

Question 3

In Lloyd's v Harper (1880) Lush LJ said:

“I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been made with B himself.”

To what extent does the law of England and Wales now allow a claimant suing on a contract, to recover for losses suffered by a third party?

The extent that the law allows a claimant suing on a contract to recover for losses suffered by a third party is primarily concerned with the doctrine of privity of contract. This says that “a person cannot be bound by, or take advantage of, a contract to which he is not a party”¹, and thus, until recently, someone who was not party to a contract was unable to sue on it to recover losses suffered due to its breach. Therefore the promisee of a contract may attempt to sue to recover damages for an affected third party.

To properly consider the rights of the promisee to recover for losses suffered by a third party, it is necessary to consider the case history of this point of law. In *Lloyds v Harper* (1880) Lush LJ said that where a contract is made for the benefit of some third party, the promisee may sue to recover all that the third party could have recovered, had the third party himself been party to it². Lord Pearce agreed with this in *Beswick v Beswick* (1967)³, where a widow tried to sue as the administrator of her husband's estate, to enforce the performance of an annuity promised her by an agreement between her late husband and nephew. She sued as the promisee (the estate of her husband), to recover loss and enforce a term to the benefit of a third party, that party being herself. However, despite Lord Pearce' position, it was held that

¹ Keenan, D. and Riches, S., *Business Law* 7th edition (UK, Pearson, 2005) pp. 257

² *Lloyd's v. Harper* [1880-81] L.R. 16 Ch. D. 321

³ *Beswick v. Beswick* [1968] A.C. 58-107

as the promisee would receive no benefit himself, no benefit could be enforced for the third party, although sadly had the agreement continued to benefit the estate the widow may have been able to enforce it. In *Jackson v Horizon Holidays Ltd* (1974) when asking whether a father suing for damages caused by an unsatisfactory family holiday can claim for his wife and children, in addition to himself, Lord Denning said “I think he can. The case comes within the principle stated by Lush L.J. in *Lloyd's v. Harper* (1880)”⁴. Orr L.J. agreed with this ruling, and the damages were allowed. This precedent has since been followed in number of similar cases⁵, such that in circumstances where a contract is made by a promisee explicitly for the benefit of himself and other parties, the promisee may recover damages not only for himself, but for the third parties also.

In November 1999 the doctrine of privity was largely repealed⁶ by the Contracts (Rights of Third Parties) Act 1999, altering the common law to allow, under certain circumstances, parties that were not privy to a contract to enforce a term, against the promisor thereof⁷. However the third party’s right to enforce a term only applies where “the contract expressly provides that he may”⁸, or if “the term purports to confer a benefit on him”⁹ unless “on a proper construction of the contract it appears that the parties did not intend”¹⁰ that it be enforceable. The Act has had the effect, of allowing third parties themselves to claim where the contract expressly identifies them¹¹, and as such it is no longer so frequently necessary for the promisee to claim on their behalf.

⁴ *Jackson v Horizon Holidays Ltd* [1975] 1 W.L.R. 1473

⁵ *Buckley v Lane Herdman & Co* [1977] C.L.Y. 3143, *Sutcliffe and Greenwood v Cosmoair* [1996] C.L.Y. 711, *Thomson v RCI Europe* [2001] C.L.Y. 4275, *Minhas v Imperial Travel Ltd* [2003] C.L.Y. 2043

⁶ Merkin, R., *Privity of Contract, The Impact of the Contracts (Rights of Third Parties) Act 1999* (UK, LLP Professional Publishing, 2000) pp. 1

⁷ Contracts (Rights of Third Parties) Act 1999 s1.1

⁸ 1999 Act s1.1a

⁹ 1999 Act s1.1b

¹⁰ 1999 Act s1.2

¹¹ Contracts (Rights of Third Parties) Act 1999 s1.3

The importance that the term bestowing benefit, expressly identifies the third party is demonstrated in the case of *Avraamides v Colwill* (2006), where a couple brought action claiming for failures in the refurbishment of two bathrooms. The contracting company had just completed a transfer agreement, with another in which all assets were bought and all outstanding liabilities assumed by the transferee. The plaintiffs claimed against the transferee under the 1999 Act as third parties to the transfer agreement, but on appeal it was held that the clause in the agreement that required them to “pay in the normal course of time any liabilities properly incurred by the company”¹² did not expressly identify any class of third parties, and so a proper construction of the contract never intended this to be enforceable by a third party. So despite the clause promising “to complete outstanding customer orders”¹³, it was found that any liability for not fulfilling this could not be enforced by the customer.

To conclude, the law of England and Wales currently allows a claimant to sue on a contract to recover for losses suffered by a third party (by *Jackson v Horizon Holidays Ltd* 1974), where both the promisee and the third party are direct benefactors of the agreement, and the contract expressly implies that the contract was made, in part, for their benefit. That said, in most cases where this is true, the third party may now claim directly by the 1999 Act. However, it still holds that third parties which suffer loss, but where the contract is not explicitly for their benefit, may not sue on the contract, though if they can show a duty of care they may be able to sue in the law of tort.

¹² *Themis Avraamides, Emma Maitland v Mark Colwill, Stephen Martin t/a Bathroom Trading Company* [2006] EWCA Civ 1533 at [4]

¹³ *Avraamides v Colwill* [2006] at [4]