

Removing blots from the copybook: third-party rights and *HNW Lending Ltd v Lawrence*

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The authors consider *HNW Lending Limited v Lawrence* [2025] EWHC 908 (Ch), in which Andrew Lenon KC expressly departed from the ruling of HHJ Dight CBE in the analogous case of *HNW Lending Limited v Mark* (unreported, Central London County Court, 7 August 2024). Both cases concern whether, and on what basis, a security agent for a lender may sue under the loan agreement by reference to the Contracts (Rights of Third Parties) Act 1999.

Key Points

- The Contracts (Rights of Third Parties) Act 1999 (1999 Act) came into force to alleviate the injustice caused by the inflexibility of common law privity of contract.
- In *HNW Lending Limited v Mark* (CLCC), HHJ Dight CBE held that a security agent for a lender had no standing to sue the borrower under the loan agreement because it conferred no benefit on that agent. Therefore, the agent could not avail themselves of the 1999 Act.
- In *HNW Lending Limited v Lawrence* [2025] EWHC 908 (Ch), the court expressly departed from the ruling in *Mark*. Per *Lawrence*, the security agent had standing merely because the express terms so provide and, in any event, the contract did confer a benefit on the agent (and therefore the

agent could rely upon the 1999 Act).

- Permission was granted in *Lawrence* to appeal to the Court of Appeal.

Introduction

Part of the common law doctrine of privity provides that a term in a contract cannot in general be enforced by a third party, even if the term purports to confer a benefit on the third party. This element of the doctrine was established in the 1861 judgment in *Tweddle v Atkinson* (1861) 1 B. & S. 393 and was, until legislative intervention, the subject of near-universal complaint among the judiciary and commentators. Dillon J is reported to have called it a "blot on our law and thoroughly unjust" in *Forster v Silvermere Golf and Equestrian Centre Ltd*.¹

The legislative intervention came by way of the Contracts (Rights of Third Parties) Act 1999 (1999 Act), which enacted a

¹ According to Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (1996, Law Com No 242), para 2.65. Law reports differ as to the wording of the quotation and whether it formed part of Dillon J's judgment: see (1981) 125 S.J. 397 and (1981) 42 P. & C.R. 255, as well as *Darlington BC v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68 at 77D.

statutory exception to the common law doctrine. It implemented the recommendations of the Law Commission's 1996 report titled *Privity of Contract: Contracts for the Benefit of Third Parties*, albeit with some amendments.²

The centrepiece of the 1999 Act is s 1, which provides that, subject to the provisions of the 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:

- the contract expressly provides that he may (the First Limb); or
- the term purports to confer a benefit on him (the Second Limb).

Under s 1(2), the Second Limb 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.

This may be a reason why the First Limb appears to have been given insufficient weight, if not simply overlooked, in *HNW Lending Limited v Mark* (unreported, Central London County Court, 7 August 2024) (*Mark*), in which HHJ Dight CBE held that a security agent for an undisclosed lender had no standing to sue under the loan agreement because that agent had no benefit to enforce under the agreement.

It is of interest that the First Limb was seemingly overlooked in *Mark* despite being a less expansive inroad into privity than the Second Limb.³

The judgment of Andrew Lenon KC

in *HNW Lending Limited v Lawrence* [2025] EWHC 908 (Ch) (*Lawrence*), a claim brought by the same security agent (HNW) as in *Mark*, provides a corrective that is of importance for security agent (or security trustee) arrangements. It also highlights that, as a result of what Andrew Lenon KC called the "dearth of case law on the scope of section 1(1)", there remain uncertainties about the Second Limb of that section in particular.

Background to *Lawrence*

In *Lawrence*, HNW claimed possession of a property pursuant to a first charge securing lending under a 2018 loan agreement, as well as payment of sums alleged to be owing under the agreement.

The loan agreement provided that it was made between Ms Lawrence and an undisclosed lender "acting by [HNW]", with HNW acting as "security agent". By other clauses it provided for HNW's obligations and powers as agent (which are outside the scope of this article).

Clause 26.7 of the loan agreement provided that:

"The Borrower and Lender agree that, while [HNW] is not a party to this Loan Agreement, [HNW] may take the benefit of and specifically enforce each express term of this Loan Agreement and any term implied under it pursuant to the Contracts (Rights of Third Parties) Act 1999."

