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REFORMING THE PRIVACY OF CONTRACT RULE IN NIGERIA*♦**Abstract**

By the doctrine of privity of contract, a contract cannot confer rights or impose obligations arising under it on any person except the parties to it. The non-conferral of rights or benefits on third parties is an aspect of the privity doctrine which is heavily criticised for its inability to give effect to the intention of contracting parties to allow a third party to enforce a contract for promises made in his or her favour. The academic and judicial criticisms of the privity doctrine need to be reviewed so as to make a strong case for the abolition of the common law doctrine of privity of contract in Nigeria. It will be seen that the adoption of statutory recognition of third party rights in a contract has the potential of making Nigeria's business environment globally attractive and competitive.

Keywords: *Privity of Contract, Privity Doctrine, Third Party, Reform, Promisor, Promisee.*

1. INTRODUCTION

The doctrine of privity of contract says that as a general rule, a contract cannot confer rights or impose obligations arising under it on any person except the parties to it. In other jurisdictions, the privity rule is heavily criticised for its inability to give effect to the intention of contracting parties to allow a third party to enforce a contract for promises made in his or her favour. The shortcomings of the privity doctrine and support for its reform have received much academic attention in the United Kingdom as well as Australia. In those countries, legislative interventions have helped to reform the privity rule to a large extent. Unfortunately, Nigeria still relies on the antiquated rules of privity developed under the common law and the provisions of the statutes of general application in force in England

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as at January 1, 1900 to guide issues of third party interest in contracts. This has made the Nigerian law to be behind other common law countries in contract law as it relates to third party interest.

It must be admitted that in order to mitigate the difficulty posed by the common law rule of privity, courts have developed exceptions to the rule. This article examines those exceptions and finds that they are fragile and inadequate in mitigating the hardship in the privity doctrine and in suiting into today's international contracts. For example, the exception created by the Australian High Court in *Trident General Insurance Co. Ltd. v. McNiece Bros Pty Ltd.*¹ has limitations in the uncertainty of the extent of its scope. The cases decided after *Trident* show that there are two views on this matter: first, the cases that limit the application of the exception to insurance contracts only² and second, cases that apply the exception to situations outside the context of insurance contracts.³ In the United Kingdom where we inherited the common law from, the inadequacies of the privity doctrine have been recognised and legislative intervention has followed.⁴

In view of these developments, this article further examines judicial decisions and finds that the hardship evident in other jurisdictions from the application of the privity rule is also clearly manifest in Nigeria. This article, therefore, makes a strong case for the replacement of the common law doctrine of privity of contract in Nigeria with statutory provisions that would, amongst other things, give recognition to third party rights in a contract in deserving cases in order to make her business environment globally attractive and competitive. The significance of this article is the need for reform which it proffers, that it should be possible for contracting parties to confer on third parties the right to enforce a benefit conferred on them (third parties) by the contract. This article believes that though

¹ (1988) 165 CLR 107.

² See for example, *Rail Corporation of New South Wales v Fluor Australia Pty. Ltd.* [2008] NSWSC 1348.

³ *Westina Corporation Pty. Ltd. v BCG Contracting Pty. Ltd.* [2008] WADC 183, District Court of Western Australia.

⁴ See M. Chen-Wishart, *Contract Law*, 3rd edn. (Oxford: Oxford University Press, 2010), 189-190.

there are exceptions to the privity doctrine which apply to Nigeria as common law rules, judicial reform is limited. Statutory interventions in other common law jurisdictions indicate that statutory recognition may be the best way forward. Statutory reform has the added benefit of internationalising Nigerian contract law particularly given the global recognition for third party rights. As globalised trade is key for Nigeria's economy, internationalising Nigerian contract law will make trading relationships easier and smoother. Therefore, concern of this article is limited to the conferral of rights or benefits on third parties in a contract and the basic philosophy behind this is the need to give effect to the intention of parties to the contract.

2. GENERAL PRINCIPLES OF PRIVACY OF CONTRACT

A contract or its performance can affect a third party.⁵ However, the doctrine of privity means that, as a general rule, a contract cannot confer rights or impose obligations arising under it on any person except the parties to it.⁶ The privity of contract doctrine dictates that only persons who are parties to a contract are entitled to take action to enforce it. A person who stands to gain a benefit from the contract (a third party beneficiary) is not entitled to take any enforcement action if he or she is denied the promised benefit. For example, A promises B, for consideration moving from B, to pay C ₦100. A and B are parties to the contract – privity to the contract – and can sue each other if there is a breach by the other. C is not a party to the contract and cannot sue A if A fails to pay C the sum of ₦100. The general principle of privity of contract is succinctly stated thus: “As a general principle a contract affects the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made

⁵ As when C guarantees a debt owed by A to B and A pays, thus releasing C who thereby indirectly gains a benefit. See G. H. Treitel, *The Law of Contract*, 11th edn. (London: Thomson, Sweet & Maxwell, 2003), p. 551.

⁶ Indeed, before *Donoghue v Stevenson* [1932] AC 562, the privity doctrine was seen as precluding actions in tort by third parties arising from negligence by a party to a contract in carrying it out: *Winterbottom v Wright* (1842) 10 M & W 109; 152 ER 402.

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for his benefit and purports to give him the right to sue, or to make him liable upon it.”⁷

A classic authority for the doctrine is *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge Ltd.*⁸ where Lord Haldane said:

My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesi tum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*.

It is generally agreed that the modern third party rule was conclusively established in 1861 in *Tweddle v. Atkinson*.⁹ In this case, in consideration of the intended marriage between his daughter and the plaintiff, Guy made a contract with the plaintiff’s father whereby each promised to pay the plaintiff a sum of money. Guy failed to pay and the plaintiff sued his executor. The action was dismissed on the ground that the plaintiff was a stranger to the contract. The authority of *Tweddle v. Atkinson* was soon generally acknowledged. In *Gandy v Gandy*, Bowen LJ said that, in spite of earlier cases to the contrary, *Tweddle v. Atkinson* had laid down “the true common law doctrine.”¹⁰

The decision in *Dunlop Pneumatic Tyre Co. Ltd. v Selfridge Ltd.*¹¹ further illustrates the doctrine of privity. In this case, Dunlop sold their tyres to a wholesaler, Dew & Co. In order to maintain the prices of their tyres, they included a term in their contract of sale requiring Dew to obtain from any trade customers to whom they resold the tyres an undertaking in writing that, in consideration for being allowed a discount off the list prices of the tyres, they would observe the list prices on any further resale to a consumer and would pay Dunlop £5 for every tyre sold in breach of that agreement. Dew sold a tyre to Selfridge and duly obtained the undertaking in

⁷ *Halsbury’s Laws of England*, 3rd Edition, p. 66, para. 110.

