PRIVITY OF CONTRACT: THE POTENTIAL IMPACT OF THE LAW REFORM COMMISSION RECOMMENDATIONS ON IRISH CONTRACT LAW

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INTRODUCTION

The doctrine of privity, described as both a "fundamental principle of English law"[1] and an "anachronistic shortcoming",[2] is a controversial rule of the law of contract. The doctrine prevents a person who is not a party to the contract from having any legal right to enforce the contract, or to have contractual liabilities imposed as a result of the contract, and that contractual remedies are for the contracting parties alone.[3] The underlying rationale for the doctrine is to protect the contracting parties from any interference in their agreement by a third party. Thus, it operates so as to deny a third party any right of enforcement under the contract. Indeed, the traditional approach taken by the courts went so far as to deny any right of enforcement even where the contract provided for such third party rights.[4] Such a position is clearly untenable, thus the modern approach is to give effect to the intentions of the parties as they appear under the contract. Thus, permitting enforcement by third party beneficiaries is seen as giving effect to the intentions of the parties under a contract which creates a benefit for such parties.

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[1] Per Haldane L.J., *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge and Co. Ltd.* [1915] A.C. 847, at 853.

[2] Per Diplock L.J., *Swain v. Law Society* [1983] A.C. 593, at 611.

[3] Clarke, *Contract Law in Ireland* (5th ed., Thomson Round Hall, 2004), p. 473.

[4] *Tweddle v. Atkinson* (1861) 121 E.R. 762.

However, a key rationale underpinning the doctrine [5] is the provision of clarity for the contracting parties viz. the scope of their contractual obligations and liabilities and establishing the enforcement rights under the contract itself. Indeed, when it is considered that the raison d'être of contract law theory and practice is synonymous with providing certainty and stability for the contracting parties, the doctrine is, *prima facie*, a legitimate manifestation of the wider role of contract law in this sense.[6] However, the operation of the doctrine gives rise to an unacceptable dichotomy between certainty and uncertainty in relation to those affected by the formation of the contract. While the creation of certainty is an integral part of common law systems, the central role for the law has always been the provision of justice. Thus, the creation of certainty for the contracting parties by virtue of the doctrine is not reconcilable with the provision of justice for third parties, particularly where an express term of enforcement exists in the contract.

As a result, the law has grappled with protecting the contracting parties on the basis of their bargain while also creating justice for third party beneficiaries. As Tisdale aptly notes, "[t]he life of the law lies in its ability to solve specific problems … [W]ithout some degree of flexibility law could not grow … to meet the needs of people".[7] The Irish law of contract is faced with such a "specific problem" with regard to privity of contract. The operation of the doctrine has the effect of marginalising those third parties wishing to enforce a contract made for their benefit. However, any attempts to reform the rule is considered to be at odds with the fundamentals of contract law theory. Critics of the doctrine have focused on the harshness of the rule on third parties, thus existing reforms of the doctrine have placed an emphasis on creating substantial rights for such third

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[5] *Anson's Law of Contract* (28th ed. by J. Beatson, Oxford University Press, 2002), p. 4.

[6] As Wilson notes, Kessler and Gilmore make the argument that privity is an essential element in the role of contract law: "To lack privity is to have failed to achieve the requisite state of contractual grace": Wilson, "Contract and Benefits for Third Parties" (1986-1988) 11 *Sydney Law Review* 230, 230.

[7] Tisdale, "The Place of Certainty in the Law" (1959) 35 *North Dakota Law Journal* 99, 118.

parties. Such substantial rights may be seen in both the English and the proposed Irish reforms, where a presumption of enforcement for third party beneficiaries has been included.

However, such reforms may tilt the law in favour of the third party to the detriment of the contracting parties. Indeed, the recent recommendations by the Irish Law Reform Commission[8] (hereinafter "the LRC") arguably tilt the law unnecessarily in favour of the third party to the detriment of the contracting parties, particularly where the third party is the beneficiary of an express benefit under the contract. However, upon evaluating the recommendations of the LRC it becomes apparent that there is an incongruity between the rationale for reform and the recommendations which were ultimately proposed. Thus, an imbalance subsists such that the recommendations do not address all third party beneficiaries and place restraints on the contracting parties, notwithstanding their intentions under the contract. While the justificatory rationale of the LRC's reform agenda is to give effect to the intentions of the contracting parties, the effect of their recommendations shall frustrate such intentions in relation to beneficiaries of an implied or an unambiguous benefit. In this context, the LRC creates an arbitrary distinction between third parties that are expressly conferred with a benefit and those that are conferred with a benefit which is ambiguous or implied. Thus, whereas an expressly-conferred beneficiary would have a presumption of enforcement, the non-expressly conferred beneficiary seemingly has no redress in law, under the LRC recommendations. The result is that notwithstanding a clear intention (on behalf of the contracting parties) to confer a benefit, the LRC deny such third parties any redress for want of clarity *viz*. the benefit conferred.

As noted, where the contracting parties have expressly conferred a benefit under the contract, the LRC propose a presumption in favour of such third parties. However, the LRC recommend that the contracting parties, in rebutting this presumption, should be denied recourse to the entire surrounding circumstances relating to the formation of the contract. In this

[8] Law Reform Commission, *Report on Privity of Contract and Third Party Rights* (LRC 88 – 2008), hereinafter "LRC Report".

respect, the LRC recommend a right of rebuttal which not only restricts the contracting party in mounting an effective rebuttal but also restricts the judiciary in construing the intentions of the contracting parties in the formation of their contract. The aim of this article is to demonstrate that the recommendations of the LRC fail to reflect the necessary balance between the contracting parties and the third party beneficiary. In doing so, the reforms undertaken in the English, Welsh and Canadian jurisdictions shall be evaluated to provide a comparative analysis with the current Irish reform proposals.

I. THE RELEVANT RECOMMENDATIONS OF THE IRISH LAW REFORM COMMISSION

In recommendations similar to their English and Welsh counterparts, the LRC propose the creation of a third party right of enforcement, restrictions on when the contracting parties may vary or rescind the contract, and allowing the third party to have access to the same remedies as the promisee. The LRC propose the creation of a presumption in favour of third party enforcement where a contract term expressly confers a benefit on the third party.[9] In relation to enforcement, the LRC also propose the creation of a facilitative provision such that an express term of enforcement within a contract shall be legally effective.[10] The right of enforcement in this context is not dependent upon the third party receiving the benefit.[11] The LRC propose the third party should be able to rely on any exemption of liability clause where this was the intention of the parties.[12] The third party beneficiary must be identifiable under the contract, either expressly by name, by class or by description.[13] The third party does need to be in existence in order to be identified at the time of

[9] LRC Report, p. 54.
[10] LRC Report p. 57.
[11] LRC Report, p. 57, para. 3.11.
[12] LRC Report, p. 57, para. 3.16.
[13] LRC Report, p. 59, para. 3.20.

contractual formation.[14] In relation to consideration the LRC recommend a general policy exception, whereby the third party can enforce the contract if all other conditions are met, notwithstanding the failure to provide consideration for the promise.[15]

The LRC recommend that the contracting parties should be restricted in their ability to vary or rescind the contract, where a benefit exists for the third party.[16] The point of crystallisation recommended by the LRC is when the third party assents to the contract (either expressly or by conduct) or when either contracting party is aware of the third party's assent.[17] The LRC recommend that the third party should have all defences available to it that would have been available to the promisee under the contract.[18] These include misrepresentation, mistake, duress, undue influence and frustration.[19] Similarly, in relation to the remedies available to the promisee, the LRC recommend that the third party should have the same remedies that would be available to the promisee, based upon their expectation interest of having the contract performed.[20] Thus, remedies include specific performance and/or damages.

II. THE TEST OF ENFORCEABILITY: THE IMPLICATIONS OF A RESTRAINED APPROACH TO REFORM

A. Judicial Interpretation v. the Presumption of Enforcement

The LRC favour a presumption of enforcement as a test of enforceability for third party beneficiaries. Such a presumption is, *prima facie,* consistent with the approach of the Law Commission for England and Wales (hereafter "the EWLC") viz. enforcement rights.[21] The EWLC determined that a rebuttable presumption of

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[14] LRC Report, p. 59, para. 3.22.
[15] LRC Report, p. 60.
[16] LRC Report, p. 65.
[17] LRC Report, p. 63.
[18] LRC Report, p. 69.
[19] LRC Report, p. 67.
[20] LRC Report, p. 71.
[21] Note the recommendations of the Law Commission are also applicable to the Northern Ireland jurisdiction.

enforcement was the best means to implement reform of the privity doctrine on the basis that it would create more certainty for third parties while allowing contracting parties to rebut such a presumption where necessary.[22] However, the inclusion of a presumption of enforcement was seen by the EWLC as a compromise measure such that their preference was to create a "dual intention" test.[23] The "dual intention" test required intent, on behalf of the contracting parties, to grant the third party the benefit under the contract and to have enforcement rights. The rationale underlying the EWLC preference was that in hard cases, where intent was not readily apparent, recourse to the courts would become inevitable. Thus, the contracting parties would be protected against unmeritorious claims whereby the onus would be on the third party to demonstrate that such dual intent is present under the contract. As a result, the judiciary would play a central role in determining whether such intent was apparent or not. The EWLC's difficulty with this approach lies not only in the fact the third party would face an almost insurmountable task in proving such intent but also that the judiciary would be placed in the position of creating enforcement rights on a case-by-case basis. Such a development would almost certainly lead to considerable ambiguity for third parties as to the circumstances in which they may or may not enforce a contract.

