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PRIVITY OF CONTRACT: A LIMITATION TO THE ENFORCEMENT OF THIRD PARTIES RIGHTS TO A CONRACT?

INTRODUCTION

Contract is a universal concept which is as old as the existence of mankind itself. The olden days activities of buying and selling which started by what is commonly referred to as 'trade by barter' gained prominence in the early centuries.

However, with the introduction of money as a medium of exchange and the evolution of complexities in human relations, it became imperative for commercial transactions to be regulated by principles of law.

Contract has been variously defined by erudite jurists, scholars and legal practitioners in different words, but tending towards the same depictions.

Chambers 21st Century Dictionary[1] defines contract, as 'an agreement, especially a legally binding one'. Denis Keenan[2] also defines contract thus:

> *An agreement, enforceable by the law, between two or more persons to do or abstain from doing some act or acts, their intention being to create legal relations and not merely to exchange mutual promises, both having given something, or having promised to give something of value as consideration for any benefit derived from the agreement.*

Similarly, the Court of Appeal in B.F.I. GROUP V. BUREAU OF PUBLIC ENTERPRISES[3] defines comprehensively the concept of contract in the following words-

> *A contract is an agreement between two or more parties which creates reciprocal legal obligation or obligations to do or not to do a particular thing. For a valid contract to be formed, there must be mutuality of purpose and intention. The two or more minds must meet at the same point, event or incident. They must not meet at different points events or incidents. They must not be saying different things at different times. Where or when they say a different thing at different*

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[1] Revised Edition on Page 297

[2] Smith and Keenan's English Law, Eight Edition Pitman Publishing ltd. London – Page 185.

[3] [2008] All FWLR Pt. 416 page 1915 at 1937 Paras. E - H.

times, they are not ad idem and therefore no valid contract is formed.

The Court went further and stated that:-

The meeting of minds of the contracting parties is the most crucial and overriding factor or determinant in the law of contract. An agreement will not be binding on the parties to it until their minds are at one both upon matters which are cardinal to the species of agreement in question and also upon maters that are part of the particular bargain.

ELEMENTS OF A VALID CONTRACT

The elements of a valid contract have been listed as offer, acceptance and consideration. An intention to enter into legal relations can be added as a fourth, although parties to a contract do not consciously contemplate this element when entering into a contract.[4] However, Dennis Keenan[5] in his book gave a detailed essential elements for the formation of a valid and enforceable contract thus:

1. There must be an offer and acceptance, which is in effect the agreement.
2. There must be an intention to create legal relations.
3. There is a requirement of written formalities in some cases.
4. There must be consideration
5. The parties must have capacity to contract.
6. There must be genuineness of consent by the parties to the terms of the contract.

It follows, therefore that in the absence of one or more of these essentials, the contract may be void, voidable and unenforceable.

These essential elements will now be examined in some depth.

OFFER.

An offer is, in effect, a promise by the offeror to do or abstain from doing something, provided that the offeree will accept the offer and pay or promise to pay the 'price' of the offer. The price, of course, need not be a monetary one.[6]

Black's Law Dictionary[7] defines an offer as 'the act or an instance of presenting something for acceptance OR ' a promise to do or refrain from doing some specified thing in the future, conditioned on an act, forbearance,

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[4] Sagay, I.E. Nigerian Law of Contract 2nd Edition Spectrum Law Publishing, Ibadan, 2000 Page 6.

[5] Keenan, D. Smith and Keenan's English Law, Eight Edition, Pitman Publishing Ltd. London, 1986 Page 185.

[6] Atiyah, P.S. An Introduction to the Law of Contract 3.

[7] Eight Edition [2004] West Publishing Co. USA Ed. Bryan A. Garner P. 1113.

or return promise being given in exchange for the promise or its performance; a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract.

Similarly, an offer is described as an expression of willingness or a definite undertaking to contract on certain terms by the person to whom it is made, with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed.[8]

The court in BFI Group v. Bureau of Public Enterprises[9] added that, "a valid offer must be precise and unequivocal, giving no room for speculation or conjecture as to its real contract in the mind of the offeree".

