

## **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

**From 11th May 2000 this Act will apply to virtually every contract: contract givers and contract takers beware.**

The Contracts (Rights of Third Parties) Act, which was given Royal Assent on 11<sup>th</sup> November 1999, radically changes a fundamental principle of English law, namely that only those who are parties to a contract can enforce rights under that contract – the ‘privity of contract’ rule.

The Act applies to virtually all contracts. Therefore the construction industry **must** consider its impact on all its contracts – building contracts, sub-contracts, consultants’ appointments, collateral warranties, insurance policies, bonds, adjudication agreements etc.

The Act is **facilitative**, that is it enables contracting parties to confer benefits on others, not themselves parties to the contract, which the third party can then enforce. No benefits or rights are given automatically (although they can be given impliedly ie without an express clause granting such rights).

Throughout, the philosophy is one of **party autonomy**. The privity of contract rule has not been abolished; it will continue to govern relationships where no rights have been given under the Act (or the Act does not apply).

The Act enables contracting parties to confer **benefits**, but not to impose burdens or duties on the third party.

### ***Examples***

*If in a building contract an employer and contractor agree that a subcontractor will be paid direct by the employer in certain circumstances, without the benefit of the Act the subcontractor could not enforce that right against the employer (unless he had a direct contract). Under the Act, it will be possible to draft the building contract so that the subcontractor can enforce the right against the employer.*

*Or, say that the conditions of engagement of an architect acting for a developer state that he will co-operate in providing information to allow a tenant and his designers to prepare fit-out drawings. Neither the tenant nor designers can enforce that obligation directly against the architect. Under the Act however, it will be possible to draft the conditions of engagement so that the right can be enforced directly.*

*Since burdens cannot be imposed, in the first example above the subcontractor could be given the right to be paid direct, but the employer could not impose a warranty regarding his work. (Although what the employer could do is provide that the sub-contractor is entitled to*

*be paid direct for work that the contract administrator has agreed has been carried out correctly.)*

A third party may enforce a term of the contract if either the contract **expressly** provides that he may, or if the term **purports to confer** a benefit on him. There is concern that this 'purport to confer' provision will create uncertainty. For this reason, **it is advisable for every contract to have a 'third party rights clause'** making it clear whether any third party rights are conferred by the contract, and if so where in the contract the relevant terms may be found.

If it is not intended to confer any third party rights, the following would be an appropriate clause to include in the contract:

**"Nothing in this contract confers or purports to confer on any third party any benefit or any right to enforce any term of this contract."**

In order to avoid any possible argument that this provision interferes with rights of assignment, the following can be added, **"pursuant to the Contract (Rights of Third Parties) Act 1999."** Even when third party rights are expressly granted, it would always be wise expressly to exclude purported rights.

A number of recently published standard forms of contract contain this provision (or a very similar one), or amendments have been issued. This includes the RIBA and ACE conditions of engagement, the ICE and JCT forms of building contract, and the ACA contracts.

When it is intended to utilise the provisions of the Act, great care needs to be taken in the drafting to ensure that the parties' intentions are realised. Until industry precedents are established, legal advice should be taken. All bespoke forms of contract should be checked, and advice taken if third party rights are given.

With the benefit of the Act, the rights currently given to funders, purchasers and tenants in collateral warranties could be included in contracts of appointment (or building contracts), rather than in collateral contracts. However, again this requires careful drafting, for example to distinguish between rights given to the client and lesser rights given to third parties. In the short term therefore collateral warranties are not likely to disappear. This does not mean that the Act will not afford useful opportunities to give third parties rights direct.

**This Digest is for general guidance only. Where assistance is required in a specific situation, legal advice must always be taken.**

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**This Digest can also be downloaded from the CIC website: [www.cic.org.uk](http://www.cic.org.uk)**

***Also available from CIC is a fuller Guidance Note on the Act.***

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