

Assigning Contracts in Property Matters (NSW)

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OUTLINE

It may become necessary to assign title in a contract to a third party. Can this be done and if so how is it done? This session looks at the legal formalities in assignment of a contractual interest including an insurable interest. Issues I will cover off in the course of my lecture will include the following:

- Can you assign a land contract?
- The distinction between legal and equitable assignment
- When is consent of the other party required?
- Compliance requirements under the *Conveyancing Act* on assignment
- Assignment of choses in action in property transactions
- Assignment of benefit and not burden – importance of knowing what your assigning
- Stamp duty implications of assignment

WHAT IS ASSIGNMENT?

Assignment is the transfer of a right from one person to another. *A chose in action* is often thought of as a cause of action that allows enforcement of the right.

“An assignment involves an "assignor" transferring some or all of its rights under a contract to an "assignee", so that the assignee is entitled to the corresponding performance directly from, and can enforce those rights against, the non-assigning party. An assignment in itself does not create a contract between the assignee and the non-assigning party nor does it make the assignee a party to the original contract.”¹

Assignable contractual rights are choses in action; are a species of personal proprietary right

¹ Citing from Justine Kirby's with respect, excellent, article, below.

²; and can be transferred to a third party at law or in equity in accordance with the formal rules governing the transfer of such rights.³

The assignee of a contractual right under a legal assignment is entitled to take action in respect of it: e.g. Sec 12 *Conveyancing Act 1919* (NSW).

As to the vexed question of whether assignments of purely equitable choses in action must be in conformity with Sec 12, see Austin R P *The Conveyancing Act 1919 (As amended) Sec 12 and equitable choses in action* [1976] SydLawRw 5.

CAUSE OF ACTION CANNOT BE ASSIGNED: MAINTENANCE AND CHAMPERTY

As to the difference between maintenance (basically, assisting / intermeddling in litigation of another) and champerty (getting a financial benefit from that intermeddling) , see *Thai Trading (A Firm) v Taylor & Anor* [1998] EWCA Civ 370 (27 February 1998) and as to its application to legal fees, see *Geraghty & Co v Awwad & Anor* [1999] EWCA Civ 3036 (25 November 1999); [2001] QB 570, [2000] 1 All ER 608, [2000] 1 Costs LR 105, [2000] 3 WLR 1041, [1999] EWCA Civ 3036

A cause of action itself (sometimes referred to as a “bare right to litigate”) may not be assigned, as that offends the rules on maintenance and champerty: para [48] of *SPV Osus Limited -v- HSBC International Trust Services (Ireland) Limited* [2015] IEHC 602. The same general rule applies in Australia: *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 2017, para [2] referring to UK authority such as *Brownnton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499, 509d, but noting portentiously for the appeal, that:

“...the extent to which the courts might permit an assignment of a cause of action is far from settled under Australian law.”

That was a case where a subsidiary (EWC) had an agreement with the bank, to provide, as intermediary, electronic payment services to various merchants. EWorld was EWC’s holding company, and alleged that the Bank owed it a duty of care to avoid causing foreseeable economic loss, which duty it breached by breaching the agreement with the subsidiary.

EWC alleged that all of EWorld’s right title and interest in the claim against the Bank had been assigned to third party, (Internet Marketing) which had in turn assigned same to EWC, a

² : PhD Thesis of Gregory Tolhurst , UNSW 10/2/4 entitled *Assignment of Contractual Rights*, viewed online February 2016 ; para [32] of *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40

³ : see authorities collected in para [32] of *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40

two step assignment process. The issue was whether EWorld was an officious inter-meddler in EWC's affairs, or had sufficient commercial interest in the transactions to justify the assignment.

The primary judge struck out the claim as offending the rules of maintenance and champerty; that was reversed on appeal.

To take a recent UK example, the assignment of a bare cause of action in tort for personal injury was held contrary to public policy because the assignee had no legitimate interest in the claim: *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149.⁴

Take an important Australian example, though of some vintage, *Poulton v The Commonwealth* (1953) 89 CLR 540. An issue was the ability of a plaintiff to waive a cause of action in conversion. It was held that the right to waive, could only be exercised by the persons in whom the cause of action lay.

Two reasons were given for this, namely, as a matter of fact there was no assignment by those persons to the plaintiff and, in any event, "because, according to well-established principle, the right [of action for the tort] was incapable of assignment either at law or in equity." These findings were apparently *obiter* and otherwise subject to criticism⁵.

There are a number of exceptions to this rule:

- The rules relating to insolvency, e.g. some claims may only be allowed to be prosecuted by a liquidator. See e.g. *In the matter of Colorado Products Pty Ltd (in prov liq)* [2014] NSWSC 789;
- An assignment of a cause of action may be effected as part of a transfer of property to which the cause of action relates, for example a debt (which is effectively both property and a cause action itself) or the transfer of a lease which may carry with it the right to existing arrears of rent;
- It may be possible to assign the proceeds of a cause of action. This would take effect as an agreement to assign *future property*.

A contract may contain an express non-assignment provision. A non-assignment provision cannot prevent assignment by operation of law, and any assignment that takes place will be effective as between assignor and assignee. However, the provision will generally prevent a purported assignment from being effective as against the non-assigning party, if clearly drafted: *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85.

⁴ There are, it seems, no "hits" on this case on austlii, as at early February 2016.

⁵ *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 2017, paras [26] and [27]

STATUTORY PROVISIONS IN NEW SOUTH WALES FOR LEGAL ASSIGNMENT

Sec 12 Conveyancing Act, is headed “Assignments of debts and choses in action “ and provides:

Any absolute assignment by writing **under the hand of the assignor** (not purporting to be by way of charge only) of any debt or **other legal chose in action, of which express notice in writing has been given** to the debtor, trustee, or other person **from whom the assignor would have been entitled to receive or claim such debt or chose in action**, shall be, and be deemed to have been effectual in law (**subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed**) to pass and transfer **the legal right** to such debt or **chose in action from the date of such notice**, and all **legal and other remedies** for the same, and the power to give a good discharge for the same without the concurrence of the assignor: Provided always that if the debtor, trustee, or other person liable in respect of such debt or chose in action has had notice that such assignment is disputed by the assignor or anyone claiming under the assignor, or of any other opposing or conflicting claims to such debt or chose in action, the debtor, trustee or other person liable shall be entitled, if he or she thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he or she may, if he or she thinks fit, pay the same into court under and in conformity with the provisions of the Acts for the relief of trustees.

The following features emerge from a consideration of Sec 12:

- It refers to choses in action, without specifying what they are—that remains for the case law to develop and articulate;
- express notice in writing is required;
- there is no reference to assigning *burdens* –only choses in action;
- there is no express mention of the requirement for *consideration* to support the assignment;
- there remain exceptions, e.g. that any assignment is subject to “all equities”: again, not identified, but a recent example is where there bonds were held subject to a constructive trust : para [276] of *Warner v Wong, in the matter of Bellpac Pty Limited (Receivers and Managers Appointed) (In Liq) (No 5)* [2015] FCA 784.
- *Section 12* does not require that notice be given by the assignor. If the assignee wishes to obtain absolute assignment ownership of debts or choses in action, it too can give notice to the debtor: para [67] of *Bennell v Westlawn Finance Limited* [2010] FCA 658.

(for example, a person buys a car on finance from Dealership, which factors the debt to Factors. Factors can (and in practice, do), give written notice to Debtor that payments are to be directed to them).

WHAT IS MEANT BY EXPRESS WRITTEN NOTICE?

Consolidated Trust Company Limited v Naylor [1936] HCA 33 concerned a notice in writing that had been given to the respondent under the *Moratorium Act* 1932 (NSW). The issue was whether that notice satisfied the requirements of s12 of the *Conveyancing Act*.

The majority (Dixon and Evatt JJ) said (at 438-439):

The object of the requirement made by the words “of which express notice in writing shall have been given” is, we think, correctly stated in *Warren’s Choses in Action* (1899), at pp. 177, 178. “The term ‘express notice’ is doubtless employed by way of opposition to notice arising by implication or operation of law, and to what was known in equity as constructive notice. It means a notice which indicates an express intention – a direct and definite statement of a thing, as distinguished from supplying materials from which the existence of such a thing may be inferred.” The purpose is to make essential actual notice that the debt has been assigned. “One of the objects of the giving of notice to the debtor is that he shall ‘know with certainty’ in whom the legal right to sue him is vested” (*McIntosh v Shashoua* (1931) 46 CLR 494 at p. 515, per Evatt J.). The purpose does not extend to giving the debtor particulars of the assignment. The assignment must be by writing, but, if it is in writing, then notice to the debtor is necessary only to acquaint him with the fact that the debt is payable to the assignee and the statute requires that he shall be expressly notified. But, neither in its exact terms, nor according to its general intent, does the provision appear to make it essential that the notice should contain an express statement that the assignment is a written one.

As to the formal requirements for the notice and any subsequent demand: see *Bennell v Westlawn Finance Limited* [2010] FCA 658.

There is no relevantly operative difference between the Sec 12 CA and s 134 of the *Property Law Act 1958* (Vic): para [30] of *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40.