⁸ [1915] A.C. 847 at 853. See also *Coulls v. Bagot’s Executor & Trustee Co Ltd* (1967) 119 CLR 460, at 478, per Barwick CJ.

⁹ (1861) 1 B & S 393; 121 ER 762.

¹⁰ (1885) 30 Ch. D 57, 69.

¹¹ Above note 8.

favour of Dunlop from Selfridge. Selfridge sold the tyre in breach of this agreement and Dunlop sued for the £5. The action failed because Dunlop gave no consideration to Selfridge for the latter's promises to observe the list price and to pay Dunlop £5 if they failed to do so. It was held that no consideration moved from them to Selfridge, and that the contract was unenforceable by them. In clear terms, there was no privity of contract between them and the defendants, Selfridge.

Given Nigeria's importation of the common law rules, the principle firmly enunciated in *Tweddle v. Atkinson* found expression in a plethora of cases. For example, in *Negbenebor v. Negbenebor*,¹² the Federal Supreme Court reversed an order compelling the appellant to repay the loan obtained by his wife from the Lagos University Teaching Hospital with which she purchased a car because there was no privity of contract between him and the Lagos University Teaching Hospital, and in addition, the car was not a necessity for his wife.

There are two aspects of the common law doctrine of privity. These are: (i) No one except a party to a contract can acquire rights under it, and (ii) No one except a party can be subjected to liability under it.¹³ The justification for the second aspect is that a person should not, as a general rule, have contractual obligations imposed on him without his consent. The first principle is however difficult to justify.¹⁴ It is this first principle that this article criticises and calls for reforms on.

An illustration of how the second principle of privity of contract works is shown by the case of *UBA PLC & Anor. v. Jargaba*.¹⁵ In this case, the respondent was introduced to the second appellant, who was manager in one of the branches of the first appellant in Kaduna for the purpose of purchase of fertilizer in commercial quantities. The second appellant had assured the respondent that the first appellant had fertilizer for sale in commercial quantity. Based on the

¹² (1971) 1 All NLR 210.

¹³ Treitel, above note 5, p. 588.

¹⁴ L. Atsegbua, *Law of Contract* (Benin City: Justice Jeco Printing and Publishing Global, 2013), 228.

¹⁵ [2007] 11 NWLR (pt. 1045) 247.

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assurances, the respondent made payment in bank drafts to the tune of ₦12,690,000.00 for the truck loads of fertilizer to the first appellant on the instruction and directives of the second appellant. When the respondent went to the second appellant to evacuate his truck loads of fertilizer, he was directed by the second appellant to the warehouse/premises of a company called Barmani Holdings Company (Nig) Ltd in Kaduna, where the third party company told him that there was a price increment of ₦5000 per bag. The respondent conceded to pay the increment for the truck loads of the fertilizer despite his initial protest and reluctance. On evacuating the 9th truck load of fertilizer at Barmani Holdings (Nig) Ltd at a later date, the respondent was informed that there was no more fertilizer to evacuate. At this time, respondent's outstanding balance was ₦6,960,000.00 hence the respondent went back to the second appellant to demand a refund of the said balance. On this demand, the respondent was paid the sum of ₦5 million, leaving a balance of ₦1,960,000.00. In an action by the respondent, the appellants claimed that they were not responsible for this balance but Barmani Holdings (Nig) Ltd. The High Court, Court of Appeal and the Supreme Court arrived at the same decision that the doctrine of privity of contract is all about sanctity of contract between the parties to it. The doctrine will not apply to a non-party to the contract who may have unwittingly, been dragged into the contract with a view to making him a shield or scapegoat against the non-performance by one of the parties. In the instant case, Barmani Holdings (Nig) Ltd was a complete stranger to the contract between the appellants and the respondent and so, only the appellants were held liable for the unpaid balance of the money.

Also in *Cross Rivers State Water Board v. Nugen Consulting Engineering Ltd. & Ors.*,¹⁶ the first and second respondents entered into a contract with the appellant. The first and second respondents completed their contract, and various interim payment certificates totalling ₦3,604,736.69 were approved for payment but the appellant, the third and fourth respondents refused to pay the said amount. Consequently, the first and second respondents filed a suit against the appellant, the third and fourth respondents for the sum

¹⁶ [2006] 13 NWLR (pt. 998) 589.

of ₦3,604,736.68 being the total amount due to them from the appellant for the design and supervision of construction of water supply scheme in Calabar. In response, the appellant, the third and fourth respondents argued that the first and second respondents were aware that the contract sum was to be paid by a non-contracting third party, Hold Trade Co Ltd., on the recommendation of the appellant. Consequently, the appellant, the third and fourth respondents denied owing the first and second respondents, and argued that Hold Trade Co. Ltd. should have been sued instead by the claimants. The High Court and the Court of Appeal came to the same conclusion that Hold Trade Co. Ltd., not being a named party to the contract agreement but a total stranger to it, could not be subjected to any obligations under it.

No doubt, the doctrine of privity of contract has close relationship with the doctrine of consideration in contract. With very few exceptions, a contract is enforceable only where there is a consideration furnished by the promisee. In addition, privity of contract requires that the consideration must move from the promisee himself/herself in order to be entitled to enforce the contract. Thus, if A gives consideration to B, the promisor, A is a party (privity) to the contract and can enforce the promise.¹⁷ However, as Halsbury explained, the fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration flows does not entitle him to sue upon the contract.¹⁸

In *CAP PLC v Vital Investment Ltd.*, Salami JCA (as he then was) gave a further reason why the principle in *Tweedle* should be held sacrosanct thus:

The reason for the enunciation of the principle of privity of contract is based on *consensus ad idem*; it is only the contracting parties that know what their enforceable rights or obligations are and therefore a stranger should not be saddled with the responsibility.¹⁹

¹⁷R. Brownsword, *A Casebook on Contract*, 12thedn. (London: Thomson, Sweet & Maxwell, 2009), 289.

¹⁸Above note 7.

¹⁹[2006] 6 NWLR (pt. 976) 220 at 264.

