TWO CONCEPTIONS OF EQUITABLE ASSIGNMENT

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Introduction

One of the opening sentences of Professor Tolhurst's *The Assignment of Contractual Rights* says that assignments of contractual rights 'involve a transfer of a contractual right from the owner (assignor) to the transferee (assignee)'.[1] This is also a consistent theme throughout *The Law of Assignment* by Marcus Smith QC.[2] It is a theme of J G Starke's treatise on *Assignments of Choses in Action in Australia.*[3] There are also many judicial decisions which characterise the assignment of contractual rights as involving a transfer of the rights or acquisition of the rights.[4] And even the very word 'assignment' connotes a transfer of rights.[5] These ideas, by very distinguished authors and judges, represent a view which is now very widely held about equitable assignment. But this was not always the case. An earlier conception of equitable assignment stands in contrast with this modern view, with quite different consequences.

The point made in the first part of this paper is that there are two different conceptions of equitable assignment which can have different consequences. The first conception involves conceiving of equitable assignment as a transfer. Apart from the significant support in the language of many cases, and in leading texts, this approach is supported in one of the leading Australian cases, a decision of a powerful Court of Appeal in Queensland in *Thomas v National Australia Bank Limited.*[6] The alternative

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[1] G Tolhurst *The Assignment of Contractual Rights* (2006) 3 [1.01].

[2] M Smith *The Law of Assignment: The creation and transfer of choses in action* (2013) 234 [11.43]: ‘assignment is concerned with the *transfer* of property'.

[3] J Starke *Assignment of Choses in Action in Australia* (1972) 10: 'An assignment of a chose in action is a transaction or disposition which has the effect, in general, of immediately transferring the right in question from the party in whom it is vested to another party'.

[4] Some examples include *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, 26 (Windeyer J); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 915 (Lord Hoffmann); *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40 [31] (Finn and Sundberg JJ) [188] (Emmett J).

[5] 'Assign': transfer or make over formally (esp. personal property, to); 'Assignment': legal or other formal transference of a right or property; a document that effects or authorizes this: *Shorter Oxford Dictionary*, Vol 1 (5th ed 2002) 134.

[6] *Thomas v National Australia Bank Limited* [1999] QCA 525; [2000] 2 Qd R 448.

conception of equitable assignment is that equitable assignment essentially involves the creation of a trust. Unless the case is brought within the statute, and a legal assignment effected, title never passes. The right of action remains with the assignor, and what the assignee acquires is a right against the assignor relating to that right of action.

On this alternative conception, equitable assignment is not a *transfer* of rights but it is a *creation* of new rights or powers in equity which relate to, or encumber, the existing rights held by the assignor. The assignor holds his rights subject to that equitable encumbrance which generally includes a requirement that the assignor use his rights for the benefit of the assignee. It is a debate only about semantics whether the label 'trust' should be attached to the equitable assignment. Importantly, it is now well accepted that the creation of a trust involves no transfer of any rights.[7] This alternative view, espoused as early as 1884 by Story[8] and with modern adherents,[9] is explained below.

There are a number of substantial issues, the resolution of which may depend upon which of the two conceptions of equitable assignment is adopted. One issue concerns the proper parties to an equitable assignment. This is the concern of the second part of this paper. On the transfer conception of an equitable assignment it is easy to see why the assignor should 'drop out' and the action be litigated between the assignee and the debtor. But on the trust conception of equitable assignment the assignor should never drop out because he holds the relevant rights. Another issue concerns anti-assignment clauses. This issue is briefly discussed in the third part of the paper. On the transfer conception of assignment it has been argued that an anti-assignment clause prevents transfer of the right but does not prevent the creation of a trust. On the encumbrance conception the effect of an anti-assignment clause ought to be the same whether the prohibition is described as a prohibition against the creation of a trust or a prohibition against assignment.

The encumbrance conception of equitable assignment is today in need of friends. Over the past thirty years or so the transfer conception has gained an increasing hold in the intermediate appellate courts in Australia and in England. One of the purposes of this paper is to redress this by outlining the case in favour of the encumbrance conception. Its cause is not a lost one for the High Court of Australia and the Supreme Court of the United Kingdom are still yet to choose.

Part 1: The two conceptions of equitable assignment

A very short history of equitable assignment

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[7] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 706 (Lord Browne-Wilkinson); *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1982] HCA 14; (1982) 149 CLR 431, 463 (Aickin J); *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* [2005] HCA 20; (2005) 220 CLR 592 [30] (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ); *Peldan v Anderson* [2006] HCA 48; (2006) 227 CLR 471 [37] (Gummow ACJ, Kirby, Hayne, Callinan & Crennan JJ).

[8] J Story *Commentaries on Equity Jurisprudence* (1884) ●.

[9] See especially CH Tham 'The Nature of Equitable Assignment and Anti-Assignment Clauses' in J Neyers et al (eds) *Exploring Contract Law* (2009) 283.

Keynes once said that practical men who believe themselves to be quite exempt from any intellectual influence are usually the slaves of some defunct economist. So too, practising lawyers who advise clients, counsel who argue the law, and judges who adjudicate, are often slaves of long-dead Roman jurists.

The origin of much of our law of obligations is Roman. The etymology of obligation is *ligare* or 'to bind'. The etymology of contract is '*contrahare*', 'to draw together'. As Emmett J has observed, these metaphors emphasised the personal nature of contractual obligations and led Roman lawyers to say '*nomina ossibus inhaerent* that is to say, contractual claims cling to the bones (of the contracting parties) [and accordingly] ... in classical Roman law, contractual obligations, being personal, could not be assigned: a contractual claim could not be separated from the person of the contracting parties and could be enforced only by a contracting party against a contracting party'.[10]

Despite the Roman law principle that a personal claim remained between those persons, there were various ways in which a third party could obtain the benefit of a creditor's claim. Two of those were *novatio* and *procuratio in rem suam*. Each of these techniques is well known today. A contract can be novated by agreement between the parties to substitute a different creditor. This is not assignment. The Romans called it *delegation obligandi*: an old debt was substituted with a new one. The other instance, *procuratio in rem suam*, was an authorisation of the third party to sue in the name of the creditor. Again, this was not an assignment. It is the equivalent to today's power of attorney coupled with an undertaking that the third party could keep the proceeds arising from any claim. *Procuratio* had numerous disadvantages. The creditor could still sue the debtor himself; the creditor could release the debt owed by the assignee prior to any litigation; and the creditor could revoke the power of attorney. A separate undertaking, or *cautio*, was necessary by which the creditor promised by *stipulatio* not to 'interfere' with the rights.