EQUITABLE ASSIGNMENT

Corin v Patton (1990) [1990] HCA 12; 169 CLR 540 concerned a gift of land.

Mason CJ and McHugh J said (at 559):

..... if an intending donor of property has done everything which it is necessary for him to have done to effect a transfer of legal title, then equity will recognize the gift. So long as the donee has been equipped to achieve the transfer of legal ownership, the gift is complete in equity. “Necessary” used in this sense means necessary to effect a transfer. From the viewpoint of the intending donor, the question is whether what he has done is sufficient to enable the legal transfer to be effected without further action on his part.

Deane J said at (582-583):

[The relevant] test is a twofold one. It is whether the donor has done all that is necessary to place the vesting of the legal title within the control of the donee and beyond the recall or intervention of the donor. Once that stage is reached and the gift is complete and effective in equity, the equitable interest in the land vests in the donee and, that being so, the donor is bound in conscience to hold the property as trustee for the donee pending the vesting of the legal title. In that regard, it is not a matter of equity ignoring the provisions of s 41 of the Act and treating the unregistered transfer as effective of itself to assign the beneficial interest in the land. It is simply that equity, acting upon the “fact or circumstance” that the donor has placed the vesting of the legal title within the control of the donee and beyond the donor’s recall or intervention, looks at the substantial effect of what has been done and regards the gift as complete ...

Whilst those statements of principle were not necessary to the decision in *Corin*, they have been overwhelmingly applied in subsequent cases: para [71] of *Bennell v Westlawn Finance Limited* [2010] FCA 658.

A party that takes a legal assignment of a chose in action, can subsequently acquire the legal title, by giving written notice to the assignor: para [72] of *Bennel* (ibid).

So for example, an equitable assignment could occur, when two related companies pass resolutions, one to assign a debt, another to accept the assignment, but absent any express notice to the debtor: see para [86] of *Adelaide Bank Ltd v Property Builders Pty Ltd* [2010] NSWSC 830.

ASSIGNMENT OF CAUSE OF ACTION JUSTIFIABLE WHERE:

- **ANCILLARY TO PROPERTY RIGHTS**
- **THERE IS A GENUINE COMMERCIAL INTEREST SUPPORTING IT**

In *Trendtex Trading Corporation v Credit Suisse* [1982] A.C. 679, the House of Lords considered the validity of an assignment of a cause of action of a customer of Credit Suisse. Credit Suisse had funded a transaction previously entered into by the customer and it also guaranteed the customer’s costs in a case it was prosecuting against the Central Bank of Nigeria. Moneys remained outstanding with respect to both of these transactions, which transactions had occurred prior to any assignment.

The House, per Lord Roskill recognised that if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit such an

assignment did not savour of maintenance or champerty. The relevant passage in the judgment, at pp. 702-703, read as follows:

“[m]y Lords, just as the law became more liberal in its approach to what was lawful maintenance, so it became more liberal in its approach to the circumstances in which it would recognise the validity of an assignment of a cause of action and not strike down such an assignment as one only of a bare cause of action. Where the assignee has by the assignment acquired a property right and the cause of action was incidental to that right, the assignment was held effective. Ellis v. Torrington [1920] 1 K.B. 399 is an example of such a case. Scrutton L.J. stated, at pp. 412-413, that the assignee was not guilty of maintenance or champerty by reason of the assignment he took because he was buying not in order to obtain a cause of action but in order to protect the property which he had bought. But, my Lords, as I read the cases it was not necessary for the assignee always to show a property right to support his assignment. He could take an assignment to support and enlarge that which he had already acquired as, for example, an underwriter by subrogation: see Compañia Colombiana de Seguros v. Pacific Steam Navigation Co. [1965] 1 Q.B. 101. My Lords, I am afraid that, with respect, I cannot agree with the learned Master of the Roles [1980] Q.B. 629, 657 when he said in the instant case that “the old saying that you cannot assign a ‘bare right to litigate’ is gone’. I venture to think that that still remains a fundamental principle of our law. But it is today true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance.”

Trendtex is the leading decision of the House of Lords in this area.⁶ *Trendtex*, a trading company, instituted proceedings against the Central Bank of Nigeria (“CBN”). *Trendtex* had contracted to sell cement for shipment to Nigeria. The purchase price and demurrage would be paid under a letter of credit issued by CBN. It subsequently failed to honour the letter of credit. Credit Suisse had financed the transaction between *Trendtex* and CBN. Repudiation of the letter of credit by CBN had left *Trendtex* heavily indebted to Credit Suisse. Credit Suisse agreed to guarantee all costs incurred by *Trendtex* in proceedings against CBN where it claimed damages amounting to US\$14 million. Subsequently, in a series of agreements, *Trendtex* assigned to Credit Suisse the whole of its residual interest in a claim for breach of contracts against CBN. The agreement recited that an offer had been received from a third party to buy *Trendtex*’s right of action against CBN for US\$800,000.00. The agreement then provided (article 1) that *Trendtex* did not oppose the sale by Credit Suisse to a purchaser of

⁶ Case summary is mostly verbatim that of Costello J in paras [53] ff in *SPV Osus Limited -v- HSBC International Trust Services (Ireland) Limited* [2015] IEHC 602; but also with reference to what was said of *Trendtex* in *Camdex Intl Ltd v Bank of Zambia* [1996] EWCA Civ 1356.

its choice of all Trendtex's claims against CBN and recognised that it had no further interest in the case against CBN. Five days later the claim against CBN was assigned to a third party for US\$1.1 million. A few weeks later the claim against CBN was settled for sum of US\$8 million. Trendtex saw none of this money; they considered that they had been defrauded and challenged the validity of the agreement. To this end Trendtex started an action against Credit Suisse to set aside the transactions on the ground that the assignment to Credit Suisse was contrary to public policy and void as "savouring of champerty" insofar as it contemplated the possibility that a third party would make a profit out of the litigation even though it was not a party to the transaction.

Both Lords Wilberforce and Roskill, in their speeches, indicated that if the assignment in *Trendtex* had been no more than an assignment of Trendtex's claim against CBN to Credit Suisse, the assignment in question would not have offended the law against maintenance and champerty. They were both clear that Credit Suisse had a *genuine and a substantial interest* in the success of the CBN litigation (in the words of Lord Wilberforce) or a *genuine commercial interest in the litigation* (in the words of Lord Roskill). They each agreed that the transaction offended the law against champerty because of the possibility that the cause of action would be *further assigned by Credit Suisse to an anonymous third party who lacked the requisite interest which the House recognised was enjoyed by Credit Suisse* in the litigation against CBN.

Lord Wilberforce stated at p. 694:

"[t]he vice, if any, of the agreement lies in the introduction of the third party. It appears from the face of the agreement not as an obligation, but as a contemplated possibility, that the cause of action against C.B.N. might be sold by Credit Suisse to a third party, for a sum of U.S. \$800,000. This manifestly involved the possibility, and indeed the likelihood, of a profit being made, either by the third party or possibly also by Credit Suisse, out of the cause of action. In my opinion this manifestly 'savours of champerty,' since it involves trafficking in litigation - a type of transaction which, under English law, is contrary to public policy."

Lord Roskill held that the assignment to the third party was champertous in the following terms at p. 703:

"[b]ut, my Lords, to reach that conclusion and thus to reject a substantial part of Mr. Brodie's argument for substantially the same reasons as did Oliver L.J. does not mean that at least article 1 of the agreement of January 4, 1978, is not objectionable as being champertous, for it is not an assignment designed to enable Credit Suisse to recoup their own losses by enforcing Trendtex's claim against C.B.N. to the maximum amount recoverable. Though your Lordships do not have the agreement between Credit Suisse and the anonymous third party, it seems to me obvious, as already stated, that the

purpose of article 1 of the agreement of January 4, 1978, was to enable the claim against C.B.N. to be sold on to the anonymous third party for that anonymous third party to obtain what profit he could from it, apart from paying to Credit Suisse the purchase price of U.S. \$1,100,000. In other words, the 'spoils,' whatever they might be, to be got from C.B.N. were in effect being divided, the first U.S. \$1,100,000 going to Credit Suisse and the balance, whatever it might ultimately prove to be, to the anonymous third party. Such an agreement, in my opinion, offends for it was a step towards the sale of a bare cause of action to a third party who had no genuine commercial interest in the claim in return for a division of the spoils, Credit Suisse taking the fixed amount which I have already mentioned."

In *Monk v Australia and New Zealand Banking Group Ltd* (1994) 34 NSWLR 148, Cohen J considered whether the plaintiff had a genuine commercial interest.⁷ The assignment was from an owner of cheques who purported to assign its right of action for the tort of conversion. There was no other subject matter of the assignment. The plaintiff in that case sought to establish he had a genuine commercial interest by reason of the possibility of becoming a creditor of the defendant bank. It was hoped this would then allow the plaintiff to claim a set-off in relation to a claim made by the bank against the plaintiff. This was held not to be a genuine commercial interest.

