

Who has rights under your contract?

Generally speaking, when you enter into a contract, only you and the other parties to the contract can rely on it, everyone else (“Third Parties”) cannot. This changed on 11th May 2000 when the Contracts (Rights of Third Parties) Act 1999 (“the Act”) took effect.

WHAT DOES THE ACT DO?

Put simply, the Act allows Third Parties to acquire rights and rely on terms of the contract that apply to them. If it is your contract, a Third Party can rely on the benefit of that contract to them in making a claim against you, even though they are not a Party to the contract, but you cannot use the contract to make a claim against them. The Act has mainly impacted on the Construction Industry to date, but its provisions are far wider reaching, applying but for a few exceptions, to ALL contracts.

HOW DOES A THIRD PARTY ACQUIRE RIGHTS UNDER A CONTRACT WITHOUT BEING A DIRECT CONTRACTING PARTY?

- When the parties to the contract expressly name a Third Party in the contract and make it clear what terms the Third Party can rely on.
- When the parties to the contract agree the terms of the contract and do not consider who else might be affected by the terms of the contract. They might have inadvertently given a Third Party a benefit under the contract upon which they could rely. Even though they might have supposedly conferred a benefit, they will only actually have done so if the Third Party can be identified from a description in the contract, such as references to sub-contractors, architects, tenants, buyers or suppliers for example.

WHO ARE THE THIRD PARTIES WHO MIGHT BENEFIT?

These examples relate primarily to the Construction Industry, but remember that the Act is of far wider scope:

- A main contractor (whose contract is with the Employer) may be able, as a Third Party, to sue the architect under the architect’s contract with the Employer for the late supply of drawings or information that has not affected the Employer, but has delayed the main contractor.
- Future owners, tenants and funders who have no direct contracts with any of the contractors or designers may be able to sue the architect/engineer, contractor or sub-contractors for defects in workmanship, materials or design.
- Adjoining owners who do not have a contract might claim against contractors for nuisance/annoyance during building works.
- Employers could enjoy rights against specialist sub-contractors who have been specially selected and relied upon by the employer and his design team.
- Sub-contractors might sue other sub-contractors who disrupt/delay their parallel works, even though there is no contract as between each sub-contractor, but each is aware of the others’ reliance on them completing their works quickly so as not to delay subsequent works.
- Where a new company is set up under a term in an agreement for the sale of a business, the new company could then rely on the warranties given by the seller to the purchaser.

IMPORTANT CONSIDERATIONS

- Third Parties do not have to have paid any money to the contracting parties for the right to rely on relevant terms of the contract.
- Where a Third Party has acquired the right to rely on someone else's contract, the contracting parties cannot vary or terminate the contract without the Third Party's permission unless the contract expressly allows them to do so.
- The Third Party must be identified, either by name, general class, or by a particular description, e.g. sub-contractors, Employer's Agent etc.
- Whilst a Third Party must be identifiable by description, they do not have to actually exist as a physical entity at the date of the contract, but can come into existence subsequently.
- The Act only gives Third Parties the opportunity to rely on benefits and rights in a contract. No Third Party can be burdened with obligations under the contract, unless the Third Party enters into a separate agreement which contractually binds them.

WHEN DOES A THIRD PARTY ACQUIRE THE RIGHT TO ENFORCE A BENEFIT?

A Third Party can only rely on terms in the contract (that are applicable to them) once that Third Party's rights have "crystallised". In other words, the Third Party must have communicated its acceptance of a relevant term in some way, or must be able to show that it has relied on that term, and the contracting parties were aware or ought to have been aware of that reliance.

To strengthen its position, the Third Party should communicate in writing, acceptance of, assent to, or reliance on the relevant term(s), to the contracting parties.

EXCLUDING THE ACT

Although the Act itself cannot be excluded, the effects can be, by simply including clear unambiguous words in the contract to that effect. The Act has very wide reaching effects, and can have serious unforeseen consequences. Protect yourself! At [stevensdrake](#) we can make sure your contracts are drafted to meet your needs, so that only those parties you want to be able to rely on a benefit under it, are able to do so.

Whether the parties expressly agree to rely on the Act, or whether they chose to exclude its effect, one overriding principle remains:

IGNORE THE ACT AT YOUR PERIL!!!

LITIGATION



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