By the time of Justinian, an *action utilis*, a concept similar to the early English action on the case, was allowed whenever the parties intended to 'transfer' a claim. The Codex spoke of 'actiones transmittere'[11] and 'actiones per cessionem transferre'.[12] The assignee would bring his own claim; his name would appear in the *intentio* in the formula and the claim could not be revoked or affected by death of the creditor. But, as Zimmermann has observed, the action was not really 'transferred' because the creditor continued to have a claim. If the debtor paid the creditor then the assignee would no longer have an action. [13]

English law initially followed the early Roman approach generally prohibiting the assignment of choses in action. Although English law permitted novation, a false start led to an early view that the power of attorney fell within the prohibition against

[10] *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40 [187]. See R Zimmermann *The Law of Obligations - Roman Foundations of the Civilian Tradition* (1990) ●.

[11] C 8.53.33.

[12] C 5.12.31.pr.

[13] R Zimmermann *The Law of Obligations* (1996) 62.

maintenance.[14] But by the 17th century English law permitted the creation of a power of attorney.[15] The early Roman approach was probably introduced into English law by its enunciation by Bracton.[16]

As Holdsworth observed, the old rule of non-assignability was based upon twin concerns of (i) maintenance and oppression of the debtor and (ii) the perception that rights of action are personal. Those concerns became allayed and the rule gradually modified; and in this work of gradual modification 'both law and equity ... lent a hand'.[17] The very earliest equity cases recognised that equitable rights could be 'assigned': 'a Grant of future Possibility is not good in law, yet a Possibility of a Trust in Equity might be assigned'.[18] It was soon recognised that common law rights could be the subject of the same assignment principles in equity. By the end of the 18th century, Buller J described as 'absurd' the common law refusal to give effect to the assignment of a legal action.[19]

This brief history of equitable assignment has not tackled the issue of the subject matter of equitable assignment. It is very commonly said that equitable assignment is concerned only with assignment of 'choses in action'. For the purposes of this paper, it is not necessary to examine that proposition. It suffices to make one criticism of the nomenclature.

The term 'chose in action' is an unfortunate, but long standing, expression historically used in contradistinction to ‘chose in possession’. Fry LJ once said that the law knows no *tertium quid* between choses in possession and choses in action.[20] But the expression 'chose in action' involves a misconception dating back to the great Roman law distinction between persons, things and actions. The great Roman jurists, and the extraordinary Roman texts upon which so much of our law was built, did not speak in terms of rights. In the life of the law, the language of rights is a very recent phenomenon, probably originating at the time of Grotius. A misconception upon which the Roman structure was founded was the notion that the law was concerned with 'things' rather than *rights* to things. We do not think in this way. As Gleeson CJ, Gaudron, Kirby and Hayne JJ emphasised in *Yanner v Eaton*,[21] quoting from Hohfeld,[22] 'property' comprises legal relations *not* things.

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[14] J B Ames *Lectures on Legal History* (1913) 213.

[15] G Spence *The Equitable jurisdiction of the Court of Chancery* (1849) 851; Code 8.42.1

[16] Bracton *De Legibus Consuetudinibus Angliae* (On the laws and customs of England).

[17] W Holdsworth 'The History of the treatment of choses in action by the common law' (1920) 33 Harv Law Rev 997, 1029.

[18] *Warmstrey v Tanfield* (1628-9) 1 Ch Rep 29, 30; 21 ER 498.

[19] *Master v Miller* (1791) 4 TR 320, 340; 100 ER 1042, 1052.

[20] *Colonial Bank v Whinney* (1885) 30 Ch D 261, 285.

[21] *Yanner v Eaton* [1999] HCA 53; 201 CLR 351 [86] also quoting *Wily v St George Partnership Banking Ltd* [1999] FCA 33; (1999) 84 FCR 423, 431 (Finkelstein J).

[22] W Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16, 21-22.

Once this is understood, the distinction between a chose in possession and a chose in action disappears. It is not the 'thing in possession' which is the concern of the law but the *right* which a person has in relation to the thing against other persons. That right is enforceable by action. Nor is it to the point that rights relating to tangible things which can be possessed are often, but not always, exigible against the world at large. A right against a person, such as a debt, also entitles the rightholder to protection from another intentionally inducing a breach of that right. This is why a right between two persons such as a debt has sometimes been described as 'quasi-proprietary'. [23]

The 'transfer' conception of equitable assignment

The first conception of equitable assignment is that it involves rights against the debtor which are held by the assignor being transferred to the assignee. The assignee becomes the right-holder and a direct jural relationship between the debtor and the assignee is formed. There are a number of difficulties for the transfer conception of equitable assignment.

First, in relation to assignment of contractual rights, the common law rights and obligations under contract generally represent the manifested will of the parties. If one party is able unilaterally to transfer rights owed to him by another then the other party to the contract will be placed under an obligation to a person to whom he has never undertaken to be bound.

Second, and related to the first point, is a point powerfully made by Associate Professor Tham.[24] In the context of assignment of contractual rights the notion of transfer of the contractual rights makes no conceptual sense. Suppose the debtor (A) is an individual with a contractual debt to a bank creditor (B). If the bank B assigns the debt to C, what has been 'transferred'? Can C, a person about whom A has no knowledge and with whom A has no relationship, make any demands of A? If so, on what basis can C do this? A has not agreed to incur a debt to C, either expressly or impliedly. Or consider an assignment of legal rights involving the holding of shares in a company. What has been 'transferred' when the registered shareholder assigns in equity? The registered shareholder will still receive the dividends. The registered shareholder still has the right to vote. From the perspective of the company nothing has changed.