Cohen J gave examples of where case law had found "genuine commercial interest" and continued:

"... In the authorities where the *Trendtex* test has been applied, the commercial interest has gone beyond a mere personal interest in profiting from the outcome of the proceedings and has required *an interest by the assignee in the assignor or its business affairs or activities which the assignment may in some way protect.* "

"As was noted in 1994, in *Monk v Australia and New Zealand Banking Group Ltd*.... the exception to the general rule, as stated in *Trendtex Trading Corporation v Credit Suisse*, was subsequently applied in Australia.....*However, the applicability in Australia of this decision in the House of Lords was far from clear.* "⁸

In *Monk*, the difficulty that was seen in *Trendtex*, was that:

".....the proposition urged is inconsistent with *Poulton v The Commonwealth* ... and it is not easy for courts below the High Court legitimately to depart from the considered dicta of three High Court Justices."

⁷ Case summary from para [167] of *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 2017

⁸ *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 2017, para [35]

Reviewing the authorities, a judge on the VSC concluded last year that:

“Based on the above authorities, there can be no doubt that the exception identified in *Trendtex Trading Corporation v Credit Suisse* now must be treated as good law in Australia. Although this is evident from the last decision referred to above.....I have gone into some detail of the history of the authorities to demonstrate that this area of the law is developing, and the application of the underlying policy or “asserted public policy”....., upon which the *general rule is said to be justified, may have changed or shifted over time*. It might be said (and I put it no higher) that the courts, in more recent decisions *concerned with whether or not “wanton and officious”..... intermeddlers are engaged in “litigation trafficking”, are taking a more liberal view, including in cases concerning the “legitimate or genuine commercial interest” which must be established before a cause of action relating to that interest is treated as being lawfully assignable.....*”⁹

GENUINE COMMERCIAL INTEREST: THEORY AND EXAMPLES

Extracts follow from *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 2017

“[65] There is no clear authoritative statement as to what a “legitimate or genuine commercial interest” or a “genuine commercial interest”^[127] exhaustively encompasses.^[128] It would be surprising if it were otherwise. Whilst examples may be given of what “genuine commercial interest” does not include (for example, an interest in profiting in litigation based solely on the existence of an assignment of a bare cause of action) and what it does include (for example, the assignment of a cause of action relating to a property right which is also lawfully assigned or the assignment of a cause of action to a person who has a pre-existing enforceable right against the assignor), there are many circumstances in which the position may be far from clear.^[129]”

[66] The whole of the transaction must be looked at in determining whether an assignee has a genuine commercial interest.^[130] As to the approach to be taken, the following passage from *Giles v Thompson* is instructive:^[131]

[T]he law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests

⁹ *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 2017, para [62]

of vulnerable litigants. For this purpose the issue should not be broken down into steps. Rather, all the aspects of the transaction should be taken together *for the purpose of considering the single question whether ... there is wanton and officious intermeddling with the disputes of others in where the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.* “

The Court made reference to *Monk's* case, dealt with elsewhere herein, and continued as follows:

“[68] In *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd*,^[134] Lindgren J identified some strictures of what is meant by the phrase. His Honour said as follows:^[135]

[T]he genuine commercial interest referred to in *Trendtex* is not a nebulous notion of the general commercial advantage of the assignee but something more specific and limited. In particular, it does not embrace an interest arising from an arrangement voluntarily entered into by the assignee of which the impugned assignment is an essential part, like the arrangement in the present case. Rather, the expression refers to a commercial interest *which exists already or by reason of other matters, and which receives ancillary support from the assignment.*

(Emphasis added.).....”

In *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499, the Court held that a claimant who had sued its computer installer and its computer supplier had a sufficient commercial interest to accept an assignment from the former of its rights against the latter as part of a settlement of its claim against the former. They held that it was necessary to examine the transaction as a whole to see if the assignee had a sufficient genuine commercial interest, that it was not necessary for the assignee's interest to extend to 'every facet of the cause of action', and that it was not objectionable that the assignee stood to make a profit from the assignment so long as there was no massive disproportion.

Further examples of people who have been held to have genuine commercial interests, and thus can take assignments of causes of action include:

- (a) The defendant to the claim: *Faryab v S&P* (unreported), 2000.
- (b) A shareholder of the claimant or potential claimant: *Massai Aviation Services and another v Attorney General* [2007] UKPC 12, where the court upheld the validity of an assignment of a cause of action from the company in which the claim was vested to a second company owned by the same shareholders. The

remainder of the assets of the original company had been sold to a third party who had no interest in prosecuting the claim.

Cohen J in *Monk's case (above)* gave as examples from decided cases of where there had been held to be a genuine commercial interest, the following:

- (a) an existing substantial creditor of the assignor;
- (b) a sole shareholder who was guarantor of an overdraft of the assignor; and
- (c) an assignee who was a debenture holder with an interest in protecting the value of its security.

Baroness Hale, in *Massai Aviation Services*, reading the judgment of the court, said:

- (1) In order to decide whether the particular transaction is permissible it is essential to look at the transaction as a whole and to ask whether there is anything in it which is contrary to public policy [paragraph 19].
- (2) The question was whether the transaction was or was not 'wanton and officious meddling in another person's litigation for no good reason'. If, *taken as a whole*, the transaction was a *perfectly sensible business arrangement*, then it would *not* be held to be void [paragraph 21].

EXAMPLE OF WHEN ASSIGNMENT MIGHT BE CONTRARY TO PUBLIC POLICY: LITIGATION FUNDING

The issue of maintenance and champerty arises in the context of litigation funding.

In *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Limited* [2011] 3 IR 654 Clarke J. accepted the definition of maintenance as set out in Halsbury's Laws of England (London: Butterworth & Co., 1907), vol. 1, at p. 51, para. 81, as:

“the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by law as justifying his interference”.

Clarke J. continued:

“...a person guilty of maintenance ‘acts unlawfully and contrary to public policy’ and, therefore, is not entitled to enforce any agreement for any form of benefit made with the relevant litigant.

[13] Champerty is a particular form of maintenance whereby the person concerned obtains a share in the subject matter or proceeds of litigation in return for assisting with funding the litigation concerned.”

In *Waldron v. Herring & Ors* [2013] IEHC 294, Edwards J. followed the decision of Clarke J. and held that:

“‘[m]aintenance’ is the intermeddling of a disinterested party to encourage a lawsuit. ‘Champerty’ is the maintenance of a person in a lawsuit on condition that the subject matter of the action is to be shared with the maintainer. It is therefore unlawful for a party without a legitimate interest to fund the litigation of another, or to fund litigation in return for a share of the proceeds.”

In the High Court in *Campbells Cash and Carry Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386, Justice Kirby, supporting the majority that the mere fact of litigation funding should no longer be regarded as an abuse of the Court’s processes.

This picks up the thrust of cases such as *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2000] EWCA 17, [2001] 2 BCLC 116 (CA), which held that . “Public policy now recognises that it is desirable, *in order to facilitate access to justice*, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation.”

The case put by funded plaintiffs, is expressed in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 3)* [2009] FCA 450, (2009) 256 ALR 427 where Finkelstein J commented at first instance that the maintenance and champerty challenge was motivated by the “*desire to stop the action in its tracks.*”

(this was a case that arose out of the Wembly Stadium issues)

See generally *Waterhouse v Contractors Bonding Limited* [2013] NZSCTrans 7; [2013] NZSC Trans 7 (19 March 2013)

ASSIGNMENT: PRACTIC AND PROCEDURE--PLEADING

--Title to sue is an essential part of cause of action: *Finlan v Eyton Morris Winfield (A Firm)* [2007] EWHC 914 (Ch), [2007] 4 All E.R. 143 (“*Finlan*”), *head note 2*).

--Thus, if one takes right and title by assignment, this must be pleaded: *Finlan* p 155, para [45].

-- Modern practice is to allow an amendment, the effect of which is to make good a defect in the claimant's title, even though the event relied on did not arise until *after* the proceedings were issued, so that, in strict law, the claimant did NOT have a cause of action at the time he issued process (*Finlan*, *ibid*).

-- The court has discretion to allow the amendment (*Finlan*, *ibid*).

-- Absent prejudice, the amendment will be permitted especially *if the underlying claims* were unaffected (*Finlan*, *ibid*, para [47]) Pleading an assignment is something which for the purposes of the UK rules relating to amendment, generally arises substantially from the same facts as the underlying claim, though is a matter "of impression".

A skim readings of *Pickthall* [2008] EWHC 3409 suggests it supports *Finlan's* reasoning, which is broadly that the courts have the discretion to allow an amendment to introduce a new cause of action to raise assignment, subject to prejudice etc. The discretion will be exercised even where the amendment is to demonstrate title, and even where title did not exist when the claim form issued.

Finlan was again referred to with approval in *Parker*, [2008] EWHC 3017 para [15].

Extracts follow from *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 2017, follow:

"[100] Given the object of pleadings, together with the specific rules referred to above, in my opinion it is sufficient for a plaintiff to simply plead the occurrence of an assignment if a plaintiff, as assignee, seeks to rely upon an assignment in prosecuting a cause of action.

