

EXCLUDING THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

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The Contracts (Rights of Third Parties) Act 1999 was heralded as a very welcome reform.¹ Yet 20 years after that Act came into force, it continues to be excluded by commercial parties on a regular basis. Why has the Act not been more widely embraced? The fear of uncertain outcomes under new legislation is only one factor. Often overlooked, but equally significant, are appellate decisions which confirm that, as a result of the 1999 Act, enforceable rights may be conferred upon third parties when that was not the intention of the contracting parties.² It therefore remains prudent for parties to exclude s.1(1)(b) of the 1999 Act in order to avoid such unexpected, and probably undesired, outcomes. Particularly problematic cases have arisen where parties have not excluded the Act due to the contract being relatively short and simple, such as under a Letter of Instruction³ or Letter of Understanding.⁴ Parties should consider excluding the operation of the 1999 Act even in such simple contracts.

This article will focus upon how the courts have applied section 1 of the 1999 Act, and why that has not encouraged commercial parties to change their practice of regularly excluding the operation of the Act, often in their standard terms of business. Section 1 is entitled “Right of third party to enforce contractual term”, and the first three subsections are as follows:

“(1) Subject to the provisions of this Act, a person who is not a party to a contract (a ‘third party’) may in his own right enforce a term of the contract if—

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need

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¹ See e.g. N. Andrews, “Strangers to Justice no Longer: The Reversal of the Privity Rule Under the Contracts (Rights of Third Parties) Act 1999” [2001] C.L.J. 353; C. Macmillan, “A Birthday Present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999” (2000) 63 M.L.R. 721. It has been used as a model of reform elsewhere: see e.g. the Singapore Contracts (Rights of Third Parties) Act 2001, the Cayman Islands Contract (Rights of Third Parties) Law 2014 and the Hong Kong Contracts (Rights of Third Parties) Ordinance 2015.

² e.g. *Chudley v Clydesdale Bank Plc* [2019] EWCA Civ 344; [2020] Q.B. 284.

³ e.g. *Chudley* [2020] Q.B. 284.

⁴ e.g. *Laemthong International Lines Co Ltd v Artis (The Laemthong Glory (No.2))* [2005] EWCA Civ 519; [2005] 2 All E.R. (Comm) 167.

not be in existence when the contract is entered into. ...”

Reasons for reform

The two most important reasons identified by the Law Commission for extending to a third party the right to enforce a contractual term were (i) to give effect to the intentions of the original contracting parties,⁵ and (ii) to avoid the injustice caused to a third party where the contract has engendered reasonable expectations of having a legal right to enforce the contract.⁶

The first justification explains s.1(1)(a).⁷ If the parties wish to provide a third party with the right to enforce a term of the contract, then the lack of consideration provided by the third party no longer poses any obstacle.⁸ This can make things simpler in various commercial contexts.⁹ For example, if an exclusion clause is intended to extend to third parties, that can be made clear in the contract such that s.1(1)(a) will apply.¹⁰ In this respect, the 1999 Act probably is “useful but still underused”.¹¹ If the contracting parties are happy to commit to providing the third party with a right to enforce the contract, then it is appropriate to exploit s.1(1)(a) of the 1999 Act, rather than enter into a series of collateral contracts, for instance.

However, parties should remain conscious that the Law Commission’s second justification means that it may be difficult for the contracting parties later to vary or terminate their agreement to the detriment of the third party. Section 2 of the 1999 Act provides that the parties to the contract will not be able to vary or terminate their agreement without the third party’s consent if the third party has communicated their assent to the promisor,¹² or the promisor is aware that the third party has relied on the term,¹³ or the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.¹⁴ Such reliance does not need to be detrimental. For instance, the parties may agree to pay a third party £1,000 in a month’s time.¹⁵ In expectation of receiving the money, the third party puts £1,000 on *Stinking Bishop* to win in the 2.30 at Newbury. *Stinking Bishop* wins at 10-1. The third party therefore makes a £10,000 profit, but the contracting parties may be prevented from varying or terminating their agreement to pay £1,000 to the third party as a result of s.2. Section 2 operates in a manner very favourable to third parties. As a consequence, even where the Act is not excluded in its entirety and s.1(1)(a) is relied upon, contracting parties may well seek to exploit s.2(3) and include an

⁵ *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No. 242, 1996) at [3.1].

