

Contract (Third Party Rights) (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Contract (Third Party Rights) (Scotland) Bill introduced in the Scottish Parliament on 31 January 2017. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

2. The following other accompanying documents are published separately:

- statements on legislative competence by the Presiding Officer and the Cabinet Secretary for Justice (Michael Matheson MSP) (SP Bill 5–LC);
- a Financial Memorandum (SP Bill 5–FM);
- Explanatory Notes (SP Bill 5–EN).

Policy objectives of the Bill

Summary

3. The principal policy aim of the Bill is to replace the current common law (known as *jus quaesitum tertio*) which enables parties to a contract to create an enforceable right in favour of a third party with a clearer and more usable statutory version of the rule.

4. In this way the Bill implements the legislative recommendations contained in the Scottish Law Commission ("SLC") Review of Contract:

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

Report on Third Party Rights (SLC No 245; July 2016)¹. The Report was published as part of the SLC's review of contract law.² Greater detail as to the legal and practical issues which informed the Bill are set out in the Report and also in the preceding SLC Discussion Paper on Third Party Rights in Contract (DP No 157; March 2014)³, both of which are available on the SLC's website.

Scottish Government National Outcomes

5. The proposals in the Bill and SLC Report are in line with the Scottish Government's National Outcomes,⁴ which form part of the Government's National Performance Framework that:⁵

“We live in a Scotland that is the most attractive place for doing business in Europe.”⁶

6. The Bill will make the law up-to-date and more flexible, addressing the criticisms that it is not currently fit for purpose. In turn this will encourage the use of Scots law.

Policy for the Global Economy

7. In updating the law the Bill will ensure it is more useful to business. One consequence of the Bill may be that greater use of Scots law in this area could provide a boost to Scotland's economy.

Background

8. In 2010 the SLC decided to carry out a review of contract law against the Draft Common Frame of Reference: Principles, Definitions and Model

¹http://www.scotlawcom.gov.uk/files/2014/6850/9379/Review_of_Contract_Law_-_Report_on_Third_Party_Rights_No_245.pdf

²<http://www.scotlawcom.gov.uk/law-reform-projects/contract-law-in-light-of-the-draft-common-frame-of-reference-dcf/>

³ http://www.scotlawcom.gov.uk/files/8013/9592/4224/DP_TSO.pdf

⁴ <http://www.scotland.gov.uk/About/Performance/scotPerforms/outcome>

⁵

<http://www.scotland.gov.uk/About/Performance/scotPerforms/NPFChanges>

⁶

<http://www.scotland.gov.uk/About/Performance/scotPerforms/outcome/business>

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

Rules of European Private Law (the DCFR). In effect the intention is to use the DCFR, which has the benefit of a wide base of comparative research from across the European Union, as a benchmark against which to check the fitness of Scots law in certain areas.

9. The law on third party rights is one of the discrete areas where this approach has been applied. The rationale for using the DCFR was not only to gauge Scots law against what is said to be a modern statement of the best rules in contract law, but also to ensure that given the economic significance of contracts, whether at a private or business level, Scots law needs to be regarded throughout the world as being of a high quality. This was an important consideration of Scottish Ministers when they agreed the work programme of the SLC in this area.

10. The ability to create third party rights is important. There are many reasons for third party rights to be created and these apply to individuals as much as to business. For example:

- Booking a family holiday for oneself – it may be beneficial for family members other than the person who booked the holiday to be able to enforce rights under the contract;
- Taking out life insurance the proceeds of which are payable to another person – it would be of value to the third party beneficiary to be able to enforce terms of the insurance policy in their favour;
- A company within a group taking out an IT contract where it wants all of the companies in the group to be covered – again, it may be helpful if group companies who are not party to the IT contract are able to sue, for example, in relation to losses suffered as a result of any breach of the contract.

11. In everyday life and in business, it can therefore be very helpful to create third party rights. They can provide important protections for individuals and businesses and help to ensure that a loss does not fall into the 'black hole' of non-liability. The SLC cites the example⁷ of the difficulties created in construction contracts where the company who has suffered a loss has no right to sue:

⁷ Scottish Law Commission Discussion Paper Op Cit Page 43, paragraph 3.11

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

“The typical scenario has been where one company in a group (A) contracts with a construction firm (C) to build or carry out repairs for another company in the group (B). The work is undertaken defectively, causing loss. The loss however is not incurred by A – the party with the right to sue C for a breach of contract – but by B, the building owner. B’s loss is therefore not recoverable in contract, nor being economic in nature, is it recoverable in delict (or tort, in England). On the other hand A, the party with the right to sue for breach of contract has no loss for which it can recover damages. The ‘black hole’ is that the party with the loss has no right, while the party with the right has no loss.”