[101] As may be seen from the discussion above, there may be many reasons why it might be contended that the subject matter of an alleged assignment is unassignable or that for some other reason an alleged assignment is invalid. By pleading the assignment of the cause of action, the plaintiff potentially enlivens all these issues. The most efficient and practical manner to identify the real issues between the parties is to require the defendant to allege what issues, if any, might be taken in relation to a pleaded assignment. Once any such issue is taken by a defendant, the plaintiff is capable of addressing that issue in its reply. As the reply will be directed specifically to any issue raised by the defendant, no extraneous matters will be raised on the pleadings.

[102] An analogy might be made with the pleading of an agreement as part of a claim. The usual practice is for the plaintiff to plead the conclusion, namely that an agreement has been entered into. It is not necessary for a plaintiff to plead the various elements which are said to

comprise the agreement, or to positively plead why an agreement is lawful and enforceable. Such matters are for a defendant to raise in its defence in an appropriate case.

[103] The Commonwealth Bank submits[179] there is a prima facie prohibition against enforcing an assigned cause of action and therefore the genuine commercial interest must be alleged in the statement of claim. Accepting the premise of this submission for present purposes, the contention is not made good. For example, there is a prima facie prohibition against enforcing claims that are commenced after the time prescribed under a statute of limitations.[180] This fact does not require a plaintiff to plead in its statement of claim relevant facts which might be in issue under the statute of limitations if the limitations period has expired. It is for the defendant to make allegations in its defence on this issue and only then, if it is raised by the defendant, is it incumbent upon a plaintiff to plead to such matters.[181]"

ASSIGNING BENEFITS AND NOT BURDENS

While it is not legally possible to assign the burden of a contract (i.e. the obligation to render performance), it may be possible to assign:

- (a) the entire benefit of a contract (i.e. the right to receive performance): *Don King Productions Inc v Warren* [2000] Ch 291 at 318 ("*Don King*");
- (b) if a right under a contract is separate and severable, such a separate and severable right: cf *Federal Commissioner of Taxation v Everett* [1980] HCA 6; (1980) 143 CLR 440 at 449-450; or
- (c) if some only of the rights under a contract are assignable, those rights. "[A]ssignability is not a matter of all obligations arising under a contract or none at all": *Don King*, above, at 319.

A contractual obligation cannot be assigned without the consent of the other contracting party: *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668. This, for practical purposes, requires novation of the original contract.

Further a contract may expressly or impliedly authorise assignment of rights in a contract which would not otherwise be assignable: *Devefi Pty Ltd v Mateffy Perl Nagy Pty Ltd* (1993) 113 ALR 225 at 235 ("*Devefi v Mateffy*"); or, conversely, may expressly or impliedly prohibit assignment of rights otherwise prima facie assignable: *Don King*, above, at 319. "Such contractual provisions are legally effective" as between the contracting parties: *Don King*, *ibid*; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 103 ff

("Linden Gardens Trust").”¹⁰

“.....hence, while that party has *unperformed obligations*, it cannot assign a contract as a whole. This protects the interests of the non-assigning party:

[a]ny one who is bound to any performance whatever or who owes money cannot by any act of his own, or by any act in agreement with any other person than his creditor or the one to whom his performance is due, cast off his own liability and substitute another's liability. If this were not true, obligors could free themselves of their obligations by the simple expedient of assigning them.

And:

. . . A cannot without the consent of B assign the burden of the contract to C, because B has contracted for performance by A and he cannot be required against his will to accept performance by C or anyone other than A.

The general principle also protects the *assignee*, by preventing the assignor from imposing contractual obligations on the assignee without the assignee's consent.

Despite this general principle, commercial lawyers often refer to assigning "a contract". In *Linden Gardens Trust Limited v Lenesta Sludge Disposals Limited* Lord Browne-Wilkinson explained this as follows:

Although it is true that the phrase "assign this contract" is not strictly accurate, lawyers frequently use those words inaccurately to describe an assignment of the benefit of a contract since every lawyer knows that the burden of a contract cannot be assigned.”

Citing from Justine Kirby's article (below) (various case citations omitted).

NOVATION

A third party may become a "substituted contracting party" by novation of the original contract. Novation generally requires the agreement of the original and the substituted party although the original contract itself may, as a matter of its true construction, authorise a party to substitute a contracting party in its place without need for a further tri-partite agreement: see *Harry v Fidelity Nominees Pty Ltd* (1985) 41 SASR 458 at 460 (see more fully below).

When there is a novation, there is no assignment of rights and obligations, but rather the

¹⁰ Lightly edited extract from para [32] of *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40.

creation of new rights and obligations in a new contract: *Olsson v Dyson* (1969) 120 CLR 365 at 388.

‘... one difference between novation and assignment is that assignment is not a transaction between creditor and debtor, but only between the creditor and the assignee, to which the assent of the debtor is not needed.’¹¹

ASSIGNING INTERESTS IN LAND AND CONTRACTS RELATING TO LAND

Sale to X “or nominee”

In *Karangahape Road International Village Limited v Holloway* [1988] NZHC 159; [1989] 1 NZLR 83, 101, Chilwell J noted that:

“Novation can be inferred from acts and conduct but ordinarily it is not to be inferred from conduct without some distinct request.”

Mr and Mrs Holloway agreed to sell land to Jackson "or nominee". Jackson nominated Karangahape Road International Village Limited as nominee.

KRIV argued that there had been a novation, thereby leading to a new contract between itself and the Holloways (and terminating the contract between Jackson and the Holloways) based on conduct, e.g. the Holloways executing a memorandum of transfer to the company and addressing their settlement statement to the company.

As the conduct of the parties was consistent with an alternative explanation (that is, that KRIV remained Jackson's nominee for the purposes of completing the contract), it was held that there was insufficient evidence of a novation by conduct.

Ordinarily when a purchaser is described as “A or his nominee”, A is treated as having the power to nominate the person to whom the property purchased is to be transferred. The nominee does *not* become a party to the contract, much less a party with the rights and obligations of the purchaser: *Tonelli v Komirra Pty Ltd* [1972] VicRp 87; [1972] VR 737.

i.e.¹² the contract remains one between the vendor and the originally named purchaser.

However, a contract may permit the purchaser to nominate a person that will stand in his place as the purchaser under a *novated contract*: *Salter v Gilbertson* (2003) 6 VR 466, 473-

¹¹ *Olsson* p 388

¹² Usefully gathered in para [25] to *Vercorp Pty Ltd & Anor v ACN 096 278 483 Pty Ltd as trustee of the Williams Family Trust (No 2)* [2010] QSC 405

475; *Commissioner of State Revenue v Politis* [2004] VSC 126 at [16]. A nomination clause must clearly provide for this, to have such an effect: *Harry v Fidelity Nominees Pty Ltd* (1985) 41 SASR 458, 460 per King CJ.

Further, in *Lambly v Silk Pemberton Ltd* [1976] 2 NZLR 427, 432 Cooke J arrived at the same view, in this words:

“And in the absence of compelling language I do not think the court should impute to the parties an intention to allow an original signatory to substitute for himself a man of straw.”¹³

Extracts now follow from a recent Victorian SC case on the topic, *Vercorp Pty Ltd & Anor v ACN 096 278 483 Pty Ltd as trustee of the Williams Family Trust (No 2)* [2010] QSC 405:

“[25].....Many of the cases say that it is open to the parties to agree that upon the original purchaser’s nomination, the nominee will become a party to the contract or at least, to a contract with the vendor. But there are several observations to the effect *that clear words would be needed to achieve that result*. Thus in *Harry v Fidelity Nominees Pty Ltd*, King CJ said that he would be “most unwilling to construe a contract as containing a provision of such unusual character ... unless the language of the contract was quite clear”.^[16] And in *Salter v Gilbertson*, Phillips JA said:^[17]

As has been pointed out often enough, although it must be so if the context so demands, it is a strong thing to regard the words “or nominee” as authorising B, unilaterally and in his or her own absolute discretion, to nominate a purchaser to stand *in the place of* B, with all the attendant consequences for A [the vendor]. For such a construction ‘compelling language’ is required”

[26] In *Harry v Fidelity Nominees Pty Ltd*, King CJ remarked that not only was the notion of a vendor binding himself to accept an unknown nominee, as the party to whom he must look exclusively for performance of the contract, an unusual one, it was “by no means clear that such a provision could be made legally effective”.^[18] King CJ said that “[t]he substitution could only occur if the nominee subsequently agreed, for a fresh consideration or under seal, to perform the [original purchaser’s] obligations under the contract”.^[19]

[27] However, there is at least one case where this intention, to substitute the nominee as the party to be contractually bound, was identified, which is the judgment of Green CJ in *Parland Pty Ltd v Mariposa Pty Ltd*.^[20] In that case the defendant contracted with two individuals to sell land the subject of a proposed rezoning application. Shortly after the contract was made, the purchasers said that they wished to nominate another purchaser and to amend the

¹³ Cited with approval in various Australian jurisdictions e.g. para [9] of *Avzur Hotels Pty Ltd v Ivanhoe Entertainment Pty Ltd* [2009] FCA 701

agreement by adding the words “and/or nominee”. The response by the defendant, through its solicitors, was that “[t]he matter therein raised will be attended to at or prior to settlement”. A form of transfer was then submitted to the defendant which showed the plaintiff (the nominee) as the transferee. Subsequently, the contract was settled, when the executed transfer was handed over together with an amended contract by which the words “or their nominee” were added after the names of the individual purchasers. *Importantly, the contract contained a condition that in the event that “the purchaser” was unsuccessful in having the property rezoned within three years from the date of completion, then the purchaser might require the vendor to repurchase the property upon certain terms.* The plaintiff was unsuccessful in having the property rezoned and called upon the defendant to repurchase it. The defendant refused upon the basis that the plaintiff was not a contracting party and was not “the purchaser” for the purposes of that clause. After referring to some of the cases and setting out a passage from *Harry v Fidelity Nominees Pty Ltd*, Green CJ said:[21]

Whilst accepting the above statements and also accepting that in this particular case there was evidence of the conveyancing practice referred to in those passages it must be kept in mind that every case must be determined on the basis of the circumstances and terms of the particular contract under consideration.

