



## LEGAL BRIEFING

### *Hidden identity*

#### *(1) Themis Avraamides (2) Emma Maitland v (1) Mark Colwill (2) Stephen Martin (T/A Bathroom Trading Company)*

Court of Appeal, LJ Waller and LJ Leveson [2006] EWCA Civ 1533

#### **The Facts**

This was an appeal against a decision that some third parties were entitled to enforce a transfer agreement between two individuals and The Bathroom Trading Company under the Contracts (Rights of Third Parties) Act 1999. Avraamides brought a claim against The Bathroom Trading Company in respect of a refurbishment of bathrooms. The refurbishment had been carried out by an individual, but the claim was brought against a company. The action was based upon a transfer agreement. Under that agreement The Bathroom Trading Company assumed all of Colwill and Martin's liability. At first instance, the judge held that Colwill and Martin were liable to Avraamides. Colwill and Martin appealed.

Liability had been found on the basis of section 1(3) of the 1999 Act. That section stated that "a third party must be expressly identified in the contract by name, as a member of a class or as answering to a particular description but need not be in existence when the contract is entered into [Emphasis added]." The appellant argued that the claimant had not been identified at all in the transfer agreement, and therefore they were not owed any duty.

#### **The Issues**

Did a third party, under the Contracts (Rights of Third Parties) Act 1999, have to be expressly identified by name?

#### **The Decision**

The Court of Appeal considered the terms of the transfer agreement. The purchasers had bought the assets of the company and agreed to settle all current liabilities. In order for a third party to obtain a benefit under that transfer agreement, they had to come within the requirements of the 1999 Act. That Act required that a third party must be expressly identified in the contract by name or as a class or by description.

Lord Justice Waller considered that the word "express" meant that it was not susceptible to the presence of construction or implication. In the absence of clear identification, no liability was owed. As a result, the appeal was allowed and Avraamides could not bring a claim under the transfer agreement.

#### **Comment**

The Contracts (Rights of Third Parties) Act 1999 is of particular interest to the construction industry. It could be used to replace collateral warranties. In other words, anyone who might normally be given a collateral warranty can simply be referred to in a building contract or a consultant's appointment and then those third parties (for example a funder, a purchaser and tenants, or

---

indeed others) could then bring a direct action under the building contract in reliance upon the 1999 Act.

There have been concerns that many, even those with only licences to be on the property, could then rely upon, for example, a building contract in order to bring a direct action. This is the reason why standard form building contracts initially excluded the 1999 Act. This case will give some comfort to those in the supply side of the construction industry. It seems that a mere implication is not adequate, but that express identification is required.

***Nicholas Gould***  
***January 2007***