12. The solution is to ensure that the principal contract identifies a third party and makes it clear that the parties to the contract intend that the identified third party is entitled to a contractual remedy for defective performance.

13. As the SLC Discussion Paper points out: “Every Western codified system of contract law since the French Code Civil in 1804 has recognised that third parties may have rights under other parties’ contracts as a result of provision in the contract itself”.

14. This is an area of the law which is ripe for reform. Many other jurisdictions have already reformed and Scotland is in danger of falling behind. In jurisdictions where third party rights were not recognised and the doctrine of privity prevailed, such as England and Wales, Hong Kong, Singapore, New Zealand and some Australian states, they have now legislated. In other jurisdictions where third party rights were recognised the laws have been updated and clarified (for example in France in 2016).

15. The Bill will promote the use of Scots law and enhance legal certainty. The absence of confidence in the law as it stands amongst Scots law practitioners means that English law is sometimes chosen in place of Scots law to govern transactions that are otherwise Scottish in nature⁸. All legal systems should aspire to meet the needs of those who live under them and Scots law is no different in this regard. The current uncertainty

⁸ SLC Business Regulatory Impact Assessment
https://www.scotlawcom.gov.uk/files/8114/6857/7407/Business_and_Regulatory_Impact_Assessment_-_Review_of_Contract_Law_-_Report_on_Third_Party_Rights_No_245.pdf page 12

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

over third party rights and lack of flexibility damages the reputation of Scots law by limiting its use. A clear, positive and readily accessible statement of the law in a short statute will improve the standing and value of Scots law domestically and internationally, given the multi-jurisdictional nature of many of the transactions in which contracts are created.

16. Importantly, the provisions in the Bill set out in general terms the default position. Contracting parties are free to make express provisions to the contrary.

The current law in Scotland

Jus Quaesitum Tertio

17. As noted above, in some jurisdictions third party rights are (or were) not recognised at all. But in Scotland, the concept of third party rights has existed for many centuries. As far back as 1591 in the case *Wood v Moncur*⁹ the court found that a provision in favour of a third party in a contract relating to an exchange of heritable property could be invoked by the third party despite recognising that they were not a party to the contract.

18. Third party rights in Scots law were first termed *jus quaesitum tertio* by Stair (one of the institutional writers) back in the 17th century and that term is still used today. It has the literal meaning of ‘right acquired by a third party’.

19. For a third-party right to be in existence, the current law requires that the contracting parties intended to benefit the third party and that the right must be constituted irrevocably.

20. However, this common law doctrine is rarely used in Scotland and has been the subject of some criticism on the basis that it is inflexible and does not meet modern standards. The SLC noted that the law on *jus quaesitum tertio* has ‘often become clouded’ with other areas of the law such as assignation, trusts and donation because they share some

⁹ (1591) Mor 7719

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

similarities. It has been reported that instead, the preferred option in Scotland is for the use of English law on contract or collateral warranties.¹⁰

21. It is worth noting however that whilst the reform of the law in England and Wales through the Contracts (Rights of Third Parties) Act 1999 (“the 1999 Act”) has influenced the development of this Bill because at least some Scottish commercial lawyers regard it as holding advantages over current Scots law in this area, the 1999 Act is not an off the peg solution for Scots law as it introduced third party rights into a jurisdiction where they previously did not exist. This is not the case in Scotland.

22. It is therefore clear that this is an area where reform is highly desirable. Reform will not only remove a practical barrier to the use of Scots law in commercial transactions but will also keep Scots law fit for purpose by ensuring it is flexible enough to deal with modern day expectations.