In my view the following circumstances militate in favour of a conclusion that the first plaintiff was not merely the transferee of the property but was a contracting party.

The contract was ‘between ... the vendor of the one part and Andrew Hamilton and Andrew McGregor or their nominee [hereinafter called ‘the purchaser’] of the other part’. *Prima facie* the effect of those words is that if Hamilton and McGregor did not nominate anyone the contract was between the vendor of the one part and Hamilton and McGregor [thereinafter called ‘the purchaser’] of the other part and that if they did nominate someone then the contract was between the vendor of the one part and the person nominated [thereinafter called ‘the purchaser’] of the other part. It follows that *prima facie* the person nominated was a contracting party and that the word ‘purchaser’ refers to the person nominated wherever it appears in the contract. Another internal indication supporting that construction is provided by the fact that the only way in which the rezoning referred to in cl15 could have been achieved was by an objection by the owner or occupier of the property pursuant to the *Local Government Act 1962*, s727 (4). If the defendant’s contention is correct and for the purposes of cl15 ‘the purchaser’ should be construed as referring to the second and third plaintiffs notwithstanding that the first plaintiff was nominated as the transferee, the clause would have been unworkable from the beginning because the second and third plaintiffs were not the owners and would not have had standing to lodge the objection which was necessary to achieve the rezoning.

There are two matters which were of apparent importance for the result in that case. The first was that the contract was amended at the same time as the original sale was settled, with the result that there was no outstanding obligation to be performed by the plaintiff as the

nominee. Secondly and importantly for the present case, the provisions in the contract which were to operate after settlement of the sale would have been unworkable if they were unenforceable by the plaintiff.

.....

[31] Ordinarily a vendor is taken to have agreed to transfer the land to the purchaser or to the purchaser's nominee, whether or not the contract specifically provides for such a nomination: *Lord v Trippe*".

Worked Case Examples

In *Lambly v Silk Pemberton Limited* [1976] 2 NZLR 427 (CA) Lambly entered into a contract to sell land to "Nigel Pemberton of Auckland or his nominees". Pemberton later nominated Silk Pemberton Limited. When Lambly refused to settle, Silk Pemberton Limited sued Lambly for specific performance. Silk Pemberton Limited argued that the contract gave Pemberton the power to bring about a novation, so that there was continuously a binding contract but one party to it could be altered by unilateral action.

This was described as "novel", with the judges concluding that:

“No doubt it is theoretically possible for a vendor to authorise a purchaser to bring about a substitution of some other person of his own choosing as a new purchaser under the agreement, directly responsible to the vendor as a matter of privity of contract. But the whole concept is so unusual in practice that *I would look for much clearer words than are to be found in the present agreement*

[I]n the absence of compelling language I do not think the court should impute to the parties an intention to allow an original signatory to substitute for himself a man of straw

The real difficulty in the idea of novation is that novation involves a new contract, to which (it is usually said) the consent of all parties must be obtained In the present case the vendor did not in fact consent, and any implied consent which might arguably arise from the contract was withdraw before the nomination of Silk Pemberton Ltd.”

As noted by Justine Kirby in her article (below, and whose case summary I have relied on with minor editing), the “Court left open the possibility that, absent a withdrawal of consent, the consent in a sufficiently clear prospective substitution provision may itself be sufficient

agreement to a novation at a later time.”

At common law, there are various exceptions to the above stated general principle, as follows [as noted by Justine Kirby in her article (below), and lightly edited versions of her case summaries:

- (a) An assignee takes rights "subject to equities".
- (b) In *Tito v Waddell (No 2)* [1977] Ch 106, 290 [*Tito*], Megarry V-C, referring to one aspect of this principle, stated that an assignee may obtain "a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed, such as an obligation to make certain payments" which are "an intrinsic part of the right".

Rhone v Stephens [1994] UKHL 3; [1994] 2 AC 310, 322 (HL) [*Rhone*], Lord Templeman accepted that conditions relevant to the exercise of a right could be attached to that right in express terms or by implication.

This can occur when the assignor must perform certain obligations prior to and as a condition of the non-assigning party performing its obligations. After the assignor assigns its rights to the assignee, the assignee is in no better position than the assignor. Thus, the assignee must perform the assignor's obligations itself (or have someone else do so) before it can enforce its rights against the non-assigning party.

This principle was applied in *Field v Fitton* [1988] NZCA 20; [1988] 1 NZLR 482 (CA) [*Field*], where a purchaser of land assigned its interests. The NZ Court of Appeal held that the assignees were not entitled to have the land transferred to them as neither they (nor anyone else) had performed the assignor's obligations under the agreement.

Compare and contrast *HEB Contractors Limited v Verrissimo* [1990] 3 NZLR 754 [*HEB Contractors*], where an assignee who had fulfilled the assignor's obligations under an agreement for sale and purchase of land was granted specific performance of that contract.

Thus, as noted by Justine Kirby in her article (below), “there is a risk for assignees relying on assigned rights where their ability to enforce those rights depends on the performance of obligations (especially performance by someone other than the assignee), such as banks who are assigned, as security for a loan to the assignor, the assignor's rights under an executory contract”.

In *Tito*, Megarry V-C held that there is also a "pure principle of benefit and burden" whereby independent burdens pass because "he who takes the benefit must bear the burden".

This point is hardly clear clear in Australia. The “pure principle” was rejected in *Government Insurance Office (NSW) v K A Reed Services Pty Limited* [1988] VicRp 75; [1988] VR 829, 841 (Full Court of the Supreme Court of Victoria) per Brooking J.

However, a defence (which I pleaded) in *Bank of Western Australia Ltd v Love* [2009] NSWSC 1421 was not struck out, despite application by the Bank forcefully argued by experienced counsel.

Mr Love owned property at West Pennant Hills, and mortgaged it to the Bank pursuant to a registered mortgage.

In August 2006, Mr Love leased the premises to State Wide, to use as a pool shop. He had sought and obtained the Bank’s consent, in the usual course. The consent provided:

The Bank consented to the granting of the lease between Mr Love and State Wide on conditions, as follows:

“1. The Bank:

- (a) gives this consent without prejudice to its right to act under the Mortgage subject to the Lessee’s right to quiet enjoyment under the lease); and
- (b) is not under any obligation, liability or responsibility to observe or perform the covenants and agreements entered into by the Lessor, unless it enters into possession of the property as a mortgagee in possession, but in that event only to the extent of the lessor’s covenants and agreements contained in the Lease.

2. Until the Mortgage is discharged:

- (a) the lessor and the Lessee will not vary, rescind, terminate or renew the lease (or purport to do so); and
- (b) the lessor will not terminate the Lease (or purported to do so):

without first obtaining the Bank’s written consent.”

The consent deed was addressed to both Mr Love and State Wide, Mr Prior only became aware of that document and its terms 16 August 2009.

The term of the lease, between the Bank and Mr Love, was for a period of three years, commencing on 1 August 2006, with an option to renew for a further two period of three years set out in Clause 4 of the lease. The lease expired on 31 July 2009

In April 2009, State Wide sent Notices to Exercise Option to Renew the lease to both the Bank and Mr Love. (it will be recalled the Bank's consent required that the lease could not be renewed unless it gave its written consent) .

Mr Love defaulted in his mortgage -- to the tune of at least \$1m.

The Bank obtained default judgment against Mr Love for possession; and the matter came to me in the search for a solution to get that judgment set aside, and for some cognisable defence to be pleaded.

One matter in respect of which I sought leave to be let in and defend on, was whether the Bank was subject to the doctrine of benefits and burdens.

Paragraphs [9.1] to [11.2] of the proposed defence that I drafted, pleaded as follows:

- “ 9.1. The Plaintiff consented to the registration of the Lease by producing the Certificate of Title to the Department of Lands;
- 9.2. On or about 10 March 2009, the Plaintiff served a Notice on the Second Defendant pursuant to Sec 63 of the Real Property Act; and
- 9.3. The Second Defendant has paid the rental delimited by the Lease to the Plaintiff since then.
10. On or about 11 April 2009, the Second Defendant served notice on both the First Defendant and the Plaintiff whereby it gave Notice of its intention to exercise the said Option to renew the Lease.
- 11.1. As at 10 March 2009, the Plaintiff was in possession of the Land by dint of the said Sec 63 Notice, and as such;
- 11.12. Is bound by its consent to the registration of the Lease alternatively, by Item 1 of the consent to give effect the Second defendant's said exercise of the Option.”

