

Has the contracts act
1999 created as
many problems as it
has solved



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The Act provides a detailed legislative scheme to allow contracting parties to provide a benefit to a third party and enforceable by the same. Made in response to great criticism of the privity rule, since its enactment it has received almost universal praise. However, it has created a number of not insubstantial problems, the principal of these to do with the level of uncertainty generated by some aspects of the Act. It creates this uncertainty with respect to several issues. The most significant of these is in ascertaining what s. 1(1)(b)'s "purport to confer a benefit" means.

The Law Commission in their Report state that it is being used in the sense of "to intend or purpose" ¹ rather than in one of the more common usages such as "convey to the mind" or "profess". It is possible that it here implies an objective interpretation as it is usual to speak of the purport of documents rather than individuals. The Law Commission tries to draw a distinction between cases where the promisor is purporting to confer a benefit on a third party and merely enabling the promisee to do so. This is a difficult distinction to draw and the examples given do not help to clarify the position entirely.

The Law Commission's view was that a builder constructing a conservatory at the request of a father for his daughter was purporting to confer a benefit, whereas a solicitor drawing up a will for a testator was merely enabling the promisee to confer a benefit upon the legatee. But why could the builder not be described as enabling the father to confer the benefit of the conservatory? Why is the position with the solicitor different when the whole purpose of the contract between the solicitor and his client is that the legatees inherit?

Professor Tettenborn suggests that the distinguishing feature of the disappointed legatee example is that it is envisaged that some act or decision of the other contracting party is to intervene. “ 2 In some cases this appears decisive; a purchaser of a building does not appear to acquire rights against the builder who had agreed with the original owner to take proper care in construction. The decision of the original owner to sell to the purchaser has intervened so that it cannot be said that the contract to build purported to confer a benefit upon the subsequent purchaser³.

However, in the case of the disappointed legatee there is no further decision of the testator to benefit his children which needs to be taken after the agreement to draft the will has been entered into. Stevens⁴ submits that the correct distinction is that there is still potential for the benefit of the inheritance to be denied to them by the father changing his will whereas once the builder has constructed the conservatory it cannot be taken down without the daughter’s consent. The next point of uncertainty comes from the question of the strength of the presumption of enforceability of s. 1(1)(b).

This will be rebutted if it can be shown that on the proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party. On the one hand, Professor Burrows, the Law Commissioner directly responsible for the report, has described the presumption as a “ strong one” ⁵. However, regarding the context of construction work the Report states that due to the “ existence of the connected head-contract and the background practice and understanding of the construction industry” the usual construction will be that it is not intended that the employer will have rights under the contract.

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However, if this approach of referring to background practice and understanding of an industry is taken to its logical conclusion, claims under the Act based on s. 1(1)(b) would only succeed where a claim would already exist as it would only be in those circumstances that the background practice was consistent with a third party having enforceable rights. If this is correct, the presumption of enforceability is not a strong one as the Act will simply follow the pattern of enforceability in place before it came into force.

Another factor is when a right of a third party will be conditional. S. 1(4) states that the third party is only entitled to enforce his rights under the Act “ subject to and in accordance with any other relevant term of the contract”. This possibly creates more confusion than clarity because the scope of the third party’s rights must always be determined by the construction of the contract. Where the right of enforcement arises due to the operation of the presumption, the task of construction is an exceptionally difficult one as the parties will not have addressed themselves to the issue.

A possible solution in this case would be to presume the right of enforceability to be subject to all of the conditions to which the promisee’s right of enforcement is subject to. A further issue is whether the parties can create an irrevocable set of rights for the third party from the outset. The Report states that any clause purporting to effect this would be “ as open to variation... by the contracting parties as any other term. “ 6 Professor Burrows has, however, expressed a view to the contrary based upon the “ broad wording of s. (3)(b)”.

This states that the contract may expressly provide that the third party's consent to the variation is required " in circumstances specified in the contract instead of those specified in subsection (1). " Although this provision is identical to the one proposed in the draft Bill attached to the Report, a literal reading supports Professor Burrow's view of the scope of this section. Another issue is what defences are available to a promisor.

Under the Act the promisor may assert against the third party by way of defence or set-off " any matter that... arises in connection with the contract and is relevant to the term " sought to be enforced that could have been asserted had the proceedings been brought by the promisee⁷ subject to express contrary agreement⁸. The Law Commission thought it necessary to have the words italicised in the section to prevent a third party's claim in one clause of a contract being limited or set-off by a defence available in another unrelated clause.

Stevens⁹, however, submits that the difficulty with this in practice is that such is the interdependence of contract terms that it will be wholly exceptional for a court to determine that a defence or set-off is not " relevant to the term" sought to be enforced. A related question may also arise as to what counts as a defence. If, for example, a promisee does not have " clean hands" he will be unable to claim specific performance. Is the clean hands doctrine a defence for the purposes of the Act? If so, the promisee's conduct can be relied upon if specific performance is sought by the third party.

