

CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

EXPLANATORY NOTES

COMMENTARY

Section 3: Defences etc. available to promisor

15. *Section 3* enables the promisor, in a claim by the third party, to rely on any defence or set-off arising out of the contract and relevant to the term being enforced, which would have been available to him had the claim been by the promisee. He may also rely on any defence or set-off, or make any counterclaim, where this would have been possible had the third party been a party to the contract.
16. *Subsection (2)* can be illustrated as follows-
 - (1) a third party can no more enforce a void, discharged or unenforceable contract than a promisee could;
 - (2) P1 (the promisor) and P2 (the promisee) contract that P2 will sell goods to P1, who will pay the contract price to P3 (the third party). In breach of contract, P2 delivers goods that are not of the standard contracted for. In an action for the price by P3 (just as in an action for the price by P2) P1 is entitled to reduce or extinguish the price by reason of the damages for breach of contract.
17. *Subsection (3)* can be illustrated as follows-

P1 and P2 contract that P1 will pay P3 if P2 transfers his car to P1. P2 owes P1 money under a wholly unrelated contract. P1 and P2 agree to an express term in the contract which provides that P1 can raise against a claim by P3 any matter which would have given P1 a defence or set-off to a claim by P2.
18. *Subsection (4)* makes it clear that the promisor also has available any defence or set-off, and any counterclaim not arising from the contract, which is specific to the third party. It can be illustrated as follows.
 - (1) P1 contracts with P2 to pay P3 £1000. P3 already owes P1 £600. P1 has a set-off to P3's claim so that P1 is only bound to pay P3 £400.
 - (2) P3 induced P1 to enter into the contract with P2 by misrepresentation, but P2 has no actual or constructive notice of that misrepresentation. P1 may have a defence (or a counterclaim for damages) against P3 which would not have been available had the action been brought by P2.
19. *Subsection (5)* makes subsections (2) and (4) subject to any express term of the contract which narrows the defences or set-offs available under section 3(2) or narrows the defences, set-offs or counterclaims available under section 3(4). For example-
 - (1) in relation to subsection (2), P2 agrees with P1 to purchase a painting, the painting to be delivered to P3, who is expressly given a right to enforce the delivery

These notes refer to the Contracts (Rights of Third Parties) Act 1999 (c.31) which received Royal Assent on 11 November 1999

obligation. P2 owes P1 considerable sums for other art works purchased. P2 wishes to ensure that P3's right is not affected. P1 and P2 expressly agree that P1 may not raise against P3 defences and set-offs that would have been available to P1 in an action by P2.

(2) in relation to subsection (4), P1 agrees with P2 to pay £5000 to P3 if P2 will transfer a number of cases of wine to P1. P3 is in dispute with P1 over a prior contract and P1 alleges that P3 owes P1 money. P2 is concerned that P1 may seek to withhold part of the £5000 payable to P3 by raising a set-off or counterclaim against P3 in relation to the prior contract. Consequently P1 and P2 include an express term that P1 may raise no defences, set-offs or counterclaims of any nature whatever against a claim by P3 to enforce P1's obligation to pay the £5000.

20. *Subsection (6)* ensures that an analogous approach to that set out in subsections (2) to (5) applies where the proceedings are brought against the third party and he seeks to avail himself of, for example, an exclusion section.