Third, if an equitable assignment really involved a 'transfer' of rights then how is it possible to make sense of this as a matter of history? Consider, for example, the equitable assignment of a common law debt. Prior to Judicature reforms, how could a court of Chancery have held that common law rights had been transferred from one party to another? How could the same Court then have enforced the transferred common law right for the purposes of giving a common law remedy to the grantee of a common law right against the debtor? And if this was not historically possible, what has changed so that it would be possible today? Or, in the words of Meagher,

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[23] *Zhu v Treasurer of New South Wales* [2004] HCA 56; (2004) 218 CLR 530, 573 [125]; see also at 577 [135].

[24] See especially CH Tham 'The Nature of Equitable Assignment and Anti-Assignment Clauses' in J Neyers et al (eds) *Exploring Contract Law* (2009) 283.

Gummow and Lehane, '[h]ow a person not the legal owner can, the Judicature Act notwithstanding, prosecute what is, in effect, an action at common law for damages is not explained'.[25] The same is true of a common law action for debt. This difficulty is explored further below in relation to the consequence of the 'trust' conception of equitable assignment as involving joinder of the assignor as a matter of substance, not merely procedure.

The encumbrance conception of equitable assignment

The other conception of equitable assignment is that it involves the rights being held by the assignor becoming encumbered by a new (equitable) right which is held by the assignee. Nothing is transferred. Rather, new rights are created in equity. As we explain below, this conception means that equitable assignment brings about a trust in all but name.

(i) The requirements for creation of a trust and the requirements for equitable assignment

There are various essential requirements for the assignment of a right. Three of the core requirements are as follows.

First, the assignor must manifest an intention to assign the right.

Second, there must be a right in existence which is identified or identifiable with reasonable certainty.

Third, there must be certainty of the identity of the assignee.

On the encumbrance conception of equitable assignment, it is no coincidence that these three requirements match those for the creation of a trust.

Story argued that 'every such assignment is considered in equity, as in its nature amounting to a declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt, or to reduce the property into possession'.[26] The only objection to this observation by Story is that no agreement to 'use the name of the assignor' need be express or implied, although it will often be the case that an assignor will also grant a power of attorney.[27] The expedient of using of the assignor's name to sue can also be obtained by joinder of the assignor as a defendant. As we discuss further below, if the assignor will not sue for the benefit of the assignee then the assignee can preserve that benefit by suing the creditor, joining the assignor as a defendant. It is, of course, possible for the intention behind the 'assignment' merely to be an undertaking to allow the assignee the right to sue in the assignor's name. But if the manifest intention is limited in that way then the appropriate label to attach to such an arrangement is a 'power of attorney' not 'assignment'.

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[25] R Meagher et al *Meagher Gummow and Lehane's Equity Doctrines and Remedies* (4th edn 2002) 286 [6-520].

[26] J Story *Commentaries on Equity Jurisprudence* (1884) 689 [1040].

[27] *Tailby v Official Receiver* (1888) 13 App Cas 523; *Re Andromma Pty Ltd* [1987] 2 Qd R 134.

In Marshall's 1950 thesis on assignment he developed a three-fold classification of equitable assignments: (i) informal assignment; (ii) assignment by way of trust; and (iii) assignment by way of contract.[28] Properly understood, however, Marshall's classification was not of independent categories. A trust can be created by contractual agreement. Hence, category (ii) and category (iii) are not independent. And, as Marshall acknowledged, the first category was really a catch-all for assignments which operated other than by way of contract or trust.[29] But, as Marcus Smith observes, the *effect* of any assignment in category (i) is that if the right being assigned is equitable then 'an equitable chose will be held behind a trust'[30] and if the right being assigned is a common law right then the common law right is held on trust.[31]

(ii) The need for the creation of rights in assignment and trust

The 'encumbrance' conception of equitable assignment matches a long established approach to the nature of a trust. It should, however, be acknowledged that there are competing conceptions of a trust which more closely match the conception of an equitable assignment as involving a 'transfer'. For instance, it is not uncommon to encounter references to the creation of a trust by the transfer of rights to the beneficiary. But this view of a trust is conceptually flawed.

The House of Lords, and the High Court of Australia on numerous occasions, has emphasised that equitable rights do not co-exist with legal rights.[32] The creation of a trust does not separate two existing rights. Instead, the creation of a trust *creates new* equitable rights. In a recent article one of us has explored a long history which has recognised the conception of a trust as requiring as *necessary* (though not always sufficient) the creation of an equitable encumbrance upon particular rights held by the trustee.[33] This historical conception of a trust was supported by Sanders' great text from 1791 until 1844;[34] by Dr Whitley Stokes in his carefully drafted Indian Trusts Act 1882 section 3; by Walter Hart in 1899;[35] by the United States Restatements of the Law of Trusts 1935, section 2 (a definition substantially reproduced in the second

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[28] O Marshall *The Assignment of Choses in Action* (1950) 80.

[29] O Marshall *The Assignment of Choses in Action* (1950) 109.

[30] M Smith *The Law of Assignment: The creation and transfer of choses in action* (2nd edn 2013) 219 [11.06].

[31] M Smith *The Law of Assignment: The creation and transfer of choses in action* (2nd edn 2013) 222 [11.14].

[32] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 706 (Lord Browne-Wilkinson); *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1982] HCA 14; (1982) 149 CLR 431, 463 (Aickin J); *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* [2005] HCA 20; (2005) 220 CLR 592 [30] (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ); *Peldan v Anderson* [2006] HCA 48; (2006) 227 C.L.R. 471 [37] (Gummow ACJ, Kirby, Hayne, Callinan & Crennan JJ).

[33] J Edelman 'Two fundamental questions for the law of trusts' (2013) 129 LQR 66.

[34] FW Sanders *An Essay on Uses and Trusts, and on the Nature and Operation of Conveyances at Common Law, and Those Deriving their Effect from the Statute of Uses* (2nd edn 1799). The final edition was the 5th by GW Sanders and J Warner in 1844.