I then went on to plead that in any event, by reason of *i.a.* the appropriation of rental, the Bank was bound to recognise State Wide's exercise of the Option, pursuant to the principle of benefits and burdens.

This is the way the Associate Justice summarised my arguments:

[26] Counsel for State Wide submitted that a person who takes the benefit of a deed is bound by a condition contained in it even though that person does not execute the deed and that this principle extends to successors in title to a person bound by a deed: *Clifford v Dove* [2003] NSWSC 938; 11 BPR 21,149; [2004] ALMD 4806. While State Wide is not a successor in title, the deed entered into by the Bank is addressed to both Mr Love and State Wide.

[27] In *Clifford v Dove*, Bryson J discussed the statement “*A man who takes the benefit of a deed is bound by a condition contained in it though he does not execute it.*” Bryson J continued (at [67]):

“... in *Gallagher v Rainbow* [1994] HCA 24; (1994) 179 CLR 624 at 647-648 McHugh J referred to *Frater v Finlay* (1968) 91 WN (NSW) 730 and *Rufa v Cross* [1981] Qd R 365 -

‘Furthermore, the successor in title to a person bound by a deed may be bound by obligations in the deed if the successor in title takes a benefit conferred by the deed *Rhone v Stephens* [1994] UKHL 3; [1994] 2 WLR 429; *Halsall v Brizell* [1957] Ch 169; *ER Ives Investments Ltd v High* [1966] EWCA Civ 1; [1967] 2 QB 379; *Frater v Finlay*; *Rufa Pty Ltd v Cross*.’

McHugh J assumed but to my reading should not be understood to have decided that the benefit and burden principle extends to persons who are not parties to or named in the Deed (at 648). The benefit and burden principle was extensively criticised in *Government Insurance Office (NSW) v KA Reed Services Pty Ltd* [1988] VicRp 75; [1988] VR 829 by Brooking J in his judgment at 830 to 841: the views of Brooking J would have to be addressed carefully by a court which is asked to act simply on that principle, but that is not the present case. The principle of benefit and burden has not become established as a general legal principle. It has sometimes been referred to as the Ocean Island Equity, an allusion to *Tito v Waddell (No 2)* [1977] Ch 106. It was considered with references to authorities and sources, by Young J in *Rural and Agricultural Management Ltd v West Merchant Bank Ltd* (1995) 18 ACSR 793 and in *Ryan v Rouen* [2000] NSWSC 468 at [72] to [75]. There seems to be room for such a principle where owners of equitable interests or claimants against a fund compete with other similar claims. In context of positive obligations under easements *Rhone v Stephens* appears to have concluded against any such principle.”

[28] The benefit and burden principle is not certain. With the consent of Mr Love, Mr Prior caused \$47,454.15 worth of work to be carried out on the premises so that it complied with the development application for the use of the premises. Mr Prior has obtained a valuation of the property and has offered to buy the property for a figure higher than the valuation but the Bank had refused to negotiate. There is an arguable case that the Bank has taken a benefit, namely an increased value of the premises and does not want take the burden, namely consenting to the option.

[29] State Wide further submitted that the consent to the renewal of the lease cannot be unreasonably withheld. State Wide referred to a passage from *The Law of Consent*, by Young JA, (1986) The Law Book Company, where his Honour stated (at 156):

“The landlord is not bound to give any reasons for refusing his consent, *Young v Ashley Gardens Properties Ltd* [1903] 2 Ch 12; *Goldstein v Sanders* [1915] 1 Ch 549, but if he does not, the court would more readily imply that the withholding was unreasonable, *Frederick*

Berry Ltd v Royal Bank of Scotland [1949] 1 KB 619 at 623, explaining a dictum of Slesser LJ in *Lambert v F W Woolworths & Co (No 2)* [1938] Ch 883 at 906. However, the facts may be so plain that no reasons need to be given, such as in *Goldstein v Sanders*, where the tenant had so conducted himself as to make the landlord's refusal perfectly reasonable."

[30] This passage refers to the landlord/tenant relationship but not one where the mortgagee takes possession. However, this proposition is at least arguable."

ASSIGNMENT OF RETAIL, COMMERCIAL AND RESIDENTIAL LEASES

Sec 39 *Retail Leases Act* (NSW) provides as follows:

- (1) The lessor is entitled to withhold consent to the assignment of a retail shop lease in any of the following circumstances (and is not entitled to withhold that consent in any other circumstances):
 - (a) If the proposed assignee proposes to change the use to which the shop is put,
 - (b) If the proposed assignee has financial resources or retailing skills that are inferior to those of the proposed assignor,
 - (c) If the lessee has not complied with section 41 (Procedure for obtaining consent to assignment),
 - (d) The circumstances set out in section 80E.
- (2) This section does not preclude any right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with the consent, so long as the lessor has substantiated those expenses to the lessee at the request of the lessee.

Sec 80E relates to the international airport market.

Sec 43 *RLA* provides as follows:

Section 133B (Covenants against assigning) of the *Conveyancing Act 1919* does not apply to a retail shop lease to the extent that the section is inconsistent with this Act (or any conditions implied in a lease by this Act). That section also makes a proviso against assignment etc., subject to a proviso that consent will not be unreasonably withheld.

See also Secs 74 ff of the *Residential Tenancies Act*.

STAMP DUTY IMPLICATIONS

Where a contract for the sale of land contemplates a "nominee", that may well trigger an obligation to pay double stamp duty: first, by the named purchaser, second, by the nominee:

Liability limited by a scheme approved under the Professional Standards Legislation

see *See NSW - Duties Act 1997 s 18(2); Qld - Duties Act 2001 s 22(2); WA - Duties Act 2008 s 74(4); SA - Stamp Duties Act 1924 s 31(2); NT - Stamp Duty Act 1978 s 17A; ACT - Duties Act s 17(2).*

See further *Revenue Ruling No DUT 010* for the ATO's construction of (and practice in relation to) Sec 18 (2). Numerous cases / extracts are cited in the ruling.

ASSIGNMENT OF INSURABLE INTERESTS

See Sec 50 *Insurance Contracts Act*, which is not without its problems, and which provides:

Where:

- (a) A person (in this section called the *purchaser*) agrees to purchase, or to take an assignment of, property and in consequence the purchaser has, or will have, a right to occupy or use a building;
- (b) The building is the subject-matter of a contract of general insurance to which the vendor or assignor under the agreement is a party; and
- (c) The risk in respect of loss of or damage to the building has passed to the purchaser.

The purchaser shall be deemed to be an insured under the contract of insurance, so far as the contract provides insurance cover in respect of loss of or damage to the building and such of the contents of the building as are being sold or assigned to the purchaser at the same time, during the period commencing on the day on which the risk so passed and ending at whichever of the following times is the earliest:

- (d) The time when the sale or assignment is completed;
- (e) The time when the purchaser enters into possession of the building;
- (f) The time when insurance cover under a contract of insurance effected by the purchaser in respect of the building commences;
- (g) The time when the sale or assignment is terminated.

A reference in this section to a building includes a reference to a part of a building and also includes a reference to a structure.

Whether the risk has passed, depends, of course, on the form of contract used: see dicta by side draft in *Francesco Cusmano v Neville Pinner, MLC Insurance Ltd & Ors* [1998] FCA 927 (5 August 1998).

In *Rayner v. Preston* (1881) 18 ChD 1, the Court of Appeal held that a purchaser who had completed the contract of sale was not entitled as against the vendor to the benefit of insurance because the benefit of the insurance did not pass by virtue of the contract of sale or by virtue of the vendor's trusteeship of the land for the purchaser. See also *Phoenix Assurance Company v. Spooner* (1905) 2 KB 753 which was overruled on another ground in *West Midland Baptist Association v. Birmingham Corporation* (1970) AC 874.

Rayner v. Preston has been consistently followed down to and including the decision of the HC Court in *Ziel Nominees Pty. Ltd. v. V.A.C.C. Insurance Co. Ltd.* (1975) 50 ALJR 106, at p 107; 7 ALR 667, at p 669, where Barwick C.J. pointed out that on the making of the contract the purchaser, by reason of his equitable interest, has an insurable interest which he may independently protect by taking out an insurance policy.

See generally, *Kern Corporation Limited v Walter Reid Trading Proprietary Limited and Ors* (1987) 163 CLR 164.

A further layer to the above, is the situation in NSW, as follows:

“The case gives rise to a question concerning the application of s66M of the Conveyancing Act 1919.

The problem addressed by Div 7 of Pt 4 of the Conveyancing Act is the passing of risk between vendor and purchaser of real estate. Under the common law, risk passed to the purchaser at the time of contract. If a dwelling house upon the subject land were damaged or destroyed by fire between contract and completion, that would not ordinarily affect the obligation of the purchaser to complete, nor would it entitle the purchaser to a reduction of the purchase price. However, some purchasers were not aware of that, and failed to protect themselves by taking out an appropriate contract of insurance. The legislature decided to intervene.

