

Diagram 4C

In general, the party seeking to enforce a contractual promise must:

- (i) be the promisee; and
- (ii) have given consideration for the promise.

The effect is that third parties (who are neither promisees nor have given consideration) can't sue for the promise. This is the **privity rule**.

Diagram 4C gives an overview of the **Contracts (Rights of Third Parties) Act 1999**.

1. This Act creates a wide **exception** to the privity rule by allowing a third party who satisfies the statutory conditions to enforce a contractual term, *as if she were the promisee*.
2. **Section 1(1) (a)** allows a third party to enforce a contractual term where the contract '*expressly provides that he may*'. This meets the Law Commission's stated aim of giving effect to the contract parties' intentions.
3. **Section 1(1)(b)** allows a third party to enforce a contractual term where the contract '*purports to confer a benefit on him*'. Decided cases have confirmed that the presumption in favour of third party enforcement a very 'strong one'. The point is that, if a contract is *silent* on whether the parties intend to allow the third party to sue, the *default* presumption will be that they *do* so intend. Section 1(2) stipulates that this is rebuttable - but only by strong positive evidence to the contrary. In practice, this **reverses the burden of proof**: once the third party shows that the contract '*purports to confer a benefit on him*', it is up to the promisor to positively show that the original contract did *not* intend for the third party to sue. This has been the subject of much criticism, mainly for uncertainty and for its potential to contradict the parties' intentions.

Under both qualifying tests, **section 1(3)** requires qualifying third parties to be **expressly identified in the contract** 'by name, as a member of a class, or as answering a particular description, but need not be in existence when the contract is entered into'.

4. If the third party does not qualify under either subsections, she has no claim under the Act but may still be able to claim under one of the so-called common law 'exceptions'. These are discussed in Diagram 4E, the next audio file.
5. If the third party *does* qualify as a claimant under the Act, the Act has to deal with any *potential conflict* between:
 - i. the *contract parties*' (who are normally free to vary or rescind their contract) and
 - ii. the *third party* (who would be prejudiced if the parties *do* vary or rescind their contract).

So section 2(1) of the Act sets out when the third party's rights **crystallize**; after that time the contract parties *are barred from rescinding* the contract *without that third party's consent*. This is the case:

6. where the third party has communicated her *assent* to the contract to the promisor;
7. where the promisor *knows* that the third party has actually *relied* on the term; or
8. where the promisor can *reasonably foresee* the third party's actual *reliance*;

All of this is *unless*, the contract parties *expressly* reserve the right to vary or rescind the contract without the third party's consent; or if they expressly spell out other circumstances when the third party's consent is required.

9. If the third party's rights have not crystallized, and the contract parties vary or rescind the original benefit, the third party cannot sue for it under the Act but she may still be able to claim under one of the can common law 'exceptions' set out in Diagram 4E.
10. If the third party's rights *have* crystallized, the starting point is that the third party's claim replicates the promisee's claim; the promisor is liable to the same extent as if she was sued by the promisee.

11. However, the *third party's* claim may be weakened or negated in a number of circumstances
12. First, unless the contrary is expressly agreed by the parties, section 3 allows the promisor to raise any **defences** or **set-offs** that would have been available against the *promisee*.
The promisor *can also raise* any defences, set-offs, or counterclaims that would have been available had the *third party* been a party to the contract. So, the third party's claim would be defeated if, for example, she had induced the promisor to enter the contract by misrepresentation.
13. Second, **section 5** requires the court, when considering what damages to award a third party, to take account of any damages already awarded to the promisee claiming for the third party's loss. This can reduce or extinguish the third party's damages, for example under the *Albazero* exception.
14. Third, in deference to the parties' intentions, terms excluding or limiting liability (other than for personal injury or death) *are* effective against third parties. Third parties are not protected by the Unfair Contract Terms Act 1977
15. Fourth, the third party is also not treated as a party to the contract for the purposes of 'any other Act', so eg she can't appeal to the Law Reform (Frustrated Contracts) Act 1943 or the Misrepresentation Act 1967.
16. Lastly, the 1999 Act bars third parties from suing on certain types of contracts set out in section 6 such as contracts relating to company and partnership, employment, negotiable instruments, carriage of goods, and bills of lading.
17. If the third party's claim meets any of these five obstacles, her claim will be reduced or negated accordingly.
18. Otherwise, the third party can claim as if she were the promisee.