⁶ *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No. 242, 1996) at [3.2]. For some other reasons, see too [3.3]-[3.9].

⁷ Although its basis can still be criticised: see generally R. Stevens, “The Contracts (Rights of Third Parties) Act 1999” (2004) 120 L.Q.R. 292; S. Smith, “Contracts for the Benefit of Third Parties: In Defence of the Third Party Rule” [1997] O.J.L.S. 643; P. Kincaid, *Privity: Private Justice or Regulation* (Dartmouth: Ashgate, 2001).

⁸ Compare *Tweddle v Atkinson* (1861) 1 B. & S. 393.

⁹ See generally H. Beale, “A Review of the Contracts (Rights of Third Parties) Act 1999” in A. Burrows and E. Peel (eds), *Contract Formation and Parties* (Oxford: Oxford University Press, 2010).

¹⁰ See too s.1(6).

¹¹ H. Beale, “A Review of the Contracts (Rights of Third Parties) Act 1999” in A. Burrows and E. Peel (eds), *Contract Formation and Parties* (Oxford: Oxford University Press, 2010) at p.250.

¹² s.2(1).

¹³ s.2(2).

¹⁴ s.2(3).

¹⁵ It does not matter whether the third party’s right to enforce a term of the contract arises under s.1(1)(b) or s.1(1)(a) when considering the operation of s.2.

express term which allows the parties, by agreement, to rescind or vary the contract without the consent of the third party.

In any event, s.1(1)(a) is relatively straightforward. Much more difficult is s.1(1)(b). The Law Commission's initial Consultation Paper proposed a requirement that the contracting parties must evince, objectively, a positive intention to give enforceable rights to a third party,¹⁶ but that was later abandoned. Instead, such an intention is presumed simply by the fact that a term purports to confer a benefit on the third party; if the contract contains nothing to rebut that presumption then the third party will have a right to enforce the relevant term. As a result, it is possible that s.1(1)(b) will apply in ways not intended by the parties.

This possibility was recently realised in *Chudley v Clydesdale Bank Plc.*¹⁷ Arck LLP opened an account with Clydesdale Bank through a Letter of Instruction, which was held to constitute a binding contract. The account was described as "Arck LLP – Segregated Client Account". This was agreed to be an account "for the sole purpose of the development of the Paradise Beach Resort Sal Cape Verde".¹⁸ The Bank agreed to hold the monies in that account until a certain date, and to allow withdrawals from the account only if an unconditional undertaking was received from a named solicitor. Various investors paid into the scheme, but the Bank never set up the segregated client account; the monies were paid into a general account which Arck LLP held at the Bank. The development scheme was later discovered to be fraudulent, and Arck LLP entered liquidation.

Understandably, the investors sought to recover their losses, and stumbled upon a possible claim against the Bank. The Bank had released the investors' money without setting up the required client account or obtaining the required undertaking. This was a breach of contract, albeit a contract to which the investors were not privy. The investors argued that they could nevertheless bring a claim under the 1999 Act. This claim succeeded in the Court of Appeal.¹⁹

Did giving the investors a right to enforce the contract reflect the intentions of Arck and the Bank? This seems most unlikely. It is improbable that the Bank intended to expose itself to claims brought by parties it did not know and to whom it made no promise. And it is just as unlikely that Arck intended to confer enforceable rights against the Bank upon the investors. Burrows, the Law Commissioner primarily responsible for the Report, observed that "[t]he concern has been expressed that, if the contract draftsmen does not say anything expressly one way or the other, the 1999 Act can lead to unintended liabilities being imposed on the parties. If that were the case it would certainly contradict the purpose of the second test, which is to give effect to the parties' intentions, albeit by using the presumption".²⁰ *Chudley* appears to be an example of this concern being realised. The presumption does not invariably give effect to the parties' intentions.

Nor can *Chudley* be explained on the basis of the second major justification for reform provided by the Law Commission. The contract clearly did not engender any reasonable expectations amongst the investors that they would have a legal right to enforce

¹⁶ *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com C.P. No. 121, 1991) at [5.10]-[5.15].

¹⁷ [2020] Q.B. 284.

¹⁸ *Chudley* [2020] Q.B. 284 at [10].

¹⁹ Permission to appeal to the Supreme Court has been refused: UKSC 2019/0070.