Contract (third party rights) (Scotland) Bill

Overview

23. The Bill establishes a statutory basis for the operation of third party rights in Scotland. The existing common law rule will be abolished. By way of an overview the Bill:

- sets out the circumstances in which a person who is not a party to a contract acquires a third-party right under it. The ‘right’ provided is to enforce or otherwise invoke an undertaking that one or more of the contracting parties will do, or not do, something for the person’s benefit;
- affirms that contracting parties can modify or cancel a third-party right, subject to exceptions set out in the Bill;

¹⁰ Article in Lawnow.com http://www.cms-lawnow.com/ealerts/2014/04/third-party-rights-in-scotland-scottish-law-commission-discussion-paper?cc_lang=en 9 April 2014. Collateral warranties are usually documents ancillary to the main contract which provide a third party with a right to the performance of an obligation on the part of one of the main contractors. They are typically used in construction scenarios.

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

- provides a third party with the same remedies that would be available to a contracting party unless there is express provision contained in the contract to the contrary;
- provides contracting parties with the same defences against third party claims that they would have had against any other contracting party's claim where the defence is relevant to the undertaking being enforced, unless there is express provision contained in the contract to the contrary;
- provides a mechanism whereby any arbitration agreement between the contracting parties can operate in respect of third party rights;
- enables a third party to renounce their third-party right either expressly or implicitly, (the effect of such a renunciation being that the right is extinguished);
- confirms that a third-party right is an obligation which prescribes after 5 years under the Prescription and Limitation (Scotland) Act 1973.

Identification of a third party

24. Under the existing law a third party must be identifiable in the contract – whether this is by name or by description (for example, by being a member of a group or class). Practically speaking it is useful for a contract to be capable of being concluded without knowing exactly who the third party might be. For example, an employer may contract with a letting company for the provision of rented accommodation for their employees but at the time of agreeing the contract the employer is not aware of the names of any employees who may be placed in the accommodation.

25. It therefore makes practical sense for this position to continue to be the law and the Bill makes provision to that effect.

26. Similarly, it is currently the case that a third party need not be in existence at the time of the contract being concluded. For example the contract may give rights to children but one child is not yet born, or to use one of the examples set out in paragraph 10 above, rights may be conferred on all companies within a group but a company within the group may not yet be formed. The current law enables third party rights to be provided in these circumstances and the Bill will enable this facility to continue. In doing so it removes the possibility that an undertaking in

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

favour of a non-existent person could be found to be void as a result of uncertainty.

27. Aligned to this is the question of whether or not a person who existed at the time the contract was made, but who did not belong to the class of person being provided with a right under the contract, could become entitled to the right should they subsequently become a member of the class of person referred to. So as before if a contract provides rights for employees of a given company, when an individual takes up employment with that company they would become entitled to the right.

28. Although the SLC was of the view that there is nothing in the current law to prevent this, consultees to its Discussion Paper regarded such a provision as desirable. The Bill therefore achieves this and places the matter beyond doubt.

Intention

29. A critical part of the current law is the requirement for contracting parties to intend to confer a right on a third party. In effect this is the basis for the existence of a third-party right. It is simply not enough for a contract to merely refer to a third party - there must be a clear intention. Nor is an interest in a contract sufficient to give the interested third party a right.

30. In terms of what constitutes intention, there will of course be some obvious ways in which contracting parties are able to demonstrate their intent – delivery of the document to the third party being one method.

31. But there are also other means by which ‘intention’ may be assessed. For example, letting the third party know about the undertaking informally and verbally; or taking out an advertisement or some other form of publicity to notify third parties of their rights.

32. The SLC therefore recommended that there should be ‘no general requirement of formal writing for the constitution of a third party right’. The Bill makes it clear that delivery, intimation or communication to the third party is not necessary for a right to be constituted and whilst the SLC considers that this is probably the current law, the Bill will place the matter beyond doubt.

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

33. It is already possible in Scotland to create a third-party right by implication and the Bill will not change the law here. In terms of whether or not a third-party right has been implied, this should be left to the ordinary rules of interpretation and implication for voluntary obligations.

Irrevocability

34. As already mentioned, for a third-party right to be in existence, the current law requires that the right must be irrevocable. So when the contract is formed, assuming that the criteria are in place for the creation of a *jus quaesitum tertio*, the contracting parties are unable to withdraw or change the third-party right. This is at odds with the ability of the contracting parties themselves to modify, cancel or otherwise amend the terms of the contract.