Indeed, in Canada, the potential for such uncertainty in this regard is highlighted by the fact that a novel approach was taken in creating third party enforcement rights by the Canadian Supreme Court.[24] The novelty of the approach taken by the Canadian judiciary is seen in the fact that the common law court relies on no precedent to create such rights. Thus, the policy shift in the Canadian jurisdiction in relation to the privity rule came, not from the legislature but from the courts. Such a development has many implications, most notably that the role of the common

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[22] The Law Commission, *Report on Privity of Contract: Contracts for the Benefit of Third Parties Report* (1999, No. 242), p. 80, para. 7.17, hereafter "Law Commission Report".

[23] Law Commission Report, p. 71, para. 7.4.

[24] See *London Drugs v. Kuehne and Nagel International Ltd.* [1992] 3 S.C.R. 299; *Fraser River Pile and Dredge Ltd. v. Can-Drive Services Ltd.* [1999] 2 S.C.R. 108.

law judge is generally considered to implement policy by virtue of legislation, not to implement such policy via decisions. In this context, the Dworkinian analysis of the law is pertinent; such that judges should not decide hard cases on policy, rather upon principle. Dworkin believes the use of policy by the judiciary permits the application of retroactive law, whereas the use of principles upholds rights and duties that already exist. In analysing the Dworkinian approach to law, McCoubrey and White note:

> If judges, on occasions, simply made the law instead of applying settled law, they would be failing to allow people to act in accordance with already established rules. Individuals would be unable to plan their affairs to keep within the bounds of what is legally acceptable if there was a possibility that a judge might decide to extend a law or line of precedents to cover marginal cases.[25]

Thus, a comparative review of the reforms as between the English and Welsh jurisdiction and the Canadian jurisdiction is instructive to demonstrate the rationale behind the presumption of enforcement and the effective removal of the common law judge from ascertaining intent in third party contracts.

B. The Canadian Approach

The Canadian Supreme Court favoured relaxation of the privity rule in *Fraser River Pile and Dredge Ltd. v. Can-Drive Services Ltd.*,[26] hereinafter *Fraser River*. The case concerned a contractual relationship between the plaintiffs and the defendants, whereby the defendants had chartered a barge from the plaintiffs, which subsequently sank. The barge sank as a result of the defendant's negligence; the plaintiffs were insured against such loss and recovered the sum under their insurance policy. However, the insurers of the plaintiff brought a subrogated claim against the defendants for the loss resulting from negligence. However, the contract of insurance – to which the defendant was

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[25] McCoubrey and White, *Textbook on Jurisprudence* (3rd ed., Oxford University Press, 1999), p. 162.
[26] [1999] 2 S.C.R. 108.

not privy – included a waiver of subrogation clause between the insurer and the plaintiff. Furthermore, the insurance policy indemnified the plaintiff but also purported to indemnify the defendants as "other insureds".[27] The waiver of subrogation clause also purported to waive any right of claim against the defendants.

The central issue before the court was whether the defendant, although lacking privity, could rely on the waiver of subrogation clause to defend against the subrogated action.[28] The terms of the waiver of subrogation by the insurer were applicable to "any charterer(s) and/or operator(s) and/or lessee(s) and/or mortgagee(s)" and further states "it is agreed that the Insurers waive any right of subrogation".[29] The argument put forward by the defendants was that such a clause inferred they should be a beneficiary of the clause; however the privity rule would prevent enforcement. The plaintiffs argued that the defendant could only rely on the waiver of subrogation if enforcement was carried out by the plaintiffs acting as agents for the defendants. Furthermore, they argued that the waiver clause was rendered ineffective by the subsequent variation of the contract (as between the plaintiffs and the insurer) following the event that caused the damage.

Iacobucci J., giving judgment for the Supreme Court, relied on the earlier Canadian case of *London Drugs v. Kuehne and Nagel International Ltd.*,[30] hereinafter *London Drugs*, to permit the defendant to rely on the subrogation clause. In *London Drugs*, the Canadian Supreme Court created a "principled exception" to the privity rule, such that a third party could enforce an exemption of liability clause under a contract. The "principled exception" is based, not on the established principles of contract law; rather they are seemingly based on the core common law principles of providing justice – informed by pragmatism and

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[27] Trebilcock, "The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada" (2007) 57 *University of Toronto Law Journal* 269.
[28] *Fraser River* [1999] 2 S.C.R. 108, para. 20.
[29] *Fraser River* [1999] 2 S.C.R. 108, para. 21.
[30] [1992] 3 S.C.R. 299.

commercial realities. As Ogilvie notes,[31] Iacobucci J. relied on policy considerations rather than precedent, such policy reasons are namely that privity should not apply to insurance contracts where the benefit is for the third party beneficiary and in the wider context it should not frustrate the intentions of the parties.

The "principled exception" consists of two limbs, the first requires that the parties intend, either expressly or impliedly that the third party should benefit under the contract. The second is that the activities of the third party are the activities contemplated as coming within the contract, *e.g.* in the case of stevedores such activities would be unloading goods from ships. As Trebilcock notes,[32] the principled exception – while initially a narrow concept under *London Drugs* – was clarified and broadened in *Fraser River*. Whereas in *London Drugs* the test, *prima facie*, seemed applicable only to employees of the insured, in *Fraser River* Iacobucci J. states that the newly broadened test is to apply to all third party contracts. The learned judge notes, "… [i]t was not our intention in London Drugs … to limit application of the principled approach to situations involving only an employer-employee relationship".[33]

Trebilcock argues[34] that the decision in *Fraser River* represents the most suitable approach to take in the context of both "true beneficiaries" and "contractual chains". In relation to contractual chains, he argues that the current privity doctrine permits opportunistic behaviour on the part of the contracting parties. Such opportunism manifests itself via waiver of subrogation clauses in insurance contracts, whereby the subcontractor becomes an "easy target" for the insurer to pursue under tort law, *e.g.* negligence actions. Thus, while the subcontractor may believe the risk allocation under the contract may be in his favour by virtue of an exemption of liability clause, he is not privy to the subrogation clause, permitting the insurer to take a claim.[35] Under the principled exception, such opportunism

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[31] Ogilvie, "Privity of Contract in the Supreme Court of Canada: Fare Thee Well or Welcome Back" [2002] *Journal of Business Law* 163, 170.
[32] Trebilcock (above, note 27) at p. 289.
[33] *Fraser River* [1999] 2 S.C.R. 108, para. 3.1.
[34] Trebilcock (above, note 27) at p. 290.
[35] Such was the case in *Fraser River.*

may be curtailed, permitting the third party to take advantage of the benefit of the indemnity of liability and subrogation clause. Trebilcock notes the principled exception undermines such opportunism by allowing the third party to be considered as priced into the contract, as is the case with true beneficiaries:

> Economic intuitions provide a clear framework that avoids the perverse incentive effects [opportunism] of the traditional approach [privity] but allows parties in a contractual relationship to fully manage their expected liability … while often converging with recommendations that are premised on "fairness" or "equitable concerns", it has the advantage of a less amorphous and tighter analytical structure.[36]

However, Trebilcock does not address the opportunism which potentially exists for apparent third party beneficiaries, namely whether or not they were intended beneficiaries at all. Clearly, the contracting parties may rebut any case made by the defendant as to intent. However, in *Fraser River,* the principled exception permits considerable scope for the judiciary to infer such intent, notwithstanding the defendants arguing no such intent was present. Indeed, the waiver of subrogation clause, read in conjunction with the clause that, *prima facie,* indemnified "other insureds", would appear to show that the contracting parties intended to indemnify the defendants against any action. However, both clauses may arguably relate to different intentions – while the indemnity of "other insureds" is undeniably aimed at benefiting the third party, the waiver of subrogation clause may not necessarily be for the benefit of the subcontractor. While Iacobucci J. held that the defendants were intended beneficiaries under the contract, it is feasible that subsequent judicial interpretation in this regard may lead to varying outcomes as case law develops under the principled exception.