²⁰ A. Burrows, "The Contracts (Rights of Third Parties) Act 1999 and its Implication for Commercial Contracts" [2000] L.M.C.L.Q. 540 at 545.

the contract. The investors had no idea about the terms of the contract between Arck and the Bank until after they instructed lawyers; it was probably revealed as part of the process of disclosure.²¹ Flaux L.J. observed that “[i]t may be said that it is somewhat serendipitous that the appellants can take the benefit of the contract ... given that they were unaware of its existence at the time of their investment and when they first sought to recover that investment in 2010”.²² Their ability to rely upon the 1999 Act was probably as surprising to the investors as it was to Arck and the Bank.

In order to understand how such surprising results can arise under the 1999 Act it is important to analyse, in some detail, how the cases have applied the statutory language.

Section 1(1)(b): “Purport to Confer a Benefit”

A narrow view of the scope of s.1(1)(b) was adopted in *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening*.²³ Underwriters settled a cargo owner’s claim against the carriers in respect of loss of goods at sea. The underwriters became subrogated to the cargo owner’s claim, and employed recovery agents to pursue that claim against the carriers. The carriers’ P&I Club issued a Letter of Undertaking addressed to the underwriters and the cargo owners by which they undertook to pay to the recovery agents “on your [i.e. the underwriter’s] behalf or to any solicitor you may appoint” such sums that might become due under a final judgment or by an agreement with the carriers in respect of the loss. Christopher Clarke J. held that this term was not enforceable by the recovery agents under the 1999 Act since it related only to the means or mode by which payment should be made by the carriers to the underwriters or their solicitor.²⁴ Even though the contract between the carriers and the underwriters allowed the recovery agents to deduct its commission from any recovery,²⁵ the judge held that the term did not purport to confer a benefit on the recovery agents. This highlights the robust approach taken by Christopher Clarke J., who insisted that “[a] contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed”.²⁶ His Lordship thought that “one of the purposes of their bargain (rather than one of its incidental effects if performed) [should be] to benefit the third party”.²⁷ This limits the scope of s.1(1)(b), although it raises a very difficult and important boundary between “incidental” and “direct” effect (and strictly the focus should be on the term under consideration rather than the purpose of the contract).

Dolphin Maritime might be compared with the more recent decision of *Cavanagh v Secretary of State for Work and Pensions*.²⁸ A contract of employment contained a term by which the employer promised the employee to make specified deductions from the employee’s pay and to pay these deductions to the employee’s trade union. The employee clearly had the right to enforce performance. But the court held that this term was also enforceable against the employer by the union: the term purported to confer a benefit on the

²¹ *Chudley* [2020] Q.B. 284 at [24].

²² *Chudley* [2020] Q.B. 284 at [80].

²³ [2009] EWHC 716 (Comm); [2009] 2 Lloyd’s Rep. 123.

²⁴ [2009] 2 Lloyd’s Rep. 123 at [75]-[76].

²⁵ [2009] 2 Lloyd’s Rep. 123 at [77].

²⁶ [2009] 2 Lloyd’s Rep. 123 at [74].

²⁷ [2009] 2 Lloyd’s Rep. 123 at [74].

²⁸ [2016] EWHC 1136 (QB). See too e.g. *Randgold Resources Ltd v Santam Ltd* [2018] EWHC 2493 (Comm); [2019] Lloyd’s Rep. I.R. 467.

union even though it could also be said to benefit the employee. This sits somewhat awkwardly with the approach in *Dolphin Maritime*. Perhaps the two decisions might be reconciled because in *Cavanagh* the term purported to confer a benefit on both the employee and the union, which was sufficient for s.1(1)(b).²⁹ Of course, each case turns on the interpretation of terms in a particular contract so comparing different decisions may not be especially instructive. But when different courts adopt more or less expansive approaches it makes it difficult to predict whether a third party will be held to have a right to enforce the contract. Such uncertainty can be unsettling to commercial parties.