35. The pivotal case is *Carmichael v Carmichael's Executrix*¹¹ which dealt with an insurance policy taken out by a father for his son, where until the age of the son's majority the premiums were paid for by the father. When the son died, prior to taking on the payment of the premiums himself but having indicated his willingness to do so when the next payment was due, there were competing demands from the father and the executrix of the son's will (his aunt, the sole beneficiary) for the proceeds of the policy. In the House of Lords ruling it was determined that there was an enforceable right under an irrevocable contract and the executrix succeeded in her claim. Lord Dunedin set out a non-exhaustive list of the ways in which a contract can be made to be irrevocable.

36. It is easy to see why a right which is very difficult to amend or extinguish after it has been created can be problematic. Over many years, this issue is one which has attracted criticism. The current law does not provide the necessary flexibility for parties dealing with the uncertainty of future events and runs counter to commercial flexibility and the facilitation of business transactions.

37. The Bill will therefore change the law in this regard and abolish the current requirement that a third party right is incapable of being constituted in a contract unless the right is irrevocable. This means that it will now be

¹¹ 1920 SC (HL) 195, 203

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

possible for the contracting parties to, by agreement between themselves, modify or cancel a third-party right.

38. In considering the implications of this change in the law, the SLC considered whether the ability to modify or cancel should be unfettered or whether it should be subject to some qualification. They decided that it should be qualified, so that once a certain point has been reached contracting parties lose their freedom to withdraw, or alter, a third party's entitlement. The SLC decided that contracting parties should lose the ability to remove or change a third-party right once:

- any condition that has to be fulfilled before the right can be enforced has been fulfilled;
- the contracting parties have given the third party notice of the third-party right; or
- the third party has acted in reliance on the right and the contracting parties knew, or could have foreseen that the third party might do so.

39. The SLC provides an example which demonstrates that the particular drafting of the agreement will inform how and when any irrevocability kicks in. An organisation, subject to the profits of the business achieving a given level in any year, agrees that a certain amount will be paid annually over the next three years to a daughter of one of the partners to help fund her education. If the level of profit is achieved in year one then the daughter (Tertia) is entitled to the first payment:

“Depending on the way in which the relevant agreement has been drafted, Tertia may be seen as having a unitary right to all three payments, or (perhaps more likely) as three different rights to payment each arising in successive years. Whichever, her rights are subject to the suspensive condition of the firm's profitability in each of the years in question. If we suppose the second analysis of three separate successive rights applies, and all goes well for the firm in Year 1, Tertia's right in that year crystallises. But her rights in years 2 and 3 are still vulnerable to the partners' decision to cancel or modify

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

the content of the right prior to the crystallisation in succeeding years".¹²

40. In essence the contracting parties cannot modify or cancel a right if that would have the effect of retrospectively affecting an existing claim under the provisions before the change was made.

41. In the case of an unconditional right, the default position in the Bill is that the contracting parties will not be able to cancel or modify the third-party right if they have notified the third party of that right - but they will have the freedom to provide otherwise in the contract. Conversely if the contract includes an express statement to the effect that a third-party right is not capable of cancellation or modification then that will be given effect.

Remedies

42. Currently, it seems clear that a third party is able to sue for payment due under a contract or for the implementation of their right. There is however some doubt about the ability of a third party to claim for damages against non-performance.

43. The SLC considered whether or not to leave the issue of remedies to the principles of Scots law on this matter. When they looked at best practice across other jurisdictions they noted that in England and Wales the 1999 Act provides third parties with the same remedies that would be available for a breach of contract had they been a party to the contract. They concluded however that it was not entirely appropriate to treat a third party as a contracting party and that such a construct was artificial.

44. In what they termed the comparator instruments¹³ the approach taken was to give the third party the same remedies that a contracting party would be entitled to were the undertaking in favour of such a party. The SLC concluded that this was a more suitable approach which has the

¹² SLC Review of Contract Law – Report on Third Party Rights No 245, July 2016 – page 72, paragraph 5.15.

¹³ The Draft Common Frame of Reference (DCFR), the UNIDROIT Principles of International Commercial Contracts (PICC) and the Common European Sales Law (CESL).

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

advantage of drawing “upon the analogy of contract, in which the law on remedies is in general well-developed.”¹⁴

45. Again this is intended to be the default position in the Bill. It remains open to the contracting parties to define exactly what remedies may be available to a third party which may involve excluding, restricting or extending them.