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Consensus ad idem means that there was a meeting of the mind by both parties to the contract, which is based on the intention to be bound on certain commonly agreed terms. Knowledge is an unsatisfactory explanation for the privity doctrine because a third party may be aware of an obligation and yet not be bound unless there is a clear intention on his/her part to be so bound. Conversely, where there is a proper reform of the privity rule, a third party may be able to claim a benefit which he/she had no knowledge of as at the time of its creation. The case of *CAP PLC* itself illustrates the inadequacy of knowledge as a basis for the privity doctrine. In that case, the respondent supplied some chemicals to the appellant at the appellant's request. Under the terms of the contract, the appellant was to pay the full value of the goods to the respondent within 30 days of delivery. However, the appellant completed payment eight months after the stipulated time. The respondent claimed it sourced the funds for the execution of the contract from a finance company to the knowledge of the appellant, and under the terms of the finance facility, the respondent was liable to pay a penalty of ₦1, 135, 750.00 per month in the event of delay in repayment of the facility. Since it could not repay the loan due to the default of the appellant to pay within 30 days, the respondent claimed against the appellant for the penalty charges, loss of profit and loss of goodwill in the total sum of ₦15, 923, 250.00 with interest. The Court of Appeal in reversing the decision of the Lagos High Court held that where there is no privity, it cannot confer enforceable obligation on a person or persons who are not parties to the contract even where the contract is for its benefit. This meant that the appellant was not liable to pay the accrued sum from the loan facility entered into by the respondent. Harsh as the outcome of this decision may seem, it aptly demonstrates the second principle of privity that an obligation cannot be imposed on a party without his/her consent evidenced by a clear intention. The respondent suffered for leaving out a vital term in its contract agreement: penalty on the appellant for failure to pay within 30 days. In addition, obviously there was no intention or agreement between the respondent and the finance institution to bind the appellant, and if such an agreement had existed, the appellant would not have been bound by such an obligation in the

light of the second principle of privity which is a reasonable principle.

Lord Denning had attempted to put the records straight as to the correct position of the privity of contract rule years after its formulation in *Tweedle*. This was in *Drive Yourself Hire Co. (London) Ltd. v. Strutt* where His Lordship contended that:

It is often said to be a fundamental principle of our law that only a person who is a party to a contract can sue on it. I wish to assert, as distinctly as I can, that the common law in its original setting knew no such principle. Indeed, it said quite the contrary. For the 200 years before 1861 it was settled law that, if a promise in a simple contract was made expressly for the benefit of a third person in such circumstances that it was intended to be enforceable by him, then the common law would enforce the promise at his instance, although he was not a party to the contract.²⁰

Denning LJ cited several cases to support his view. In *Dutton v. Poole*,²¹ a son promised his father that, in return for his father not selling a wood, he would pay £1000 to his sister. The father refrained from selling the wood, but the son did not pay. It was held that the sister could sue, on the ground that the consideration and promise to the father may well have extended to her on account of the tie of blood between them. In *Marchington v. Vernon*,²² Buller J said that, independently of the rules prevailing in mercantile transactions,²³ if one person makes a promise to another for the benefit of a third, the third may maintain an action upon it. In *Carnegie v. Waugh*,²⁴ the tutors and curators of an infant, C, executed an agreement for a lease with A, for an annual rent to be paid to C. It was held that C could sue

²⁰ [1954] 1 QB 250 at 272.

²¹ (1678) 2 Lev 210; 83 ER 523. This decision was supported, obiter, by Lord Mansfield in *Martyn v Hind* (1776) 2 Cowp 437, at 443; 98 ER 1174, at 1177.

²² (1797) 1 Bos & P 101, n (c); 126 ER 801, n (c). This case was described as “but a loose note at Nisi Prius” by counsel in the interesting case of *Phillips v Bateman* (1812) 16 East 356, 371; 104 ER 1124, 1129, where A, in the face of a run on a banking house, promised to support the bank with £30,000, whereupon note holders stopped withdrawing their money. When the bank subsequently stopped paying out, A was held not liable to an action by individual holders of banknotes.

²³ The case itself involved a bill of exchange.

²⁴ (1823) 1 LJ (OS) KB 89.

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on the instrument, even though he was not a party to it. In spite of the respectable line of authorities cited by Lord Denning to support his compelling interpretation of the correct position of the privity doctrine, His Lordship's exposition was not followed by judges in subsequent cases and so continued a complex rule of law in contract with its attendant hardship.

3. EXCEPTIONS TO THE DOCTRINE OF PRIVACY OF CONTRACT

There are a number of exceptions to the privity of contract rule.²⁵ The first sets of exceptions are the general law exceptions which include:

3.1. Agency

Agency is the relationship which exists between two persons, one of whom (the principal) expressly or impliedly consents that the other (the agent) should act on his behalf, and the other of whom (the agent) similarly consents so to act or so acts.²⁶ One consequence of this relationship is that the principal acquires rights (and liabilities) under contracts made by the agent on his behalf with third parties. Therefore, under an agency, a contract entered into with a third party by the agent when exercising his authority is enforceable both by and against the principal.²⁷ The limitation in this exception is that contracts that do not include principal/agent relationship are not covered.

3.2. Covenants Relating to Land

The law allows certain covenants (whether positive or restrictive) to run with land so as to benefit (or burden) people other than the original contracting parties. The relevant covenant may relate to freehold land or leasehold land. The law relating to the running of covenants is an illustration of where, for commercial and ethical reasons, the privity of contract doctrine has been departed from

²⁵ I. E. Sagay, *Nigerian Law of Contract*, 2nd edn. (Ibadan: Spectrum Books, 2000), 495-517.

²⁶ F. M. B. Reynolds (ed.), *Bowstead and Reynolds on Agency*, 16th edn. (London: Sweet & Maxwell, 1996) paras. 1-001; M. P. Furmston (ed.), *Cheshire, Fifoot and Furmston's Law of Contract*, 13th edn., (London: Butterworths, 1996), 483.

²⁷ *UBA PLC v Ogundokun* [2009] 6 NWLR (pt. 1138) 450.

through the development of a separate body of “non-contractual” principles (here the principles being categorised as belonging to the law of real property). The doctrine of privity created difficulty when land is sold which has a covenant running with it. In the case of *Tulk v. Moxhay*,²⁸ equity created an exception to the privity doctrine.

3.3. Assignment of a Chose in Action

An assignment is the act of transferring to another all or part of one’s property, interest or rights.²⁹ The owner of a contractual right can transfer his interest to a third party, and the third party can enforce the right against the debtor or obligation. Except when personal considerations are at its foundation, the benefit of a contract may be assigned (that is, transferred) to a third party.³⁰ The assignment is effected through a contract between the promisee under the main contract (that is, the assignor) and the third party (that is, the assignee). In addition to assignment by an act of the parties, there exists assignment by operation of law. Assignment may deprive promisors of their chosen contracting party, although safeguards are imposed to protect promisors.

3.4. Trust and Privity of Contract

Trust is a concept created by the courts of equity. A trust arises where property is handed over to ‘B’ (trustee) by ‘A’ to hold for the benefit of ‘C’ (beneficiary). The concept of trust is an exception to the privity of contract rule. The beneficiary who is not a party to the contract, but for whose benefit the trusteeship was created, can sue the trustee.³¹

3.5. Estoppel

Following the decision in *Waltons Stores (Interstate) Ltd. v Maher*,³² a third party may be able to seek relief against a promisor on the basis

²⁸ (1848) 2 PH 774.

