

RESPONSE FORM

DISCUSSION PAPER ON THIRD PARTY RIGHTS IN CONTRACT

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Summary of Proposals

Impact assessment

1. Do consultees know of any information or statistical data, or have any comments on any potential economic impacts of either the current law relating to the third party rights or any proposed reform of that law?

(Paragraph 1.29)

Comments on Proposal 1

The writer is unaware of any statistical data of the kind referred to.

However, the writer endorses the general view put forward by the SLC both in para 1.29 of the discussion paper and later in the DP in the section regarding third party rights in the construction law context. These comments match the writer's experience while in private practice in the field of construction law. The writer's views on these issues are expanded on below.

Company groups

2. Are there other situations involving company groups beyond those identified in paragraphs 3.4-3.19 in which third party rights might be of use to contracting parties?

(Paragraph 3.19)

Comments on Proposal 2

No comment is made on this proposal.

Construction projects and collateral warranties

3. Do consultees agree that collateral warranties are currently relied on rather than third party rights in Scots law? If so, is this problematic in practical terms? Would a modern set of rules on third party rights be utilised in place of collateral warranties should such rules be introduced?

(Paragraph 3.28)

Comments on Proposal 3

In terms of the first part to this question, the writer's experience, drawing from private practice and consideration and research of the issues in his present academic role, is that it is indeed collateral warranties which are currently relied upon rather than third party rights in

Scots law.

In terms of the third part of the question, taking the comments in para. 3.25 of the discussion paper into account, it apparently took over a decade from the passage of the English third party rights legislation in 1999 for there to be a discernible shift in attitude towards third party rights in England and Wales. This might suggest that any change to the law made in Scotland may not have any significant short term impact – especially if it is considered that the broadly similar principles of *jus quaesitum tertio* (JQT) despite their vintage have not gained any particular traction as an alternative to collateral warranties.

Against that suggestion, however, the fact that third party rights are now gaining momentum in England and Wales ought to provide a platform for their growth in Scotland, since many of the main commercial players in the construction related sector (big company employers, main contractors and financial institutions) operate on a UK wide basis. Timely reform along the lines set out in the DP would present a useful opportunity to harness that momentum for the benefit of the Scottish legal system.

Such a development would, moreover, be of particular benefit in the area of construction law and collateral warranties since, to take the second question posed above, the use of collateral warranties in place of third party rights is problematic, in this context.

For the sake of driving home that point, it is worth setting out the following.

1. The problem with collateral warranties in practical terms is correctly captured by the quote which is referenced by footnote 41 in para. 3.22 of the Discussion Paper. This matches the present writer's experience in practice.

Collateral warranties are often something of an afterthought in the process of collating, negotiating and agreeing construction contracts and can therefore be difficult to procure; especially once the momentum of negotiations has dissipated and parties relationship "capital" is being spent on dealing with the issues arising from the actual execution of the underlying construction project. While the collateral warranties position is one which often falls within the scope of the "boilerplate" sections of a contract and - therefore - ought to be relatively routine, this does not always recognise the complexity of the interlinking relationships on a construction project.

2. Following on from point 1 above, the procurement of collateral warranties can pose significant practical difficulty in another way. That difficulty is in enforcing the contractual obligation to procure the warranty.

This contractual obligation often arises when the employer under a building contract provides that the contractor is to procure collateral warranties from among the contractor's design team and subcontractors. These collateral warranties would be granted in favour of the employer and, say, future tenants of the property being built (and other potential third parties). This is sensible in the sense that it is the contractor who has the relationship and commercial leverage with the subcontractors and designers to get through the process of agreeing the terms and putting these documents in place (although the fact that the precise terms are prescribed in the main contract can make the position more difficult, by inhibiting flexibility) It also puts the work and cost of procurement onto the contract. The employer has no such direct

link.

However, if the contractor fails to get the warranties signed up; there are limits to the remedy which might be available to the employer. While there may be damages; these can be difficult to quantify and even specified damages do not replace the benefit of the employer having direct recourse against a particular party.

The recent decision of Mr Justice Ramsey in *Liberty Mercian Limited v Cuddy Civil Engineering Limited and another* [2013] EWHC 4110 (TCC) suggests that, at least in England, it might be possible for a court to order the specific performance of the contractor's obligation under the main contract to procure a collateral warranty. This does not seem like a solution which can be applied universally – in the face of subcontractor intransigence, there can be no implementation/performance (since they are not a party to the obligation in question). Implementation of the obligation would be impossible.