ACCEPTANCE.

An acceptance is the reciprocal act or action of the offeree to an offer in which he indicates his agreement to the terms of the offer as conveyed to him by the offeror. In other words, acceptance is the act of compliance on the part of the offeree with the terms of the offer. It is therefore the element of acceptance that underscores the bilateral nature of a contract. The aforesaid could be demonstrated, either by conduct of the parties, or their words or documents that have passed between them.[10]

It is imperative to note that an acceptance should be devoid of any variation to the original offer as variations of any resort will negate the principle underlying a valid acceptance.

William R. Anson in his book[11] explained that 'acceptance means communicated acceptance . . .' it must be something more than a mere mental assent. However, Arthur L. Corbin[12] opined in the following words: the use of the word 'communicated' is open to some objection. To very many persons the word means that knowledge has been received. Frequently, a contract is made

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[8] Yakubu J. A., Law of Contract in Nigeria, !st Edition, Malthouse Press Limited, Lagos, 2003 P 8.

[9] Supra ibid at P 1935-1936, paras H-B; Orient bank (Nig.) Plc v National Bank of Nigeria (1978.) NWLR (t. 515) 37; U.B.N. Ltd v. Ax (Nig.) Ltd. (1994) 8 NWLR (Pt. 361) at 150.

[10] BFI Group v. BPE (Supra) ibid at pp. 1936-1937, paras. B-A; Majekodunmi v. National Bank of Nigeria (1978) 3 SC 119; Chaboury v. Adebayo (1972) NCLR 383; U.B.N. Ltd. v. Ozigi (19191 2 NWLR Pt. 176; at 677; Council of Yabatech v. Nigerlec Contractors Ltd. (1989) 1 NWLR Pt. 95 at 99; Wakama v. Kalio (19191) 8 NWLR Pt. 207 AT 123.

[11] Anson W.R. Principles of the Law of Contract 25th Ed.

[12] Arthur L. Corbin Ed. (1991).

even though the offeror has no such knowledge. In such case the acceptance is not 'communicated' and yet it consumates the contract.
It should be noted that a valid acceptance brings the offer to an end because offer then merges into the contract.

CONSIDERATION

This third element of a contract that is, consideration is of great importance in the formation of a valid contract, it is the nexus between the offer and acceptance.
Its absence renders a contract invalid. In the celebrated case of Currie v. Misa[13] Lush J. defines 'consideration' in the following words:

> *A valuable consideration in the eye of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. Thus consideration does not only consist of profit by one party but also exists where the other party abandons some legal right in the present, or limits his legal freedom of action in the future as an inducement for the promise of the first. So it is irrelevant whether one party benefits but enough that he accepts the consideration and that the party giving it does thereby undertake some burden or lose something which in contemplation of law may be of value.*

It is sometimes said that consideration consists of some benefit to the promisor or detriment to the promisee. It should be noted that both elements stated in that definition are not required to be present to support a legally enforceable agreement though, in practice, they are usually present. If the promisee acts to their detriment, it is immaterial that the action does not directly benefit the promisor. In Rasaq Adisa Oyebanji v. Mrs. Patience Adunni Fowowe[15] Court of Appeal defines consideration as follows:

> *Consideration is defined as something of value which must be given; and accordingly, consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor*

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[13] (1875) L.R. 10 Exch. 153at P. 162.
[14] Gary Slapper & David Kelly, Englsh Law Second Edition, Routhledge-Cavendish, United Kindom 2006, page 266.
[15] [2005] All FWLR Pt. 410 Pg. 786 Paras. D-G; Bram white v. Worchester (1969) AC 552; Chitty on Contracts General Principles, 25th Edition.

(in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. This payment by a buyer as consideration for the seller's promise to deliver can be described either as a detriment to the seller or as benefit to the buyer.

It is germane to note that in order to sustain an action, the plaintiff must prove either a benefit conferred by him on the defendant, or a detriment suffered by him (the plaintiff) in the implementation or the fulfillment of the terms of the bargain.