The charge provided that it was made between Ms Lawrence and HNW, with HNW

² Law Com No 242. Parts of the report are excerpted in this article. Contains public sector information licensed under the Open Government Licence v3.0. The licence is available at: <https://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/>.

³ See Meryll Dean, 'Removing a blot on the landscape – the reform of the doctrine of privity' (2000) Mar JBL 143 at 146-147.

“acting as security agent for the Lender as defined in the Loan Agreement”. The charge was an all monies legal mortgage and referred to the finance being provided (both under the loan agreement and otherwise) as consideration for the grant of security. The charge contained a covenant to pay the lender.

Ms Lawrence alleged various bases of defence. She also sought strike-out of the claim on the basis (among others) that HNW had no standing because it had no enforceable rights against Ms Lawrence under the loan agreement or charge.

This argument appears to have been made because it had been successful in *Mark*.⁴ As alluded to above, *Mark* was a similar claim in that the claimant was HNW and sought possession of a property in reliance on a first legal charge and a loan agreement which (including cl 26.7) were in materially the same terms as those in *Lawrence*. In *Mark*, HHJ Dight CBE had accepted the defendant’s argument in the following stages, and as a result had dismissed the claim:

- HNW has at no point had its own cause of action against the defendant. The lender could have assigned it but did not.
- Under the 1999 Act, a third party is able to acquire and enforce the rights under a contract to the extent intended by the parties to the contract. The difficulty with the application of this principle to the loan agreement is that the defendant owes no obligations to HNW and HNW is not expressed to benefit from the agreement.
- The Act is intended typically for a case where A and B agree to enter into a

contract for the benefit of C, who is not a party, but in the contract A and B agree that C can, under the Act, enforce a claim to the benefit.

Judgment in *Lawrence*

In *Lawrence*, HNW submitted that the judgment in *Mark* should not be followed because HHJ Dight CBE had failed to give due weight to the First Limb in s 1 of the 1999 Act.

Andrew Lenon KC dismissed the defendant’s basis for strike-out, in the following stages:

- The First Limb is not limited to enforcement by a third party of a term purporting to benefit the third party ([72]). This type of term is provided for by the Second Limb. It suffices that, under cl 26.7, the contract expressly provides that the third party may enforce the term.
- In any event, cl 26.7 comes within the Second Limb ([72]). It provides that HNW “may take the benefit of and specifically enforce each expressed term of this loan agreement and any term implied under it”.
- Construing cl 26.7 as legally effective accords with the principle that the courts should endeavour to give effect to contractual provisions rather than treating them as otiose ([73]).
- As to the charge, HNW is entitled to enforce the repayment provisions in the loan agreement under its express terms, so the objection in relation to the charge falls away ([74]).
- However, Andrew Lenon KC proposed (at [76]) to grant Ms Lawrence permission to appeal, and stay enforcement

⁴ The judgment in *Mark* is unreported and the summary of that judgment contained in the judgment in *Lawrence* is relied upon for the purposes of this article.

of HNW's claim in the meantime, because he had reached a different conclusion to that in *Mark*.

The preferred approach

The analysis in *Lawrence* is preferable to that in *Mark* for the three legal reasons that follow.

First, the 1999 Act is clear in its drafting. The First Limb provides for parties to make terms enforceable by third parties even where the term does not purport to benefit the third party. The Second Limb provides for third party enforceability where a term purports to confer a benefit on that third party. This is a strong indicator (and, it appears, a near-conclusive one for Andrew Lenon KC) that the First Limb is not concerned with "benefit" at all.

Second, the Law Commission's report provides important background, if not an aid to construction (the scope of such aid being open to debate).⁵ The report was not mentioned in the judgment in *Lawrence*. At para 7.5, where the Commission explains the two-limb structure of s 1 of the proposed Act, it states:

"where the parties have expressly conferred legal rights on the third party...it ought not to be necessary to show additionally that the third party was an intended beneficiary of the contract."