Acknowledging that point, in *Liberty Mercian*, Ramsey J did at least limit the order to providing that the contractor use its "best endeavours" to procure the warranty (allowing the court to evaluate whether the steps taken were sufficient if these endeavours did not bear fruit and the matter returned to court). That does not solve the problem where there is a stubborn subcontractor who is not willing to cooperate with the main contractors endeavours.

In *Liberty Mercian*, the matter of whether the particular circumstances amount to impossibility was left open for further resolution once the contractor had used its best endeavours. It may be that, when this position is clearer more guidance will become available (there does not appear to have been any further judgement in this case at the time of writing).

Notwithstanding that, it does seem unlikely that there can be a positive, unequivocal order of performance here, without the subcontractor is also somehow brought within the court's jurisdiction. The only way to do that would be to bring proceedings for implementation against the subbie (always assuming that the subcontract incorporates the necessary provisions, which it may not). While "best endeavours" requires a high degree of effort towards compliance, it did not seem that the order made in *Liberty Mercian* envisaged that ultimate course of action. If it had, then it might have been expected to make that extreme requirement clear (although other factors may have weighed on the court's mind). In any event, the position is, at least, uncertain.

Given this uncertainty – and the apparent difficulties in identifying an appropriate remedy – the opportunity for a third party rights regime to mitigate and simplify this practical issue is clear. In that case, the rights(/benefits) which the subcontractor/design team are to grant can simply be specified in the contract. Given the general flexibility about the third party rights regime which is provided for in the DP – it ought to even be possible to incorporate these rights by referring to a list set out in the main contract. Such drafting can be inelegant – and may not be optimal (since issues of interpretation and incorporation might arise) but it would provide a reasonably straightforward means of spreading third party rights – which can be put in place with the rest of the contract; rather than becoming a logistical chore post

contract execution.

3. The recent *Parkwood* case which is discussed at para. 3.27 of the DP is a clear demonstration of the lack of clarity about precisely what a collateral warranty is and, importantly, demonstrates that this lack of clarity is not merely an issue of academic interest but one which resonates in practice. The present writer has sketched out a view of what the proper understanding of a collateral warranty might be at http://www.thenbs.com/topics/contractsLaw/articles/Collateral-Warranty_A-Scottish-viewpoint.asp. This understanding draws from the “essential purpose” of the collateral warranty which was identified by Lord Drummond Young in *Scottish Widows Services Limited v Harmon Facades Ltd and others [2010] CSOH 42* at para 1; namely “*to ensure that the party who suffers loss has a right of action against any contractor or member of the professional team who has provided defective work*”.

As his Lordship identifies in that decision, collateral warranties grew up in response to the limiting of recourse for pure economic loss in the law of tort in England following the decision of *Murphy v Brentwood*.

In addition to this original purpose, there is the role which is identified in paras. 3.11 – 3.14 of the DP around the filling of “black holes” and transferring loss.

Taking account of this, it can be said that collateral warranties sit slightly awkwardly on the border between the law of voluntary and involuntary obligations: they act as a contractual substitute for a delictual/tortious claim. This slightly uneasy attempt to straddle the two branches of private law might contribute to the lack of clarity identified above, and by Professor Hogg in his blog post on the *RBS v Carlyle* case, discussed in the DP. It is also apparent in the variable terminology surrounding collateral warranties (which can be known as a number of things – “duty of care” letters is used and, as it happens, might reflect the purpose more accurately).

As mentioned already, this incoherence is demonstrated as problematic in decisions such as *Parkwood*. Reform of the law to limit the impact of collateral warranties would therefore be useful.

This is not to say that there is no use for collateral warranties. Even if a rigorous and credible third party rights regime is put in place there may still be a need to retain collateral warranties as a means of securing rights for third parties which may arise over the course of a construction project, and in other eventualities. However, if this would be as an exception, rather than the rule however that of itself would mitigate the worst of the practical difficulties which have been identified.

The current position on JQT in Scotland – which might be the alternative to collateral warranties - is unsatisfactory for the reasons identified in the discussion paper. It is not a particularly attractive alternative to collateral warranties. In order to lessen the importance of collateral warranties, parties need to be offered a more coherent and reasoned alternative. It is not sufficient to simply clarify the existing law in that area.