Consideration is so essential in the formation of contract, that its absence or what otherwise may be referred to as 'gratuitous promise' will make such a contract invalid and unenforceable. Where a party gave a promise to do an act or render a service to the other without any corresponding promise coming from the latter (promisee), the latter cannot in law enforce such promise since he had given nothing in return.[16]

There may be an apparent contract between two parties, which on closer examination is no contract at all because one of the parties has either undertaken no obligation at all, or has not performed his own part of the agreement, in a situation in which the 2nd party's (defendant) liability can only arise after such performance by the 1st party.

In such a situation any action brought by 1st party to enforce the promise of the 2nd party will fail for want of consideration.[17]

INTENTION TO CREATE LEGAL RELATIONS

In deciding the question of intention, the courts have regard to two main presumptions, namely: (i) that domestic agreements are unenforceable without proof of intention to create legal relations and (ii) that commercial agreements are enforceable in the absence of clear proof that legal relations were not intended.[18]

In other words, for a valid contract to be formed, there must be mutuality of purpose and intention. The two or more minds must meet at the same point, event or incidents. They must be saying the same thing at the same time. An agreement will not be binding on the parties until their minds are at one both

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16. L.A. Cadoso v. The Executors of the Late J.A. Doherty (1938) WACA 78.

17. Miles v, New Zealand Alford Estate Co. (18860 32 cH. d. 267.

18. Smith and Keenan's Englsh Law ibid on P. 198.

upon matters which are cardinal to the species of agreement in question and also upon matters that are part of the particular bargain.[19]

However, in most cases the parties are silent with regard to this fourth element of a valid contract, it is because this is taken for granted as being present, and only in rare cases in which a dispute subsequently arises will the issue be expressly and consciously considered.

It should be noted that in those cases in which the contractual intention is presumed to exist the parties can exclude it by starting so expressly.

The court in *BFI Group v. B.P.E*[20] underscore the importance of mutual assent in a contractual agreement when it stated thus:

> *In order to bring a contract into being that is, a situation where the parties to the contract confer rights and impose liabilities on themselves, there must be mutual assent. The mutual assent of the parties to it must be capable of being broken down into offer and acceptance.*

However, notwithstanding the importance attached to the parties intention to enter into legal relations, some legal scholars and jurists appear to have whittle down its significance in contract formation.

The greatest exponent of the school of thought that intention to enter into legal relations is irrelevant to the formation of a contract is Professor Williston.[21] His postulations may be summarised in the following well-known passage:

> *The common law does not require any positive intention to create a legal obligation as an element of contract. . . A deliberate promise seriously made is enforced irrespective of the promissor's views regarding his legal liability.*

Whilst this assertion may be true with regard to commercial contracts, in which the contractual intention is presented, it is inapplicable to social and domestic engagements to which the contrary presumption applies.[22]

ENFORCEMENT OF A VALID CONTRACT

The whole essence of a contract is performance, this pre-suppose that all the parties to a contract must have discharged their contractual responsibilities

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[19] Orient Bank (Nig.) Ltd. v. Bilante International Ltd. (1997) 8 NWLR Pt. 515 Pg. 37; Okubule v. Oyagbola (1990) 4 NWLR Pt. 147 at Page 723; BFI Group v. Bureau of Public Enterprises (Supra).

[20] Supra.

[21] Willston On Contracts (3rd ed.), P. 21.