At para 7.12 onwards, the Commission expressly addresses the issue in further detail. It states that it found the issue "difficult" and that an argument against its conclusion (an argument, the Commission noted, that was adopted by its Scottish

counterpart in 1977) is that a third party with a bare right to sue will generally recover no substantial damages (or the court will face some difficulty in deciding whether such damages are to be passed on) because the third party has suffered no loss. But the Commission opined that the argument was not strong enough to be persuasive, because the third party will be in no worse position under the proposed reform, and some valuable remedies, such as specific performance and payment of an agreed sum, will be available. The Commission accepted that it was conceivable that parties would want to give a third party such a bare interest. It gave as an example of a bare interest a contract where the third party is to hold sums received from the promisor on trust (albeit for the benefit of a fourth party, not the promisee).

Third, it is arguable that, as Andrew Lenon KC adopted by way of alternative conclusion, the Second Limb of s 1 applies because cl 26.7 provides that HNW may "may take the benefit of" each term of the loan agreement. However, it should be noted there is some difficulty with this argument. It is unclear whether, even on its face, cl 26.7 grants HNW a benefit in circumstances where the loan is repayable to the lender only, HNW is appointed as security agent and it is at least implied in the loan agreement that anything received by HNW is received on behalf of the lender. The Law Commission was unsure about this issue in its report; as to the example of a bare interest (mentioned above), it said that the trustee "could perhaps be said not to 'benefit' from the performance by being made a trustee of the benefit".

⁵ It is established that such reports may be used to glean the purpose or mischief targeted by the legislation in question, but judicial attitudes differ on whether they may be used to discern the meaning of a doubtful word or phrase. See *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis Butterworths 2020) at §24.9.

Practical points

The conclusion in *Lawrence* as to the First Limb is an unsurprising but welcome correction to the approach adopted in *Mark*. In security agent and trustee arrangements, and other similar arrangements, the First Limb provides a largely straightforward means of securing enforceability by a third party.

But the judgment in *Lawrence* also reveals that questions remain to be answered about the Second Limb. These questions underscore that use of the First Limb will likely supply greater certainty to parties, and that there might be weaknesses to be exploited in contracts where the First Limb cannot be or has not been resorted to.

The following practical points fall to be made:

- There is, as discussed above, uncertainty as to the meaning of “benefit” where the third party is a security agent, trustee or similar custodian. However, the judgment in *Lawrence* is an indicator that little is needed to establish that a custodian has benefit.
- Parties can and often do set out expressly the duties that such a custodian has, including by excluding all fiduciary duties.⁶ But parties should be aware that this could have some bearing on whether the custodian can be said to benefit under the contract.
- Caution is needed even where a benefit is conferred on the third party with the purpose of enabling the Second Limb, because of s 1(2) (the Second Limb does not apply if on a proper construction it appears that the parties did

not intend the term to be enforceable). Even brief wording might have the effect referred to in s 1(2). For example, it has been argued that the Second Limb might be excluded (such that no benefit is conferred, and whether deliberately or not) under cl 19.1 of the Loan Market Association’s Super Senior leveraged Facility Agreement.⁷ The clause obliges the parent of a borrower to pay increased costs incurred by a finance party or any of its affiliates (the affiliates being the third parties) as a result of changes in compliance obligations; but the obligation is an obligation to pay “for the account of a finance party” only.

- Where the third party is to be given rights under the First or Second Limb, they must under s 1(3) of the 1999 Act be expressly identified by name, class or description. Particular consideration should be paid to this provision if it is intended that the identity of a third party is kept from a counterparty. In *Lawrence* and *Mark*, this issue did not arise because it was the lender whose identity was to be withheld.

What the Court of Appeal may decide in *Lawrence* remains to be seen. As a matter of commercial clarity, the use of the 1999 Act as done by HNW brings with it a number of practical benefits whether in a security trust arrangement or for a simple agent acting for its lender principal. It is hoped that a similar analysis to Andrew Lenon KC’s is adopted and that the “blot” of an inflexible rule of privity of contract is not allowed to spread despite the passing of the 1999 Act.

⁶ For example, *Landsbanken Hessen-Thuringen Girozentrale v Bayerische Landesbank, London Branch* [2014] EWHC 1404 (Comm) at [13], cl 18.1.3.

⁷ Rabin Kok, ‘Third party rights and the LMA suite of Debt Documents’ (2024) 1 JIBFL 8 at 8-9.