²⁹ Black’s Law Dictionary, 9th Edition, 2009.

³⁰ M. P. Furmston, *op. cit.*

³¹ See *Southern Water Authority v Carey* [1985] 2 All ER 1077, 1083 and *Norwich City Council v Harvey* [1989] 1 WLR 828.

³² (1988) 164 CLR 387.

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of promissory estoppel principles. To succeed the third party would need to establish the elements of promissory estoppel.³³

The second sets of exceptions are the statutory exceptions. Those which exist in Nigeria include:

3.6. Insurance Contracts

Contracts relating to insurance are exceptions to the privity of contract rule. Section 11 of the UK's *Married Women's Property Act 1882* provides that:

Where a man insures his life for the benefit of his wife or children or where a woman insures her life for the benefit of her husband or children, the policy shall create a trust in favour of the objects therein named.

This statute is of general application in Nigeria, except in the Western States (including Edo and Delta States). This is because in 1958, the Married Women's Property Law was passed in the Western States. According to Sagay,³⁴ section 11 of the 1882 was not included in the 1958 Law. Consequently, the common law and equity apply when the rights of spouses or children who are beneficiary under a life insurance policy come up for determination in the former Western States. Under section 11 of the 1882 Act, a spouse or children of an insured can bring an action to claim the benefit of the policy against the insurance company, even though they are not parties to the insurance contract. By section 11 of this provision, a policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or of any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or of any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the

³³ See *Trident General Insurance Co Ltd v McNiece Bros Pty. Ltd.*, above note 1, at 145, per Deane J.

³⁴ I. E. Sagay, above note 25, p.504.

trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts.³⁵

Another exception to the privity of contract rule is to be found in section 6(3) of the *Motor Vehicles (Third Party) Insurance Act*.³⁶ It provides that:

Notwithstanding anything contained in any written law, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of these persons or classes of persons.

A third party can sue an insurance company, even though he is not a party to the contract between the insurance company and the insured.

3.7. Property and Conveyancing Law

Under section 81(1) of the *Property and Conveyancing Law*, (Western Nigeria),³⁷ it is provided as follows:

A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

According to Sagay,³⁸ the effect of the above section would with one stroke sweep away the doctrine of privity, and would entitle any third party named in a contract to bring an action to enforce any provision relating to any type of property made for his benefit.

However, in *Beswick v. Beswick*,³⁹ the House of Lords placed a restriction on the interpretation of section 81(1). In this case, by an

³⁵ This provision can also be found in s. 272(1) *Contract Law*, Cap. 32, Revised Laws of Anambra State, 1991; and, s. 280(1) *Contract Law*, Cap. 26. Revised Laws of Enugu State, 2004.

³⁶ Cap. M22, LFN, 2004.

³⁷ This section was copied from section 56 of the English Law of Property Act, 1925. See Sagay, above note 25.

³⁸ *Ibid*, at p. 513.

³⁹ [1965] A.C. 58.

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agreement in writing made in March 1962, P.B. then aged over 70 and in poor health, agreed with his nephew, the defendant, that he would transfer to the nephew the goodwill and trade utensils of his business in consideration of the nephew's employing him as consultant at £6 10s. a week for the rest of his life, and by clause 2 the nephew agreed for the same consideration to pay to P.B.'s wife after his death an annuity charged on the business at the rate of £5 a week for life. P.B.'s wife was not a party to the agreement. The nephew took over the business and in November, 1963 P.B. died. The nephew paid one sum of £5 to the widow, then aged 74 and in poor health, but refused to pay any further sum. The widow, having taken out letters of administration to her late husband's estate, brought an action against his nephew in her capacity as administratrix and also in her personal capacity asking *inter alia* for specific performance of the agreement. It was held that:

- (i) The widow, as administratrix of a party to the contract, was entitled to an order for specific performance of the promise made by the nephew and was not limited to recovering merely nominal damages on the basis of the loss of the estate.
- (ii) The widow was not entitled to enforce the obligation in her personal capacity, since section 56 of the *Law of Property Act 1925* (similar to section 81(1) of the *Property and Conveyancing Law* of Western Nigeria) was a consolidation Act and did not effect a fundamental change in the law so as to allow a third party, not a party to a contract, to enforce it. In his own contribution, Lord Upjohn said:

I find it difficult to dissent from the proposition that section 56 should be limited in its application to real property, but equally difficult to agree with it. It may be that parliament inadvertently altered the law by abrogating the old common law rule in respect of contracts affecting personal property as well as real property, but it never intended to alter the fundamental rule laid down in *Tweddle v. Atkinson*.

The decision in *Beswick v. Beswick* is not binding on courts in States in former Western Nigeria. We do not share the view of the House of Lords in *Beswick v. Beswick*. The decision is irreconcilable with section 81(1) of the *Property and Conveyancing Law*. The section is clear enough. It applies to interest in land or other property, or the

benefit of any condition, right of entry, covenant or agreement over or respecting land or other property. Commenting on *Beswick v. Beswick*, Cheshire, *et. al*, stated that:

Their Lordships admitted that, if section 56(1) (similar to section 81(1) was to be literally construed, its language was wide enough to support the conclusions of Lord Denning and Danckwerts, LJ (Court of Appeal Judgment in *Beswick v. Beswick*). But they were reluctant to believe that the legislature, in an Act devoted to real property, had inadvertently and irrelevantly revolutionised the law of contract. The avowed purpose of the 1925 Act, according to its title, was to consolidate the enactment relating to conveyance and the law of property in England and Wales. It must therefore be presumed that the legislature designed no drastic changes in such enactments and the presumption was to be rebutted only by plain words.⁴⁰

Cheshire, *et al*, had earlier observed that:

Beswick v Beswick appears to be a sanguinary defeat for those who would hope to see the doctrine of privity curbed, if not abolished. We believe that the intention of section 81(1) of the *Property and Conveyancing Law*, was clear and definite. This section abolishes the doctrine of privity of contract rule. This common law rule has lost its usefulness. It serves no useful purpose and its continued use will cause injustice to third parties for whose benefit many contracts were entered into.⁴¹

The general law exceptions are inadequate as evident from judicial decisions. While the statutory exceptions are commendable, the statutes considered are specifically meant for contracts of insurance. In fact, in Anambra and Enugu States, it is provided expressly that: "No one may be entitled to or be bound by the terms of a contract unless he is party thereto."⁴² The only noticeable exception in the

⁴⁰ M. P. Furmston, above note 26.

⁴¹ *Ibid*, p. 471.

⁴² Sections 266 and 274 of Contract Laws of Anambra and Enugu States respectively. Sections 173 and 179 of both the Anambra and Enugu States Contract Laws further require that a third party furnishes consideration before he/she can benefit from a contract.