[22] Sagay, I. E., Nigerian Law of Contract 1st Edition, Spectrum Law Publishing, Ibadan. 1989 P. 82.

under the agreement.
In other words, parties must have furnished consideration as agreed to in the terms of the contract.
However, where one party to a contract furnished a consideration, while the other fail to reciprocate, then it amounts to a breach of contract.
In view of the importance of consideration as a major element of contract, the enforceability of a contract or otherwise depends largely on its presence or otherwise.
The Supreme Court of Nigeria in *Chabasaya v. Anwasi*[23] commenting on unenforceability of contract which consideration has not been met and existence of legal right to sue for breach thereof stated as follows:

> *A contract in which consideration has not been met is one that can be said to have been breached and the other party to the contract has a legal right to sue for breach of contract...*

The apex court in *Nwaolisah v. Nwabufoh*[24] further commenting on the effect of a failed consideration in contract states thus:

> *A breach of contract means that the party in breach has acted contrary to the terms of the contract whether by non-performance or by performing the contract not in accordance with its terms or by a wrongful repudiation of the contract... A party who has paid money to another person for a consideration that has totally failed under a contract is entitled to claim the money back from the other...*[25]

PRIVITY OF CONTRACT

The doctrine of privity means that a person cannot acquire rights or be subject to liabilities arising under a contract to which he is not a party. It does not mean that a contract between A and B cannot affect the legal rights of C indirectly[26]
Black's Law Dictionary[27] defines Privity of Contract as:-

> *The relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so.*

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[23] {2010} All FWLR Pt. 528 Pg. 839 Parags. B - C
[24] {2010} All FWLR Pt. 591 Pg. 1438 Parags. A - B
[25] Pan Bisbider (Ngeria) Ltd. V. First Bank of Nigeria (2000) I SC 71; Haido v. Usman (2004) 3 NWLR Pt. 859
[26] G. H. Treitel, The Law of Contract 8th cd. 1991 at 538.
[27] Eight Edition at Page 1237.

It further defines a privy as follows-

> *A person having a legal interest of privity in any action, matter, or property; a person who is in privity with another. Traditionally, there are six types of privies: (1) privies in blood, such as an heir and an ancestor; (2) privies in representation such as an executor and atestator or an administrator and an intestate person; (3) privies in estate, such as grantor and grantee or lessor and lessee; (4) privies in respect to a contract – the parties to acontract; (5) privies in respect of estate and contract, such as a lessor and lessess where the lessee assigns an interest; (6) privies in law, such as husband and wife. The term also appears in the content of litigation. In this sense, it includes someone who controls a lawsuit though not a party to it; someone whose interests are represented by a party to the lawsuit; and a successor in interest to anyone having a derivative claim.*[28]

The Supreme Court confirmed the aforestated position in its judgment in *Agbogunleri v. John Depo* & 3 Ors[29] as follows:-

> *A "privy' is a person whose title is derived from and who claim through a party- There are three kinds of privies-privies in law, in blood and estate.*[30]

A contract cannot confer enforceable rights or impose obligations arising under it on any person, except parties to it. Thus only parties to a contract can sue on it. It also follows that only those who have furnished consideration towards the formation of the contract can bring an action on it.[31]

The House of Lords in *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge Ltd.*[32] gave a classic exposition of the doctrine of privity of contract in the following words:

> *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 quaesitum 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*

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[28] Ibid at 1238

[29] [2008] 1 SCM P. 1 at pg. 14-15-per I. T. Muhammed JSC.

[30] Nwosu v. Udeaja (1990) 1 NWLR Pt. 125 P. 188; Arabic v. Doku Kanga (1932) 1 WACA 253. Ekuru & 2 ors v. Anuku & Anor [2011] All FWLR Pt. 561 P. 1560 at 1573 paras. A-C

[31] Sgay, I. E.: Nigerian Law of Contract 1st Edition Sweet and Maxwell. London 1985 P. 413.

[32] [1915] A.C 847 at 532 per Lord Haldane.

contract as a right in personam to enforce a contract.

Thus if Mr. A makes a contract with Mr. B, he comes under a legal obligation to pay damages if he fails to keep his promise. The enforceability or liability as regards this contract lies firmly in the hands of A and B to the exclusion of others; this is the foundation of the doctrine of privity of contract.