[35] W Hart "What is a Trust" (1899) 15 LQR 294.

and third restatements in 1957 and 2003);[36] as well as in the first edition of the leading Australian text on trusts in 1958.[37]

Broadly, each of these definitions focussed attention on the beneficiary's power or right as one which related to the rights of the trustee or, conversely, the particular liability obligation of the trustee in relation to the trust rights which were held. And, in 1910, Professor Maitland said that:[38]

> Equity did not say that the cestui que trust was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the cestui que trust. There was no conflict here. Had there been a conflict here the … Judicature Act … would have abolished the whole law of trusts.[39] Common law says that A is the owner, equity says that B is the owner, but equity is to prevail, therefore B is the owner and A has no right or duty of any sort or kind in or about the land. Of course the Judicature Act has not acted in this way; it has left the law of trusts just where it stood, because it found no conflict, no variance even, between the rules of the common law and the rules of equity.

It is, however, true that it is not always *sufficient* for a trust merely that the holder of a legal right is encumbered by some equitable liability or duty.[40] Examples are rights to redeem a common law mortgage, easements and restrictive covenants.

(iii) The substantive duties of the assignor and the substantive duties of the trustee

Sometimes, although not always,[41] trustees have positive duties. Those include duties commonly described as a duty to act in the best interests of a beneficiary.

An exposition of the same principle in relation to equitable assignment can be seen in the masterful decision of Windeyer J in *Norman v Federal Commissioner of Taxation*.[42] The principles (although not the conclusion) Windeyer J identified were concurred with by Dixon J. As Windeyer J explained, 'courts of equity would come to the assistance of the assignee if the assignor refused to do whatever was necessary to enable the assignee to get the benefit of the assignment. Thus a recalcitrant assignor would be required, on having an indemnity for his costs, to permit his name to be used

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[36] American Law Institute *Restatement of the Law of Trusts* (1935). The reporter was Austin Scott.

[37] K Jacobs *The Law of Trusts in New South Wales* (1958) 7.

[38] FW Maitland *Equity also The Forms of Action at Common Law* (1910) 17-18. See also FW Maitland *Equity - A Course of Lectures* (2nd ed 1936) 17.

[39] Section 25 of the Judicature Act 1873 provides: 'Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail'.

[40] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 702-703 (Lord Browne-Wilkinson).

[41] *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101 [5] (Gleeson CJ, McHugh, Gummow & Callinan JJ). Swadling has argued that the word 'trust' should not be used at all and that the order should be described only as an order for conveyance of a right: W Swadling 'The fiction of the constructive trust' [2011] CLP 1, 10-13.

[42] *Norman v Federal Commissioner of Taxation* [1963] HCA 21; (1963) 109 CLR 9.

in an action to recover the debt; or an assignor would be restrained from receiving the debt for himself, as for example in *L'Estrange v. L'Estrange*'.[43]

The favour of the transfer conception in recent authorities

The encumbrance conception of equitable assignment is conceptually coherent – it follows the well understood model of the trust – as well as being faithful to historical antecedents. But it does not fully reflect the current state of the law in either Australia or England. And it will not be easily capable of adoption at any level below the highest courts. What seemed clear to an earlier generation has become clouded.

It is not necessary to look back very far to find a time when the encumbrance conception was generally accepted. *Warner Bros Records Inc v Rollgreen Ltd* in 1976 involved the question whether an equitable assignee could validly exercise a contractual option.[44] The answer was that he could not. Roskill LJ gave as his reason that 'the only rights that an equitable assignment can create in the equitable assignee are rights against his assignor who thenceforth becomes the trustee of the benefit of the option for the assignee, and the assignor could, of course, be compelled in equity to exercise those rights for the benefit of the assignee.'[45] Sir John Pennycuick shared this view:

> Where there is a contract between A and B, and A makes an equitable but not a legal assignment of the benefit of that contract to C, this equitable assignment does not put C into a contractual relation with B, and, consequently, C is not in a position to exercise directly against B any right conferred by the contract on A. The equitable assignment may be converted into a legal assignment by notice to B: see section 136 of the Law of Property Act 1925; but, so long as the assignment remains equitable only, C has no more than a right in equity to require A to protect the interest which A has assigned and to do so by exercising the option himself.

As we have explained, there are reasons in support of this approach. Why should the contractual counterparty be required to recognise the act of a stranger to whom he has never undertaken any obligation and, as in *Warner Bros* itself, of whom he may never have heard? So far as the validity of contractual notices are concerned, *Warner Bros* has been followed in New South Wales: 'The right of an equitable assignee of a chose in action being one against the assignor rather than the debtor, the equitable assignee cannot exercise a contractual right against the debtor.'[46]

A conceptual divide separates those views from the view the English Court of Appeal took in the 2011 appeal in *National Westminster Bank plc v Kapoor*.[47] One of the

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[43] [1850] EngR 876; (1850) 13 Beav 281; 51 ER 108.

[44] *Warner Bros Records Inc v Rollgreen Ltd* [1976] 1 QB 430 (CA).

[45] *Warner Bros Records Inc v Rollgreen Ltd* [1976] 1 QB 430 (CA) 443-44.

[46] *Long Leys Co Pty Ltd v Silkdale Pty Ltd* (1991) 5 BPR 11,512 (NSWCA); *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548; *Silkdale Pty Ltd Ltd v Long Leys Co Pty Ltd* (1995) 7 BPR 14,414. See also *Dwyer v Derek* [2003] QSC 274.