In any event, the decision in *Chudley* confirms the direction of travel seen in *Cavanagh*, such that the requirement of a term which “purports to confer a benefit” on a third party can be satisfied quite readily. In *Chudley*, the judges dealt with s.1(1)(b) in short order. Flaux L.J. held that the “principal purpose” of the contract was to protect the investors, and the opening of the segregated account was intended to benefit the investors.³⁰ Longmore L.J. agreed: “In my view the term requiring receipt of the OM undertaking before money is distributed is a term which purports to confer a benefit on the Paradise Beach investors – otherwise what is its point?”³¹ One answer to this rhetorical question could be that the point of the term was to give confidence to investors about the soundness of the scheme, rather than to do anything as positive or open as conferring a benefit or enforceable rights upon them. But that would demand a more restrictive approach to s.1(1)(b) than the expansive view which now seems to be favoured by the courts. Both the uncertainty and potential breadth of s.1(1)(b) are reasons why commercial parties regularly exclude the 1999 Act.

Section 1(2): Rebutting the Presumption

If s.1(1)(b) is satisfied then there is a presumption that the contracting parties intended the third party to be able to enforce the relevant term of the contract.³² This presumption is not easily displaced, and has been described as “strong”.³³ The burden is squarely on the contracting party to establish that it was not intended to confer enforceable rights upon the third party.³⁴

Commercial parties may balk at the proposition that the presumption raised under s.1(1)(b) is strong. Commercial actors generally expect only the parties to the contract to be able to sue on it – and if they intend otherwise they should say so expressly (exploiting s.1(1)(a)). The presumption under s.1(1)(b) is therefore problematic, but it is impossible to disregard the statute. Yet the difficulties inherent in divining an intention from a presumption might suggest that the presumption should be weak and readily rebuttable, in contrast to the view adopted by the courts. But even though the presumption that the parties intended the third party to be able to bring a claim can be somewhat artificial – as in *Chudley*, for example – in many instances that will be determinative because there will be insufficient evidence to rebut the presumption. It will be particularly difficult to rebut the presumption in short and

²⁹ [2016] EWHC 1136 (QB) at [73]; see too *Prudential Assurance Co Ltd v Ayres* [2007] EWHC 775 (Ch); [2007] 3 All E.R. 946 at [28] (reversed, but not on this ground: [2008] EWCA Civ 52; [2008] 1 All E.R. 1266).

³⁰ *Chudley* [2020] Q.B. 284 at [78].

³¹ *Chudley* [2020] Q.B. 284 at [89].

³² *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm); [2004] 1 Lloyd’s Rep. 38 at [23].

³³ A. Burrows, “Reforming Privity of Contract: Law Commission Report No. 242” [1996] L.M.C.L.Q. 467 at 473.

³⁴ Eg *The Laemthong Glory (No.2)* [2005] 2 All E.R. (Comm) 167 at [22].

simple contracts, such as some letter agreements,³⁵ which do not provide much assistance regarding the parties' intentions on this point.

Section 1(2) calls for a "proper construction of the contract".³⁶ The construction of contracts is a difficult topic. How much weight should be placed upon the "factual matrix" is a question on which opinions differ.³⁷ The 1999 Act was passed soon after the important judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, which favoured a very broad approach to interpretation.³⁸ More recently, the Supreme Court has placed greater emphasis upon the textual language chosen by the parties.³⁹ This could mean that outcomes envisaged by the Law Commission in its Report would no longer be the same.

For instance, the Law Commission did "not think in normal circumstances an owner would be able to sue a sub-contractor for breach of the latter's contract with the head-contractor" since the chain of contracts meant that liability should go up and down the immediate links of the chain, rather than be short-circuited through an action brought by a third party.⁴⁰ The Law Commission's focus was on sub-contracts in the construction industry, where this reflected received understanding, but could be read more broadly: the Law Commission thought that s.1(2) could also be used to rebut any presumption that a purchaser of goods from a retailer should gain a right to sue the manufacturer (rather than the retailer) for breach of contract as regards the quality of the goods.⁴¹

However, in *The Laemthong Glory (No.2)* the Court of Appeal was prepared to allow a third party to enforce a claim, despite the existence of a chain of contracts. The receivers of goods issued to a charterer a Letter of Indemnity (LOI) which constituted a contract. The receivers promised to indemnify "you [the charterer] your servants or agents" in respect of any liability which might be incurred by delivering the goods at the receivers' request. The shipowner delivered the goods to the receivers, and sought to rely upon this indemnity by virtue of the 1999 Act. The Court held that this promise did purport to confer a benefit on the shipowner, which had acted as one of the charterer's "agents", and that the receivers had not discharged the onerous burden imposed by s.1(2) of proving that the LOI was not intended by the contracting parties to be enforceable by the shipowner. The Court of Appeal said: "We say nothing about the position on the case of a chain of charterparties but we agree that there is no tradition of chain LOIs similar to the examples given in the [Law Commission's] report. All depends upon the construction of the receivers' LOI."⁴²