In a much simpler exposition, the principle which underlies the privity of contract is that a contract cannot confer rights or impose those obligations arising under it, on any person except the parties to it. The term "parties" may seem simple enough but there are situations where it may become doubtful as to exactly who the parties are and resultantly, who, in the eyes of the law should be liable or should be compensated in the event of inevitable breaches that may occur from time to time.[33]

Infact, the Court in *City Express bank Ltd. V. Trade and Financial Services*[34] puts the position succinctly thus:

> *A third party to a transaction cannot sue on it even if it is made for his or its benefit. A contract only 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 for his or its benefit and purports to give him right to sue. In the instant case, the appellant and respondent are not parties to the loan agreement, exhibit S and therefore cannot take advantage nor incur liability under it. Generally, a contract cannot be enforced by or against a person who is not a party; it only affects a party thereto.*

The fundamental principles guiding the enforcement of contracts are:[35]

1. Only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertis 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.
2. If a person with whom a contract not under seal has been made is to be

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[33] Keen& Associates. /http://Nigeria.smetoolkit.org/Nigeria/en/197/Doctrine-of-privity of Contract Exceptions to 1.

[34] [2005] AllFWLR Pt. 266 P. 1241 at Pp. 1266-1267. paras. B-A Negbebor v. Negbebor (1971 1 All NLR 210; Ikpeazu v. African Continental Bank Ltd. (1965 NMLR 374; Okoebor v. Eyobo Engineering Services Limited (1991) 4 NWLR Pt. 187.

[35] Ibid at Pp. 1265-1266, paras. G -C

able to enforce it, consideration must have been by him to the promisor or to some other person at the promisor's request.

3. A principal not named in the contract may sue upon it if the promise really contracted as his agent. But again, in order to entitle him to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it.

EXCEPTIONS TO THE GENERAL RULE

As earlier highlighted, the doctrine of privity of contract dictated that only persons who are parties to a contract have the legitimate rights to enforce same as third parties are exempted from similar rights.

However, there are a number of exceptions to the general principle which enable a third party not only to derive benefits from such contracts but to also enforce same.

In the recent times, the law has recognized that with the increasingly complex world of commerce there must be changes to accommodate certain exceptions to the general rule and guarantee restitution to the aggrieved.

The increase in consumer rights awareness, which includes warranty claims have contributed to this new but radical approach.

The current relaxed requirements of modern contract law in relation to privity of contracts have, provided an avenue for redress to genuinely affected persons who have been deprived of such.

Under the current operation of law, a perfect stranger could be awarded damages if the improvement is proved.

i. Collateral Contracts

A collateral contract arises where one party promises something to another party if that other party enter into a contract with a third party.[36]

For example, A promises to give B something if B enters into a contract with C. In such a situation, the second party can enforce the original promise, that is, B can insist that A complies with the original promise.

It may be seen from this that, although treated as an exception to the privity rule, a collateral contract conforms with the requirements relating to the establishment of any other contract, consideration for the original promise being the making of the second contract.[37]

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[36] Gary S. & David L., English Law Second Edition Routledge. Cavendish, United Kindom 2006 Page. 275.

A classic example of the aforesaid was brought to the fore in the case of *Shanklin Pier v. Detel Productions Ltd.*[38] Where Mc Nair J. stated thus:

> *If as is elementary, the consideration entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some act for the benefit of A. As between A (a potential seller of goods), and B (a potential buyer), two ingredients and two only are in my judgment required in order to bring about a collateral contract containing a warranty; (1) a promise or assertion by A as to the nature, quality or quantity of the goods which B may reasonably regard as being made animo contrahendi and (2) acquisition of the goods by B on reliance on that promise or assertion.*

It is important to note that in all cases of collateral contracts the consideration furnished by the representee for the promise is ". . . no more than the act of entering into the main contract. Going ahead with that bargain (the main contract) is sufficient price for the promise, without which it would not have gone ahead at all".[39]

ii. Covenants Concerning Contracts Relating to Land

Generally, under the English law, there is a distinction between the principles relating to real and personal properties. In relation to contracts concerning land, the rule is that a restrictive covenant imposed on a purchaser of land is applicable to a subsequent purchaser of that land.[40]

For instance, if A leases land to B, B's lease and terms relating thereto are enforceable by and against subsequent purchasers of the reversion, even though they were not parties to the original contract. This principle of law is popularly known as the rule in *Tulk v. Moxhay*.[41]

However, it is important to note that there has been a radical development in

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[37] Ibid at page 275.