Defences

46. The flip side of the availability of remedies to a third party is the defences which in turn are available to one or other or both of the contracting parties. Adopting a similar approach to that contained in the comparator instruments would mean that the party bound to perform was able to rely on all defences which they could use against the other party to the contract. The Bill therefore provides for this.

47. The provision is however qualified in so far as the defences must also be relevant to the third party’s right. Typically a contract may contain a range of defences across a range of clauses. If the third party seeks to enforce a payment due to them under one particular part of the contract it will be unable to rely on defences which apply to unrelated parts of the contract.

Arbitration

48. The availability of arbitration in the context of third party rights was not included as part of the SLC Discussion Paper.¹⁵ Instead it arose as part of their consideration of whether or not to include provisions relating to the enforcement of third party rights other than in court proceedings as part of the draft Bill.

49. The 1999 Act makes provision for arbitration on third party rights for England and Wales. The Act treats a third party as a party to the arbitration agreement in relation to a contractual term which is enforceable by that third party where there is a provision that a dispute in relation to that term goes to arbitration. In practice this means that whilst a third party can benefit from the arbitration process it must also arbitrate if it wants to

¹⁴ SLC Report No 245 op Cit Page 90, paragraph 6.13.

¹⁵ SLC Discussion Paper No. 157 Op Cit.

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

enforce its right and therefore any court proceedings would be sisted until the arbitration process was completed or otherwise concluded.

50. The 1999 Act also makes provision in relation to the situation where a term of the contract gives a third party a unilateral right to require the non-performing party to the contract to submit to arbitration and if the third party exercises that right they would be treated as a party to the arbitration agreement. However the third party may choose not to exercise the right. This is the position, generally speaking, in other common law jurisdictions¹⁶.

51. When the SLC consulted with the legal profession¹⁷ specifically on the issue of arbitration there was a consensus that it would be beneficial and worthwhile to enable any arbitration agreement between the contracting parties to operate in respect of third party rights and that there would also be advantages to the commercial sector trading across the border for the law in this regard to be similar. It was also thought that this could be beneficial in relation to family law matters.¹⁸

52. The SLC agrees with the commentary¹⁹ on the Arbitration (Scotland) Act 2010 (“the 2010 Act”) by Dundas and Bartos that as the law stands in Scotland a third party is not a party to any arbitration agreement contained in the relevant contract.

53. In order to reflect modern arbitration law, and place Scotland on a par with other jurisdictions, the policy approach is to make similar provision to that of the 1999 Act, in Scots law. The Bill implements the SLC recommendation that for the purposes of the 2010 Act a third party will become a party to an arbitration agreement in the following circumstances:

- where a contract contains an undertaking in favour of that third party and an arbitration agreement provides for a dispute on the matter to be resolved by arbitration; or

¹⁶ Singapore (Contracts (Rights of Third Parties) Act 2001); Cayman Islands (Contracts (Rights of Third Parties) Law 2014; and Hong Kong (Contracts (Rights of Third Parties) Ordinance (c 623, 2015))

¹⁷ SLC Report No. 245 Op Cit Paragraph 7.2

¹⁸ Ibid - paragraph 7.23

¹⁹ Dundas and Bartos on the Arbitration (Scotland) Act 2010, Greens Practice Library, 21 August 2014 2nd Ed.

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

- where an arbitration agreement provides that one or more descriptions of disputes between one or more of the contracting parties and a third party (other than those covered above) may be submitted to arbitration, and the third party invokes that agreement.

54. However, on the basis that contracts cannot impose duties on third parties without their consent, and in line with other jurisdictions, a third party will not be bound to arbitrate. It needs to be recognised however that in so choosing, a third party may lose a valuable benefit.

Renunciation

55. There was support for the inclusion of a statutory provision enabling a third party to renounce their right. It is foreseeable that there may be a range of circumstances where the third party wishes to reject the right simply because they do not want the benefit or because it may be subject to undesirable conditions. In principle and in practice a right should not be capable of being forced upon a third party.

