CHAPTER – 3

REMEDIES OF THE PRIVITY OF CONTRACT

The general rule is that only the persons entitled to the benefits or bound by the obligation of a contract are entitled to or be sued upon it, except in a case of beneficiary under the trust or in a case of Family arrangement, no right may be enforced by a person who is not party to a contract. This is so even where it is clear from the contract that some provision into it was intended to benefit such third party. It can neither be used as shield nor as a sword.

The remedies that may be available to the promisee if the promisor fails to perform the promise are only relevant where the promisee is able and willing to enforce the contract for the benefit of the third party. The widow in Beswick v. Beswick (1966) 3 All ER¹, would not have been able to obtain her annuity had Peter Beswick appointed his nephew the executor of his estate instead of his widow. At present, there appears to be no procedure by which an unwilling or unco-operative promisee can be compelled to institute proceedings for specific performance on behalf of the third party.

¹The existence of a right of action in the promisee does not, in consequence, necessarily ensure that the third party will obtain the performance promised in the contract. But even where the promisee seeks

¹ But see the suggestion that the third party be joined as a party to the action made by Lord Denning in Beswick v. Beswick (1966) Ch. 538, at p. 554 and (in a different context) Snelling v. John Snelling1 ut. (1973).
a remedy there are certain difficulties.

### 3.1 Remedies to the Promisee and Third Party

The promisee has a right to recover required compensation for his loss, but third party can acquire substantial compensation only, which have been discussed in following five heads.

#### 3.1.1 DAMAGES

Generally, in a suit for damages, the plaintiff cannot recover more than the amount required as compensation for his own loss and not that of the third party. If the action is for recovery of amount, the promisee may not recover because the amount is not due to him. In *Forster vs. Silvermere golf and Equestraian Centre Ltd. (1981) 125 SJ 397* where the plaintiff transferred the property to the defendant who undertook to construct a house for her and her children who could live rent free for life, the plaintiff could recover her own loss, and not for the rights of occupation after her death which her children would have enjoyed. The third party rule produces an unjust and perverse result, because the person who has suffered the loss (of the intended benefit) cannot sue, while the person who has suffered no loss (the party to the contract) can sue. The legal representatives of a deceased hotel guest who had been staying in a hotel under an arrangement between his employer company and the hotel, were held entitled to claim compensation for negligence of the hotel causing his death, although they were third parties to the contract. The decision

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3 Chitty on Contracts, 28th edn, p.985, para 19-044; Coulls v. Bagot's Executor and Trustee Co (1967) 119
rested on the ground that any other view was an anomaly, where the employer company was disentitled from claiming compensation, and the guest (his legal representatives), not being parties to the contract, from suing.\(^5\)

But a trustee may be able to recover substantial damages for breach of contract even though the loss is suffered by his cestui que trust.\(^6\) An agent may be able to recover substantial damages even though his undisclosed principal suffers the loss.\(^7\) A local authority could recover substantial damages although the loss was suffered by the inhabitants, as it acted like a trustee (though not strictly a trustee) for the inhabitants of its area and had to act in their interests. It administered funds for their benefit, and owed them a duty to get them in.\(^8\)

In **Jackson v. Horizon Holidays Ltd.**\(^9\), the plaintiff had booked a holiday with the defendants. The plaintiff and his wife and children found the hotel most disappointing and their holiday was spoiled. On their return to England, the plaintiff bought an action for damages in respect of the loss of his England, the plaintiff bought an action for damages in respect of the loss of his holiday for himself, his wife and two small children. Lord Denning held that the damages granted were excessive for his own distress, but upheld the award on the ground that the contract was made for the benefit of himself as well as his wife and children, and

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5 Klaus Mittelbrachert v. East India Hotels Ltd. AIR 1997 Del 201 (whether claim arose out of contract or tort was not decided).


hence he could recover their loss as well as his own. This approach was disapproved by the House of Lords in **Woodar Investment Development Ltd. v. Wimpey Construction Co. Ltd.**  

In this case, a purchaser under a contract of sale agreed to pay part of the price to the third party. The seller alleged wrongful termination by the purchaser and sought damages. The decision rested on the ground that there was no breach by the purchaser, but all the judges indicated that if there was breach by the purchaser, the seller could have recovered only for his loss and not that of the third party. But the decision in Jackson's case was supported on the ground that the damages had been awarded for the plaintiff's own loss, or alternatively on the ground that cases relating to holidays required special treatment.  