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contract laws of Anambra and Enugu States is the conferral of benefits on an undisclosed principal to a contract entered into by his/her agent who acted within the scope of authority of the agency agreement.⁴³ This exception has limitation as it is useful only in contracts involving agency relationship. Where a third party is not an undisclosed principal, the exception will not apply to confer a third party benefit.

Regrettably too, a statute of general application as old as 1882 constitutes one of the laws governing third party interest in a life insurance policy in Nigeria: this is obviously an outdated statute. The *Property and Conveyancing Law* which is the only statute with broad application is restricted to States in the former Western Region. In modern highly technical, complicated and trans-boundary contractual agreements, for example in the construction industry, the extractive industry and perhaps, in procurement contracts, the general law exceptions and the modicum of statutory exceptions are grossly inadequate. This necessitates a reform of the current law on privity of contract in Nigeria.

4. THE NEED FOR REFORM OF THE PRIVACY RULE IN NIGERIA

The need to reform privity of contract rule in Nigeria may be the same as the pressure that led to the reform of the common law privity rule in the United Kingdom. In the UK, the need arose from two principal sources: one was simple third-party beneficiary cases of the kind represented by *Beswick v Beswick* (same as Nigeria at least in States not bound by the Property and Conveyancing Law); the other was the kind of case generated by complex chains or networks of commercial contracts, where one party (whether the client, main contractor, or downstream sub-contractor) sought to rely on provisions in a contract in the chain or network to which it was not directly a party. Stated formally, one puzzle arises where A is in contract with B, B is in contract with C, and A now seeks to recover financial losses by suing C. If A's claim is barred in contract (because of lack of privity), there is tension if the same claim is recognised as a matter of tort law. Inadequacies and inconsistencies

⁴³ Ss. 267 and 685, *ibid.*

of this nature in the privity doctrine necessitate the call for reform in the privity rule.

Clearly, the differences in statutory exceptions applicable to the privity rule between States in the former Western Nigeria and the rest of the country is a major concern with regard to the recognition of third party rights in a contract. This observation brings to the fore the question whether Nigeria's contract laws need to be harmonised with regard to the recognition of third party rights? The submission made in this sub-head addresses this specific issue and submits firstly that the common law privity doctrine should be abolished and that third party rights should be statutorily recognised. This is so because by its current nature, a contract is an agreement enforceable only by and against the parties to it. Where however necessary reforms as canvassed here permit, a contract will empower a third party to enforce a right or benefit conferred on him/her going by the *intention* or *agreement* of the main parties to it. Secondly, the present statutory laws providing for third party rights in States in Western Nigeria, Edo and Delta States need to be harmonised in line with a new national policy on third party rights to be adopted by all the states of the Federation. Such a development will lead to uniformity in view of the trans-boundary nature of modern contracts with the use of information technology.

The privity rule has been heavily criticised for its inability to give effect to the intention of contracting parties to allow a third party to enforce a contract for promises made in his or her favour. As earlier mentioned, the shortcomings of the privity doctrine and support for its reform have received much academic attention in the United Kingdom⁴⁴ as well as in Australia.⁴⁵ Although the Australian High

⁴⁴ See for e.g., R. Flannigan, "The End of an Era (Error)" (1987) Vol. 103 No. 4 (*Law Quarterly Review*) 564-593; J. N. Adams, D. Beyleveld and R. Brownsword, "Privity of Contract - the Benefits and the Burdens of Law Reform" (1997) Vol. 60 (*Modern Law Review*) 238-264; J. Beatson, "Reforming the Law of Contracts for the Benefit of Third Parties: A Second Bite at the Cherry" (1992) Vol. 45 No. 2 (*Current Legal Problems*) 1-28; A. L. Corbin, "Contracts for the Benefit of Third Persons" (1930) Vol. 46 (*Law Quarterly Review*) 12-45; F. Dowrick, "A *Jus Quaesitum Tertio* By Way of Contract in English Law" (1956) Vol. 19 (*Modern Law Review*) 374-393; M. Furmston, "Return to *Dunlop v. Selfridge*?" (1960) Vol. 23 (*Modern Law Review*) 373-398; J. Wylie, "Contracts and Third Parties" (1966) Vol. 17 (*Northern Ireland Legal Quarterly*) 351; B. Markesinis, "An Expanding

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Court decision in *Trident General Insurance Co. Ltd. v McNiece Bros. Pty. Ltd.* created a new exception (the ‘*Trident* exception’),⁴⁶ there are limitations in the uncertainty on the extent of its scope. The cases decided after *Trident* show that there are two views on this matter; first the cases that limit the application of the exception to insurance contracts only and secondly, cases that apply the exception to situations outside the context of insurance contracts.⁴⁷ However, cases necessitating the consideration of the *Trident* exception are yet to arise in Nigeria, and so, the utility of this exception to Nigeria is yet unknown.

The hardship inherent in the privity rule in Nigeria is most illustrated by the Supreme Court case of *Ikpeazu v. ACB Ltd.*⁴⁸ In that case, E was indebted to the respondent and could not repay the loan. There was a deed agreement between E and the appellant who

Tort Law – The Price of a Rigid Contract Law” (1987) Vol. 103 (*Law Quarterly Review*) 354; F. Reynolds, “Privity of Contract, the Boundaries of Categories and the Limits of the Judicial Function” (1989) Vol. 105 (*Law Quarterly Review*)1; P. Kincaid, “Third parties : Rationalising a Right to Sue” (1989) Vol. 48 No. 2 (*Cambridge Law Journal*) 243-270; J. Adams & R. Brownsword, “Privity and the concept of a network contract” (1990) Vol. 10 No. 1 (*Legal Studies*)12; D. Beyleveld & R. Brownsword, “Privity, Transitivity and Rationality” (1991) Vol. 54 (*Modern Law Review*)48; H. Beale, “Privity of Contract: Judicial and Legislative Reform” (1995) Vol. 9 (*Journal of Contract Law*)103-124; J. Wilson, “A Flexible Contract of Carriage – The Third Dimension?” (1996) Vol. 27 No. 2 (*Lloyd’s Maritime & Commercial Law Quarterly*) 187-201; and S. Whitaker, “Privity of Contract and the Tort of Negligence: Future Directions” (1996) Vol. 16 (*Oxford Journal of Legal Studies*) 191-230.