[47] *National Westminster Bank plc v Kapoor* [2011] EWCA Civ 1083; [2012] 1 All ER 1201. And more recently *Bexhill UK Limited v Razzaq* [2012] EWCA Civ 1376 at [58]: 'Where there has been an

questions in that case was whether an equitable assignee of part of a debt was a 'creditor' entitled to vote in an insolvency procedure. This turned on whether the equitable assignee was a person to whom the relevant part of the debt was owed. Etherton LJ, with whom the others agreed, answered this question by reference to a supposed principle of law that 'the equitable assignee of a debt, and not the equitable assignor, has the substantive legal right to sue for the assigned debt.'[48]

It is possible to understand why Etherton LJ felt that a number of decisions of the Court of Appeal decided since *Warner Bros* pointed towards this conclusion.[49] What is more difficult to understand is the conclusion itself.[50] The Lord Justice accepted that the assignor had legal title, but held that the court should refuse to recognise this title in favour of the title of the assignee, 'except where the assignor is a trustee for the assignee and expressly suing as such or the assignee joins in'.[51] He justified this approach, amongst other things, by reference to section 49 of the Senior Courts Act 1981 (Eng), which provides that 'wherever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same subject matter, the rules of equity shall prevail'.

This reasoning involves the same fallacy that Maitland identified more than a century ago. An equitable assignor and his assignee do not have competing titles. The assignor has rights against the third party debtor and the assignee has rights against the assignor. There is no conflict that needs to be resolved by resort to section 49. If Etherton LJ's reasoning were correct and there were a conflict, then it would apply across the law of trusts for the title of trustees would always be in competition with the title of their beneficiaries. The truth is that while beneficiaries have rights against their trustees, they do not have a 'title' to the trust assets in any sense that is comparable to the sense in which the trustees have title.

It is, moreover, wrong to think that the framers of the Judicature Acts intended through section 49's predecessor to give equitable assignees a cause of action directly against the debtor which they had never previously enjoyed. The framers did innovate in this area but in a much more limited way. By section 25(6) of the Judicature Act 1873 (Eng) they, in effect, allowed a defined class of equitable assignments to be converted into outright transfers of legal rights by the provision of notice. In these cases and through this mechanism assignees were to gain direct claims. There would have been little purpose in this if the framers also intended that by section 49 equitable assignees should have direct claims in every case. As French CJ, Crennan and Kiefel JJ said in *Equuscorp Pty Ltd v Haxton* (quoting Lord Esher MR)[52] 'the words mean what they say; they transfer the legal right to the debt as well

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assignment that takes effect in equity, the general rule is that it is the equitable assignee who has the right to sue, because it is the equitable assignee who is beneficially entitled to the thing in action.'

[48] *National Westminster Bank plc v Kapoor* [2011] EWCA Civ 1083; [2012] 1 All ER 1201 at [43].

[49] *Central Insurance Co Ltd v Seacalf Shipping Corporation (The Aiolos)* [1983] 2 Lloyd's Rep 25 (CA); *Three Rivers District Council v Bank of England* [1996] QB 292 (CA); *Raiffeisen Zentralbank Osterreich AG v Five Star Trading LLC* [2001] QB 825 (CA).

[50] See also PG Turner, 'May the assignee of part of a debt vote at a creditors' meeting?' [2012] CLJ 270.

[51] *National Westminster Bank plc v Kapoor* [2011] EWCA Civ 1083; [2012] 1 All ER 1201 at [40].

[52] *Read v Brown* (1888) 22 QBD 128, 132, Fry and Lopes LJJ agreeing at 132 and 133 respectively.

as the legal remedies for its recovery.'[53] But, as they said in the same joint judgment, '[e]quitable assignments were not affected'.[54]

To a proponent of the encumbrance conception, part of the difficulty with Etherton LJ's analysis is the opposition he posits between equitable assignments that take effect as trusts and other equitable assignments. There is no distinction here because every equitable assignment is, in essence, a species of trust. Referring to a modification limited to marine policies wrought by section 50(2) of the Marine Insurance Act 1906, Slesser LJ explained in *Williams v Atlantic Assurance Company Limited* that at common law 'the assignee could not sue in his own name on the policy, but an action could be brought by the assignor as trustee for the assignee'.[55]

The same thinking that underpins *Kapoor* also underpins the decision of the Queensland Court of Appeal in *Thomas v National Australia Bank Limited*.[56] In that case, Pincus JA said that:

> . . . it is not in question that an equitable assignment is good as between assignee and assignor, without notice to the debtor. The only debatable point is whether the meaning of this statement is that the assigned property passes, without notice, but until notice is given the debtor may pay the assignor . . . or whether, on the other hand, notice to the debtor is necessary in order to pass title to the debt.[57]

His Honour's conclusion, with which McMurdo P and Thomas JA said they agreed, was that title passes with or without notice.

Again, this conclusion is fundamentally inconsistent with the encumbrance conception of equitable assignment. On that conception, unless the case is brought within the statute, and a legal assignment effected, title never passes. The right of action remains with the assignor, and what the assignee acquires is a right against the assignor relating to that right of action, just as the beneficiaries of a trust are limited to rights against their trustee. Arguably, if Pincus JA were correct, and a mere equitable assignment were effective to pass the right of action, section 26(5) of the Judicature Act 1873 (Eng) and its Australian counterparts would have been unnecessary.

Part 2: Equitable assignment and joinder of parties

We have already identified some of the different consequences that follow depending upon whether one adopts the transfer conception or the encumbrance conception of equitable assignment. This part of our paper is concerned with one of the most basic

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[53] [2012] HCA 7 [63].

[54] [2012] HCA 7 [57]. See also *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, 461 (Lord Macnaghten).

[55] *Williams v Atlantic Assurance Company limited* [1933] 1 KB 81 (CA) 105.

[56] *Thomas v National Australia Bank Limited* [1999] QCA 525; [2000] 2 Qd R 448. The transfer conception has also been favoured by the New Zealand Court of Appeal: *Mountain Road (No 9) Limited v Michael Edgley Corporation Pty Ltd* [1999] 1 NZLR 335.

[57] *Thomas v National Australia Bank Limited* [1999] QCA 525; [2000] 2 Qd R 448 at [18].

procedural distinctions which arises between these two conceptions. That is, is it necessary always for an assignee to join the assignor in an action against the debtor? On the transfer conception joinder should not be necessary. The relevant right has been transferred and it may often by an unnecessary inconvenience to join an assignor who has no real interest in participating in the litigation. On the encumbrance conception, joinder must always be necessary, even if the assignor merely enters an appearance and agrees to abide by the decision of the Court (removing any likelihood of any costs consequences or further expense).