For instance, Iacobucci J. cites "commercial realities" as a justification for the principled exception; however such reasoning may also be applied to the rationale of the subrogation clause itself. Fraser River as a company may have sought the waiver of subrogation clause to encourage business – thus the main

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[36] Trebilcock (above, note 27) at p. 291.

beneficiary would be Fraser River, not the charterer who merely had an incidental benefit. It is submitted that such a creative interpretation should not be considered an abstract interpretation, particularly where the merits of the intent under each contract shall be subject to the circumstances of the individual case and the varying element of judicial interpretation. The magnitude of the loss, *e.g.* a ship, may have incentivised the insurer to seek variation of the clause and pursue the charterer. The significance of such an alternative interpretation of the contract highlights the impact which judicial interpretation of the contract (under the principled exception) may have on the outcome of every individual case. Indeed, as Trebilcock notes,[37] creative judicial reasoning was required in order for the principled exception to trump the privity rule. However, the fundamental flaw of the "principled exception" is its uncertainty, whereby the creation of a mere right of enforcement will be dependent on judicial interpretation in each case.

In *Fraser River,* had a presumption of enforcement existed, *e.g.* similar to the English and Welsh jurisdiction, the subrogation clause may have come within the "purported to confer a benefit" test of the Contracts (Rights of Third Parties) Act 1999, which includes contractual situations in which an ambiguous benefit has been conferred on a third party. As a result, there is no requirement for the judiciary to engage in "creative reasoning" to establish enforcement rights, rather the right of enforcement is included within the primary legislation. The result is that the

[37] Trebilcock (above, note 27) at p. 289. Indeed, in *Fraser River*, the Supreme Court of British Columbia rejected an argument of a third party seeking to rely on a waiver of subrogation clause, relying on the earlier precedents of *London Drugs* and *Vandepitte v. Preferred Accident Insurance Corp. of New York* [1933] A.C. 70. However, the British Columbia Court of Appeal overruled the decision of the Supreme Court – Esson J.A. held that the precedent of the latter case had been *impliedly overruled* by the Supreme Court of Canada by virtue of its being ignored in subsequent case law. It is respectfully submitted, such reasoning is somewhat dubious – the fact that *Vandepitte* had been relied upon by the Supreme Court of British Columbia would seem to suggest the case was not considered as having been overruled. Indeed, Esson J.A.'s analysis that the case had been "impliedly overruled" by being ignored, highlights judicial discretion in this area in coming to conclusions based upon varying interpretations of precedent to justify their reasoning.

contracting parties, in rebutting such a presumption, may have relied upon an argument similar to that above which shows they had no intention of the subrogation clause conferring a benefit on the charterer. Clearly, the success of such a rebuttal shall be reliant upon the necessary proof which shows that no intent was present. However, in the alternative scenario, where no presumption is present and such rebuttal arguments are put forward, it is conceivable they shall be met with much scepticism by a judiciary intent on creating mere rights of enforcement for a third party with perceived inherent weakness.

Thus, it is respectfully submitted that the benefit concept, as applied to the subrogation clause by the Canadian Supreme Court in *Fraser River*, may be seen as an artificial benefit, devised to create a right of enforcement in favour of the third party against the insurer. Indeed, the second limb of the principled exception test appears tailored-made to ensure that third parties in commercial situations, similar to *Fraser River* (*e.g.* insurance), shall not fail. As a result, the contracting parties fall victim to a judicial test that inherently favours the third party, which fails to rely on any established contract law principle. Thus, the role of the judge is seemingly one of absolute and unrestrained discretion.[38]

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[38] Indeed, as Adams and Brownsword note in relation to *London Drugs*, the principled exception amounts to a formal analysis being undertaken by the judiciary of the contract in question. Adams and Brownsword, "Privity of Contract – That Pestilential Nuisance" (1993) 56 *Modern Law Review* 722. Namely, such an analysis is to determine whether the contracting parties intended the benefit to be for the alleged third party beneficiary. Adams and Brownsword further note that this analysis involves working along two dimensions, explicit stipulation and implicit stipulation of the benefit under the contract. Each of these dimensions permits three possibilities that the parties' stipulation is clearly for the third party to benefit, the stipulation is clearly against the third party benefiting, or the stipulation is unclear. Combining these possibilities, there are nine available two-dimensional interpretations of the meaning of the term and what it stipulates. Adams and Brownsword observe, at p. 726, "So much for formal analysis and first principles. In practice, the outcomes of the cases will depend upon how the stipulations are interpreted". Thus, under the Canadian approach, a significant manoeuvrability exists for the judge to interpret cases on a subjective basis – leading (inevitably) to more uncertainty for all parties under a third party beneficiary agreement.

The approach of the Canadian Supreme Court highlights the concern of the consultees of the EWLC consultation paper, who protested that such an approach would lead to great ambiguity for all stakeholders to the contract.[39] It is submitted, they were correct, such that the "dual intention" and the "principled exception" tests are reliant on a subjective judicial analysis of each case upon its merits. The underlying principle of both tests is that the judiciary are to be informed by policy rather than principle and the doctrinal rules of contract law, particularly in the Canadian jurisdiction. In light of the inherent subjectivity of the "dual intention" and "principled exception" tests, the most suitable approach to reform the privity doctrine is through legislative means. While the Canadian approach aims to rectify what it perceives as the injustice of the privity rule, it inadvertently creates more issues relating to uncertainty than it solves. The role of the common law judge is to apply the law by virtue of *stare decisis*, overruling bad law where necessary but in so doing having a reasoned argument within the margins of the common law. Thus, the recommendation of a presumption of enforcement by the LRC is the best approach to take in creating third party enforcement rights.

C. The English and Welsh Approach

While the LRC reforms *prima facie* mirror their English and Welsh counterpart, the English and Welsh approach is considerably wider than the LRC reforms. The English and Welsh legislation – Contracts (Rights of Third Parties) Act, 1999,[40] hereinafter the 1999 Act – includes a right of enforcement where expressly provided for and also where the contract purports to confer a benefit on the third party. In using the term "purports to confer a benefit", the English and Welsh approach includes third party beneficiaries of an express benefit under the contract and those situations where the benefit is ambiguous.[41] Where the contract contains an express benefit, the contract does purport to benefit the third party, thus manoeuvre for controversy is limited. However, the interesting point is that the term also covers those

[39] LRC Report, p. 75, para. 7.5.
[40] Note the 1999 Act also applies to Northern Ireland.
[41] Contracts (Rights of Third Parties) Act, 1999, s. 1(1)(b).

third party beneficiaries under a contract which contains an ambiguous benefit. The result is that all third party beneficiaries in the English and Welsh jurisdiction have a presumption of enforcement where the contract purports to benefit them. Thus, the risk of a third party being marginalised or the intentions of parties being frustrated is limited. In stark contrast to the English and Welsh reforms, the LRC propose a presumption of enforcement in favour only of those third party beneficiaries who are expressly conferred with a benefit under the contract.

While this approach may seemingly have the benefit of providing more certainty in the context of enforcement, it is submitted it is a half measure which fails to reflect the complex nature of contractual terms. It is reasonable to assume that not all contracts shall be clear and unequivocal as to the benefit for third parties. Indeed, the need to provide a redress for beneficiaries of an implied benefit was recognised by the Nova Scotia Law Reform Commission:

> While not in favour of promoting widespread reliance on implied benefits, the Commission acknowledges there are situations in which as a matter of fairness it would be appropriate to uphold an implied third party benefit. This would, however, be a matter for the courts to decide, after having considered the relevant circumstances.[42]

If an ambiguous contract is considered in light of the LRC proposal, the benefit is not expressly conferred, thus no right of enforcement shall arise – yet the third party has been identified in the contract and there is a benefit, albeit ambiguous. The third party in this instance shall seemingly have no redress before the law. Indeed, the lead researcher for the LRC report on reforming the doctrine notes that under the LRC recommendations:

> If the contract impliedly benefits a third party, there is no such presumption, *and the third party has no rights* [emphasis added] unless the contract expressly gives the third party a right to enforce the contract. This creates certainty for, and

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[42] Law Reform Commission of Nova Scotia, *Report on Privity of Contract (Third Party Rights)* (September 2004), p. 16.

> protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so.[43]

Clearly, the objective of the LRC is to avoid claims by incidental beneficiaries.[44] However, in attempting to avoid opening up claims by incidental beneficiaries, the LRC proposal shall effectively marginalise a legitimate third party beneficiary and frustrate the intentions of the parties. Indeed, it is difficult to conceptualise exactly how a third party may incidentally claim a benefit under the contract and succeed. In the English Court of Appeal case of *Avraamides v. Colwill*,[45] the respondents Avraamides brought a claim against the appellants Colwill to hold them personally liable for deficient work carried out by the company the "Bathroom Trading Company (Putney) Ltd". The appellants had entered into a transfer agreement with the latter company which, *prima facie*, transferred all liabilities the company had incurred. At first instance, the respondents were given judgment to the effect that the transfer agreement purported to benefit them, such that the appellants contracted to discharge the liabilities of the company.