Section 66K reverses the common law principle, and provides that the risk in respect of damage to land shall not pass to the purchaser until the completion of the sale, or until an earlier time stipulated by the parties to the contract.

The legal consequences of damage to land after the making of a contract for sale now depend, in part, upon whether the damage is substantial. Where land is substantially damaged after the making of the contract, then the purchaser may elect to rescind the contract within a specified time (s66L).

Where land is damaged after the making of a contract but the damage was not substantial, or where, even though the damage was substantial, the purchaser does not rescind, then s66M applies.”

per Gleeson CJ in *Stephenson v State Bank of NSW Ltd* [1996] NSWSC 109 (7 May 1996).

CASE STUDIES –OLD & NSW

ELLIS V TORRINGTON [1920] 1 KB 399

Trendtex Trading Corp v Credit Suisse [1982] A.C. 679, is dealt with more fully above . It will be recalled that in that case, Lord Roskill (with whom Lord Edmund-Davies, Lord Fraser and Lord Keith also agreed), having observed at page 702F-G that one of the reasons why equity would not permit the assignment of a bare cause of action in tort was because it savoured of maintenance, noted that the law had since become more liberal in its approach and said at page 703A-D:

“Where the assignee has by the assignment acquired a property right and the cause of action was incidental to that right, the assignment was held effective. *Ellis v. Torrington* [1920] 1 K.B. 399 is an example of such a case.....”

Ellis v Torrington still gets cited fairly frequently in the UK, eg *SPv Osus Ltd -v- HSBC International Trust Services (Ireland) Ltd & ors* [2015] IEHC 602 (05 October 2015), although the facts are never reported , which is unsurprising, since the case is written in the old style and is an impenetrable thicket of words. Something like this seems to have occurred: a freehold was subject to a lease, sub lease and sub under lease. All contained onerous repair covenants.

The sub underlease became vested in the defendant. The plaintiff had formerly been a tenant to the defendant, and was liable to him under a covenant to repair.

However, the Plaintiff then bought the freehold together with the benefit of the covenants in the head lease.

The premises fell into disrepair, and the defendant threatened the plaintiff with an action on his covenant. The plaintiff then obtained an assignment of the lessees covenants of repair in the under-lease and pressing these assigned rights, commenced an action against the defendant.

The UK CA held that the action on the covenant was so connected with the use and enjoyment of property as to be more than a bare right to litigate.

DAWSON V GREAT NORTHERN AND CITY RAILWAY [1905] 1 KB 260

The Railway Co needed to dig a tunnel which passed under three properties in which the Plaintiff, Ms Dawson, carried on business as a draper. She originally leased the properties, pursuant to long leases with the respective owners and or lessees. The Railway Co served compulsory acquisition notices on all concerned, which invited the relevant owners to begin treating as to the terms of the acquisition, including statutory compensation.

Before any compensation was paid , agreements were made by the relevant land owners and the Railway Co for them to seel, and the Railway Co to acquire, easements for their . The agreements reserved the right to claim certain types of compensation.

Before any compensation was paid., Ms Dawson purchased the relevant properties (those of Blake, Berry and Vickery), and took assignments of the rights to compensation.

The Railway Co said that this offended the rules on maintenance and champerty, but a unanimous Court of Appeal preferred the position of Ms. Dawson. They noted that there were nuancedly different arguments as regards the three properties; but in essence held that the purchases were bona fide (see g p 271 , about half way down) where it was emphasised that the “*great weight must be given to the circumstance that this assignment is incidental and subsidiary to that conveyance , and is part of a bona fide transaction the object of which was to transfer to the plaintiff the property of Blake with all the incidents which attached to it in his hands . Such a transaction seems to be very far removed from being a transfer of a mere right to litigation.*”

(Ms Dawson purchased the *freehold* from Blake.)

As regards the Berry and Vickery *leaseholds*: the CA noted that Ms Dawson had purchased the *very* long leases of Berry and Vickery (terms of over 40 years left to run), and at the same time took an assignment of their right to receive statutory compensation. The CA said this, too, was not a mere right to litigate in the nature of damages for a wrong. Stirling LJ pointed out that there was at law no right to claim damages for a wrong—because the statute forbade that; there was only a right to compensation.

Stirling LJ said similar considerations to the Blake assignment, applied.

The *Hewitt leasehold* purchased by Ms Dawson (in respect of which she succeeded as well) was more complex, and I leave to you (and commend to you) reading that aspect of the judgment.

AUSTRALIAN ZIRCON NL -v- AUSTPAC RESOURCES NL [No 2] [2011] WASC 186

Austpac held an exploration licence (EL), in a tract of land in Victoria known as the WIM 150 Heavy Metal Sands Project (Project Area) . This was held pursuant to the *Mineral Resources (Sustainable Development) Act 1990* (Vic) (Mineral Resources Act). That provides that a licence may be transferred by an instrument approved by the Minister, but not otherwise. The Minister must be satisfied that the proposed transferee complied with the various requirements. The *Mineral Resources Act* provides for the creation of a Register of licences and interests in licences.

Austpac was principally engaged in developing and commercialising technologies for the production of synthetic rutile from ilmenite (as opposed to developing or operating mines); and could not afford to explore or develop the Project Area. It was seeking out a party that could meet the minimum expenditure requirements set by the Government to maintain the EL.

Zircon was interested in seeing whether the Project Area could be economically mined; and was willing to enter in a joint venture.

After a quick negotiation with minimal drafts passing them, the parties entered into an agreement whose provisions were ‘sparse’, to do a bankable feasibility study in the Project Area, in order to earn an interest in the Project (*The Farm -in Agreement*).

“The parties' objectives in making the agreement were limited and nascent. That is reflected in the apparent simplicity of the terms of the agreement”: para [87]

Terms included

Recitals:

- Referred to 'that part' of the EL that was the Project Area and which was known as the WIM 150 Heavy Mineral Sands Project;
Defined the area that was known as the WIM Heavy Mineral Sands Project as 'the Project'.
- Referred to the balance of the licensed area as being 'that part' that was excluded from the Project Area and by definition, the Project and which was prospective for base and precious metals.

Recital 3 recorded Austpac's agreement to farm-out the Project. Effect was given to that agreement by Australian Zircon agreeing to carry Austpac through to and including the completion of a bankable feasibility study in respect of the Project Area. Australian Zircon would earn an interest in the Project on completion of the study.

Operative Terms:

- Zircon would do a bankable feasibility study.
- Australian Zircon would be entitled to at least an 80% interest in the Project.
- Austpac had to maintain the EL in good standing.
- Zircon was required to provide all necessary reports on the work undertaken to enable Austpac to meet its obligation.
- The parties were to form a management committee.
- Zircon was to report to the committee quarterly --Zircon was required to spend on the Project Area sufficient amounts to meet the expenditure requirements for the EL.
- Cl 7 “Austpac warrants that the EL is in good standing and that it has good and unencumbered title to the EL. Southern acknowledges that Austpac may deal with third parties in that part of the EL other than the Project Area in respect of base and precious metals”.

Austpac then purported to sell and assign its right title and interest in the Farm-In Agreement to Astron, which purported to further assign it (*Assignment*).

The Assignment had various terms, including as follows:

- It recited that Austpac had entered into a Farm--in agreement in relation to the 'Project'.
- It provided for the sale and purchase of 'the Business and the Assets' (cl 2.1).
- The term 'Assets' was defined by cl 21.1 of the agreement to mean 'all interest, right and title of [Austpac]' to, among other things, the 'EL' and the Farm-in Agreement.
- Dealing with transfer of the EL, Business and Assets to Astron.
- From the date of the agreement until Completion, Austpac was required not to do anything in relation to the EL or the Farmin Agreement nor communicate with Australian Zircon without Astron's prior written approval.
- Austpac was obliged to cooperating with Astron with it in taking such reasonable action as Astron determined in relation to negotiations with, and any litigation against, Zircon in relation to the Farm--in Agreement.
- At Completion, Austpac assigned and transferred to Astron the right, title and interest that it held in the Farm-in Agreement and Astron accepted the assignment and transfer *and assumed all of the obligations of Austpac in and arising out of the Farm-in Agreement* (cl 10.1).

Astron took the position that the Farm – In Agreement was at an end, for various reasons.

- a) Zircon successfully objected to the assignment, and said *i.a.* the only way that Austpac could divest itself of its rights and obligations in the Project, to a third party, was by novation. The grounds advanced by Zircon were that:

The parties' rights and obligations under the Farmin Agreement are properly to be characterised as personal and incapable of being transferred without the consent of the nonassigning party (par 7 of the statement of claim). It was also contended at trial that the rights and obligations created by the agreement were so interdependent as to be incapable of assignment. In addition, the interdependent nature of the obligations was relied on as a significant textual indication that the parties intended to prohibit assignments under the Farmin Agreement.