Community of interest cases

4. Do consultees agree that, while parties to “community of interest” transactions should continue to be free to make use of third party rights law, there is no need to make special provision for such cases in any reform of the law?

(Paragraph 3.47)

Comments on Proposal 4

No thoughts are offered on this point.

Concepts and terminology

5. Should any legislation on third party rights that may follow from this Discussion Paper and any subsequent Report be expressed in terms of rights or benefits or both?

(Paragraph 4.6)

Comments on Proposal 5

There is clearly a need for the certainty which comes from having clearly identified and clearly articulated, as well as conceptually accurate terminology (which are two sides of the same coin).

Without wishing to become repetitive – but since it is referred to in the DP – the *Parkwood* decision is once again a relevant example of the dangers which can occur when this is not done. There are of course numerous others scattered throughout Scots law.

The question about whether to express “third party right” as “rights or benefits or both” is finely balanced.

“Benefit” might be preferable since it creates a clear terminological separation between the “rights” of the third party and the “rights” of the primary parties to the contract. These primary parties will have rights against each other – but the position of the third party is separate from that. The use of “benefit” signifies that differentiation and avoids confusion with the reciprocal rights and obligations which make up a contract. While “rights” can, of course, mean much the same as “benefit” in the circumstances set out in the paper, the language chosen in any legislation ought to also accord with the general understanding of the lay person and the profession. The clear distinction between rights and benefits would be worthwhile for that purpose.

The need for this separation emerges clearly when one looks at the issue later on in the DP. In particular, in the discussion of implied terms, rights and benefits, it would be useful to have a clear difference between “rights” which might be implied ‘internally’ (that is, between the parties to the contract) and those “rights” which operate “externally” (that is, to the benefit of third parties). When operating in this more abstract field of implication – it is crucial that the language is clear and that what is being implied is similarly clear: is what is being implied something which relates to the “internal” parties; is it something which might also relate to the third party – or might it be both? Differentiating the terminology in this way would assist

that process.

It is of course possible that “internal” implied rights could, at the same time, lead to “external” implied benefits but the precise context and the interpretation of the ‘surrounding circumstances’ might well be different in each case. Labelling the concepts differently will assist the exercise of interpretation. The issue is less significant where the rights/benefits are captured expressly since the expressions deployed by the parties can be used to provide the anchor terminology around which the rights can be hung.

Finally, “benefit” is an equally accurate description of what is gained by the third party, when compared to “right”.

6. Do consultees agree with the suggested terminology for the parties and for the right, and that these might be suitable for use in any legislation on third party rights in Scots law? Would these terms be easily understood in practice? Are there better alternatives?

(Paragraph 4.13)

Comments on Proposal 6

Subject to the comments on proposal 5, above, the writer agrees with the suggested terminology and agrees that it would be easily understood in practice, save for the following point.

There would be merit in identifying different terminology to distinguish – when the circumstances arise - between the contracting party who bears the obligation which correlates to the third party’s right and the contracting party who is, at least, neutral in that respect.

In terms of the precise terminology, if “benefit” was to be used to identify the third party’s right – then ‘burden’ might be appropriate to identify the party who had the correlative obligation in each relevant instance (albeit its not ideal given the possible confusion with real burdens etc).

Again, when there is express provision for the rights, the terminology can be drawn from the parties’ express agreement but in the case of implied rights there is benefit in having clear “default” terminology.

7. Do consultees agree it is preferable for any legislation dealing with third party rights to avoid as far as possible any explicit juristic characterisation of the right?

(Paragraph 4.14)

Comments on Proposal 7

The need for conceptual clarity has been addressed in the comments above.

It is also noted that the need to utilise existing Scots law concepts is expressed in para 4.8 of the DP. The risk of a departure from existing concepts is lessened if the right involved is characterised juristically. This might allow a higher degree of flexibility.

Having said that, the DP sets out clearly what the difficulties with such a characterisation are. The key thing is that the terminology used is clear and accurately reflects the underlying position. No mean feat – but the structure of the DP and the proposals within it set out the context clearly.

If the legislation is clear there ought not to be too great a scope for mischaracterisation of the position. However there is, of course, the risk in attempting to provide a more detailed juristic characterisation of the position in the legislation in that it would create a greater risk of confusion between the concepts as expressed and the ways in which these are explained. Simply put, the constraints of legislative drafting would risk losing the nuance of the position.

