

ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION
NOT FOR PUBLICATION OR BROADCAST
BEFORE 0001 HOURS 28 MARCH 2014

TWO'S A PARTY; THREE'S A CROWD?

When we make a contract with another person we generally intend the benefits and obligations to be confined to the two parties involved: we pay for an item in a shop, for example, and we receive the item in return. But what happens if we want, say, to book a holiday for our self and our family, or to take out life insurance payable, on our death, to a named person? Or, in business, what if one company within a group wants to take out an IT contract with a specialist provider and wants all group companies to have rights under the contract? These scenarios all involve seeking to provide a benefit for a third party, that is someone who is not a party to the contract itself.

Generally, when we contract with another party – with the travel agent, insurance company, or IT supplier – the law provides rights and remedies for both parties, but not for anyone else. This is sometimes known as the principle of *privity of contract*. Although other people may be affected by the contract, they are not treated as being a party to it. But there is another principle, that of *freedom of contract*, which is also relevant: it would allow the contracting parties, if they so wish, to provide rights under the contract for third parties.

The way in which these two principles interact is at the heart of the Discussion Paper we are publishing today. Although, like most other European jurisdictions, Scots law has, for centuries, recognised third party rights in certain situations, it needs modernisation: much of the case law is very old, and it is neither clear nor comprehensive. What may once have been satisfactory for resolving disputes is no longer suitable for today's citizens and business people, who rightly demand that contract law should be certain, robust and clear, yet also flexible.

Many common law jurisdictions, such as England & Wales and New Zealand have recently introduced statutory third party rights for the first time, while longer-established rules elsewhere have also been refreshed. Scots law is therefore at risk of becoming unattractive by comparison with some of its closest neighbours. Prompted by comments from solicitors and others that the law is too inflexible and uncertain, we have carried out a thorough review. We ask whether the current judge-made common law should be replaced by a short legislative statement of how third parties can have rights and remedies conferred upon them under a contract between other parties. Our proposals for reform, which take careful account of relevant developments in other jurisdictions, are set out in our Discussion Paper on Third Party Rights in Contract and we invite comments from all those with an interest in the topic.

Professor Hector MacQueen, the lead Commissioner for this project, said: “Scots law in this vital area has, as one practitioner put it to us, been stuck in the 17th century for far too long. There is a real demand to bring it completely up-to-date, in the interests of both business and private individuals. I think that our suggestions will, if accepted and implemented, go a long way to satisfying that demand. I look forward to receiving as many views as possible on the subject over the next few months.”

NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Hon Lord Pentland, a Court of Session judge. The other Commissioners are Laura J Dunlop QC, Patrick Layden QC TD, Professor Hector L MacQueen, and Dr Andrew J M Steven. The Chief Executive is Malcolm McMillan.
2. Further information can be obtained by contacting Charles Garland, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, email: info@scotlawcom.gsi.gov.uk).
3. The paper may also be viewed on our website at <http://www.scotlawcom.gov.uk/> or purchased from TSO (<http://www.tsoshop.co.uk/>).