56. When a third-party right is given by the contracting parties, their intention to do so can be either express or implied. To mirror this, the Bill provides that renunciation can be either express or implied. Given that it is not necessary for a third party to accept the right for it to come into existence, it follows that implied renunciation could not simply be achieved by failing to acknowledge the right. Rather, it must be as the result of an active process that makes the fact of renunciation clear from the third party's actions. The SLC provides the example of the third party returning the delivered documents providing the right to the contracting parties.

57. Once a third party has renounced their right it has the effect of bringing the right to an end and it is not capable of revival. Otherwise it would be unreasonable if renunciation was communicated to the contracting parties and then the third party changed their mind and demanded their rights. This approach delivers certainty.

Alternative approaches

58. The only alternative approach considered is to allow the status quo to continue and to effectively leave the courts to improve the law through judicial reform. If this approach was taken, whilst some policy objectives might be achieved by the courts under the common law this cannot be

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

predicted or guaranteed and would certainly take very much longer than the statutory route offered by the Bill. As the SLC records in its Business Regulatory Impact Assessment (BRIA)²⁰:

“Left to itself, the common law can only be changed by a decision of an appropriate court. The leading case on third party rights and irrevocability in Scotland was decided in 1920 in the House of Lords.²¹ Under the doctrine of precedent, therefore, only a decision of the Supreme Court can change the law, and only if a suitable case arose”.

59. But even assuming that a suitable case might arise, which may be doubtful if English law is being used instead, there is also no guarantee with this approach that the policy objectives discussed above would be realised. In addition any court decision would examine only the relevant facts of that particular case. It would be unlikely to look at the law in the round and would therefore be unlikely to produce a comprehensive solution in the way that the Bill does.

60. This uncertainty is hugely unsatisfactory for practitioners and others. We therefore see no benefits in this approach. The law in Scotland on third party rights would be likely to remain out of date and inflexible and would continue to constitute an unnecessary hindrance to business and individuals alike.

61. Mr Douglas Mathie, then of Brodies LLP and now of CMS Cameron McKenna, described the law in this area as ‘massively inflexible’ and is quoted in the Scottish Law Commission Report as noting:

“Recently I had a contract that had to be Scots law, but also needed to create flexible third party rights. The solution was to expressly apply the English Act to the third party rights clause, but have the rest of the Agreement subject to Scots law.”

62. This situation will remain unless the Bill is passed.

²⁰ <http://www.scotlawcom.gov.uk/publications/reports/2010-present/>

²¹ *Carmichael v Carmichael's Ex* 1920 (SC) HL 195

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

Consultation

63. The SLC has carried out a comprehensive consultation in accordance with the SLC's established practice in conducting law reform projects.

64. The SLC's Discussion Paper was published in March 2014 as part of the general review of contract law. Consultation responses were overwhelmingly in favour of statutory clarification of the existing common law on third party rights in Scots law. As part of that process the SLC established an Advisory Group which comprised members of the legal profession and academics. This was supplemented with a Judicial Advisory Group and additional ad hoc input from a further mix of members of the legal profession and academics.

65. The SLC released a revised draft of the Bill for further comments in January 2016.²² This draft did not generate as significant a volume of comments as the previous Discussion Paper, but responses focussed on drafting issues, such as favouring alternative terminology for certain concepts, whilst expressing support for the overall concept of the Bill. When commenting on the draft Bill, the Law Society of Scotland's director of law reform said:

“We fully support the intention of the Third Party Rights Bill and believe that the legislation will provided clarity and certainty. It is a significant improvement and development on the current common law²³”.

66. At each stage of this process, members of the legal profession and the public were able to comment on the proposals. At no stage of the consultation process have comments been received to the effect that statutory provision on third party rights would have an adverse effect on Scots law, only the contrary.

67. The arbitration provisions were the subject of an extensive informal consultation process during the preparation of the SLC's Report. The

²²

http://www.scotlawcom.gov.uk/files/6514/5252/9147/A9_provisions_2015-12-29.pdf

²³ <https://www.lawscot.org.uk/news/2016/01/law-society-supports-proposed-third-party-rights-bill/>

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

process involved the Scottish Arbitration Centre, the Chartered Institute of Arbitrators (Scotland), and the Scottish Council for International Arbitration. Professor Andrew Burrows QC (Oxford), who had been the responsible Law Commissioner for England and Wales during the preparation of the equivalent provisions in the English Act of 1999, was also consulted by the SLC.