It is suggested, therefore, that there is no need to attempt any explicit juristic characterisation of the right in any legislation.

However, it would benefit Scots law and the future interpretation of the statute if any Report on this issue which may be produced in due course and perhaps any other documents which underpin any eventual legislation provided some guidance – if not a bald statement of intention – as to what form it is envisaged that this right might take.

8. Is it a correct perception that a requirement that third party rights be constituted in formal writing (ie subscribed by the grantor(s)) is undesirable in the interests of maintaining flexibility?

(Paragraph 4.15)

Comments on Proposal 8

As the discussion of third party rights develops through the DP it does create a sense of growing complexity and detail which could result in controversy and difficulties of proof. This would militate in favour of mandating constitution in writing – as already occurs with other unilateral obligations.

However, writing is not needed for unilateral obligations created in the commercial sphere – and it is in this sphere that the most complex third party rights will most likely be created. Taking that into account, it would be anomalous to create a distinction in that area between unilateral obligations granted by one party and those granted by two or more, under a contract.

The need for flexibility wins out, then, and it is agreed that it is undesirable to require formal writing of the constitution of the right.

9. Should any legislation on third party rights make clear that formal writing is not required for their constitution?

(Paragraph 4.15)

Comments on Proposal 9

Yes. In the absence of a clear identification of the juristic principles, the precise requirements (or lack thereof) for constitution ought to be made clear as a means of removing grounds for later debate and possible resulting lack of clarity.

10. Is it useful in the interests of legislative economy to draw analogies as may be appropriate with other legal institutions such as the unilateral promise (eg to define without elaborating the remedies available to the third party)?

(Paragraph 4.18)

Comments on Proposal 10

Reference is made to the comments on proposal 7. It is not clear exactly what the legislative wording might be and if it is not clear; then it runs the risk of being misinterpreted.

For the reasons discussed in the comments on proposal 7, it would be better to clarify the juristic nature of the right – even if only in terms of the underlying report; than to try and spell out the position without confidence in the legislation.

In terms of drawing analogies in the legislation, this ought to be done only if the analogy is sufficiently close as to be considered equivalent – rather than as a means of providing an example. If there is doubt, it is better to avoid the analogy and simply spell out the remedies.

11. Should there be any general or more specific provision to the effect that a third party right may be conditional upon some performance by the third party or some other uncertain future event?

(Paragraph 4.20)

Comments on Proposal 11

Yes, a general provision such as those set out in the comparative instruments would seem sensible.

Identification and intention

12. Do consultees agree that the third party must be identified by or identifiable from the contract, in particular as a member of a particular class of persons or as a person fulfilling or meeting conditions laid down in the contract?

(Paragraph 5.11)

Comments on Proposal 12

In relation to this proposal, it is noted that para. 9.5 records that the third party can be identified by “later nomination or authorisation by one or more of the contracting parties”.

The writer understands that this would allow contracting parties to create a contractual mechanism for the creation of third party rights at some time after the contract has been executed. Such a mechanism would be useful, in particular as it would add further flexibility into the system.

It would also further decrease the need for collateral warranties – which is very worthwhile for the reasons which have been set out above.

For the sake of completeness, the writer confesses to struggling to identify the supporting reasoning for proposition in para. 9.5 in the body of the DP, even including the paragraphs of the DP cited in support of the position.

The scenario envisaged by the quote set out above seems to go beyond the writer's understanding of the present situation in terms of setting out the relevant conditions.

Despite this, there is a great deal of merit in allowing the parties to set up a mechanism which would allow them– or indeed one of them to identify – to subsequently identify who might become benefited by the contract in due course. It would be necessary to provide some limits to this to avoid such a nomination becoming equivalent to an assignation – when no such assignation would otherwise be possible.

More narrowly, the writer supports the proposal and considers that the position ought to be clarified to ensure that the outcome identified in para. 9.5 is clearly set out and promoted.

13. Do consultees agree that a right in favour of a third party who is not in existence at the time that the right is set up should continue to be valid and enforceable by any such third party which subsequently comes into existence?

(Paragraph 5.11)

Comments on Proposal 13

Yes. Following on from the point made in comments on Proposal 12, as long as the intention of the parties is sufficient to identify the third party, then there ought to be maximum flexibility over who that third party might be.