The Laemthong Glory (No. 2) illustrates that the existence of a chain of contracts is not, in itself, sufficient to rebut a presumption that the third party should be able to enforce the contract. This is consistent with the language of the Act. But the contrary result would also have been possible, especially given the steer in the Law Commission's Report: the existence of the chain of contracts could have rebutted the presumption that the term was

³⁵ At first instance in *Chudley* the LOI was not thought to have contractual effect, following *So v HSBC Bank Plc* [2009] EWCA Civ 296; [2009] 1 C.L.C. 503; see [2017] EWHC 2177 (Comm) at [151]-[161].

³⁶ *Royal Bank of Scotland v McCarthy* [2015] EWHC 3626 (QB) at [119]-[143].

³⁷ Compare eg Lord Sumption, "A Question of Taste" [2017] O.U.C.L.J. 301 and Lord Hoffmann, "Language and Lawyers" (2018) 134 L.Q.R. 553.

³⁸ [1998] 1 W.L.R. 896; [1998] 1 All E.R. 98. See too *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101.

³⁹ *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619.

⁴⁰ *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242, 1996) at [7.18(iii)].

⁴¹ *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242, 1996) at [7.18(iii)].

⁴² *The Laemthong Glory (No.2)* [2005] 2 All E.R. (Comm) at [54].

intended to be enforceable by the shipowner. The charterers had provided an LOI to the owners, and the receivers in turn provided an LOI to the charterers. The owners could have been provided with an LOI directly from the receivers, but this was not given. That may have been a deliberate choice; the parties could clearly have bargained for such an LOI. It would not have been inconsistent with the statutory language for the court to have concluded that the owners and charterers intended their contractual obligations to be contained solely within the charterparty and the LOI provided by the charters, and that the receivers and charterers intended their respective obligations to be contained within the contract of sale and LOI provided by the receivers. The presumption of enforceability might therefore have been rebutted under s.1(2). By favouring instead a relatively strong presumption under s.1(1)(b) that is not easily rebutted under s.1(2), the Court of Appeal in *The Laemthong Glory (No. 2)* bolstered the protection given to third parties.

Indeed, to return to the example of sub-contracts in the construction context, it is not clear that a court would now find that the presumption of enforceability could be rebutted under s.1(2) simply by virtue of being made within the construction industry. That depends upon the proper interpretation of the contract under the factual matrix existing at the time the contract was made. The conclusion of the Law Commission that the presumption would be rebutted was always open to the criticism of circularity:⁴³ the parties did not intend a third party to have the right to enforce the contract because that was the understanding under the “old” law on privity of contract. Now that the Act has been in place for over twenty years, it is strongly arguable that a court would not find that a presumption of enforceability should be rebutted just because a chain of contracts exists, regardless of the context of the agreements.⁴⁴ As a result, contracting parties who wish to ensure that parties should be able sue only up and down a chain of contracts may sensibly choose to exclude the 1999 Act.

Section 1(3): “Expressly Identified”

Section 1(3) of the 1999 Act restricts the range of third parties which can benefit from the presumption of enforceability. Contracting parties should not be surprised if an expressly identified third party later seeks to enforce a term of the contract. However, the courts have taken an increasingly generous approach when interpreting this provision in favour of third parties. This may prompt further concern amongst commercial parties and encourage them to exclude the operation of the 1999 Act for fear of it operating in unanticipated ways.

Initially, a narrow interpretation of s.1(3) was adopted by the Court of Appeal. *Avraamides v Colwill*⁴⁵ concerned the transfer of a company. The purchasers promised to pay “any liabilities properly incurred by the company.” The Court of Appeal, overturning the judge below, held that this did not amount to an express identification of one of the company’s former customers (even though the purchasers had also promised “to complete outstanding customer orders”) since the “liabilities” to which it referred “would benefit third parties but of a large number of *unidentified* classes”.⁴⁶ This was perhaps hard on the former

⁴³ Eg C. Macmillan, “A Birthday Present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999” (2000) 63 M.L.R. 721 at 725; R. Stevens, “The Contracts (Rights of Third Parties) Act 1999” (2004) 120 L.Q.R. 292 at 308-309.