⁴⁵ M. Dean, “Removing a Blot on the Landscape – The Reform of the Doctrine of Privity” (2000) Vol. 4 No. 1 (*Journal of Business Law*) 143–152; R. E. Forbes, “Practical Approaches to Privity of Contract Problems”(2002) Vol. 37 No. 3 (*Canadian Business Law Journal*) 357-387; C. Macmillan, “Privity and the Third Party Beneficiary: ‘The Monstrous Proposition’”(1994) (*Lloyd’s Maritime & Commercial Law Quarterly*) 22–29; J. D. McCamus, “Loosening the Privity Fetters: Should Common Law of Canada Recognise Contracts for the Benefit of Third Parties?”(2001) Vol. 35 No. 2 (*Canadian Business Law Journal*) 173-215; C. Kelly, “Privity of Contract – The Benefits of Reform” (2008) Vol. 8 No. 1 (*Judicial Studies Institute Journal*) pp. 145-170.

⁴⁶ Above note 1.

⁴⁷ See for example *Rail Corporation of New South Wales v. Fluor Australia Pty Ltd* [2008] NSWSC 1348; *Westina Corporation Pty. Ltd. v. BCG Contracting Pty. Ltd.*, *supra*.

⁴⁸ (1965) N.M.L.R. 374.

incidentally was the Solicitor to the respondent. The agreement was to the effect that the appellant should be running E's business with a view to paying proceeds after deduction of running cost to the respondent bank until the debt was finally liquidated. By the terms of the agreement, all the powers of E as Managing Director of the business, including the collection and disbursement of revenue and the control of staff and debt were relinquished to the appellant. A copy of the agreement was deposited with the respondent bank by the appellant. However, the appellant operated the business for some time without paying the debt to the respondent and handed over the business back to E. In an action by the respondent bank to claim the debt from him and E, the appellant denied liability of any kind with regard to the debt but lost at the High Court. He alone appealed the High Court judgment. Relying on *Tweedle and Dunlop Pneumatic*, the Supreme Court held that the bank was not privy to the contract between the appellant and E, their customer debtor, and therefore could not benefit under it. The appellant's appeal succeeded. Clearly, the intention of the agreement between E and the solicitor was the management of the business of E by a party other than E in order to get the funds needed for the repayment of his debt to the respondent bank. By that agreement between E and the solicitor, a benefit had been created in favour of the respondent bank which was brought to its knowledge, and so should be enforceable by it. Unfortunately, the common law rule of privity prevented the bank from enforcing its right and benefit under that agreement.

In another case, the Supreme Court reiterated its earlier position.⁴⁹ In that case, the second appellant took a lease of certain industrial property from the first appellant with a covenant not to sublease or assign without the written consent of the lessor which consent should not be unreasonably withheld. The second appellant subleased the property to the respondent. The first appellant withheld assent and thereafter moved into the premises and pulled down the building being erected by the respondent on the site. The respondent brought an action against the appellants for specific performance in which the Court held that only parties to an

⁴⁹ *LSDPC & Anor. v. Nigerian Land & Sea Foods Ltd. & Anor.* [1992] 6 SCNJ (Pt. 11) 2243; [1992] 5 NWLR (Pt. 244) 653.

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agreement can enforce it. The Court's opinion was that as there was no privity of contract between the first appellant and the respondent as the contract to sublet was between the second appellant and the respondent, subject to the consent of the first appellant, an order for specific performance could not be decreed against the second appellant. As it was in *Ikpeazu*, a benefit was created for the respondent which it properly took opportunity of. The failure to comply with consent requirement is that of the second appellant and not the respondent's. The nullification of the sublease agreement worked hardship on the respondent. Instances like this bring to the fore the shortcomings of the privity of contract rule in today's modern business practices where chain contract is fast becoming an everyday practice.

Some cases may appear quite confusing, but a proper analysis will reveal their nature. In *Attorney General of the Federation & Anor. v. AIC Ltd.*,⁵⁰ the Supreme Court had an opportunity to consider one of such cases. Here, the respondent (AIC Ltd) was appointed through an oral agreement as the sole representative of an Italian company engaged in the manufacture and sale of Aircrafts. The agreement was that the respondent would receive 10 per cent commission on any sale in Nigeria. The respondent informed the Italian company that it had secured a contract with the Ministry of Defence and asked for the 10 per cent commission. The Italian company denied the existence of any agreement. The respondent claimed against the Italian company the payment of the said commission and also claimed against the Ministry of Defence and its agents an injunction against any payment of the contract sum to the Italian company without the Italian company agreeing to pay the 10 per cent commission to the respondents. The Supreme Court refused to uphold the claims of the respondent. In addition to the position of the Ministry of Defence as a total stranger to the exclusive representation agreement between the respondent and the Italian company, two other factors were fatal to the claims of the respondent company. Firstly, this was an oral agreement which existence was denied by the Italian company. Secondly, there was no agreement between contracting parties that created a benefit in

⁵⁰ [2000] 10 NWLR (Pt. 675) 293.

favour of the respondent as a third party; rather, the respondent sought to enforce its parole contract with the Italian Company in a way that that would have imposed an obligation on a third party – the Ministry of Defence. Placing an injunction on the Ministry of Defence would have worked against freedom of contract law and allowed needless meddlesomeness by a third party. Such interference is not what is being canvassed here by way of reform. In the light of this explanation, the *AIC Ltd* decision is supportable.

In the same vein, a third party cannot come in to create a benefit for himself/herself outside the intention of the contracting parties in the main contract. The conferral of benefit with the corresponding power to sue should exist where contracting parties by their *intention* create such a benefit. This was not the case in *Onamade & Anor. v. ACB Ltd.*⁵¹ In this case, the first appellant and the second appellant entered into an agreement whereby the latter undertook to pay the balance of the former's mortgage debt to the respondent bank. The respondent however refused to sign the deed of release prepared by the second appellant and further refused to release the title documents of the mortgage property to the second appellant even after receiving the said balance sum from him via a cheque. The Supreme Court rightly held that there was no privity of contract between the second appellant and the respondent. This judgement is supportable on the ground that there was no agreement between the first appellant and the respondent to transfer the title documents to the second respondent.⁵² There was already an existing contract and so the intervention of the second appellant (as a third party) was to willingly undertake the obligation of the first appellant as pertaining to the indebtedness and so could not have created a benefit for himself in that process in the form of take-over of the mortgaged property. Apart from these obvious cases which are clearly

⁵¹[1997] 1 NWLR (Pt.480) 123.

⁵² The decision of the Court was partly premised on the provisions of the Land Use Act. The separate agreement entered into by the first and second appellants purported to create a new mortgage in favour of the 2nd appellant or otherwise to transfer the rights and benefits under the relevant mortgage from the respondent to the 2nd appellant without the consent of the Governor of Oyo State first had and obtained: ss. 22 & 26.

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supportable on principle, the current law as represented by *Ikpeazu* and *LSPDC* is no longer useful.