14. Should it be provided for the avoidance of doubt that when a third party right is drawn in favour of a class, a person who was in existence at the time the relevant contract is formed, but was not then a member of the intended class, may become so upon joining the class if the contracting parties so intended?

(Paragraph 5.11)

Comments on Proposal 14

Yes. Again, the comments on proposal 12 are referred to. As long as the intention of the parties is sufficient to identify the third party, then there ought to be maximum flexibility over who that third party might be.

15. Subject to the over-arching requirement that the existence of any third party's right must depend upon the contracting parties' intention, should the identification or identifiability of the third party come from the contract only, or should it be possible to refer to extra-contractual evidence by which a third party can be identified?

(Paragraph 5.15)

Comments on Proposal 15

The extent to which reference is made to surrounding circumstances and extra contractual evidence ought to fall back to the general rules on the interpretation of contracts and the extent to which extra-contractual evidence is used there. These rights will flow from contracts and it is appropriate that issues of interpretation and evidence remain in line with the existing, underlying law of contract. In addition, given that this area of law is currently developing, there is merit in leaving these issues sufficiently 'loose' that they can keep pace with developments.

16. If so, what kinds of evidence might be allowed?

(Paragraph 5.15)

Comments on Proposal 16

Reference is made to the Comments on Proposal 15. In short: the same kinds of evidence as would be normally used for the interpretation of contracts.

17. Do consultees agree that the current rule in Scots law, that the intention of contracting parties to create a right by their contract for an identified or identifiable third party can be express or implied, should be continued?

(Paragraph 5.21)

Comments on Proposal 17

Yes. Although it may create ambiguity in particular circumstances, the writer can think of no reason in principle to deviate from the general rules of contract.

18. Do consultees agree that it should be expressly provided that an exclusion or limitation of the third party's liability to one or more of the contracting parties can be an example of a third party right?

(Paragraph 5.25)

Comments on Proposal 18

Yes. This is a key point about the substance of the right/benefit and its existence ought to be made clear in the legislation; rather than being left to a conceptual analysis of the alternatives.

Irrevocability

NB Respondents may wish to note the discussion in paragraph 6.3 of some of the terms which are used in the questions in this section

19. Do consultees agree that any requirement that a third party right cannot be constituted in a contract unless the right has first been made irrevocable by the contracting parties should be abolished?

(Paragraph 6.6)

Comments on Proposal 19

Yes.

20. Do consultees agree that it should be specifically provided that where a contract provides for a third party right while reserving the entitlement of the contracting parties to vary or cancel the right, that entitlement may only be defeated by (i) the fulfilment of any conditions for the third party's entitlement to enforce the right before any variation or cancellation is completed, or (ii) the operation of personal bar against the contracting parties' exercise of their entitlements?

(Paragraph 6.9)

Comments on Proposal 20

Yes.

21. Do consultees agree that an express contractual statement that a third party right conferred by the contract is irrevocable should be given effect, at least if delivered, intimated or otherwise communicated to the third party?

(Paragraph 6.11)

Comments on Proposal 21

Yes – and subject to communication in the way suggested in the DP.

22. Do consultees agree that, where a contract sets up a third party right without any provision for an entitlement of the contracting parties to vary or cancel the right, either:

- (i) the fulfilment of any conditions for the third party's entitlement to enforce the right will prevent any variation or cancellation by the contracting parties; or
- (ii) representations of irrevocability or unmodifiability made to the third party by the contracting parties (or any one of them?) and detrimentally relied upon by the third party will lead to the operation of a personal bar against any attempt by the contracting parties to revoke or modify the third party's right?

(Paragraph 6.17)

Comments on Proposal 22

Yes. Subject to the issue identified in question (ii) namely whether representation needs to be made by only one of the parties. This is a difficult issue; tentatively, perhaps if the representation was limited to the party who is burdened with the correlative obligation to the third party's benefit, that might be acceptable. It is that party who has "most to lose" and therefore representations by them ought to be capable of bearing the necessary weight to support a claim for personal bar.

23. Do consultees agree that a post-contract promise to the third party by the contracting parties that a third party right conferred by the contract is irrevocable or unmodifiable should be given effect if the steps needed for the constitution of an enforceable promise have been met by the contracting parties?