68. In completing the BRIA the SLC also consulted with a range of business interests.

69. In addition the Scottish Government carried out some targeted consultation on the Report and invited comments from a number of stakeholders - two responses were received. Both were very supportive of the principles of the Bill and offered a range of comments on the Bill itself which have been taken into consideration.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal Opportunities

70. The Bill is facilitative; it reforms the existing common law on third party rights and places it on a statutory footing. Parties to a contract have the choice of whether or not to confer third party rights and may for the avoidance of any doubt reference the legislation in order to explicitly exclude the giving of third party rights.

71. For these reasons the Scottish Government concludes that the Bill will not impact negatively on a person by virtue of their particular religion, belief, age, sexual orientation, gender, race or ethnicity. As such, the Bill will not in any way hinder access to equal opportunities.

Human Rights

72. The Scottish Government has considered the effect of the provisions of this Bill on human rights: in particular on (i) Article 6 of the European Convention on Human Rights (the ECHR) (right to a fair trial) and (ii) Article 1 of the First Protocol (A1P1) (protection of property). The Scottish Government has considered the extent to which the provisions on arbitration engage Article 6 ECHR. This Bill enables arbitration in respect of third party rights in the two scenarios provided for in section 9 (see

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

paragraphs 48 to 54 above). Arbitration is a procedure whereby parties agree to submit a dispute between them to an arbitrator who will act as a private tribunal to produce a final and binding determination of the dispute. By agreeing to go to arbitration, the parties voluntarily deny themselves recourse to the courts.

73. Article 6 does not prohibit the use of arbitration as a means of resolving disputes about civil rights and obligation as it is open to parties to waive their Article 6 rights to a public hearing and judgment if the parties freely and unequivocally choose to do so²⁴.

74. The Bill does not compel a third party to submit a dispute to arbitration proceedings and therefore does not remove the third party's right to a fair and public hearing by an independent and impartial tribunal established by law. The effect of the Bill is that a third party who takes a voluntary step into the arbitration process, either by initiating it or in responding to a dispute being raised against it, waives the right to a judicial hearing which meets the full requirements of Article 6.

75. This issue is discussed at paragraphs 7.50-59 of the SLC Report.²⁵

76. The Scottish Government considered whether section 11 of the Bill interferes with A1P1 rights – specifically, the right of a third party to enforce a third-party right or the corollary right of a contracting party to plead in defence that a claim by the third party is time-barred²⁶.

77. Section 11 of the Bill provides that third party rights are to be treated as obligations arising from the contract for the purposes of the Prescription and Limitation (Scotland) Act 1973 and thus the short negative prescriptive

²⁴ *Suovaniemi v Finland* (Appl. No. 31737/96), 23 February 1999.

²⁵ Scottish Law Commission Discussion Paper Op Cit Pages 118-121, paragraph 7.50-7.59

²⁶ A1P1 protects not only tangible property, but a range of economic interests and possessions. See *Pressos Compania Naviera SA v. Belgium* (1996) 21 EHRR 301 where the ECtHR held that a claim for damages could be an asset and a 'possession' for the purpose of A1P1. See also *AXA General Insurance Limited and Others v. The Lord Advocate and others* [2011] UKSC 46 in which the Supreme Court was prepared to accept that a possession held by the appellants was being interfered with by legislation which removed a defence to an action for damages.

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

period applies in relation to third party rights. This rule extends both to third party rights created under the Bill and to those arising under the common law of *jus quaesitum tertio*.

78. As this provision merely puts the current law on an express statutory footing (and thus is not retrospective), the Bill does not interfere with any A1P1 rights which may exist.

Island Communities

79. No detrimental effects are anticipated.

Local Government

80. We do not anticipate any adverse effect on local government. The proposals update Scots law generally, and are not of particular relevance to any particular part of Scotland or any local authorities. Local authorities, like any other person, will be able to take advantage of the Bill's provisions.

Sustainable Development

81. No detrimental effects are anticipated. By ensuring that the law is up-to-date and fit for purpose, it may encourage greater use of Scots law in this area which would have consequential benefits for the Scottish economy.

This document relates to the Contract (Third Party Rights) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 31 January 2017

Contract (Third Party Rights) (Scotland) Bill

Policy Memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -

www.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:

www.parliament.scot/documents