Where a promisee seeks damages in respect of a contract made for a third party's benefit, he can recover nominal damages only.  

But in **St. Martins Property v. Sir Robert McAlpine**, a question arose as to whether a contraction party was liable for loss suffered by a third party to whom the subject matter was transferred. In this case, the owner-employer, having a building contract (which contained a clause prohibiting assignment) for development of property by a contractor, assigned the property, and later along with the assignee, sued the contractor for damages for defects in the building. It was held that since the assignment was invalid, the assignor retained the rights under the agreement. Although, the normal rule disabled a plaintiff from recovering...
damages except for his own loss, and hence from recovering any damages if he had parted with the ownership of property, the plaintiff assignor in the present case could, as an exception recover substantial damages. The contractor could foresee that the parts of the constructed property would be occupied and purchased by third parties, and therefore it could be foreseen 'that damage caused by a breach would cause loss to a later owner. The parties were treated as having entered into a contract on the footing that the plaintiff would be able to enforce contractual rights for the benefit of those who suffered from the defective performance, but who, under the terms of the contract, could not acquire any right to hold the defendant contractor liable for breach. The House of Lords held that the case fell within the rationale of one of the exceptions to the rule that a party can recover damage only in respect of his own loss, applied the principle of The Albazero,¹³ that since the parties to the contract of carriage must have contemplated that property in the goods might be transferred to third parties after the contract had been made, the shipper must be treated in law as having made the contract of carriage for the benefit of all persons who might after the time of contracting acquire interests in the goods.

The exception to the rule that damages could not be recovered for third party's loss was later extended further. It was held that where a party entered into a building contract for the benefit of a third party and subsequently assigned its rights against the building contractor to the

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¹² (1993) 3 All ER 417; sub nom Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.
¹³ Albacruz (Cargo Owners) v. Albazero (Owners) (The Albazero) [1977] AC 774; Dunlop v. Lambert (1939) 2 Cl & F
third party, the latter was entitled to recover substantial that such defects would cause third party loss.

This case was followed and perhaps extended by the Court of Appeal in Darlington Borough Council v. Wiltshier (1995) 3All ER 895. In this case, the plaintiff local authority, in order to side step (legitimately) government restrictions on borrowing, decided to carry out the construction of a recreational centre by a complex scheme. It was arranged that the finance company would pay for the erection of the building and be paid by the plaintiff. The finance company entered into the construction contract with the defendant contractors. It was always intended that the building, and any rights under the construction contract, would be assigned by the finance company to the plaintiffs. It was alleged that the building, when completed, had major defects. The plaintiff duly took an assignment of the building contract from the finance company and commenced an action against the contractor. It was accepted that the plaintiff could not be better off than the finance company and the question before the Court of Appeal, and the preliminary point, was which damages could have been recovered by the finance company. The contractor argued that the finance company could not have recovered substantial damages since it had suffered no loss. It was always intended that the building would be transferred to the plaintiffs and the plaintiffs had agreed to pay the finance company in full. The finance company was in no way responsible to the plaintiff for the condition of the building. The defendant

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argued that the St. Martin’s case could be distinguished since that was a case of a defective assignment whereas the present case was one of a valid assignment and, further, that in St. Martin’s there had been no contemplation that the building would be transferred to someone else at the time of the contract whereas, in the present case, it was always expected by all the parties that the building would end up belonging to the plaintiffs. The Court of Appeal did not regard these distinctions as of any significance and indeed, if anything, as strengthening the case of the plaintiff.

