules may well be felt sufficient in themselves.

Assignment

If A owes B £10 B may assign the right to receive the money to C and provided that assignment is a legal assignment (as distinct from an equitable one) C may sue A without the assistance of B as a party to the claim. The matter of assignment is considered more fully in Chapter 22.

Land law – generally

The position in land law is that benefits and liabilities attached to or imposed on land may in certain circumstances follow the land into the hands of other owners.

Smith and Snipes Hall Farm Ltd v *River Douglas Catchment Board*, 1949 – Exceptions to the privity rule: passing of benefits (**90**)

Tulk v *Moxhay*, 1848 – The passing of burdens (**91**)

Land law – leases

The rule of privity of contract had an unfortunate effect on leases of land in the sense that if the original tenant under the lease assigned his tenancy to another tenant with the landlord's consent the original tenant, being in privity with the landlord, could not get rid of the duties under the lease. If, therefore, the person to whom the lease was assigned did not, for example, pay the rent the original assignee could be required to do so and this remained the case where there were further assignments to other assignees. The Landlord and Tenant (Covenants) Act 1995 abolished this liability in the original tenant so that the landlord will only be able to sue the tenant for the time being unless there is an authorised guarantee agreement in force. Under the Act a landlord may require an assigning tenant to enter into a guarantee with the landlord as a condition of the landlord giving his assent to the lease being assigned. Under such an agreement the outgoing tenant would guarantee the performance of the terms of the lease, e.g. payment of rent by his immediate (but not subsequent) assignee. The rules relating to leases are, as we have seen, contained in the Landlord and Tenant (Covenants) Act 1995 which applies to the exclusion of the Contracts (Rights of Third Parties) Act 1999.