In 1995, the UK Court of Appeal in *Darlington Borough Council v. Wiltshier Northern Ltd.* in criticising the present law said:

The case for recognising a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. *But there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties.* Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.⁵³

Other justices had similarly criticised the rule for its deficiencies. In *Beswick v. Beswick*,⁵⁴ Lord Reid cited with approval the U.K. Law Revision Committee's proposals that when a contract by its express terms purports to confer a benefit directly on a third party, it should be enforceable by the third party in its own name. While implying that the way forward was by legislation, he stated that the House of Lords might find it necessary to deal with the matter if there was a further long period of Parliamentary procrastination. In *Woodar Investment Development Ltd. v. Wimpey Construction UK Ltd.*,⁵⁵ Lord Salmon (dissenting) regarded the law concerning damages for loss suffered by third parties as most unsatisfactory and hoped that, unless it were altered by statute, the House of Lords would reconsider it.⁵⁶ Lord Scarman expressed "regret that [the] House has not yet found the opportunity to reconsider the two rules which effectually prevent [the promisee] or [the third party] recovering that which [the promisor], for value, has agreed to provide."⁵⁷ He reminded the House that twelve years had passed since Lord Reid in *Beswick v. Beswick* had called for a reconsideration of the rule, and hoped that all the cases which "stand guard over this unjust rule"

⁵³ [1995] 1 WLR 68, at 76, Steyn LJ. Emphasis added.

⁵⁴ [1968] AC 58, at 72.

⁵⁵ [1980] 1 WLR 277.

⁵⁶ *Ibid.*, at 291.

⁵⁷ *Ibid.*, at 300.

might be reviewed.⁵⁸ Lord Scarman concluded his judgment with an unequivocal call for reform:

[T]he crude proposition...that the state of English law is such that neither [the third party] for whom the benefit was intended nor [the promisee] who contracted for it can recover it, if the contract is terminated by [the promisor's] refusal to perform, calls for review ... now, not forty years on.⁵⁹

In *Forster v. Silvermere Golf and Equestrian Centre Ltd.*,⁶⁰ Dillon J referred to the effects of *Woodar* in the case before him as being a blot on the law and thoroughly unjust. In *Swain v. Law Society*,⁶¹ Lord Diplock referred to the general non-recognition of third party rights as “an anachronistic shortcoming that has for many years been regarded as a reproach to English private law.” Later, Lord Goff and Steyn LJ added their influential voices to the criticisms of the third party rule. In *The Pioneer Container*,⁶² Lord Goff called into question the future of the rule, and in *White v. Jones*,⁶³ his Lordship said:

[O]ur law of contract is widely seen as deficient in the sense that it is perceived to be hampered by the presence of an unnecessary doctrine of consideration and (through a strict doctrine of privity of contract) stunted through a failure to recognise a *jus quaesitum tertio*.⁶⁴

Steyn LJ's dicta in *Darlington Borough Council v. Wiltshier Northern Ltd.*⁶⁵ are particularly notable for their forthright treatment of the third party rule.

⁵⁸ At p. 300. Lord Keith, at pp. 297-298, also associated himself with Lord Scarman's view.

⁵⁹ [1980] 1 WLR 277, at 301.

⁶⁰ [1981] 125 SJ 397.

⁶¹ [1983] 1 AC 598, at 611.

⁶² [1994] 2 AC 324, at 335.

⁶³ [1995] 2 AC 207.

⁶⁴ [1995] 2 AC 207, at 262-263.

⁶⁵ Above note 1. Steyn LJ later went on to say, after referring to the UK Consultation Paper, that there is a respectable argument that reform is best achieved by the courts working out sensible solutions on a case-by-case basis. “But that requires the door to be opened by the House of Lords reviewing the major cases which are thought to have entrenched the rule of privity of contract. Unfortunately, there will be few opportunities for the House of Lords to do so:” at p. 78.

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Of the criticisms of the third party rule made by the judiciary in common law jurisdictions, the judgments in the High Court of Australia in *Trident General Insurance Co Ltd v. McNiece Bros. Pty. Ltd.*⁶⁶ are particularly clear and rigorous. A company which operated a limestone crushing plant took out a liability insurance policy with the appellants (Trident), which was expressed to cover all contractors at the plant. The respondent contractor (McNiece) fell within the terms of the policy, but when it sought indemnification for damages payable to one of its sub-contractors, the appellant insurance company refused to indemnify the respondent on the grounds that the latter was not a party to the contract of insurance. The respondent succeeded before the High Court of Australia,⁶⁷ in a decision which effectively reversed the decision of the legislature not to make the Insurance Contracts Act 1984 retrospective. In doing so, three of the Justices mounted an attack on the doctrine of privity. Mason CJ and Wilson J were of the opinion that “[t]here is much substance in the criticisms directed at the traditional common law rules [of privity]...,”⁶⁸ and they accepted that reform was needed in the area under consideration, as it was an example of “common law rules which operate unsatisfactorily and unjustly.”⁶⁹ Toohey J was even more vociferous, stating that the rule is “based on shaky foundations and, in its widest form, lacks support both in logic or jurisprudence”.⁷⁰ He was of the opinion that,

...when a rule of the common law harks back no further than the middle of the last century, when it has been the subject of constant criticism and when, in its widest form, it lacks a sound foundation in jurisprudence and logic and further, when that rule has been so affected by exceptions or qualifications, I see nothing inimical to

⁶⁶ *Supra*. In *Olsson v. Dyson* (1969) 120 CLR 365, 392, Windeyer J. in the High Court of Australia spoke of “...the rigidity of the obstacles the common law doctrine of privity of contract places in the way of justice to third parties.”

⁶⁷ Brennan and Dawson JJ dissenting.

⁶⁸ *Supra*, at 118.

⁶⁹ *Ibid*, at 123.

⁷⁰ *Ibid*, at 168.

principled development in this Court now declaring the law to be otherwise...⁷¹

In the event, Mason CJ and Toohey and Wilson JJ decided the case on the basis of a specific abrogation of the third party rule in relation to insurance contracts. Two reasons were advanced. First, it would be unjust not to give effect to the contracting parties' intentions. Secondly, it was likely that third party beneficiaries would rely on an insurance policy covering them and not insure separately. Deane and Gaudron JJ favoured the use of a trust and the principle of unjust enrichment⁷² respectively, in order to avoid the injustice of the operation of the third party rule, and even the two dissenting judges, Brennan and Dawson JJ, based their dissent on maintaining coherent and gradual development of the common law rather than justifying their decision on the appropriateness of the rule itself.