To explain why joinder is required on the encumbrance conception of an equitable assignment it is necessary to begin with trusts before turning to assignment.

Trusts: the *Vandepitt* procedure

Although there are arguably exceptional cases,[58] any common law claim against a third party who tortiously damages the trust property belongs to the trustee. This is because it is the trustee who holds the right to the property. Similarly, if the trustee contracts with a third party in his representative capacity, any claim to enforce the contract belongs to the trustee.[59] The third party has made no promises to the beneficiaries and may not even know of the trust. It follows that any claim to enforce contractual or other rights which are the subject of a trust must be made by the trustee.

The reason for this is clear. Apart from anything else, the beneficiaries themselves have no rights against the third party. Beneficiaries do have rights against their trustee, and these may include rights to require that he enforce whatever claims he may have in his representative capacity against third parties. [60] In an appropriate case beneficiaries may bring proceedings against their trustee for a mandatory order requiring that he do so. If the trustee improperly fails to enforce rights subject to the trust, he may be required to account to the beneficiaries for the value of the benefit that is lost.

There is accordingly a chain of rights and therefore a chain of possible claims. Apart from exceptional cases where the beneficiaries separately enjoy common law rights against the third party, the beneficiaries cannot leapfrog over the trustee and sue the third party directly.

Where the trustee refuses to claim, in order to avoid the inconvenience and delay of a multiplicity of actions the courts have for a long time allowed the claims at both stages of this chain to be brought together in a single proceeding initiated by the beneficiaries. The first case involving a trust appears to be *Meldrum v Scorer* in 1887,[61] but there are much earlier cases involving deceased estates.[62] Nowadays this

[58] *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180; [2011] QB 86. An appeal to the UK Supreme Court settled before hearing.

[59] *Dunlop Pneumatic Tyre Co v Selfridge & Co* [1915] AC 847, 853; *Vandepitt v Preferred Accident Insurance Corp of New York* [1933] AC 70, 79.

[60] *Lloyd's v Harper* (1880) 16 Ch D 290 (CA).

[61] *Meldrum v Scorer* (1887) 56 LT 471.

[62] Marcus Smith QC traces this back to *Nicholson v Sherman* (1664) 1 Ch Cas 57; 22 ER 693.

is commonly referred to as the *Vandepitt* procedure following Lord Wright's reference to it in *Vandepitt v Preferred Accident Insurance Corp of New York.*[63]

What is important to understand about the *Vandepitt* procedure is that it involves two conceptually separate claims compressed into one proceeding. The beneficiaries sue as claimants naming both the trustee and the third party as defendants. In order to succeed, the beneficiaries must show two things. They must first show that the case is one in which the court should direct that the trustee assert his claim against the third party or, which amounts to the same thing, a case in which the trustee should be required to lend his name so that the beneficiaries can claim. They must then show that the trustee's claim should succeed. The procedural configuration does not obscure the jural reality that there are two claims in issue. Hanworth MR explained this clearly in *Harmer v Armstrong*.[64]

There are several good reasons why the trustee is a necessary party to this form of procedure:

(i) The trustee may deny that there is any trust, as in *Harmer v Armstrong* itself, or else admit the trust but object to the claim being made. In fact the beneficiaries may only take the decision whether to claim out of the hands of the trustee where special circumstances exist,[65] usually only in cases where the trust is bare.[66]

(ii) The trustee is also needed so that he will be bound *res judicata*. If the trustee is not joined, after satisfying a judgment in favour of the beneficiaries the third party may find that he faces a fresh claim by the trustee.

(iii) Since the dispute necessarily concerns a transaction between the third party and the trustee, there is every possibility that the trustee will have evidence to give. It may not be fair to require that the third party operate the more limited procedures available for compelling disclosure and other evidence from non-parties.

(iv) Unless the trust is bare and the beneficiaries are the only claimants on the *res*, the trustee will need to receive the proceeds of the claim so that these can be properly distributed.

These reasons are all important, but there is a more fundamental reason still. This is that the trustee is a necessary party in principle because it is the trustee who has rights against the third party.

This last proposition was confirmed by the Supreme Court of the United Kingdom in its 2010 decision in *Roberts v Gill & Co*.[67] In that case, Mr Roberts commenced

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[63] *Vandepitt v Preferred Accident Insurance Corp of New York* [1933] AC 70, 79. M Smith QC 'Locus standi and the enforcement of legal claims by cestuis que trust and assignees' (2008) ● *Trust Law International* 140 contains an excellent discussion of this procedure and its historical development.

[64] *Harmer v Armstrong* [1934] 1 Ch 65 (CA) 84. More recently, *Barbados Trust Co v Bank of Zambia* [2007] EWCA Civ 148; [2007] 1 Lloyds Law Rep 495 at [45].

[65] *Hayim v Citibank NA* [1987] AC 730.

[66] *Re Field* [1971] 1 WLR 555, 561.

[67] *Roberts v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240.

proceedings for negligence against two firms of solicitors who had advised the former personal representatives of the estate of his late grandmother. His claims were brought in his personal capacity as a legatee of the estate. This claim could not succeed because the solicitors owed no duties to Mr Roberts. He applied, first, to amend his claim in order to continue it both in his personal capacity and as a derivative claim on behalf of the estate, the latter being said to involve a mere change in capacity, and, second, to join the administrator of the estate as a necessary party to the derivative claim. By the time this application was made, any new claim by either Mr Roberts or the administrator was time-barred.

The Supreme Court held that the circumstances were not sufficiently special to permit the beneficiary to bring a derivative claim. However, Lords Collins, Rodger and Walker JJSC held that another reason why the amendment would not be allowed was that a derivative action by a beneficiary requires the joinder of the administrator at the outset of the proceedings. It followed that the first amendment could not succeed because the proceedings so amended would be improperly constituted. Without the first amendment, the second amendment would not assist Mr Roberts either, because the administrator was not a necessary party to the claim Mr Roberts made in his personal capacity.