[38] [1951] 2 K. b. 854; [1951] 2 All E. R. 471.

[39] Wedderburn K. W. Collarteral Contracts [1959] C. L. J. 79.

[40] Yakubu J. A. Law of Contract in Nigeria 1st Edition Malthouse Press Limited, Lagos, Nigeria 2003 P. 226.

[41] (1848) 2 Ch. 778.

the doctrine initiated by *Tulk v. Moxhay*.[42] Since the latter years of the nineteenth century, it is required that the covenantee, i.e. the original vendor, should have retained other land in the neighbourhood for the benefit and protection of which the restrictive covenant was taken. This requirement is based on the idea that if an owner sells only a portion of his land, the selling value or enjoyment of what he retains will often diminish or depreciate unless there are restrictions upon the enjoyment of the part sold. It is therefore essential that the covenantee must retain land capable of being benefited in this way so that the court, in the enforcement of its equitable jurisdiction, will be able to enforce a restrictive covenant against a third party, he must be in possession of the land for the benefit of a covenant against a third party,[43] he must be in possession of the land for the benefit of which the covenant was made or the covenant was made or the covenant must run with the land. A covenant runs with land if the following are present:

1. The covenant must be made with the covenantee who has an interest in land to which it refers.
2. The covenant must concern or touch the land; and
3. There must be an intention that the benefit of the obligations shall extend to third parties or subsequent purchasers.[44]

iii. Valid Assignment of Benefit in Favour of a Third Party

A party to a contract can transfer the benefit of that contract to a third party through the formal process of assignment.

It is germane to note that such an assignment must be in writing and the assignee receives no better rights under the contract than those which the assignor possessed. The burden of a contract cannot be assigned without the consent of the other party to a contract.[45]

iv. Insurance Contracts

Section 6(3) of the Motor Vehicles (Thirty party) Insurance Act[46] provides as follows:

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[42] Supra.

[43] Yakubu J. A. Law of Contract in Nigeria 1st Edition Malthouse Press Limited, Lagos, Nigeria 2003.

[44] Smith v. River Douglas Catchment Board (1949) 2 KB 500.

[45] Slapper, G & Kelly D, 2nd Edition Routledge. Cavendish, United Kindom, (2006) pp. 275-276.

[46] Cap M 22, 2004 Law of Federation of Nigeria.

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

This means that any person or classes of person thus indemnified, can bring a claim against the insurance company, even though such person or persons were not parties to the insurance contract.

The court, per Johnson J, (as he then was) in *Sule v. Norwich Fire Insurance Society Ltd.*,[47] applying section 6(3) of the Motor Vehicle (Third Party) Insurance Act, held that a third party in the position of the driver derived the right to claim directly against the insurance company even though he was not in a strict sense a party to the contract.

v. Contracts for the Hire of a Chattel

The issue of the enforcement of third party rights had arisen quite often in contracts for hire of chattels, particularly charter parties. The problem has usually presented itself in the following manner:

In a very old but celebrated case of *De Mattos v. Gibson*[48] Knight Bruce, l. J., tried to evolve a principle to govern all such situations thus:

Reason and Justice seem to prescribe that, at least as a general rule, when a man by gift or purchase acquires property from another with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person to use and employ consideration made by him with a third person to use and employ the property for a particular purpose in a specific manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or the seller.

vi. Agency

The status and vicarious liability issues of an agent also create exception to the rule of privity. When an agent negotiates a contract between his principal and a third party. It is generally regarded as been between the principal and the third party.

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[47] (unreported) High Court of Western State. Suit No. W/74/70 delivered on March 11, 1971, Casebook. P. 419.

[48] [1859] 4 De G & J. 276.