(Paragraph 6.18)

Comments on Proposal 23

Yes.

24. Do consultees agree that where a contract provides for a third party right without any provision about an entitlement of the contracting parties to vary or cancel the right, there will be no such entitlement if the term conferring the right upon the third party has been delivered or intimated to that party?

(Paragraph 6.21)

Comments on Proposal 24

Yes.

25. Do consultees further agree that the contracting parties may at the time of the delivery or intimation mentioned in the previous question reserve an entitlement to vary or cancel the third party's right?

(Paragraph 6.21)

Comments on Proposal 25

Yes.

26. Do consultees also agree that any purported acceptance of the right by the third party should not by itself have the effect of making the right irrevocable or unmodifiable?

(Paragraph 6.21)

Comments on Proposal 26

Yes.

27. Should registration of a contract conferring a third party right, whether for preservation only or also for execution, make that right irrevocable or unmodifiable unless the contract expressly provides the contracting parties with an entitlement to vary or cancel the right?

(Paragraph 6.23)

Comments on Proposal 27

Yes – registration ought to have an equivalent effect to intimation or notice to the third party; for this purpose.

28. Should the third party's detrimental reliance (perhaps defined along the lines found in sections 1(3) and (4) of the Requirements of Writing (Scotland) Act 1995), based upon informal knowledge of its right and known to and acquiesced in by the contracting parties, make a third party right irrevocable or unmodifiable?

(Paragraph 6.27)

Comments on Proposal 28

Yes.

29. In addition, should third party reliance that is reasonably foreseeable by the contracting parties (although they had no actual knowledge of it at the time it happened) have the same effect?

(Paragraph 6.27)

Comments on Proposal 29

Yes - although this might be tricky to establish in practice, it would be in line with the general requirements of foreseeability.

It would be worth clarifying when the foreseeability would be established – at time of contract or at time of “reliance”? The former would seem more consistent with general contract law.

30. Do consultees agree that a third party right should not become irrevocable simply because the third party has informally acquired knowledge of the existence of the right?

(Paragraph 6.30)

Comments on Proposal 30

Yes.

31. Should the third party's death prior to any cancellation or variation of the contract containing its right have the effect of making the right irrevocable or unmodifiable so that it becomes enforceable by the deceased's executors?

(Paragraph 6.31)

Comments on Proposal 31

Not automatically – it depends on an assessment of the parties' intention.

The balance of justice is between imposing a right on the contracting parties who might not have otherwise been bound irrevocably into with withholding a possible benefit from a deceased's estate. An assessment of contracting parties' intentions in this respect would be better than imposing a “one size fits all” rule.

32. Should there be some provision about the effects of assignation in relation to making a third party right irrevocable or unmodifiable? If so, which direction should that provision take on the matter?

(Paragraph 6.37)

Comments on Proposal 32

The general approach ought to be to ensure that as much of the relevant law as possible is codified in the interests of clarity (why replace/supplement a currently unclear doctrinal position with something unclear?). However, making detailed provision on assisgnation would be difficult and would necessarily have to either incorporate or fall back on existing law – doctrines of *delectus personae* and *tantum et tale* (or similar) would be relevant here. Much will require to be considered in the context of the parties intention at the time.

33. In relation to making a third party right irrevocable or unmodifiable, should there be some provision about the effect of the third party declaring a trust over its right? If so, which direction should that provision take, and, in particular, should it take account of the identity of the trust beneficiary?

(Paragraph 6.38)

Comments on Proposal 33

No view is expressed on this.

34. Do consultees agree that there is no need in the present exercise to deal with competing claims between the third party and the contracting parties, and that these should be left as matters for the interpretation of the contract and/or the application of other relevant rules of law such as donation?

(Paragraph 6.43)

Comments on Proposal 34

Yes. Although overall clarity must be a goal of the present exercise there is little to be gained from trying to envisage every possible example – as might be required here. Further, there is merit in not fettering parties freedom of contract.

Renunciation or rejection of its right by the third party

35. Would a statutory mechanism allowing third parties to renounce rights conferred in their favour be useful?

(Paragraph 7.8)

Comments on Proposal 35

Yes – in the interests of overall clarity. However, it ought to be made clear that, just because there is a power to renounce the right, it does not somehow imply an *a priori* need for the right to be accepted in the first place. The use of “benefit” would be particularly useful here, it is suggested – as it aids clarity.