In *Pamatown Ltd. v. Alfred McAlpine Construction*,¹⁴ U owned a site which he wanted to develop, and appointed M as the contractor. In order to avoid VAT, the contract with M was made between M and P, the latter being a company in the same group as U. On the same day, a separate ‘Duty of Care Deed’ was executed between U and M under which M gave warranties about exercise of care in construction. This deed, unlike the building contract, did not contain an arbitration clause. P made a claim in arbitration against M for defective work. M alleged P could not recover substantial damages under the building contract since it has no proprietary interest in the site and had therefore, suffered no loss. The court of appeal held that the fact that P was not the owner of the property was no bar for its claim for substantial damages for breach of contract between P and M, being based on the intention or contemplation of P and M. On appeal, the House of Lords reiterated the rule that a plaintiff could

recover damages only for a loss which he himself had suffered, but it formulated the exception of a situation where it has been within the contemplation of the contracting parties that branch by one was likely to cause loss to an identified or identifiable stranger to the contract, rather than to the other contracting party. It justified the exception for the necessity to avoid the disappearance of a substantial claim into a legal 'black hole' and stated that the necessity disappeared where the third party had a right to recover substantial damages even if those damages might not be identification to those which would have been recovered under the main contract in the same circumstances. In the instant case, the exception did not apply, because by 'a plain and deliberate course was adopted' under which U, the company with the potential risk of loss, was given a distinct entitlement to sue the contractor directly.

3.1.2 SPECIFIC PERFORMANCE

Third parties for whose benefit a contract has been made may not sue on the contract but the party making the contract may sue for specific performance for the benefit of the third party even where damages obtainable will be nominal. In Coulls v. Bagot's Executor & Trustee Co. Ltd.¹⁵ a company O, for a consideration of £ 5, agreed to quarry stone from the property of C and agreed to pay a fixed minimum royalty of £ 12 per week to C and his wife during their joints lives and thereafter to the survivor. The document was signed by the company, the husband and the wife. The wife was held entitled to receive the royalties after her husband’s death and notwithstanding that she gave no consideration, she could

enforce this right. **Barwick CJ** held that a person not a party to a contract may not himself sue upon the contract so as to directly enforce its obligations. But it is possible for that person to obtain the benefit of a promise made with another for his benefit by steps other than enforcement by himself in his own right.\(^\text{16}\) In a contract where a promise by A is made to B and C for consideration to pay B and C, it is not open to A to question whether the consideration moved from both B and C or as between themselves or only from one of them. The agreement was a promise in respect of which there was privity between A on the one hand and B and C on the other. It is enforceable in the joint lifetime of B and C, but only if both are parties to the action to enforce it. B, though he supplied the consideration could not sue alone. If C was unwilling to join as plaintiff he could be joined as a defendant but judgement would be in favour of both B and C. Similarly, if B would not join in the action, C could join B as a defendant and with a similar judgement, i.e. in favour of B and C.\(^\text{17}\) In neither of these cases could A successfully deny either privity or consideration. Similarly, if B were dead, the representatives of B would have to be joined by C because A's promise was not made with C alone though the judgment will be in favour of C being the survivor\(^\text{18}\). The mode of enforcing would be by the executor enforcing the promise to pay the survivor, i.e. for the benefit of the widow. Windeyer J reviewed the law

\[\text{16} \quad \text{Ibid at 478 relying on Beswick v. Beswick (1966) Ch. 538, [1966] 3 All ER 1, [1966] 2 WLR 396 (CA); Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. 1915 AC 847, (1914-15) All ER Rep 333, dist on the ground that the promise was gratuitous and privity was not lacking; Beswick v. Beswick (1967) 3 WLR 932, [1967] 2 All ER 1197 (HL); approving Coull's case.}\]

\[\text{17} \quad \text{Coulls v. Bagot's Executor & Trustee Co. Ltd. (1967) 119 CLR 460 per Gaufield Barwick CJ at 478-479.}\]

\[\text{18} \quad \text{Ibid at 479; Attwood v. Rattenbry (1822) 6 Moo CP 579 at 584.}\]
relating to consideration and the right of third parties to enforce a contract where consideration moved from joint promisee and seems to hold that C (the wife) could enforce the contract in the manner suggested by the Chief Justice\(^\text{19}\), observed that complete and perfect justice to a promisor may well require that a promisor perform his promise to pay money or transfer property to a third party, and held that specific performance could be possible in such cases unless these cases were for rendition of personal services.