However, Waller L.J. aptly held that the 1999 Act requires the third party beneficiary to be expressly identified within the contract, thus where the contract purports to confer a benefit it must be for an expressly identified third party. Judgment was given for the appellants on the basis that the contract did not expressly identify any third party. The LRC also require that the third party beneficiary be expressly identified under the contract, thus it is apparent that where such is the case, a safety mechanism exists for contracting parties. Where an incidental beneficiary attempts to enforce a contract which was not intended by the contracting parties, it is unlikely such a beneficiary will be expressly identified within the contract. In the unlikely event that an incidental beneficiary is expressly identified in the contract,

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[43] Kelly, "Privity of Contract: Benefits of Reform" (2008) 1 J.S.I.J. 145, 159.
[44] *E.g.* Road users who claim that the purpose of building a bridge/road was to benefit them, notwithstanding the benefit being incidental – opening up an unreasonable number of third party claims.
[45] [2006] E.W.C.A. Civ. 1533.

the contracting parties will be capable of rebutting the presumption of enforcement. If the LRC's own example is taken,[46] where a contract has been agreed for the construction of a new school, it is unlikely the students that use it everyday – incidental beneficiaries – will be mentioned in the contract. However, where the contract identifies a third party but contains an ambiguous benefit, rather than protecting the contracting parties and creating certainty, the LRC recommendation will frustrate the intentions of the contracting parties where a benefit was indeed intended to be conferred.

In relation to the inclusion in the 1999 Act of "purports to confer a benefit", the LRC state: "The phrase 'purports to' seems to have caused unnecessary uncertainty, and the Commission is of the view that it should be omitted from the proposed legislation".[47] It is respectfully submitted that the LRC are being extremely short-sighted in this regard, such that a provision similar to section 1(1)(b) of the 1999 Act may function as a means by which the marginalisation of those third party beneficiaries of an ambiguous benefit may be prevented. Indeed, the argument by the LRC that the relevant section of the 1999 Act has lead to uncertainty may be challenged on the basis that the provision has functioned as it was envisaged by both the EWLC and the England and Wales legislature. Clearly, the intention of both the former and the latter was to mitigate the harsh consequences for those third party beneficiaries, where the benefit was in some way ambiguous under the contract. Thus, the inclusion of a provision such as section 1(1)(b) provides a means by which such third parties may seek redress.

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[46] Law Reform Commission, *Consultation Paper on Contract and Third Party Rights* (LRC CP 40 – 2006), p. 86, para. 3.37.

[47] LRC Report, p. 57, para. 3.10. Indeed, the English case of *Avraamides v. Colwill* [2006] E.W.C.A. Civ. 1533 demonstrates that incidental beneficiaries would have a difficult time in bringing a successful action as the term "purports to confer a benefit" is reigned in by the fact that the Act stipulates that the third party beneficiary must be expressly identified. The LRC recommendations propose that the third party beneficiary must be expressly identified also – thus, a term such as "purports to confer a benefit" may be effectively reigned in from being wide in its application.

III. THE LRC RATIONALE FOR A LIMITED TEST OF ENFORCEABILITY

The LRC rely upon an argument put forward by Stevens[48] to show that a provision similar to section 1(1)(b) of the 1999 Act has the potential to cause uncertainty for all parties. Stevens argues that the term "purports to confer a benefit" is vague and criticises the EWLC for drawing a distinction between solicitors and builders.[49] Namely, that according to the EWLC, a will drafted negligently by the solicitor shall not give rise to an action for third parties, notwithstanding the purported benefit to the legatees. Whereas a contract with a builder will give rise to such an action if the work carried out is done so carelessly. The basis of the EWLC distinction is that the solicitor merely facilitates the testator and should be exempted from liability. Stevens argues that both the builder and the solicitor have contracted with the promisor, thus the contract in both instances purports to benefit the third party.[50]

Thus, Stevens attempts to undermine the underlying rationale for including section 1(1)(b) in the 1999 Act, which in turn provides a basis for the LRC to utilise the argument in rejecting such a provision. However, Stevens[51] does not accept the argument put forward by Andrews[52] that the distinction (between the builder and the solicitor) is a valid one, as no promise exists between the solicitor and the testator. Andrews argues the distinction is valid as the situation with a solicitor is *sui generis*, such that the intended beneficiary of the will is the testator by virtue of the peace of mind it offers.[53] Thus, the legatees become incidental beneficiaries under the will. Whereas, as Andrews argues,[54] situations such as the facts in *Beswick v. Beswick*[55] may be distinguished as more than peace of mind

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[48] Stevens, "The Contracts (Rights of Third Parties) Act 1999" (2004) 120 L.Q.R. 292.
[49] Stevens (previous note) at pp. 306-308.
[50] Stevens (above, note 48) at p. 306.
[51] Stevens (above, note 48) at p. 307.
[52] Andrews, "Strangers to Justice No Longer" (2001) 60 C.L.J. 353.
[53] Andrews (above, note 52) at p. 359.
[54] Andrews (above, note 52) at p. 359.
[55] [1968] A.C. 58.

which has been bargained for under the contract. Indeed, the solicitor has made no promise to the promisee to provide the actual benefit to the legatee – rather the benefit moves to the legatee by virtue of the testator who is merely facilitated by the solicitor. In considering the distinction, similar to that put forward by Andrews, the EWLC note that the distinction is essentially between a promise to *confer* a benefit and a promise of a *potential* benefit.[56]

Admittedly, the characterisation of the benefit in relation to wills, by both Andrews and the EWLC, as being for the peace of mind for the testator is somewhat artificial. However, the position taken by the EWLC is arguably based upon more than a mere abstract policy position to exempt solicitors. The nature of the transaction is wholly different, while the solicitor and the builder both facilitate a purported benefit; the latter has a promise with the promisor to provide the benefit, *e.g.* by building the structure. Whereas the former, while facilitating the legatee in obtaining a benefit under the contract by virtue of drafting the will has no role in providing the benefit itself. The benefit moves from the testator to the legatee.

It is submitted, the argument put forward by Stevens should not have been relied upon by the LRC as an indication of potential difficulties associated with a provision such as that under section 1(1)(b) of the 1999 Act. The LRC seemingly accepts the criticism of the section as a self-evident means by which to justify a rejection of any such section under prospective Irish legislation. Indeed, had the LRC looked beyond such criticisms and determined the actual rationale for section 1(1)(b) of the 1999 Act, such a provision may well have found its way into their reform proposals. Clearly, the rationale for the inclusion of section 1(1)(b) (purports to benefit) is to facilitate third parties of ambiguous contracts to have redress before the law. The effect of the LRC recommendation is to arbitrarily differentiate between third party beneficiaries by restricting enforcement to those whom were conferred with an express benefit. The recommendation sits

[56] Law Commission Report, p 83, para 7.24.

in stark contrast to the 1999 Act which creates a means by which all third parties are included in reform of the privity doctrine.[57]

IV. THE PRESUMPTION OF ENFORCEABILITY AND "NON-EXPRESSLY-CONFERRED-BENEFICIARIES"

The question then is why the LRC saw fit to create a distinction between third parties expressly conferred with a benefit and those who were not. The LRC may have been reluctant to grant "non-expressly-conferred-beneficiaries" a right of enforcement due to the inclusion of such beneficiaries under a presumption of enforcement. Indeed, the most noticeable difference between the LRC recommendations and the 1999 Act is the arbitrary way in which the LRC proposes to remove "non-expressly-conferred-beneficiaries" from any reform agenda, while the 1999 Act includes such beneficiaries under the presumption of enforcement. Thus, the inference which can be made is readily apparent – the LRC did not want "non-expressly-conferred-beneficiaries" coming within a presumption of enforcement.

In contrasting the English and Welsh reforms and the LRC recommendations in relation to enforcement, it is undeniable the Irish reforms will *prima facie* create far greater certainty than the English and Welsh legislation. Indeed, it may be argued that the inclusion of a presumption of enforcement where the contract purports to confer a benefit – as in England and Wales – seems to invite uncertainty. Namely, where the contract merely purports to benefit a third party, automatic enforcement shall effectively arise, unless rebutted by the contracting parties. However, the question may be asked, who determines whether or not the contract purports to benefit the third party? The fact that the third party is relying upon a contract which only purports to benefit

[57] Dean notes that the construction industry in the UK lobbied heavily against the inclusion of such a provision on the basis that it was too broad and therefore "unworkable". However, as Dean observes, the 1999 Act, while *prima facie* too broad, can be reigned in by careful drafting by sectors such as the construction industry. He further notes that the alternative to such a provision (namely, permitting enforcement on the basis of an express provision in the contract) would have been excessively narrow. Dean, "Removing a Blot on the Landscape – the Reform of the Doctrine of Privity" [2000] *Journal of Business Law* 143, 146-148.

him/her would *prima facie* indicate that the benefit in such contracts shall be ambiguous. Indeed, if such is the case then the creation of a presumption of enforcement shall create enforcement rights based upon a contract which only purports to benefit a third party. Therefore, such a presumption of enforcement where the contract merely purports to confer a benefit could be seen as unnecessarily tilting the law in favour of the third party.