However, there are situations where it is subject to question as to whether or not an agent acted on his own behalf or not, it may ever reach new heights of complexity when an agent makes use of sub-agent, spawning twin questions of whether or not the contract will now be between the principal and the sub-agent or the agent and the sub-agent.

vii. Multilateral Contracts

When a person joins an unincorporated association such as a club, it could be said that he has gone into a contractual relationship with other members even if he may not be aware of their identity and if the person only liases with the secretary of the organization.

The exceptions stated above are not exhaustive, as the terms and incidence of each contract determines whether a third party could enforce same. The complexities and diversities in the nature of contract all over the world have therefore amplified and widened the exceptions to the doctrine of privity of contract.

PRIVITY OF CONTRACT AND THIRD PARTY BENEFICIARIES

The hard and fast rule that a third party could not enforce a contract to which he was not a party was not a settled principle of law until mid-19th century.[49] Prior to this, there were authorities supporting both this view and the contrary view.[50] In Tweedle v. Atkinson,[51] the court acknowledged the existence of contrary authorities, but held that the doctrine of privity of contract meant that third party beneficiary could not enforce against the promisor the promise that the promisor had made to the promisee.

The rule was affirmed in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd*[52] where it was accepted that it was a fundamental principle of law. This rule has subsequently been reaffirmed in other cases.[53]

The rationale behind the exceptions to the doctrine, which is largely to the benefit of the third party is that it will be unjust to deprive him of enforceable right under the contract, where it is clearly contemplated in the contract that such right has been conferred on him.

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[49] Percy, D. 'Privity of contract: The final siege of the citadel" (paper presented April 2000) at 3 (unpublished).

[50] Waddams, S.M., The law of contracts, 5th edition (Aurora: Canada Law book, 2005) at 193.

[51] (1861) 121 E. R. 726 (Q.B)

[52] (1915) A. C. 847 (H. L.)

[53] Beswick v. Beswick (1968 A.C. 58 (H. L.)

It is germane to note that all the exceptions to the doctrine of privity of contract are for the benefits of third parties, who otherwise under strict common law lacked 'enforceable rights'.

CONCLUSION

The doctrine of privity of contract, particularly under the Nigerian legal system is an aspect of law which is largely unsettled. Yakubu, J. A in his book summed up the position thus:

> *The doctrine of privity of contract has been criticized. It is said to defeat the legitimate expectations of the third party; that it undermines the social interest of the community in the security of bargain and it is commercially inconvenient.*

It is however, a positive development that countries like Scotland, Hong-Kong, United States of America and United Kingdom, among others have all reviewed the manifestly harsh and rigid doctrine of privity of contract.

The English Law Revision Committee, in its Sixth Interim Report 193 7(Cmnd. 5449) recommended as follows:

> *Where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name, provided that the promisor shall be entitled to raise as against the third party any defence that would have been valid against the promisee. The rights of the third party shall be subject to cancellation of the contract by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct.*

Recommendation, such as stated above, will no doubt obviate the problem of "third party beneficiaries".

Unfortunately, the doctrine of privity of contract remains as it is in Nigeria, however, with some legally recognized exceptions.

The Nigerian Courts have in plethora of judicial decisions relaxed the hardship the doctrine posed to the third party.

The courts are no longer concerned with the form of action, namely privity of contract. The courts look at the relationship between the parties, the cause of breach and damage that ensued by applying the proximity test to determine the rights of the parties.[55]

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[54] Ibid at Page 238.

The current relaxed requirements of modern contract law in relation to privity of contracts have, provided an avenue for redress to genuinely affected persons who the strict common law interpretation of privity might have deprived of such.

Under the current operation of the law, a perfect stranger could be awarded damages if the infringement is proved.

It is therefore submitted that this relaxed operation of doctrine of privity of contract, which is still at its developmental stage in Nigeria will in no distant future be fully evolved, given the new innovations and developments in business transaction today.

[55] Unity Bank Plc. v. Authomotive C. N. Ltd. [2012] All FWLR Pt. 610 Pp. 1309 - 1311 paras. B -C.