In *Beswick v. Beswick*,\(^\text{20}\) one PB agreed with his nephew to transfer his business in consideration of the nephew employing him at £6-10s a week for the rest of his life and to pay to PB's wife after his death an annuity charged on the business at £5 a week for her life. The nephew took over the business, but after the death of PB refused to pay any sum to PB's widow. She brought an action against the nephew in her capacity as administrator and her personal capacity. This action was decreed by the Court of Appeal. Lord Denning MR held that the rule that 'no third person can sue or be sued on a contract to which he is not a party is only a rule of procedure. Where a contract is made for the benefit of a third person, the third person may enforce it in the name of the contracting party or his executor or personal representative, or jointly with him, or, if he refused to sue, by adding him as a co-defendant.'\(^\text{21}\) Danckwerts LJ held that a


\(^{21}\) Biswick v. Beswick (1966) Ch 538, (1966) 3 All ER 1 at 9, (1966) 2 WLR 396 (CA) (Salmon LJ contra); but see Coulls v. Bagot's Executor & Trustee Co Ltd. (1967) 119 CLR 460; cj Deb Narain Dutt v. Ram Sadhan
The contract to make a money payment could be specifically performed. The House of Lords affirmed the decision of the court of appeal, but the question whether the widow was entitled to sue at common law in her personal capacity as beneficiary, was not argued and the correctness of the decision in *Tweddle v. Atkinson* was not challenged. *Dunlop Pneumatic Tyre Co Ltd. v. Selfridge & Co. Ltd.* and *Scruttons Ltd v. Midland Silicones Ltd.* were considered as the greatest difficulty in the way of widow's right to sue personally. It was held that the widow as administrator of the estate of her husband was entitled to enforce the agreement by way of specific performance in her own favour not with standing that damages recoverable 'for her husband's estate were or might be nominal. Lord Reid was of the opinion that the widow had no right in her personal capacity but as an administrator, she could sue for specific performance for the benefit of herself and Lord Hodson was of the same opinion. For an unconscionable breach of faith, the equitable remedy was apt. Lord Pearce was of the opinion that specific performance was the proper remedy.' Lord Upjohn held that in common law, a third party cannot sue to enforce a contract but equity must come in for the purpose

Mandal (1914) 41 Cal 137 at 141, 20 IC 630, AIR 1914 Cal 129 (per Jenkins CJ-Courts in India not hampered by *Tweddlle v. Atkinson*).

22 Beswick v. Beswick (1966) Ch 538, (1966) 2 WLR 396 at 410, (1966) 3 All ER 1 at 10-11; upheld by the House of Lords on appeal (1967) 3 WLR 932, 2 All ER 1197 (HL); Hohler v. Ahtton (1920) 2 Ch. (420) (contract relating to purchase of a house); Keenan v. Handley 2 DeGJ & Sm 283, (1864) 12 WR 930 (annuity); Drimmle v. Davies (1899) 1 LR 176 at 190 (annuity).

23 (1861) 1 B & S 393, [1861-73] All ER Rep 369, 124 RR 610.


25 (1962) AC 446, (1962) 2 WLR 186, (1962) 1 All ER 1 (HL); affirming *Midland Silicones Ltd v. Scruttons (1960)* 2 All ER 737 (CA).

26 Referring to and applying Hart v. Hart. (1881) Ch. D 670 at 685 (per Kay J, an agreement for valuable consideration and partically performed should be carried out by a decree for specific performance) and Coulls v. Bagot's Executor & Trusted Co. Ltd. (1967) 119 CLR 460.
of specifically enforcing a right, and if the husband of the widow could not sue for her benefit. The power of equity to specifically enforce a contract in favour of third party at the instance of the contracting party was not in doubt. And further equity will act if damages would only be nominal.27 Although, the promisee may seek specific performance of the contract, the remedy itself is limited. It may not be ordered to enforce a contract of personal service, or a contract involving numerous details or requiring constant supervision of the court.

In India Divasan Vs. Peter Jabaraj and Ans and others AIR 2008 S.C. 2052. Transfer of property Act 1882 Sec. 52, C.P.C 1908, O.I.R. 10(S) Listpendens Applicability sale by agreement holder to third party suit for specific performance against agreement holder. Further sale made by third party during suit not invalid.