⁴⁴ Cf. M. Furmston and G. Tolhurst, *Privity of Contract* (Oxford: Oxford University Press, 2015) at [8.28].

⁴⁵ [2006] EWCA Civ 1533; [2007] B.L.R. 76.

⁴⁶ [2007] B.L.R. 76 at [19] (*italics* supplied).

customers, since they could point to a term referring to “customer orders”.⁴⁷ Yet Waller L.J. refused to bow to the “temptation ... to find a route which renders the appellants liable”, which was recognised to be “great”.⁴⁸ Rather, his Lordship insisted that “section 1(3), by use of the word “express”, simply does not allow a process of construction or implication”.⁴⁹

That approach restricted the scope of the 1999 Act. But it soon came under strain, notably by the decision of Flaux J. at first instance in *The Alexandros T*.⁵⁰ The ship sank and was a total loss. The owners and insurers entered into an agreement which provided for the settlement of all claims by the owners against the “Underwriters”. This word was “construed as encompassing the servants or agents of insurers”⁵¹ both for the purposes of s.1(1)(b) and s.1(3). As a result, the claimants, who were the servants or agents of the underwriters, were “expressly” identified within s.1(3) as “a class of third party intended to have a benefit conferred upon them by the settlement agreements”.⁵²

Flaux J. admitted that his “initial reaction”⁵³ had been that the claimants were not expressly identified for the purposes of s.1(3). That would have been consistent with the restrictive approach taken by the Court of Appeal in *Avraamides v Colwill*. After all, Waller L.J. “with some reluctance”⁵⁴ refused to construe “customer” in such a way that it would cover the third parties in that case. The more generous approach adopted by Flaux J. in *The Alexandros T* sits uncomfortably with the earlier decision of the Court of Appeal. It is a shame that Flaux J. does not appear to have been referred to the decision in *Avraamides*.

In any event, the tension between *Avraamides* and *The Alexandros T* was decisively resolved in *Chudley* in favour of *The Alexandros T*. Flaux L.J. unsurprisingly followed his approach in the latter case, and the reasons given by Longmore L.J. are similar. That the contract referred to a “client account” regarding investments in Paradise Beach was sufficient for express identification of the clients/investors under s.1(3).⁵⁵ Flaux L.J. explained that it was quite proper to resort to construction of the contract as a whole for the purposes of s.1(3)⁵⁶ and that the dictum of Waller L.J. in *Avraamides v Colwill*⁵⁷ that the word “express” does not allow a “process of construction or implication” contains an error: the “or” should be replaced with “by”.⁵⁸ Construction by implication is impermissible,⁵⁹ but the standard principles of interpretation can be employed in the usual way.

This places great weight on the difficult boundary between interpretation and implication. A rigorous distinction between the two was drawn by the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd.*⁶⁰ This should

⁴⁷ See too [2007] B.L.R. 76 at [22] (Leveson LJ).

⁴⁸ [2007] B.L.R. 76 at [18].

⁴⁹ [2007] B.L.R. 76 at [19].

⁵⁰ *Starlight Shipping Co v Allianz Versicherungs AG (The Alexandros T)* [2014] EWHC 3068 (Comm); [2014] 2 Lloyd’s Rep. 579.

⁵¹ [2014] 2 Lloyd’s Rep. 579 at [62], [88].

⁵² [2014] 2 Lloyd’s Rep. 579 at [88].

⁵³ [2014] 2 Lloyd’s Rep. 579 at [88].

⁵⁴ [2007] B.L.R. 76 at [21].

⁵⁵ *Chudley* [2020] Q.B. 284 at [78], [93].

⁵⁶ Citing *The Laemthong Glory (No.2)* [2005] 2 All E.R. (Comm) at [48(ii)].

⁵⁷ [2007] B.L.R. 76 at [19].

⁵⁸ *Chudley* [2020] Q.B. 284 at [77].

⁵⁹ Since it would lead to unacceptable uncertainty: *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242, 1996) at [8.1].