In instances where the contracting parties had no intention of permitting enforcement and fail to rebut the presumption, the third party shall be capable of enforcing a contract which merely purports to confer a benefit. The effect of the presumption in this instance is to create a right of enforcement where such a right was not intended by the contracting parties, based upon a benefit which is clearly ambiguous at best. In this context, it is arguable that the inclusion of a presumption of enforcement where the contract merely purports to benefit the third party has the potential to create significant uncertainty for all parties. However, while a presumption of enforcement may arguably tilt the law in favour of "non-expressly-conferred-beneficiaries", such parties should still be entitled to justice – namely by being able to enforce the contract made for their benefit where the contracting parties intended this to be the case. Indeed, the current LRC proposal will undoubtedly marginalise a significant number of third parties – ranging from those non-commercial parties, many of whom shall be victims of negligent drafting and those commercial parties involved in complex contractual situations where difficulties may arise. Thus, the fundamental issue is why such third parties should be denied a right of enforcement, if they can prove the necessary criteria as put forward by the LRC as the main justification for reform. Namely, that they can prove the intentions of the parties were to confer a benefit and they are the intended beneficiary. The denial of a right of enforcement in this instance would be a severe injustice to a third party who has the necessary proof to satisfy these criteria.

Furthermore, the LRC assertion that the inclusion of such a provision would lead to unnecessary uncertainty appears dubious. If the nature of third party beneficiary contracts is considered, the majority of third parties shall be covered under the LRC test. It is

reasonable to assume that the majority of third party contracts shall expressly confer the benefit on a readily identifiable third party. Thus, if the minority is considered as those whom the contract purports to confer a benefit, the inclusion of a provision which permits them a cause of action would appear to offer (at a minimum) certainty. Indeed, the arbitrary exclusion of such third parties from enforcement could lead to more uncertainty in the long term. In contrasting the English and Welsh approach with the Canadian approach to reform, it is apparent that the presumption of enforcement is a superior means by which certainty may be achieved for all parties. This is certainly the case when it is considered the Canadian courts relied on policy considerations and subjective interpretation rather than precedent. However, the success of a presumption in creating certainty shall only be effective where it applies to all third party beneficiaries. The LRC distinction between those third parties expressly conferred and those who are the subject of an ambiguous benefit will only serve to undermine the effectiveness of the presumption *viz*. judicial interpretation. Thus, it is somewhat unrealistic to suppose that the judiciary shall not intervene to create redress for such third parties, certainly where it is evident from a proper construction of the contract that the intention of the contracting parties was to confer a benefit under the contract. Indeed, in keeping with the pattern that developed before reform, it is conceivable the judiciary shall create mechanisms for redress, similar to the exceptions which defined the judiciary's response to the rigid privity rule.[58]

Where the contract purports to confer a benefit upon third parties, such contracts should be interpreted and construed by the judiciary. Thus, where a contract purportedly confers a benefit on a third party, the third party should (at a minimum) have a right of action to have enforcement granted by a judge. While a right of action is far less advantageous for the third party than a

[58] *E.g. Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board* [1949] 2 K.B. 500; *Drive Yourself Hire Co. Ltd. v. Strutt and Another* [1954] 1 Q.B 250. In *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite Ltd. (The Eurymedon)* [1975] A.C. 154, the Australian High Court held a third party could rely on an exemption clause under a contract to which he was not a party by finding an agency relationship on somewhat dubious grounds.

presumption of enforcement, it is also considerably less restrictive than the current LRC proposals. Thus, the creation of a bare right to sue shall, at the very least, minimise the marginalisation of third parties who have not been expressly conferred with a benefit by virtue of the contract. However, if a presumption of enforcement is considered, there seems no appreciable reason as to why the LRC could not include third parties not expressly conferred with a benefit. Certainly, where the contracting parties fail to rebut and the purported benefit is in fact not intended to be an actual benefit, a presumption will have a detrimental effect.

However, it is reasonable to assume that this scenario represents the unique rather than the norm. Indeed, where a benefit exists under a contract (express or otherwise) it is only reasonable to assume that the contracting parties intended the third party to be able to enforce the promise. This is clearly the preferred rationale from a policy perspective, thus where such an assumption forms part of policy, the capability of the contracting parties to rebut the presumption provides the mechanism by which the opportunity for abuse or injustice is mitigated. Rather than creating a bare right to sue, the LRC should include all third parties under their reform proposals. The arbitrary exclusion of third parties where the contract does not expressly confer a benefit has little justification. The effect is to categorise third parties, granting preference to one category, while excluding the other, thus unnecessarily tilting the law in favour of third party beneficiaries where the contract expressly confers the benefit. There appears no logical or legal reason for excluding "non-expressly-conferred-beneficiaries" from reform of the privity rule in the Irish jurisdiction.

V. NORMS OF CONTRACTUAL INTERPRETATION: THE SURROUNDING CIRCUMSTANCES

The LRC recommend that in the "interests of fairness"[59] (to the third party), the courts should only have regard to the surrounding circumstances which were "reasonably available"[60]

[59] LRC Report, p. 56, para. 3.08.
[60] LRC Report, p. 56, para. 3.09.

to the third party, where the contracting party attempts to rebut the presumption of enforcement. The LRC relies on the persuasive authority of Hoffman L.J. in the case of *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (No.1),*[61] where he states: "[i]nterpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would *reasonably have been available to the parties* [emphasis added] in the situation in which they were at the time of the contract."[62] While Hoffmann L.J. refers to all the background knowledge reasonably available to "the parties", it is uncertain whether such a statement can be used to bring third parties within such an interpretative rule. The nature of the majority of third party contracts precludes such a conclusion. It is reasonable to assume that the majority of third parties will have little or no knowledge of the surrounding circumstances leading to the formation of the contract which benefits them, until made aware by the contracting parties. Indeed, upon reading the judgment by Hoffman L.J. in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (No.1)*, it is uncertain whether the judgment provides good authority for the LRC's position. While the statement of principle utilised by the LRC is capable of including third parties, the statement must be taken in its overall context.

In this context, it is arguable that Hoffmann L.J. refers only to the parties who made the contract, *e.g.* promisor and promisee. In relation to the law excluding certain evidence, Hoffmann L.J. states that the "negotiations of the parties" and their declaration of subjective intent is inadmissible. Indeed, with regard to the contextual approach of contractual interpretation, Hoffmann L.J. states: "The meaning of words is a matter of dictionaries and grammars, the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean."[63] The interesting point being that in the latter principles of the judgment, Hoffmann L.J. at no point

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[61] [1998] 1 W.L.R. 896.

[62] *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (No.1)* [1998] 1 W.L.R. 896, at 912.

[63] *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (No.1)* [1998] 1 W.L.R. 896, at 912.

makes reference to any party outside the contract (promise), certainly not third parties. Furthermore, Roe notes,[64] that Saville L.J. in *National Bank of Sharjah v. Dellborg*[65] criticises the judgment of Hoffmann L.J. such that: "[t]he position of third parties … does not seem to have been considered at all. They are unlikely in the nature of things to be aware of the surrounding circumstances".[66]

It is noteworthy that the position of the Irish Supreme Court accords with that of the House of Lords, whereby the Irish Supreme Court has held that the surrounding circumstances are pertinent in construing a disputed contract. In the Irish High Court case of *Campus and Stadium Ireland Development Ltd. v. Dublin Waterworld Ltd.*,[67] Gilligan J. cites with approval earlier authority of the Supreme Court and held he was "entitled", in certain circumstances, to take the "matrix of fact" into consideration.[68] Gilligan J. further relies upon the judgment of Keane J. in *Kramer v. Arnold*[69] where he held that in interpreting the meaning of a contract which the parties dispute, the task of the court: "… is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances".[70] Gilligan J. further relies on the

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[64] Roe, "Contractual Intention under Section 1(1)(b) and 1(2) of the Contracts (Rights of Third Parties) Act 1999" (2000) 65 M.L.R. 887, 891.

[65] English Court of Appeal, unreported, Saville L.J., 9 July 1997, cited in Clarke, "Interpreting Contracts – The Price of Perspective" (2000) 59 *Construction Law Journal* 18, 18.

[66] *National Bank of Sharjah v. Dellborg* (previous note).

[67] (High Court, unreported, Gilligan J., 21 March 2005).

[68] *Campus and Stadium Ireland Development Ltd. v. Dublin Waterworld Ltd*. (previous note).

[69] [1997] 3 I.R. 43.