The recognition of the inadequacies of the privity doctrine in the United Kingdom led to legislative intervention⁷³ which resulted in the passage of the Contract (Third Parties) Act 1999. The criticisms and justifications for reform have been well summarised thus:

(1) the privity rule defeats the intention of contracting parties by preventing third parties from suing when this was intended by them, (2) the rule is unjust to third parties in defeating their expectation and reliance interests, (3) the rule creates difficulties in commercial life, (4) the rule creates a 'legal black hole' into which contractual rights and liabilities simply disappear, (5) exceptions to the privity rule are piecemeal, complex and uncertain and (6) the rule has been abrogated throughout much of the common law world including the United States, New Zealand and parts of

⁷¹ *Ibid*, at 170-171. The approach of Toohey J can be contrasted with that of Iacobucci J. Iacobucci J. (with whom L'Heureux-Dube, Sopinka and Cory JJ concurred) in *London Drugs Ltd v. Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261, at 340-370, spoke of the need for reform of the privity rule and, while he did not think it appropriate for the courts to embark on major reform or abolition, he recognised an obligation to ameliorate injustice by the incremental relaxation of the rule in limited circumstances.

⁷² This is a novel and controversial approach in that the principle against unjust enrichment is being used to protect expectations rather than to reverse benefits acquired at the expense of the plaintiff: see K.Soh, "Privity of Contract and Restitution" (1989) 105 (*Law Quarterly Review*) 4.

⁷³ M. Chen-Wishart, above note 4.

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Australia. Moreover, the legal systems of most of the member states of the European Union recognise and enforce the rights of third parties under contracts.⁷⁴

It is useful to cite the view of Beale which may be considered as a fair review of the UK law of 1999 as follows:

While it is perhaps too soon to claim that the Contracts (Rights of Third Parties) Act 1999 has been an outstanding success, in that as yet its use seems to be limited, I think we can say that it has certainly not been a failure. Rather I regard it as useful but still underused.⁷⁵

Similarly, the need for statutory modification of the privity doctrine towards recognising third party rights to benefits created in their favour has already been acted upon and initiated in three Australian states of Western Australia,⁷⁶ Queensland⁷⁷ and the Northern Territory.⁷⁸ It is noteworthy that the reform of the privity rule in the UK and the three Australian States has modernised and internationalised contract law in those jurisdictions.⁷⁹

The reforms canvassed for here are not totally strange to the American jurisdiction as, in fact, recognition of third party right to enforce a benefit created in his/her favour in a contract had been applied in an interesting dimension long before the agitations for reforms in the UK and Australia. In the American case of *Ratzlaff v.*

⁷⁴ The Law Commission Report: "Privity of Contract: Contract for the Benefit of Third Parties," *Law Com 242 Cm 3329*, 1996 at http://lawcommission.justice.gov.uk/docs/lc242_privity_of_contract_for_the_benefit_of_third_parties.pdf. Last accessed 26/11/2013, 2.30 pm.

⁷⁵ See H. Beale, "A Review of the Contracts (Rights of Third Parties) Act 1999" in A. Burrows and E. Peel, (eds.), *Contract Formation and Parties* (Oxford: Oxford University Press, 2010), 225-250.

⁷⁶ S. 11 Property Law Act 1969 (WA).

⁷⁷ S. 55 Property Law Act 1974 (Qld).

⁷⁸ S. 56 Law of Property Act 2000 (NT).

⁷⁹ For a discussion of the legislative approaches in terms of statutory content in the three Australian States, see M. F. Cheong and P. M. Tan, "Review of Australian Contract Law: Submission on Privity of Contract and Third Party Rights" (2012) at <http://www.ag.gov.au/Consultations/Documents/SubmissiontotheReviewofAustralianContractLaw/Submission%20039%20-%20Contract%20Law%20Review%20-%20Cheong%20and%20Peng.doc>. Last accessed 25/3/2014, 7.19 p.m.

Franz Foods,⁸⁰ a third party was allowed to enforce a contract the purpose of which was to benefit someone in his position, though he was not expressly named in the contract. In that case, the respondent in its business as a chicken processing and fertilizer plant, utilised the sewers of the City of Green Forest, Arkansas, under a contract which required and made it its duty to remove and eliminate from its deposits into the sewer system some or all of the following refuse: offal of fowls, blood, wastes and other unwholesome, offensive and noxious waste products. The purpose of this contract was to prevent the sewage facilities of the city from being oversaturated because if it did, it would create harm to landowners located down-stream from the city sewage facilities. The respondent knew of the purpose of this contract. The appellants sued because the respondent violated its contract with the City of Green Forest, Arkansas as it deposited all its refuse inclusive of what should have been eliminated thereby causing an oversaturation and consequent damage to the land of the appellants. The appellate court held that the user who contracted not to over-saturate the city's treatment facilities because of the benefit to certain unnamed landowners but who violated such a contract and thereby caused pollution to the appellants' lands is liable to them. The respondent had attempted to hide under the immunity arising from its lack of control of the city's sewage facilities, but the breach of the contract made in favour of the unnamed landowners made it liable.

Judicial criticism of the privity doctrine has yet to be made in Nigeria, at least from the cases reviewed in this article. Nigerian judges have been content with applying the old common law privity principle in *Tweedle* and *Dunlop Pneumatic* without an assessment of its impact on modern contracts. Similarly, the level of academic discourse which the privity doctrine has been subjected to in the UK is yet to be replicated in Nigeria. But if it is felt that there is the need to internationalise Nigerian contract law, coupled with the realisation of the fact that England (from where Nigeria inherited the common law) has already adopted changes, then, it is time to seriously consider abolishing the privity rule and its archaic statutory exceptions in favour of a new and modern national policy

⁸⁰ (1971) 250 Ark. 1003, 468 S.W. 2d 239.

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on contract rules which will give birth to laws across Nigeria's thirty-six States and the federation that recognise third party rights to enforce a contract if conditions that would be specified in the statutes containing the reforms are met.

5. CONCLUSION

While it is self-evidently desirable, in view of the need to protect the sanctity of mutual agreements, that a complete stranger to a contract should not normally have contractual obligations forced upon him or her without consent as typified by the case of *Attorney General of the Federation & Anor. v. AIC Ltd.*, the third party rule in the privity doctrine (by which a third party cannot take rights under a contract even where that is the intention of the contracting parties) has outlived its usefulness. In the face of the damaging criticisms of the rule against the conferral of benefit on a third party under a contract in notable common law countries such as the United Kingdom and Australia and the reforms already initiated in those jurisdictions, Nigeria cannot continue to hold on to the old privity rule just for the sake of precedent.

International contracts are very important tools in any thriving modern economy. Antiquated laws of contract that slow down contract processes and hold tenaciously to undue rigidity that has long been abandoned in other climes are clear disincentives to the attraction of international business groups and persons. This is so because of the prominence of chain contracts in modern business practices. Therefore, one requirement for Nigeria to meet its target of becoming one of the twenty largest economies in the year 2020 is the modernisation and harmonisation of its contract laws along the line that has been canvassed in this article. Adopting necessary reforms as suggested here would make the Nigerian business environment contractually friendly to international investors.