The plaintiff and defendant entered into an agreement of sale. The defendant therefore sold the property to a third party. Suit for specific performance of agreement of sale was made. The Third Party made further sale of property. Thereafter, the application for addition of third party as defendant was allowed. The summons was served on added defendant later, As under O.I.R. 10(S) the defendant can be deemed to be party to suit only from date summons is served on him, the sale made by him much before cannot be said to be invalid.

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27 Beswick v. Beswick (1967) 2 All ER 1197, [1967] 3 WLR 932 (HL), applying cases of specific performance of contracts for benefit of third parties – Hohler v. Aston (1920) 2 Ch. 420 (purchase of a house for the benefit of the third parties); Keenan v. Handley (1864) 12 WR 930 at 960 (annuity to mother, and after her death to her child not a party); Drimnie v. Davies (1899) 1 IR 176 at 190 (Holmes LJ) annuities provided for third parties; Wilson v. Northampton & Banbury Junction Ry Co. (1874) 9 Ch. App. 279 at 284 (specific performance instead of damages when court can do more complete justice); and observations of Windeyer J in Coulls v. Bangot's Executor & Trustee Co. Ltd. (1967) 119 CLR 460; see also Veeramma v. Appayya AIR 1957 AP 965.
3.1.3 ACTION FOR THE AGREED SUM

The contracting party to whom the promise is made normally no claim whatsoever the money or other performance properly due to the third party.  

3.1.4 RECOVERY OF MONEY PAID

Where a contract is made for the benefit of a third party and the promise has paid money to the promisor in consideration of a promise which the promisor has totally failed to perform, the promisee will be entitled to recover the money as paid on a consideration which has totally failed. This remedy, which might be less advantageous than damages or specific performance, would not be available in the present state of the law if the promisor had partly performed, as there would not be a total failure of consideration.

3.1.5 PROMISE NOT TO SUE

Where the promisor, either expressly or by necessary implication, promises not to sue a third party, the third party, as a stranger to the contract, cannot rely directly on the terms of the contract as a defence to any action brought by the promisor. But the promisee may obtain a declaration that the promise is binding on the promisor, and thus effectively prevent the promisor from suing the third party. In *Snelling v. John Snelling Ltd. 1973, Q.B. 87*. Three brothers were shareholders and directors of a family company which owed each of them considerable sums

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of money. Differences arose between them, and as part of an effort to settle these, they made a contract, agreeing, inter alia, in the event of any director resigning, he would immediately forfeit all moneys due to him from the company. Subsequently, one brother (Brain) resigned his directorship and brought an action against the company for payment of the money owed to him. His two brothers applied to be and were joined as co-defendants to the action, and they counterclaimed for a declaration that the sums due to Brain from the company had been forfeited.

The question arose whether the company, which was not a party to the agreement could rely on it. In principle, it could not do so, and so Brian would be entitled to judgment on his claim. The two brothers would, however, also be entitled to a declaration that the provisions of the agreement were binding on Brian. In the view of Ormrod J. the resulting situation was absurd, and he held that the proper order to make was to dismiss Brian's claim. The reality of the situation was that Brian's claim had failed since his two brothers had succeeded in their counterclaim, and the order of the Court should reflect that fact. It would therefore seem that, where all parties are before the Court, the Court may stay or dismiss a claim brought by a contracting party against a third party whom the other contracting party has promised not to sue. It has been said that for the court to exercise its power to stay or dismiss a claim, the promisee must have a sufficient interest, such as a legal or equitable right to protect, and must be able to show real possibility of prejudice to himself,
for example by being exposed to an action by the third party.\textsuperscript{32} In Snelling’s case the promisees were not subject to this kind of ‘legal’ prejudice since they would not have been exposed to an action by the company. However, they would have been commercially and financially prejudiced by any deterioration in the company’s financial position as would have occurred had Brian’s action succeeded.