[70] *Kramer v. Arnold* (previous note) at p. 55. Interestingly, Murphy J observes in *Igote Ltd. v. Badsey Ltd.* [2001] 4 I.R. 511 at p. 518: "In my view the judge [Keane J.] erred in ascertaining the intentions of the parties from the evidence heard by him as well as the alterations aforesaid and documents prepared in the course of the negotiations. The intention of the parties may be gleaned only from the document ultimately concluded by them, albeit construing it in the light of surrounding circumstances but not ascertaining their intentions from such circumstances. Such a process would be justified only where one or other of the parties claimed rectification of the document executed by him: that is not the present case". Thus, Murphy J.'s comment demonstrates that while the Irish judiciary may take the entire surrounding circumstances into account, they are

Irish Supreme Court case of *Igote v. Badsey*,[71] where the plaintiff's argument relied heavily on factual information surrounding the formation of the agreement, such as the business relationships that existed, the negotiations between them and advice which they gave or received.[72] Murphy J. in giving judgment for the majority held that while reference to the "matrix of fact" is permissible, there should be caution such that it is not used to glean the subjective intentions of the parties.[73]

Thus, the LRC recommendation sits in direct contradiction to the judgment of the Irish Supreme Court and the persuasive authority of the House of Lords. The authority utilised by the LRC is not good authority for the proposition that consideration of the surrounding circumstances should be limited. The LRC is effectively advocating the creation of a hollow right of rebuttal for the contracting party, devoid of any substance with which to counter unintended third party enforcement. Where the judiciary is limited to a consideration of the surrounding circumstances which were reasonably available to third parties, a considerable injustice shall be imposed upon the contracting parties. As Jackson notes,[74] pre-contractual negotiations and subjective statements of intent are not admissible, however: "[t]he general principle is that extrinsic evidence is admissible in order to obtain the objective, aim or genesis of the contract".[75] Beatson notes[76] that the purpose of the rule is to allow the aim of the transaction to be ascertained, to clarify the true meaning of an ambiguity, to prove the existence of a collateral agreement, and establish implied terms to show the document was not intended to express the entire agreement between the parties. It is certainly not beyond the realm of possibility that a significant proportion of third party contracts shall come before the Irish courts with the

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simultaneously reluctant to do so where such an exercise shall infer subjective intent upon the parties.

[71] [2001] 4 I.R. 511.

[72] *Igote v. Badsey* (above, note 70) at p. 518.

[73] *Igote v. Badsey* (above, note 70).

[74] Jackson, "Pre-Contractual Negotiations: Recent Trends in the Interpretation of Contracts" (2007) 23 *Construction Law Journal* 268, 269.

[75] Jackson (previous note) at p. 269.

[76] *Anson's Law of Contract,* (28th ed. by J. Beatson, Oxford University Press, 2002), pp 132-133.

latter issues facing contracting parties. If the extreme example of the doctrine of duress is considered, it is unlikely the third party will be aware of any duress surrounding the formation of the contract. Where the contracting party can rebut the presumption to prevent a considerable burden being imposed (*e.g.* satisfying the benefit *viz*. duress), the courts will be restricted from considering such evidence if it was not available to the third party. The result is that the LRC proposal is placing unreasonable restraints upon the judiciary, such that it, *prima facie*, interferes with the courts ability to administer justice effectively.

As the LRC note, the 1999 Act does not refer to whether or not the courts may have regard to the entire surrounding circumstances of the contract formation. The LRC further notes, "[i]t is unclear whether this is on the basis that the normal rules of contractual interpretation provide for this, or whether in fact the courts are restricted to looking at the language contained in the contract".[77] However, the LRC make reference to[78] an argument by Roe[79] that by virtue of the absence of any reference to the surrounding circumstances, the 1999 Act restricts the court to consider the document of the contract only when construing its terms. Roe argues that the 1999 Act prescribes objective interpretation which effectively confines the judiciary to a consideration of the contract itself.[80] Roe's argument is premised on section 1(2) of the 1999 Act which states that "if on a proper construction of the contract it appears the parties did not intend the term to be enforceable by the third party". Thus, Roe relies upon the words "if on a proper construction of the contract" as an indication that the legislature preferred an objective test which would restrict the judiciary to a consideration of the parties' intentions "as expressed in the language which they actually used."[81] Roe further states that: "[t]he true construction of a written contract is a question of law, not fact".[82]

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[77] LRC Report, p. 56.
[78] LRC Report, p. 56.
[79] Roe (above, note 64).
[80] Roe (above, note 64) at p. 888.
[81] Roe (above, note 64) at p. 888.
[82] Roe (above, note 64) at p. 888.

Roe is therefore advocating a test under the 1999 Act which should solely consider the terms of the contract in terms of their ordinary and natural meaning, devoid of any consideration of extrinsic evidence. It is submitted, Roe's analysis is a flawed interpretation of the 1999 Act. While the interpretation of a contract is a matter of law, it is not to mean that fact plays no part in setting the context behind the parties' intention (the contextual approach). As Hoffmann L.J. notes in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (No.1)*, interpretation of the contract should have regard to "all the background knowledge", which forms part of the "matrix of fact".[83] The matrix of fact consists of "absolutely anything"[84] which affected the way in which the language in the document would be understood by the reasonable man. The meaning of the document is not the meaning of the words themselves, rather it is what the parties using those words against the relevant background would reasonably have been understood to mean.

Thus, Roe's analysis of the 1999 Act appears to be a stark contradiction of the House of Lords judgment in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (No.1).* While the interpretation of a written contract is a matter of law, there is nothing which precludes the judiciary from considering any evidence adduced to demonstrate an intention other than that which is seemingly apparent under the contract. Indeed, Roe is inferring that in the context of third party beneficiary contracts the intent of the legislature was to utilise the traditional approach to contractual interpretation. However, Hoffmann L.J.'s restatement of the law in this regard seemingly precludes any return to the traditional approach of considering the contract in the abstract. As Lee and Wham note,[85] V.K. Rajah J.A. observed in the Singaporean Court of Appeal case of *Zurich Insurance* (*Singapore) Pte. Ltd. v. B-Gold Interior Design and*

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[83] Per Wilberforce L.J. in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381 where he states at p. 1383: "The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations."

[84] Hoffman L.J. in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (No.1)* [1998] 1 W.L.R. 896, at 912.

[85] Lee and Wham, "Contract Law: Notes" (2008) 9 S.A.L. Ann. Rev. 212.

Construction Pte. Ltd.[86] that the traditional approach to contractual interpretation is such that it can lead to considerable uncertainty. Rather, he advocates use of the "Hoffmann principles" on the basis that the traditional approach, while permitting regard to extrinsic evidence to resolve latent ambiguities – makes it impossible to detect such ambiguity without first having had access to the extrinsic materials.[87] V.K. Rajah J.A. states: "[i]n denying the role of extrinsic evidence in the interpretation of contracts, proponents of the traditional approach are only creating frustration, conflict and inconsistency".[88]

While the LRC state their proposal is to protect the third party against unfairness, it is submitted the LRC had little choice but to include a limitation on what surrounding circumstances may be taken into account by a court. The natural policy position to adopt would be to restrict the contracting parties in rebutting such a presumption *viz*. an express benefit. As a result, the LRC essentially infer a sweeping assumption upon all contracts for third party beneficiaries such that the contracting parties, in creating an express benefit for the third party also intended to grant rights of enforcement. However, there will be instances where the contracting parties had no intention to permit enforcement – under the current LRC proposal such contracting parties may have their intentions frustrated by a proposal which unreasonably favours the third party. While such an assumption is necessary to create a presumption, it has no logical or justifiable role in limiting the ability of contracting parties to rebut such a presumption.[89]

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[86] [2008] 2 S.L.R. 1029.

[87] Lee and Wham (above, note 85) at p. 224.

[88] V.K. Rajah J.A. in *Zurich Insurance* (*Singapore) Pte. Ltd. v. B-Gold Interior Design and Construction Pte. Ltd.*, at p. 1052.

[89] In this context, quite an ironic position emerges from the LRC recommendations whereby it appears that in attempting to create certainty for the contracting parties by permitting enforcement for expressly-conferred-beneficiaries only, the LRC in turn restricts the only defence available to contracting parties who can prove they had no intention to permit third party enforcement. Indeed, the adverse effects from recommending a limited approach to a test of enforceability are brought into sharp focus, not only in the

VI. EXPECTATIONS AND THE LAW OF CONTRACT

Kincaid argues[90] that third parties have no contractual right to have their "expectations" of the benefit under the contract satisfied – as they are not a party to the agreement. While the argument is compelling in the strict legalistic bounds of contract law, it is devoid of a sense of how the world works outside the realm of contract law theory. It is an undeniable fact that the privity doctrine causes hardship, particularly in non-commercial situations (*Beswick v. Beswick*[91]). Thus, removed from contract law theory, policy must intervene and create rights and remedies for the third party in this particular context. However, such policy considerations cannot operate in the abstract, certainly in the context of third parties and contract law, rather it is submitted that policy must be informed by contractual norms. As Tarr notes,[92] Steyn L.J. in *First Energy (U.K.) Ltd. v. Hungarian International Bank Ltd.*[93] considered reasonable expectations and the law of contract, observing that: "[t]he theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principle moulding force of our law of contract".[94] While such a

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context of excluded third parties but particularly when considered in light of the LRC's recommendation as to the surrounding circumstances.

