

Party to an agreement

Beverley Whittaker explains third party rights and describes how the law can be useful for companies that use goods and services purchased by another.

Although the Contracts (Rights of Third Parties) Act 1999 has been in force for over seven years, it is still often ignored and without much thought frequently excluded in contract terms.

Reported cases involving the Act are rare, but a recent one involving Prudential shows how useful it can be.

There, a deed relating to a lease contained a limitation on liability in favour of the tenant and any "previous tenant". The previous tenant was able to use the Act to rely on the limitation even though it was not a party to the deed, so that Prudential's ability to recover from the previous tenant was significantly reduced.

Before the Act, a contract could only be enforced by the parties to it, even if the document seemed to say, as in the Prudential case, that other persons ("third parties") were intended to benefit. This was the privity rule. There are legal constructs that can be used to get round this, but these can seem complex and artificial. The Act makes things easier - broadly, the Act allows third parties to enforce the terms of the contract if the contract expressly says so, or if a term "purports to confer a benefit" on them.

Using these third party rights can be helpful in purchasing situations, for example, where one company enters into a central purchasing agreement for the acquisition of goods or services that are then used by other group companies, who are not parties to the agreement.

In these circumstances, it can be difficult to create an enforceable legal "link" between the supplier and the user. The Act provides a relatively simple mechanism that allows

the "user" group companies to claim directly against the supplier for breach of, or to enforce, relevant contractual provisions without having to channel the claim through the purchasing company. These could be product warranties, specific remedies protections for intellectual property rights and confidentiality.

Getting the Act to work for you is not difficult. Ideally you would expressly say who is intended to benefit, and from which provisions. Beneficiaries do not need to be individually named - it is sufficient for them to be identified as a member of a class (for example, "Group Companies" or "Affiliates") and it is not necessary for each of them to be in existence at the time the actual contract was entered into.

As with Prudential, the Act can help you even if it is not mentioned expressly. The Act will apply if a term "purports to confer a benefit" on the third party. This will often be the case if group companies are clearly referred to as being the beneficiaries under the agreement.

But the Act will not help you if you have failed to consider how any standard clause on third party rights works - typically it will simply exclude all rights.

So to try and avoid that, all contracts should be checked to ensure that the Act has not been excluded without proper consideration and indeed that unintended rights have not been inadvertently granted.

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