3.2 CRITICISM

The person who has suffered the loss cannot sue, while the person who has suffered no loss can sue. In a standard situation, the third party rule produces the perverse, and unjust, result that the person who has suffered the loss (of the intended benefit) cannot sue, while the person who has suffered no loss can sue. This can be illustrated by reference to \textit{Beswick v. Beswick}.(1968) AC 58, 72. In that case, the House of Lords held that the widow could not enforce the promise in her personal capacity, since the contract was one to which she was not privity. However, as administrator of her husband’s estate, she was able to sue as promisee, albeit that she could only recover nominal damages because the uncle, and hence his estate, had suffered no loss from the nephew’s breach. The widow in her personal capacity, who had suffered the loss of the intended benefit, had no right to sue, while the estate, represented by the widow in her capacity as administrator, who had suffered no loss, had that right. As it was, a just result was achieve by their Lordships decision that nominal damages were, in this three party situation, inadequate so that specific performance of the nephew’s obligation to pay the annuity to

the widow should be ordered in respect of the claim by the administrator. But where specific performance is not available (for example, where the contract is not one supported by valuable consideration or where the contract is one for personal service) the standard result is both perverse and unjust. Even if the promise can obtain a satisfactory remedy for the third party, the promisee may not be able to sue.

In Beswick v. Beswick, the promisee, as represented by the widow as administrator, clearly wanted to sue to enforce the contract made for her personal benefit. However, in many other situations in which contracts are made for the benefit of third parties, the promisee may not be able to, or wish to, sue, even if specific performance or substantial damages could be obtained. Clearly the stress and strain of litigation and its cost will deter many promisees who might fervently want their contract enforced for the benefit of third parties. Or the contracting party may be ill or outside the jurisdiction. And if the promisee has died, his or her personal representatives may reasonably take the view that it is not in the interests of the estate to seek to enforce a contract for the benefit of the third party.

In 1967, in Beswick v. Beswick, Lord Reid cited with approval the 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 *Wooder Investment Development Ltd. v. Wimpey Construction UK Ltd.* 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. 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." 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 cases which "stand guard over this unjust rule" might be reviewed. Lord Scarman concluded his judgment with an unequivocal call for reform. The 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: and now, not forty years on.

In *Forster v. Silvermere Golf and Equestrian Centre Ltd.* 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, Lord Diplock referred to the general non-recognition of third party rights as "an

36  At p. 300. Lord Keith, at pp. 297-298, also associated himself with Lord Scarman's view.
37  [1980] 1 WLR 277, 301.
39  [1983] 1 AC 324, 335. See also para 2.52 note 136, above.
anachronistic shortcoming that has for many years been regarded as a reproach to English private law."

More recently, Lord Goff and Steyn LJ have added their influential voices to criticisms of the third party rule. In Pioneer Container\(^{40}\) Lord Goff called into question the future of the rule, and in \textit{White v. Jones}\(^ {41}\) his Lordship said, "Our 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 \textit{jus quaestitum tertio}".\(^ {42}\)

\textbf{Three points about remedy} The remedies given by the courts for breach of contract exclude termination (or discharge) of a contract for substantial breach by the promisor. Termination is a self-help, not a judicial, remedy.\(^ {43}\) It is said that the third party should not be entitled to terminate the contract for breach as this may be contrary to the promisee's wishes or interests. The remedies for breach of contract, excludes restitutionary remedies, such as the recovery of money had and received for total failure of consideration, which an innocent party can claim once he has validly terminated a contract for breach.\(^ {44}\) It does not consider that the third party can establish that the promisor has been unjustly enriched at his expense (where this latter phrase means "by subtraction from the

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40 [1994] 2 AC 324, 335. See also para 2.34 above for Lord Goff's comments, in a more specific context, in \textit{The Mahkutai} [1996] 3 WLR 1.
41 [1995] 2 AC 207.
third party”).45 The third party for the purposes of this recommendation as if he had been a party to the contract, and by stressing that the rules as to the remedies are to apply by analogy, we mean to make clear that, for example, the third party is entitled to (substantial) damages for his own loss, he cannot recover loss that is too remote, that he is under a duty to mitigate his loss, and he may be awarded specific performance (unless, for example, the contract is not supported by valuable consideration or is a contract for personal service or the third party has fallen foul of the Doctrine of Larches). It should also be noted, although this is in any event the position in standard two-party contracts,46 that it will of course be the defendant’s (the promisor’s) contemplation that will be crucial for the purposes of the contractual remoteness of damages test.

46 This is made clear in cases subsequent to Hadley v. Baxendale (1854) 9 Exch. 341, 156 ER 145, such as Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 KB 528 and Koufos v. Czarnikow Ltd, The Heron II [1969] 1 AC 350.