In the leading speech Lord Collins concluded that the administrator was a necessary party to any derivative claim in part by analogy with claims by trust beneficiaries invoking the *Vandepitt* procedure and also by analogy with derivative claims made by the shareholders of companies. In the case of trusts, Lord Collins noted that joinder ensures that the trustee is bound and avoids a multiplicity of action. He added that 'joinder also has a substantive basis, since the beneficiary has no personal right to sue, and is suing on behalf of the estate, or more accurately, the trustee.'[68]

Equitable assignment

That is how matters stand in the law of trusts. If the correct conception of equitable assignment is that it involves an encumbrance upon the assignor's rights requiring the assignor to hold the rights for the assignee, and is therefore in the nature of a trust, the answer ought to be the same.

This was the case before the Judicature reforms. The answer then was that the assignee, like the beneficiary of a trust, could never sue the debtor in his own name for the simple reason that the claim belonged to the assignor. Therefore it was the assignor who sued as trustee for the assignee.[69] If the assignee had taken a power of attorney then he could initiate that proceeding in the name of the assignor. If he had not, and if the assignor was unwilling to lend his name to the proceedings, the assignee needed to proceed through two stages: first, a suit in equity for a decree

[68] *Roberts v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240 at [62]. Although Lord Hope DPSC preferred not to base his decision solely on the ground that special circumstances had not been made out, he agreed (at [84]) that '[t]he beneficiary has no personal right to sue. The requirement that the personal representative must be joined is more than just a matter of procedure.'

[69] *Williams v Atlantic Assurance Company limited* [1933] 1 KB 81 (CA) 105.

requiring the assignor to lend his name, and second, an action at law against the debtor in the name of the assignor.[70]

Two innovations ameliorated the position of equitable assignees. First, as mentioned above, by section 26(5) of the Judicature Act 1873 (Eng) and its Australian counterparts a defined class of assignees were given the right to claim directly in their own name. Second, in the case of assignments outside of the legislation, a practice developed whereby assignees would initiate proceedings naming both the debtor and the assignor as defendants.[71] The structure and rationale is the same as that of the *Vandepitt* procedure discussed above in connection with trusts and deceased estates, bearing in mind that an equitable assignment is essentially a bare trust so that the restrictions on the use of the *Vandepitt* procedure in other contexts are generally inapplicable.[72] An action in this form is properly constituted 'because the party with the title to sue at law is privy to the action.'[73]

Joinder of the legal owner was necessary in all cases of this second type. Thus the editor of *Daniell's Chancery Practice* wrote that:

> The principle that requires a trustee, or other owner of the legal estate, to be brought before the Court in actions relating to trust property, applies equally to all cases where the legal right to sue for the thing demanded is outstanding in a different person from him who claims the beneficial interest.[74]

As in the case of trusts, the requirement that the equitable assignor be joined was properly viewed as a requirement of substance. It was for this reason that, except where the legislature has intervened,[75] if the assignee sues without joining his assignor and then seeks to join the assignor after the limitation period has expired, the amendment would not be allowed and the action would fail.[76] Similarly, if the assignor was a company which has been dissolved, there could be no joinder and the claim would be lost unless the company were restored to the register.[77] The principle in both of these cases is that only the assignor has a claim against the debtor.

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[70] *Re Westerton* [1919] 2 Ch 104, 133.

[71] eg *Durham Brothers v Robertson* [1898] 1 QB 765 (CA) 770-71.

[72] See M Smith QC 'Locus standi and the enforcement of legal claims by cestuis que trust and assignees' (2008) ● *Trust Law International* 140.

[73] *Treadwell v Hickey* [2009] NSWSC 1395 at [92].

[74] *Daniell's Chancery Practice* (7th edn ●) vol 1 p 173.

[75] In England: Limitation Act 1980 s 35 and, implementing that, 1981 RSC Ord 15 r 6 (now CPR 19.5). See the discussion in *Roberts v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240 at [24] to [37]. The same issue has been resolved in New South Wales by treating an action brought by an equitable assignee alone as 'an action . . . brought on the cause of action' within the Limitation Act 1969 s 63(2): *Jennings v Credit Corp Australia Pty Ltd* [2000] NSWSC 210; (2000) 48 NSWLR 709.

[76] *Hudson v Ferneyhough (No 1)* (1890) 34 Sol J 228 (CA).

[77] *MH Smith (Plant Hire) v DL Mainwaring* [1986] 2 Lloyd's Rep 244 (CA).

An action brought by an equitable assignee without joining the assignor was therefore improperly constituted.[78] The action was not a nullity,[79] but it was considered that the action 'will not be an appropriate vehicle for the ultimate recovery of a remedy at law unless and until the assignor who is alone entitled to sue at law is a party.'[80]

All of this coheres with the encumbrance conception of equitable assignment as we have explained it in earlier parts of this paper, and all of it seems to have been well understood only a generation ago. However a significant shift, consistent with the transfer conception of equitable assignment, has more recently led English and Australian courts to take a different approach to the issue of joinder.

So far as the English cases are concerned, this shift had occurred by the time the appeal in *Roberts v Gill & Co* came before the Supreme Court in 2010. In arguing that it was not necessary that the administrator be joined at the outset of the proceedings, the analogy counsel for Mr Roberts pressed on their Lordships was with the claims of an equitable assignee. The suggestion was that a more liberal rule applies in relation to equitable assignments and that there is no good reason why that more liberal rule should not apply also to claims relating to a deceased estate.