⁶⁰ [2015] UKSC 72; [2016] A.C. 742.

be supported. There is an important distinction between interpreting the express terms of a contract, and adding to those express terms through a process of implication, even though both are concerned with the same goal of ascertaining the content of the parties' agreement.⁶¹ Although in *Wells v Devani* the Supreme Court unnecessarily blurred the two doctrines of interpretation and implication,⁶² orthodoxy appears to have been restored and the two clearly separated in the more recent decision of the same court in *Duval v 11-13 Randolph Crescent Ltd*.⁶³ In any event, it is suggested that the statutory language of s.1(3) simply does not permit implication, since the third party must be "expressly identified". But following *Chudley*, it may be doubted whether *Avraamides* would still be decided in the same way. The language of "customer" could be viewed as express language that might be interpreted to cover the claimant in that case. The approach adopted by the Court of Appeal in *Chudley* seems much more favourable to third parties than that taken in *Avraamides*.

One case not discussed in *The Alexandros T* but mentioned in *Chudley* is *London Drugs Ltd v Kuehne & Nagel International Ltd*,⁶⁴ a decision of the Supreme Court of Canada. The claimants had delivered valuable machinery to a warehousing company under a contract which limited the liability of "the warehouseman" to \$40 per package. A majority of the Supreme Court of Canada held that the employees of the warehousing contractor were protected by this limitation of liability as "third party beneficiaries" and did so through a process of implication. Iacobucci J. said:⁶⁵

"It is clear that the parties did not choose express language in order to extend the benefit of the clause to employees. For example, there is no mention of words such as 'servants' or 'employees' in [this clause] of the contract. As such, it cannot be said that the respondents are express third party beneficiaries with respect to the limitation of liability clause. However, this does not preclude a finding that they are implied third party beneficiaries."

In both *London Drugs* and *The Alexandros T* the language of "servants" or "employees" could have been expressly included by the parties but was not. In the former case, those third parties were found to be "third party beneficiaries" through implication. In *The Alexandros T* a similar result was reached through a broad process of interpretation. This was lamented by Treitel, who thought that the result in *London Drugs* could be reached *only* by a process of implication, and that in *The Alexandros T* Flaux J. should have said the same, so that s.1(3) of the 1999 Act would not be satisfied.⁶⁶ However, *Chudley* (albeit strictly obiter) rejects Treitel's reasoning. It may be that, following *Chudley*, if the facts of *London Drugs* were to occur in this jurisdiction then a court would find the third parties to have been expressly identified in the contract for the purposes of s.1(3), even though the parties did not use the language of "servants" or "agents". The particular contractual context is crucial: if the parties have deliberately included the "servants" or "agents" of some parties but not others,

⁶¹ P. Davies, "Recent Developments in the Law of Implied Terms" [2009] L.M.C.L.Q. 140 at 145.

⁶² [2019] UKSC 4; [2020] A.C. 129. The Supreme Court was clear that the appeal should be allowed because there was either an implied term or an express term in the appellant's favour, and the distinction between the two did not much matter to their Lordships' reasoning on the crucial issue in the case. See T. Pilkington and J. Eldridge, "Implied terms and contract formation" (2019) 135 L.Q.R. 526; P. Davies, "Interpretation and implication in the Supreme Court" [2019] C.L.J. 267.

⁶³ [2020] UKSC 18; [2020] 2 W.L.R. 1167.

⁶⁴ 1992 CanLII 41 (SCC); [1992] 3 S.C.R. 299.

⁶⁵ [1992] 3 S.C.R. 299 at 451. For further commentary see eg C. Macmillan, "Privity and the Third Party Beneficiary: the 'monstrous proposition'" [1994] L.M.C.L.Q. 22.

⁶⁶ *Chitty on Contracts* 33rd edn (London: Sweet & Maxwell, 2018) at [18-097].

that may indicate that only the “servants” or “agents” of some parties but not others have been expressly identified by the parties.

In *Chudley*, Longmore L.J. said that in *London Drugs* the Canadian court “was not dealing with legislation framed in the same way as the English 1999 Act. The fact that the court held that the warehousemen were ‘implied’ beneficiaries for the purpose of a decision at common law does not mean that one can only conclude that the word ‘underwriters’ includes underwriters’ agents by a process of implication for the purpose of the 1999 English Act”.⁶⁷ This is problematic: determining the contents of a contract requires the same techniques of interpretation and implication whether under a statute or not. The approach taken by the Canadian Supreme Court should not be dismissed simply because it did not involve the English statutory framework: deciding whether third parties are designated expressly (through interpretation) or impliedly (through implication) involves well-known common law techniques.