[90] Kincaid, "Privity and Private Justice in Contract" (1997) 12 *Journal of Contract Law* 41, 52-53.

[91] [1968] A.C. 58.

[92] Tarr, "Respecting Contractual Intentions: Balancing Consumer Expectations with the Sanctity of Contract in the Context of Standard Form Insurance Contracts" (2002) 7 *International Trade and Business Law Annual* 287, 287.

[93] [1993] 2 Lloyd's Rep 194 (C.A.).

[94] *First Energy (U.K.) Ltd. v. Hungarian International Bank Ltd.* [1993] 2 Lloyd's Rep 194 (C.A.), at p. 196 Interestingly Steyn L.J. further notes at p. 196 that while the theme running through contract law is to satisfy the expectations of the parties, it does not afford a *carte blanche* to the judge to depart from precedent. However Steyn L.J. qualifies this, such that, where the, *prima facie*, solution to a problem runs counter to the reasonable expectations of honest men then the criterion "… requires a rigorous re-examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness". While Steyn L.J. is clearly focused on mitigating unfairness, the

concept is indeed admirable, it should not solely inform the appraisal of the privity doctrine in terms of reform. It is submitted that such reforms should be bounded within the rationality of contract law norms insofar as this is possible. Thus, such policy must be considered in light of not only the contract, but also the contracting parties and their reasonable expectations.[95] Where policy disregards the reasonable expectations of one to satisfy another, the invariable result is an imbalance in the law.

A. Variation and Rescission

The LRC recommendation preventing variation and rescission of the contract upon assent by the third party is a direct, yet necessary, interference with the inherent freedom of the contracting parties to vary or rescind their contract under the norms of contract law. The contracting parties must be restricted from varying the contract if the third party right is to have substance, yet the fundamental issue is whether or not such restrictions are proportionate. Kincaid convincingly argues[96] that reliance may be used as a criterion for the enforcement of a promise and as a criterion for the imposition of an obligation outside the contract. In relation to the enforcement of a promise, reliance may be used to demonstrate an expectation by the promisee that the promisor will perform that which was the purpose of the bargain. However, reliance in this sense would become a mechanism for distinguishing legal from merely moral obligations. Thus, the degree of reliance is not important such that mere reliance would suffice to show the promisee relied on the promise, in expectation of performance by the promisor.

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scope of his *obiter* comment is somewhat uncertain. Where precedent dictates an unfair outcome, then, *prima facie*, Steyn L.J. is advocating an approach that reinterprets precedent, or indeed ignores it. In the context of third party beneficiary contracts such an approach should be considered with caution. The tripartite nature of such contracts ensures that delivering fairness to one party, (*e.g.* the third party) may cause significant injustice to the contracting parties, (*e.g.* in the case of variation and rescission).

[95] *E.g.* a norm of contract law is that such parties are free to vary and rescind their voluntary agreement as they see fit. In the case of damages, such contracting parties may reasonable expect that a third party may only be compensated for actual.

[96] Kincaid (above, note 90).

The important point being that the promisee, while relying on reliance to demonstrate expectation is doing so in contemplation of a promise between the parties – thus the promisee has a legitimate performance interest in contemplation of a promise. In relation to obligations outside the contract Kincaid further argues that: "… reliance shifts the risk of ill consequences away from the party relying. It would follow that the remedy, like the right, would depend upon reliance and would be designed to rectify the harm caused by the reliance. It would not be to realise the plaintiff's expectations".[97] Thus, where a third party has relied upon a contract to his detriment, it would be unconscionable not to permit the harm caused by such detrimental reliance (induced by the parties' creation of the contract) to be rectified. While it is arguable that the third party has an expectation benefit in fact, *e.g.* being able to enjoy the fruits of the benefit and shall not be disappointed, it may be argued with equal force that he/she does not have one in law.[98] However while the intention of the parties is to vary or rescind, the fact that the contract is for a third party beneficiary dictates that a consideration of the role of expectations becomes pertinent. Namely, to what extent the law of contract can incorporate and reasonably satisfy the tripartite expectations under the contract.

In this context, it is submitted that a distinction should be made between commercial and non-commercial beneficiaries. The aim of such a distinction is to realise the inherent difference between the expectations of both categories. In relation to both categories the beneficiary expects to receive the benefit under the contract. However, it may be asked whether the law should satisfy the expectations of both (and effectively remedy a factual disappointment rather than a legal loss) or should a greater emphasis be placed upon one category's expectation over the other. It is reasonable to assume the majority of non-commercial beneficiaries may be characterised by two inherent features. Firstly, that they are legally weak in the sense of their ability to mount an action in tort, thus they require a contractual basis for enforcement and secondly they fall into one of the many original

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[97] Kincaid (above, note 90).

[98] Per Clyde L.J. in *Alfred McAlpine Construction Ltd. v. Panatown Ltd.* [2001] 1 A.C. 518, at 534.

exceptions based upon familial relations.[99] In this context, the legislature has a moral obligation to reform the privity rule and satisfy the reasonable expectations of inherently weak and non-commercial beneficiaries. Thus, the LRC proposal should be applied to non-commercial beneficiaries in its current form. In so doing, the approach shall be similar to that of England and Wales.

However, commercial beneficiaries should not be able to bar variation or rescission on the basis of mere assent to the contract. Such a limitation on contracting parties is not only unnecessarily restrictive; it is based upon an expectation which is qualified. Namely, that the nature of commerce is such that any agreement is subject to variables which may or may not be foreseen. It is reasonable to assume commercial beneficiaries are cognisant of such a reality, thus while they may expect the benefit under the contract – this is not always certain. Indeed, unlike a non-commercial beneficiary, a commercial-beneficiary will generally need to rely on a clause in order to obtain the benefit therein, *e.g.* reliance upon an exemption clause. Whereas a non-commercial beneficiary generally does not need to take proscriptive action in order to obtain the benefit, *e.g.* a contract containing a benefit for a house extension for an elderly parent will generally not require the parent to do anything to get the benefit under the contract.[100]

Where the commercial-beneficiary has merely assented to the contract and has not materially altered their position upon the contract, it is an unjust and inequitable solution to restrict the contracting parties in this manner. Thus, in order to prevent variation and rescission the commercial beneficiary should be required to show detrimental reliance. The test proposed by the LRC, *viz*. assent to the contract, is too broad for commercial situations and unduly restricts the contracting parties, in particular in complex commercial situations. It is in this context that the

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[99] *E.g.* the legislature has intervened to ameliorate the harsh effect of the privity rule in domestic situations, see the Married Women's Status Act, 1957.

[100] It is conceivable that most commercial contracts shall only confer a benefit where the third party performs a positive obligation, *e.g.* stevedores will get the benefit of an exemption clause at the point they begin to unload goods from a ship. Thus they rely on the contract, materially altering their position and rescission or variation should be barred.

norms of contract law should apply and indeed in this instance, the bargain theory and freedom of contract should take precedence over the benefit (which has not been relied upon) intended for the third party.

B. Remedies

In the context of non-commercial beneficiaries, the available remedy must relate to their expectation interest under the contract. The ability to bar variation or rescission by virtue of their expectation interest and not have damages relative to such an interest is contradictory to the moral element dictating reform. Thus, the LRC proposal should be implemented in relation to non-commercial beneficiaries and satisfy their expectation of the benefit under the contract, by virtue of remedies which would be available to a promisee, *e.g.* damages (expectation based), specific performance. However, in relation to commercial-beneficiaries, a clear distinction may be made between the remedies which should be available where the contracting parties mutually vary or rescind the contract and where the promisor is in unilateral breach.

The defining feature of both the former and the latter is that the remedies should be informed by the intent of the contracting parties. Where the contracting parties' intent is to mutually rescind the contract, the remedy should be damages relative to any detrimental reliance upon the contract. Kincaid argues[101] that the rationale for the EWLC not utilising the detrimental reliance criterion is premised on the fact that any damages must in turn be restricted to detrimental loss. While this may be the case, there is no reason why it should operate in every instance. Where the promisor acts in unilateral breach, it is unjust to deny the third party, commercial or non-commercial, their expectation interest under the contract. Indeed, the weight of academic commentary supports such a conclusion.[102] As Lucke notes,[103] Parke B. in

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[101] Kincaid (above, note 90) at p. 52.

