The Law Reform Commission (LRC) has published a Consultation Paper on the rule of privity of contract and third party rights. The rule of privity of contract provides that only the parties to a contract can enforce the terms of the contract. The LRC provisionally recommends that the rule of privity be reformed to allow third parties to enforce rights under contracts made for their benefit.

The Rule of Privity of Contract.

The rule of privity of contract has been circumvented in practice to allow for situations where the Courts and legislature sought the need to give third parties rights to enforce a contract made for their benefit. The exceptions to the rule have been developed in a piece meal fashion and include the following:

1. A third party can enforce a contract where it can be shown that a completely constituted trust was created in their favour by the contract.
2. The Law of Agency whereby an agent can bind a principal acting on his behalf, i.e. the principal can sue and be sued by a third party.
3. A negative covenant relating to land can be enforced against successors in title pursuant to the rule in Tulk v Moxhay. The Land and Conveyancing Law Reform Bill 2006 proposes to provide that freehold covenants be fully enforceable by and against successors in title and abolishing the current common law rule.
4. The Married Women’s Status Act 1957 provides that any contract entered into by a married person that confers a benefit on their spouse and / or their children shall be enforceable by the spouse and / or the children. It is important to note that it must be a spouse or child of the contracting party. The contract must also expressly grant a benefit to the spouse or child.
5. The Consumer Credit Act 1995 provides where a consumer enters into a hire purchase agreement, the consumer has a remedy against both the seller and the hire purchase company in the event of a breach of the hire purchase agreement, or a misrepresentation made by either the seller or the hire purchase company.
6. A person claiming against an insured motorist has certain remedies against the motorist’s insurer under the Road Traffic Act 1961.
7. Legal methods such as collateral warranties and assignments are used to evade the rule in the area of construction law in particular. Assignments allow sellers to assign their benefit under a contract onto the purchaser. Collateral warranties are used to bind third parties to a construction project such as subcontractors, engineers and architects.

2. (1848) 2 Ph. 774.
The Need for Reform.

The exceptions to the rule on privity of contract have made this area of law very complicated necessitating specialised legal knowledge to make use of the exceptions to the rule. Accordingly reform of the rule is required in order to provide legal certainty for practitioners.

The LRC’s recommendations:

• The Method of Reform

The LRC provisionally recommends that the rule on privity should be reformed by detailed legislation. However such legislation should not limit judicial development of third party rights. The LRC also provisionally recommends that a general clause ought to be included in the legislation to keep the existing exceptions to the privity rule and to give third parties the right to avail of the existing remedies.

• The Enforcement Test

The LRC has put forward the following two stage test to determine whether or not a third party may enforce terms under a contract made for their benefit:

1. The parties intend that the third party is to receive the benefit of the contract or term of the contract; and
2. The parties intend that the term benefiting the third party should be enforceable by the third party in their own name.

• Who can Enforce the Contract?

The LRC recommends that the third party beneficiary should be identified in the contract by name or description, which can include being a member of a class or group of persons. The LRC also recommends that there should be an express provision that the third party does not have to be in existence at the time of the entering into of the contract.

• The Rights of the Parties to Modify the Contract.

Problems may arise where the contracting parties modify the terms of the contract and then a third party seeks to rely on the original contract. The LRC recommends that once the third party's rights have crystallised the contracting parties need the third party's consent to vary the contract. The LRC recommends that reliance and acceptance should be used as alternative methods of determining when a third party's rights have crystallised. The LRC further recommends that the contracting parties should remain free to include in the contract an express provision for the variation or termination of the third party rights. The method of reliance and acceptance is a complex issue and the LRC has invited views on this matter.
• **Exceptions**

There are certain types of contracts that will not lend themselves to reform due to policy reasons and existing regulations. These include contracts between a company and its members, negotiable instruments and the carriage of goods at sea and employment contracts to a certain extent. Accordingly the LRC recommends that these types of contracts should be excluded from reforming legislation to avoid it conflicting with existing legislation and regulations. The LRC also invites views as to the types of contracts that should be excluded from reform and to what extent they should be excluded.

• **Remedies**

The LRC Consultation Paper does not address the types of remedies available to the third party beneficiary. It is notable that no other common law jurisdiction has set these out. It is important that the third party beneficiary’s remedies are set out in any reforming legislation to give all parties certainty and clarity.