If not; if it is merely a restriction upon the promisee's right of enforcement, then it could not be relied upon against the third party. A further point is whether the Act applies to deeds. No mention is made of them in the Act which simply refers to contracts. Clearly some deeds are contractual and consequently will be within the scope of the Act. For example, a legal lease for more than three years must be made by deed. Of simple promises contained in deeds, though, Professor Treitel states that the "binding force of [a promise in a deed] does not depend on contract at all." 10 Stevens supports this view for two reasons.

First, a promise in a deed is binding without any requirement of agreement and second, the promise is binding even if the person in whose favour it was made knows nothing of it. 11 Therefore, as the Act only applies to contracts it does not apply to non-contractual deeds. This appears to be unobjectionable since if the party executing the deed wishes to make it enforceable by a particular party all that is necessary is that this is stipulated for in the document. Moreover, virtually all parties executing deeds will have received legal advice. A final point of consideration is whether a gratuitous joint promisee can rely on the Act.

The Report originally recommended that a joint promisee who has not provided consideration should not be regarded as a third party for the purposes of the reform¹². This provision was not included in the Bill presented to Parliament and did not find its way into the Act. Presumably, therefore, as Treitel suggests, such joint promisees may be third parties for the purposes of the Act¹³. Aside from the issue of uncertainty several other issues arise from the Act, entailing further complications. The Act entitles the <https://assignbuster.com/has-the-contracts-act-1999-created-as-many-problems-as-it-has-solved/>

promisor to invoke against the third party some of the defences that would have been available to him against the promisee¹⁴.

It does not, however, either entitle or require him to invoke any defence against the third party which would have been available to the promisee against the third party¹⁵. This can lead to the frustration of the promisee's intentions. This problem is most serious where the third party has induced the promisee to enter into a contract for his benefit through a misrepresentation, duress or undue influence. Once the third party's right has become irrevocable there is no mechanism whereby the promisor is either required or is able to invoke against the third party the defences which would have been available to the promisee.

Section 5 of the Act was intended to prevent the promisor's potential double liability. It provides that where the promisee has recovered a sum in respect of the third party's loss or the expense to the promisee of making good to the third party the defective performance the award to the third party should be reduced. Whilst this provision is useful in the context of a claim on the "narrow ground" – a claim for the loss of the third party – it would be of no assistance in the case of recovery on the "broad ground" – a claim for the promisee's loss.

This can be illustrated with a scenario where a husband (the promisee) pays a jeweller (the promisor) to make a ring for his wife (the third party) and the ring subsequently made is of a lower quality than that contracted for. If the wife obtains the right of enforcement under the Act because it cannot be shown that the parties did not intend that she should not, then the jeweller

will be liable to both the wife for her loss and the husband for his on the “ broad ground”. Allowing the third party rather than the promisee to recover damages also appears to yield anomalous results.

In the case of a breach of a contract of sale the promisor is entitled to his loss – the difference between the contract price and the market price – this could be zero. If, however, it had been agreed that the price was to be paid to a third party rather than the promisor then a different result follows. If the presumption that the contract is to be enforceable is not rebutted, then the third party has “ available... any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract” 16.

It is clear that the third party is entitled to “ the normal measure of recovery (the expectation measure). ” 17 The third party is entitled, therefore, “ to be placed in the same situation with respect to damages as if the contract had been performed” 18 and so can therefore claim as damages the price of the good for sale. Unlike the case where the promise is to pay the promisor, the absence of counter-performance does not appear to be taken into account in assessing the damages payable. It is submitted, however, that where circumstances such as this arise the Act will be interpreted in such a way so as to avoid these results.

The requirement that the third party is to be treated “ as if he had been a party to the contract” is likely to be read as meaning “ as if he had bargained for the promise himself. ” If correct, the third party should not be treated more advantageously than the contracting party. However, treating

the third party's damages as "capped" by the loss suffered by the promisee is contrary to the general approach of the Act towards seeing the third party's claim as independent of that of the promisee.

The Act also has a substantial impact upon the orthodox position of bargain promises in that it creates an exception to both the rule that it is necessary to be a promisee to acquire contractual rights and the requirement that consideration must move from the promisee. In its report the Law Commission argued that the existence of exceptions to the privity rule justified reform since "the existence of so many exceptions demonstrates [the third party rule's] basic injustice.

Of course, if the objection really was that there were too many exceptions the best response would not be to create new ones. It cannot be argued in response that the new statutory exception is any different as it is comprehensive since this is not the case – for example, the Act could not be relied upon by the majority of assignees or by an undisclosed principal. Furthermore, the fact that the other exceptions to the third party rule have been left in place means that whatever else the Act has to commend it, it will "scarcely simplify" 20 the law.

Thus it is clear that the Act has created a significant number of issues which will require resolution by the judiciary. Until this happens, in addition to the uncertainty generated by the Act there is a legitimate fear that the unwary will be caught out by conferring enforceable rights upon third parties when they do not intend to do so, a fact most clearly evidenced by the widespread

exclusion of the operation of the Act in the standard form contracts brought in after the Act by the construction industry.