36. Should it be provided that such renunciation of a third party right may be express or implied from the third party's conduct?

(Paragraph 7.8)

Comments on Proposal 36

Yes – there ought not to be only one way in which the right can be renounced; as long as the mechanism is clear.

37. Is it necessary to make any provision to protect the contracting parties against unfair exercise of the third party's power to renounce the right, for example to require the return of any benefit already conferred and reimbursement of expenses incurred by the contracting parties?

(Paragraph 7.8)

Comments on Proposal 37

This is a tricky and finely balanced point. On balance, the writer favours a broad proposition which could then be developed on a case by case basis while allowing contracting parties protection.

38. Should it be made possible to renounce a right in part if it is divisible?

(Paragraph 7.8)

Comments on Proposal 38

Yes, it ought to be possible to renounce a part of the right, if it is divisible.

Remedies available to the third party

39. Should it be provided that third parties have at their disposal all remedies which are appropriate to the enforcement of their right? If not, how (if at all) should the issue of remedies be addressed in any legislation on third party rights?

Comments on Proposal 39

Yes. As far as possible, for reasons stated above and in the course of the DP, the third party right should be grounded in the underlying rules and principles of contract law.

The issue which might be more complicated is against which of the parties the rights can be enforced.

This may be drawn from interpretation of the contract itself but given that it is possible for obligations to be implied, there ought to be a default position to cover circumstances in which the parties have not made express provision.

One tentatively expressed possibility would be for provision to be made that contracting parties to have joint and several liability for the provision of the right – in the absence of an express allocation of responsibility.

There does not appear to be any canvassing of this point in the discussion paper and it would likely be controversial point: requiring further work and consultation before being taken forward.

However, for the sake of argument, the following might be said.

Joint and several liability would have the merit of providing third party rights with a “default” level of security that they will be carried through – and this might strengthen their desirability to potential third parties.

In the construction sector, third parties could potentially be significant commercial entities. The “default” joint and several liability ought to secure their position (or at least improve the opportunity for security of their position). This security might increase the attractiveness of third party rights – especially over the current collateral warranties.

At the same time, it would be a potentially onerous imposition on the contracting parties and ought not be imposed lightly.

A default implication of joint and several liability might also impinge on the willingness of a court – when being asked to rule on whether there are third party rights under the contract – to imply these rights as it would be imposing this heavy burden on both parties. Finally, it is likely that contracting parties in the construction sector would most likely attempt to apportion responsibility expressly (although the views of the potential third parties might drive practice in that respect) – removing the benefit of joint and several liability.

At the same time, it can be said that (i) it would avoid potentially complex investigations by third parties into which party might be enforced against (ii) third party rights which are not secured in this way might be less attractive (iii) if parties intention (however construed) is that a third party will benefit – then there is no particular reason why, in the absence of provision otherwise, they ought not bear the consequences of that (iv) the law will imply joint and several liability on parties in other circumstances – this would not be a unique situation.

40. Would it be useful to make clear in legislation the availability of (i) a damages claim; (ii) a right to a cure in appropriate cases, possibly as an aspect of specific implement; (iii) a right to rescind for material breach?

(Paragraph 7.13)

Comments on Proposal 40

Yes.

41. Should third parties be entitled to exercise the remedy of rectification in relation to the contract under which rights are claimed?

(Paragraph 7.14)

Comments on Proposal 41

Yes – to the extent that it bears on the right or benefit in their favour. (Again, as it happens, a good example where “benefit” may assist interpretation – as a means of differentiating what the third party can seek rectification of, from the other rights within the contract (held by other parties).

Defences

42. Are specific provisions required regarding the enforceability of third party rights arising from contracts which fail as a result of invalidity, illegality, or frustration?

(Paragraph 7.19)

Comments on Proposal 42

This issue is finely balanced. The risk of attempting to cover existing concepts is that some might be missed (and then be interpreted as having been excluded, by implication).

There is a difference between lack of unenforceability of the benefit itself and lack of unenforceability of the underlying contract.

The issue, then, is the extent to which the third party can lose a benefit as a result of actions by the contracting parties of which it has no notice.

Provision ought to be made, for example, that the third party has recourse in respect of its benefit against a party who might – through their fault or negligence – be responsible for the lack of invalidity of the underlying document.