- b) Clause 7, read with the recitals to the Farm-in Agreement and cl 1, cl 2, cl 4, cl 5 and cl 9, prohibited the transfer of any of the parties' rights and obligations under the agreement without the nonassigning party's consent (par 8(a) of the statement of claim).

- c) A term prohibiting assignment without the nonassigning party's consent was to be implied into the Farm-in Agreement having regard to the subject matter and provisions of the agreement (par 8(b) of the statement of claim).

There was a further issue about whether Austpac's obligations under the Farmin Agreement were capable of being transferred without a novation of the agreement. That involved the construction of the Assignment and whether it provided for an assignment of or a trust over the rights and obligations comprising the whole of the Farmin Agreement ; or whether it contemplated that only the benefit of the agreement would be assigned or held on trust and that Astron would vicariously perform Austpac's obligations under the agreement.

A further question bound up in this issue was whether the obligations imposed by the Farm--in Agreement were capable of being vicariously performed. The answer to that question turns on whether the obligations were personal to Austpac.

How the judge dealt with the issues

HH referred to the Sale & Assignment, and emphasised as follows:

--the Farm-in Agreement was regarded as an asset of Austpac; and as such, something that could be owned, sold, passed, assigned and held on trust
 -- the clause providing for the assignment of Austpac's "'right, title and interest in and arising out of the Farmin Agreement'", was an expression of "'wide import"'
 --"' It apparently refers to Austpac's title to (ownership of) the bundle of rights, obligations and powers that together comprised the Farmin Agreement. That is seemingly confirmed by the balance of cl 10.1 that provided that Astron assumed all of the obligations 'in and arising out of the Farmin Agreement. The expressions used in cl 10.1 suggest that, consistent with cl 2.4 (and the stated effect of the agreement as a contract providing for the sale and purchase of the Business and the Assets), *the parties intended that more would be assigned than just the benefit of the agreement*'".

The gloss sought to be put on this by counsel for Austpact, was that all that was being assigned, were the benefits, NOT the burdens

HH referred ([para 77]) to the well known UK case of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, where a building contract provided that neither the employer nor the contractor could without the consent of the other 'assign this contract'.

Lord Browne Wilkinson observed at (103) of *Lenestra* that the clause was 'unhappily drafted in that it refers to an assignment of "the contract", and that it was "trite law" that it was impossible to assign a contract "*as a whole, i.e. including both burden and benefit*".

He continued, '[a]lthough it is true that the phrase "assign this contract" is not strictly accurate, lawyers frequently use those words inaccurately to describe an assignment of the benefit of a contract since every lawyer knows that the burden of a contract cannot be assigned'.

In *Don King Productions Inc v Warren* [2000] Ch 291, Lightman J considered (103) that those observations should be taken as establishing the proposition that '[a] provision for the assignment of a contract is to be construed as the assignment of the benefit of the contract'.

Corboy J in *Zircon's* case did not find these general statements in the UK cases to be very helpful.

Zircon argued that cl 1 to cl 6 of the *Farm-in Agreement* contained 'interlinked and interdependent' rights and obligations:

- a) Clause 1 to cl 3 were interlinked and interdependent in that Australian Zircon agreed to undertake work and complete the bankable feasibility study and Auspac agreed that, in return, Australian Zircon would be entitled to at least an 80% interest in the Project.
- b) Clause 4 obliged Auspac to ensure that the EL was maintained in good standing and Australian Zircon was required to provide all necessary reports on the work undertaken to enable Auspac to meet its obligation.
- c) Clause 5 required the parties to form a management committee. Australian Zircon was to report to the committee quarterly as the operator in respect of the Project Area. Further, Australian Zircon was required to spend on the Project Area sufficient amounts to meet the expenditure requirements for the EL.
- d) Clause 6 required Australian Zircon to make appropriate investigations of Auspac's technologies.

Corboy J at para [112] recognised that on its proper construction, a contract might contain rights and obligations that are so interdependent that they are incapable of assignment in the same way that rights and obligations may be characterised as being too personal to permit assignment or vicarious performance. In saying this, HH recognised that the opposite conclusion was reached by the Full Federal Court in *Leveraged Equities Ltd v Goodridge* [2011] FCAFC 3; (2011) 274 ALR 655, but on the facts of that case.

Para [113]: However, in my view, the rights and obligations created by cl 1 to cl 6 of the *Farm-in Agreement* were not interdependent in the sense contended for by Australian Zircon. To adopt what was said by Jacobson J in *Leveraged Equities*, the clauses exhibited a clear division between the rights of Australian Zircon and the continuing obligations of Auspac and vice versa. The terms relied on by Australian Zircon merely created rights and obligations that were mutual in the sense that the enjoyment of a right by one party was dependent on the performance of a corresponding obligation by the other party. That is the essence of a contract. It does not mean that the benefit of the obligations imposed by cl 1 to cl 6 were of such a character that they were inherently incapable of being assigned; that the rights were so intertwined with the obligations that they could not be severed by assignment so that Auspac would be unable to discharge its obligations under the *Farm-in Agreement* if the benefit of the agreement was transferred.

Para [114] For example, Australian Zircon's right to earn an interest in the Project was dependent on Austpac maintaining EL 4521 in good standing but I can see no reason why Austpac could not assign its right to have work performed and money expended on the Project Area merely because of that obligation. It could readily perform the obligation following assignment. Similarly, for cl 6 insofar as it impliedly contained an obligation imposed on Austpac (for instance, to provide sufficient information about its technologies to facilitate appropriate investigations). That was also an obligation that Austpac could perform notwithstanding the assignment of its rights under cl 1 to cl 6.

Was the Zircon-Austpac agreement personal, such that it could not be assigned?

Para 130 : ‘...the Farmin Agreement embodied an expectation and intention that Austpac and Australian Zircon would be the parties to negotiate and enter into a more definitive agreement and joint venture arrangement if an election was made to proceed to a bankable feasibility study. As I have indicated, that involved Austpac and Australian Zircon maintaining a contractual relationship through the Farm-in Agreement to enable the WIM 150 deposit to be further investigated in anticipation of that possible agreement. In that sense, the Farm-in Agreement was personal to them.’

Clause 7 of the Agreement between Austpac and Zircon came in for some scrutiny. It will be recalled that it provided as follows:

“ Austpac warrants that the EL is in good standing and that it has good and unencumbered title to the EL. Southern acknowledges that Austpac may *deal* with third parties in that part of the EL other than the Project Area in respect of base and precious metals.”

There were competing interpretations of this clause put by the parties. HH used various rules of construction, including *expressio unius est exclusio alterius* (express mention of one is the exclusion of the other), and concluded that

- (a) CL 7 defined what was both permissible and impermissible; and
- (b) Cl 7 was consistent with the parties intention that when a certain stage of exploration was reached, *they* would negotiate a more fulsome arrangement (i.e. not that other parties would so negotiate).

This, held HH, gave the agreement a commercial operation.

HH noted that the word ‘deal’ commercial transactions and the negotiations leading up to them.; and as such, ‘the concept of a dealing when used to express the prohibition in cl 7 should be given a wide effect.’

As such, HH concluded that the assignment was ineffective, because it was *contrary to a contractual prohibition*.

Para 187: ‘I have indicated that, in my view, cl 10.1 of the Sale Agreement contemplated an assignment of the bundle of rights, obligations and powers comprising the whole of the Farm-in Agreement and not merely an assignment of the benefit of the contract coupled with a delegation. The contrary view would be to construe the clause by reference to the observations of Lord Browne-Wilkinson in *Linden Gardens*. On the construction of the clause that I consider was intended by Austpac and Astron, the contemplated assignment *could only be effected by a novation as the obligations imposed by the Farm-in*

Agreement on Austpac could only be assigned by consent. Assuming that an assignment was permitted by the Farm-in Agreement, the purported assignment would nevertheless be ineffective as no consent had been given.....”

FURTHER READING AND RESEARCH

Kirby, Justine --- *Assignments and Transfers of Contractual Duties: Integrating Theory and Practice* [2000] VUWLawRw 21; (2000) 31(2) Victoria University of Wellington Law Review 317, and the treasure trove of references in that, with respect, excellent article, e.g. to M P Furmston *The Assignment of Contractual Burdens* (1998) 13 Journal of Contract Law 42.

Mark Moshinsky, *The Assignment of Debts in the Conflict of Laws* (1992) 109 *Law Quarterly Review* 591.

Holdsworth *The History of the Treatment of Choses in Action by the Common Law* (1920) 33 Harv L Rev 997.

Austin R P *The Conveyancing Act 1919 (As amended) Sec 12 and equitable choses in action* [1976] SydLawRw 5.

P G Turner, *Charges of Unassignable Rights* (2004) 20 JCL 97.

A Tettenborn, *Trusts of Unassignable Agreements* [1998] LMCLQ 498.

Trusts and Unassignable Agreements – Again [1999] LMCLQ 353.

A Trukhtanov, *Trusts of a Non-Assignable Contractual Benefit: Barbados Trust Company v Bank of Zambia* (2007) 70(5) MLR 848.

There is a body of authority relating to the operation of a covenant against an assignment of a lease; G McCormack *Debts and Non Assignment Clauses* " (2000) J Bus L 422, at 442-444.

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