[102] See Mitchell, "Promise, Performance and Damages for Breach of Contract" (2003) 2 *Journal of Obligations and Remedies* 67; Orsborn, "Expectation Damages for Breach of Contract and the Principle of '*Restitutio In Integrum*'" (1992-1995) 7 *Auckland University Law Review* 305; Coote, "Contract Damages, Ruxley and the Performance Interest" (1997) 56 C.L.J. 537; Kar,

Robison v. Harman[104] made the seminal statement that: "… where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed".[105]

However, as Lucke notes,[106] the broad policy approach of Parke B. required clarifying and definition in the context of "day-to-day" application by the courts. A significant attempt at such clarification was made by Fuller and Perdue in 1936, whereby they argued that the purpose of damages was three fold for the plaintiff.[107] Namely, to have something of value under the contract returned, to have their detrimental reliance satisfied and their expectation interest satisfied, where necessary.[108] While Fuller and Perdue advocate the importance of the reliance interest over the expectation interest, invariably the reality is that

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"Contract Law and the Second-Person Standpoint: Why Efficiency Maximization Principles Can Neither Explain nor Justify the Expectation Damages Remedy" (2006-2007) 40 *Loyola of Los Angeles Law Review* 978; Slawson, "Why Expectation Damages for Breach of Contract Must be the Norm: A Refutation of the Fuller and Perdue 'Three Interests' Thesis" (2002-2003) 81 *Nebraska Law Review* 839; Deutch, "Reliance Damages Stemming from Breach of Contract: Further Reflections and the Israeli Experience" (1994) 99 *Commercial Law Journal* 446; Slawson, "The Role of Reliance in Contract Damages", (1990-1991) 76 *Cornell Law Review* 198; Lucke, "Two Types of Expectation Interest in Contract Damages" (1989) 12 *University of New South Wales Law Journal* 98; Hutchinson, "Back to Basics: Reliance Damages for Contract Revisited" (2004) 63 *South African Law Journal* 51.

[103] Lucke (previous note) at p. 99.

[104] (1848) 1 Exch. 850.

[105] *Robison v. Harman* (1848) 1 Exch. 850, at 855.

[106] Lucke (above, note 102). Furthermore, at p. 101 Lucke notes that the influence exerted by the article put forward by Fuller and Perdue has been great, not just in the United States, but throughout the common law world. Indeed, Slawson notes that the article has been the subject of a significant number of articles and is restated almost verbatim in the *Restatement (Second) of Contracts* (1979). Slawson "Why Expectation Damages for Breach of Contract Must be the Norm: A Refutation of the Fuller and Perdue 'Three Interests' Thesis" (2002-2003) 81 *Nebraska Law Review* 839, 841.

[107] Fuller and Perdue, "Reliance Interest in Contract" (1936-1937) 12 *Yale Law Journal* 52.

[108] Fuller and Perdue (above, note 107) at pp. 53-54.

the courts apply expectation damages where the promisor is in breach.[109]

As Slawson notes,[110] notwithstanding the significance of Fuller and Perdue's categorisation of damages:

> The expectation measure continues to be the norm, and even in the situations for which the contracts restatements have explicitly suggested a flexible approach … the courts continue to use the expectation measure.[111]

Thus, as a matter of policy, the law should recognise the ability of both commercial and non-commercial beneficiaries to have damages assessed for unilateral breach relative to their expectation interest. However, where the intentions of the contracting parties are to mutually rescind or vary the contract, the commercial beneficiary should be entitled to damages relative to their detrimental reliance only. While, *prima facie*, such an argument is undermined by granting such parties their expectation interest in relation to unilateral breach, it is submitted reliance based damages reflects a compromise position *vis*. the contracting parties. As Newman notes, in relation to unilateral breach:

> … promisors will have reneged on contractual obligations and suffered no penalty … thereby defeating that aspect of the contract entirely.[112]

In such instances, the third party beneficiary should be capable of redress, however where the contracting parties mutually rescind or vary the contract, the promisor does not retain the benefit from entering into the contract, *e.g.* the price paid by the promisee. While the commercial beneficiary fails to obtain the benefit, the mutual intentions of the contracting parties are respected and the beneficiary is compensated for any detrimental reliance upon the contract.

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[109] Fuller and Perdue (above, note 107) at pp. 53-54.
[110] Slawson (above, note 106).
[111] Slawson (above, note 106) at p. 842.
[112] Newman "Doctrine of Privity of Contract: The Common Law and the Contracts (Privity) Act 1982" (1980-1983) 4 *Auckland University Law Review* 339, 341.

CONCLUSION

Kelly observes[113] that the LRC reforms are necessary if Irish contract law is to become more commercially convenient and certain for both contracting parties and third parties alike. She states:

> It is to be hoped now that heed will be paid to the recommendations in the Report, and that legislation will be forthcoming. Contract law in Ireland will be more logical, certain, fair and commercially convenient, and more in line with the law in most other jurisdictions, as a result of any such move.[114]

While this may be the case, it is not without qualification, such that certainty and commercial convenience shall be created for those third parties that are conferred with an express benefit. However, third parties that are identified under a contract which purports to confer a benefit on them will have no redress before the law. In this context, the LRC's concern of exposing contracting parties to claims by incidental beneficiaries appears unfounded. In normal circumstances, where such third parties attempt to enforce a contract that is not for their benefit, it will be a necessary corollary that they are identified in the contract. Thus, many attempts to enforce the contract shall fail due to the likelihood that most contracts will not mention incidental beneficiaries. Where such parties are identified under the contract and the contract purports to benefit them, the contracting parties will be capable of rebutting such a presumption. However, under the LRC recommendations, contracting parties will not be capable of a rebuttal which would otherwise be considered a norm under the law of contract.

The recommendations of the LRC are a perfect example of how difficult the reform process can be in relation to the privity doctrine. Certainly, where it is considered that such reforms should be informed by creating a balance for the parties, the scope

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[113] Kelly, "Privity of Contract: Benefits of Reform" (2008) 1 J.S.I.J. 145.
[114] Kelly (previous note) at p. 170.

of such reforms comes into sharp focus. The scope of the LRC recommendations is that they fail to adequately balance the law in relation to third party enforcement rights. Thus rather than an inclusive approach to reform, the LRC have adopted a position which shall effectively marginalise not only a "non-expressly-conferred-beneficiary", but also frustrate the intentions of the contracting parties where they intend to confer a benefit, albeit ambiguous. It is therefore difficult to see how such reforms may be described as logical, fair or that they are in line with most other jurisdictions. Certainly, if the English and Welsh jurisdiction is considered, the New Zealand jurisdiction, that of New South Wales and Nova Scotia, the LRC reforms are in fact far more restrained than their latter counterparts. In the former jurisdictions, (in both reforming legislation and reform proposals) no distinction is made between third parties. The implications of limiting the surrounding circumstances which the judiciary may have regard to are clear – the contracting parties will be denied an effective means by which they may rebut the LRC's proposed presumption. Furthermore, the denial of discretion to the judiciary as to what may be taken into account may be a considerable factor in contracting parties opting out of any proposed legislation.

The LRC reform proposals are undoubtedly a step in the right direction; however it would be an unfortunate development in Irish contract law if they were adhered to without sufficient evaluation by the legislature. Such an evaluation would clearly demonstrate that the LRC reforms tilt the law in favour of "expressly-conferred-beneficiaries". However, the beneficiary that is fortunate enough to have their benefit expressly conferred is not the sole constituent of third party contractual negotiations. Thus, they should not be the sole consideration in any reform process. The LRC failure to address "non-expressly-conferred-beneficiaries" may have serious implications, should their recommendations become law. Notwithstanding their potential ability to clarify the ambiguity relating to the benefit and indeed prove they are intended beneficiary, such parties will have no right of action before the courts. Their arbitrary exclusion, on the basis of increased certainty, is an untenable factor in any reform of the privity doctrine.

The doctrine of privity has enamoured considerable support from those in favour and against everything the doctrine represents. In many instances, absolute abolition of the rule and disregarding the bargain theory and freedom of contract has been the main line of attack against the doctrine. Such a position is appreciable where the harsh consequences of the privity doctrine are considered. However, as Trebilcock notes, "[s]ome form of limit is needed to avoid obliterating the boundaries of purely private contractual relationships".[115] Thus, the creation of a balance between the competing rights and interests of all parties under the contract, both moral and legal, should be the underlying rationale for any reform process. It is submitted, the LRC should be the advocate of reasoned and balanced law reform, not the advocate of one constituent element of that process. Thus, an onus rests with the LRC to adequately consider both sides of the argument and provide redress for all parties, in all instances where this is possible. Notwithstanding Diplock L.J. describing the doctrine of privity as an "anachronistic shortcoming", the shortcoming has proven itself a formidable challenge in terms of reform. Thus, no reform of the privity rule will ever be capable of satisfying the concerns of every party, in every instance. However, where the reform process actively excludes certain third parties and places considerable and onerous restrictions on the contracting parties, the comprehensive nature of such reforms must be evaluated and scrutinised. The Irish legislature should be cognisant of such issues in undertaking any legislative reform of the privity doctrine.

[115] Trebilcock (above, note 27) at p. 291.