It might also be that, by default, third party rights are provided as being severable –if possible – from their underlying contract.

43. Would a specific provision, to the effect that compensation under the Compensation Act 1592 arising from or in connection with the contract and relevant to the third party's right under the same contract could be used in extinction of the third party's claim if liquid, be appropriate and useful?

(Paragraph 7.24)

Comments on Proposal 43

No view is expressed on this question.

Prescription

44. Should a specific provision be inserted into paragraph 1 of Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 to make clear that the short negative prescription applies to third party rights arising from a contract?

(Paragraph 7.26)

Comments on Proposal 44

There is no harm in doing so – and indeed, it would aid clarity.

Liability of one contracting party if the other defaults on the contract

45. If one of the contracting parties defaults on the contract so that the other contracting party is unable to perform to the third party as required by the latter's right under the contract, should the third party have a remedy against the initially defaulting party?

(Paragraph 7.27)

Comments on Proposal 45

This is a complex issue. A default of joint and several liability of both parties might assist the third party here – and prevent the need to get into potentially complex arguments regarding the allocation of fault. There is some brief discussion of this in the comments on proposal 39 above.

More broadly, there is a need to be clear on rights of recourse by the third party against the contracting parties – especially in the absence of specific allocations of 'roles' to the parties such as "stipulator" and so on. The terminology is important, here, in allocating rights; it is not just a matter of semantics.

If joint and several liability is not the rule, then the third party ought to have a remedy somewhere and it would make sense that if, essentially, performance by one contracting party is frustrated through no fault of its own; there ought to be performance by the party which is at fault. This is not an easy or particularly attractive outcome, however.

Contracting out of liabilities to third parties

46. Do consultees agree that no express provision is needed to deal with the possibility that contracting parties may exclude or limit a liability to third parties (such as damages) that would otherwise arise?

(Paragraph 7.30)

Comments on Proposal 46

This is agreed to. However, some default provision regarding safeguards for contracting parties would be useful – as set out in response to proposal 45.

Other points arising from the 1999 Act

47. Do consultees agree that it should be clear on the face of any legislation arising from this Discussion Paper that the third party can enforce only its own rights under the contract?

(Paragraph 7.33)

Comments on Proposal 47

Yes – as part of the characterisation of the “juristic” nature of the rights and of maintaining clarity. The third party cannot step into the shoes of anyone else.

48. Would an equivalent to section 4(1) of the 1999 Act serve any useful purpose in Scotland?

(Paragraph 7.34)

Comments on Proposal 48

No comment is made in respect of this.

49. Do consultees agree that the third party need not involve any of the contracting parties in its action beyond the one from whom it seeks a remedy?

(Paragraph 7.35)

Comments on Proposal 49

Correct – although this depends, obviously, on the liability on each of the parties.

50. Do consultees agree that there is no need in Scots law for a provision equivalent to section 5 of the 1999 Act?

(Paragraph 7.38)

Comments on Proposal 50

No comment is made in respect of this.

Relationship with specific rules

51. (a) Do consultees agree that, in principle, the general reforms proposed in this Discussion Paper should be without prejudice to the specific third party rights under the current law (for example, in the areas listed in paragraphs 8.3 and 8.4)?

(b) Do consultees consider that any of the specific third party rights should be amended in the light of the general reforms which are proposed? Would it be desirable to provide that those reforms should not extend to employment contracts relating to employees, workers and agency workers?

(Paragraph 8.6)

Comments on Proposal 51

Part (a) is agreed to. The writer has insufficient knowledge of employment law to offer a view on part (b).

Methods of reform

52. (a) Are there advantages in having a comprehensive statutory statement of the law on third party rights?

(b) Alternatively, should any legislation seek only to amend the common law so far as is necessary to achieve the desired reforms?

(Paragraph 9.17)

Comments on Proposal 52

Option (a) is to be preferred. The work has been done in this DP to spell out the content and it is coherent and broadly complete. There is little to gain from scaling back that work to a more modest tweaking – which might leave open some of the controversial and difficult

issues identified in the DP.

General Comments

I hope that this is clear – please let me know if there are any points with which I can assist further.

I note with interest that ‘transferred loss’ and ‘legal black holes’ might be looked at in a subsequent DP. In particular, the role of collateral warranties in this area is very interesting and any clarity which could be brought to that area by the SLC would be welcome.

Kind regards

David

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.