Conditional undertakings constituted pre-commencement

Section 1 of the Bill sets out generally the circumstances in which a non-party to a contract can acquire third-party rights under the new statutory third party rights regime.

Section 2(2) expands on these circumstances by setting out that the undertaking through which a third-party right is acquired under the new regime can be a conditional undertaking.

Section 12 of the Bill provides for a *jus quaesitum tertio* which has been acquired pre-commencement under the common law to continue, but no new common law *jus quaesitum tertio* may be acquired post-commencement.

Following on from the above, we noted that:

- the new statutory regime expressly provides that contingent third party rights may be created;

- the Bill as drafted does not, by contrast, appear to provide that a contingent *jus quaesitum tertio* which would have been created under the common law regime on satisfaction of the relevant contingency is preserved in the saving provisions set out in Section 12.

It appears this way on the basis that no express reference to a contingent *jus quaesitum tertio* being preserved is made in Section 12, where that Section describes the preservation of pre-commencement rights which have been “acquired”. This contrasts with the express reference made to contingent third party rights capable of being created under Section 2 in connection with the new statutory regime, as explained above.

If this is correct and existing contractual terms providing for a contingent *jus quaesitum tertio* are not preserved, it could potentially involve the parties to such contracts having to go through an exercise of establishing whether such conditional rights existed and, if so, whether it may be necessary to enter into fresh contracts in order that conditional third party rights could continue to be created post-commencement in keeping with the original intentions of the parties.

If the intention is that existing contractual terms providing for a contingent *jus quaesitum tertio* are to be preserved post-commencement, we suggest that express provision for this be made in the Bill in order to reflect this.

Shepherd and Wedderburn LLP
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