Flaux L.J. rightly accepted that the requirements of sections 1(1)(b) and 1(3) are cumulative, “but it simply does not follow that the same term cannot satisfy both requirements”.⁶⁸ This must also be right. But it does not quite meet the point raised by Treitel with which his Lordship was concerned. Treitel’s observation was that “*reasoning* which satisfies the first of these requirements [i.e. s1(1)(b)] cannot, of itself, satisfy the second [i.e. s1(3)]”.⁶⁹ It is important to emphasise that just because a term satisfies s1(1)(b), that does not mean that the requirements of s1(3) are met. For example, recent decisions at first instance appear to have accepted that even an implied term can purport to confer a benefit on a third party.⁷⁰ This is consistent with the view that the 1999 Act was motivated by a desire to reflect the contracting parties’ intentions, whether express or implied. Yet an implied term does not itself “expressly identify” the third party in a contract.⁷¹ This highlights that the reasoning used for questions raised under s.1(1)(b) and s.1(3) should not be the same.

The brusque treatment of s.1(3) in *Chudley* obscures what is a difficult issue. Indeed, the trial judge and Court of Appeal differed when describing the class expressly identified by the contract. Christopher Hancock Q.C. thought it consisted of “those who have paid money into the relevant account”,⁷² whereas the Court of Appeal considered it to be “clients of Arck who were investing in Paradise Beach”.⁷³ The two formulations are similar but not the same. That of the Court of Appeal is broader. Yet establishing whether s.1(3) is satisfied should be straightforward. That provision was designed to be an important bulwark against inappropriately expansive and uncertain applications of the Act, but it appears that courts are increasingly willing to adopt generous interpretations of contracts such that third parties are found to be expressly identified. Following *Chudley*, it may now be that whenever solicitors or other professionals open a “client account”, their clients could potentially acquire rights to enforce the account contracts against the bank. This would be surprising, but the mere

⁶⁷ *Chudley* [2020] Q.B. 284 at [94].

⁶⁸ *Chudley* [2020] Q.B. 284 at [79].

⁶⁹ *Chitty on Contracts* 33rd edn (London: Sweet & Maxwell, 2018) at [18-097] (emphasis added).

⁷⁰ *Menon v Pask* [2019] EWHC 2611 (Ch); [2020] Ch. 66 at [28]; *Bates v Post Office Ltd (No. 3: Common Issues)* [2019] EWHC 606 (QB) at [938]-[946].

⁷¹ Nor does the fact that a third party is expressly identified under s.1(3) mean that there is a term that purports to confer a benefit on it, eg where an employer takes out an insurance policy that it suffers where an employee is injured or ill (see *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242, 1996) at [7.18]).

⁷² [2017] EWHC 2177 (Comm) at [182].

⁷³ *Chudley* [2020] Q.B. 284 at [78], [93].

possibility will encourage commercial parties to continue to exclude the 1999 Act as a matter of course.

Conclusion

It has been said that the 1999 Act gives the third party a right to enforce a term if that is the clear implication of the agreement,⁷⁴ but recent decisions such as *Chudley* highlight that third parties may acquire enforceable rights even where that was not the intention of the parties. The 1999 Act has been interpreted in a broad manner that favours third parties, so the choice of commercial parties to exclude the operation of the Act in order to avoid unanticipated outcomes remains justified. Ironically, the fact that the Act is excluded so frequently may drive the courts towards an expansive interpretation of the legislation. In *Chudley*, Longmore L.J. emphasised that the parties could have excluded the third party's right to enforce the contract but did not do so.⁷⁵ Where commercial parties do not make the most of this option, courts might feel emboldened to interpret the Act broadly in favour of third parties.

⁷⁴ H. Beale, "A Review of the Contracts (Rights of Third Parties) Act 1999" in A. Burrows and E. Peel (eds), *Contract Formation and Parties* (Oxford: Oxford University Press, 2010) at p.248

⁷⁵ *Chudley* [2020] Q.B. 284 at [92].