Lord Collins noted comparatively recent authorities holding that in the case of an equitable assignment the usual requirement to join the assignor is procedural only, that joinder need only occur before final judgment and that it may be dispensed with (although only in 'the most exceptional circumstances').[81] His Lordship took these cases to have the consequence that an action by an assignee is validly constituted without joinder including for the purposes of stopping limitation periods from running. Lord Collins did not, however, accept that there is a 'real analogy' between an equitable assignee and the beneficiary of an unadministered estate. This was because 'in the case of an equitable assignment the assignee is the true owner and the assignor is a bare trustee'. Lord Walker expressed a similar view.[82]

There are well known differences between the rights of a beneficiary of an unadministered estate and the rights of a beneficiary under a trust or an equitable assignee. But, as Lord Clark JSC observed, it is difficult to see how those differences require a different rule in relation to joinder.[83] His next step was to reason that if the joinder rule was not absolute in the case of an equitable assignment then perhaps it should not be absolute in a derivative action as well. It would be more logical to reason in the opposite direction. Lord Collins accepted that (i) the reasons why a trustee must be joined include the substantive reason that only he has rights against the third party and (ii) an equitable assignor is a trustee. The inference from these premises should be that in principle the assignor should be joined in every case.

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[78] *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101.

[79] See *Thomas v National Australia Bank Limited* [1999] QCA 525; [2000] 2 Qd R 448.

[80] *Treadwell v Hickey* [2009] NSWSC 1395 at [98].

[81] *Roberts v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240 at [63] to [71].

[82] *Roberts v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240 at [102].

[83] *Roberts v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240 at [124].

The line of authorities to which Lord Collins referred in support of the proposition that joinder may be dispensed with began with the 1983 decision of the Court of Appeal in *The Aiolos.*[84] The Court of Appeal there accepted, for the first time, a submission that (i) an equitable assignee has a cause of action which he can assert independently of the assignor, and (ii) the presence of the assignor is not universally necessary and can be dispensed with by the court where there is no risk of double jeopardy. This was not necessary for the decision because the court considered that the assignor in that case should be joined. The two propositions have nonetheless been affirmed and followed in the Court of Appeal on a number of occasions and may fairly be said to represent the law in England at the present juncture.[85]

A similar development has occurred in Australian intermediate appellate courts.[86] However, when this issue was considered by Gummow and Bell JJ in the High Court of Australia in *Equuscorp Pty Ltd v Haxton*, the principle was expressed in limited terms restricted to interlocutory proceedings. Their Honours said that[87]

> an action by an equitable assignee without joining the assignor is not a nullity; the action may be liable to be stayed pending joinder, but no such application for a stay has been made in the present litigation. The authorities considered by Lord Collins of Mapesbury in *Roberts v Gill & Co* indicate that any outstanding assignor must be joined before final judgment can be obtained by the assignee, but that has been held not to be necessary where the assignee is seeking interlocutory relief. As noted above, if Equuscorp were to obtain the relief it seeks in these appeals, this would not be final in nature.

In a passage referred to in a footnote, Gummow and Bell JJ also approved the remarks of Gaudron and Gummow JJ in *Oshlack v Richmond River Council*[88] that an equitable assignor of a legal chose in action could, upon receiving a costs indemnity be required to sue the debtor.

The case commonly cited in support of the development that the assignor need not always be joined is *William Brandt's Sons & Co v Dunlop Rubber Company Limited*, a decision of the House of Lords from 1905.[89] However non-joinder of the assignor was not an issue in the appeal and appears only to have been noticed in the course of the proceedings before the House of Lords. Lord Macnaghten referred to the point in passing:

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[84] *Central Insurance Co Ltd v Seacalf Shipping Corpn (The Aiolos)* [1983] 2 Lloyd's Rep 25 (CA) 33-34. See also *Weddell v JA Pearce & Major* [1988] Ch 26, 38-43.

[85] *Three Rivers District Council v Governor and Company of the Bank of England* [1996] QB 292 (CA) 313 (where the court also stated that the assignor may not sue in the absence of the assignee); *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825 (CA) [60]; *National Westminster Bank plc v Kapoor* [2011] EWCA Civ 1083; [2012] 1 All ER 1201; *Bexhill UK Limited v Razzaq* [2012] EWCA Civ 1376 at [58].

[86] See especially *Long Leys Co Pty Ltd v Silkdale Pty Ltd* (1991) 5 BPR 11,512 (NSWCA) and *Thomas v National Australia Bank Limited* [1999] QCA 525; [2000] 2 Qd R 448.

[87] [2012] HCA 7 [78] (footnotes omitted).

[88] [1998] HCA 11; 193 CLR 72 [41].

[89] *William Brandt's Sons & Co v Dunlop Rubber Company Limited* [1905] AC 454.

> Strictly speaking, [the assignor], or their trustee in bankruptcy, should have been brought before the Court. But no action is now dismissed for want of parties, and the trustee in bankruptcy had really no interest in the matter. At your Lordships' bar the [debtor] disclaimed the wish to have him present, and in both Courts below they claimed to retain for their own use any balance that might remain after satisfying Brandts.[90]

Although Lord Macnaghten did not speak in terms indicating that he intended to develop the law or decide any new point, this passage was pressed upon the House some twenty years later in *Performing Rights Society Limited v London Theatre of Varieties Limited* in support of a liberal approach to joinder.[91] Their Lordships did not agree that *Brandt's* case significantly changed the general rule requiring joinder. Lord Phillimore said that the point about *Brandt's* case was 'robbed of much weight by the fact that the objection in that case was withdrawn at the Bar of the House', and Viscount Cave LC appears to have considered the case to be confined to circumstances in which the defendant disclaimed any wish to have the legal owner made a party.[92] Although not mentioned, it is clear from *Travis v Milne* that there was nothing exceptional about the course the House took in *Brandt's* case.[93] *In Travis v Milne* there might have been an issue whether the beneficiaries of a deceased estate were entitled to maintain their suit, but since the defendants waived any objection, Turner V-C said he did not need to further consider the point.[94]

Brandt's case does not, therefore, provide convincing support for the proposition that joinder is a purely procedural requirement which can be dispensed with by the court where there is no procedural imperative.[95] Nor has a convincing principled explanation for these propositions been found. Two attempts have been made as follows.

The first attempt involves the assertion that an equitable assignee has his own direct claim, which sounds in equity, against the debtor. This equitable claim apparently sits alongside the legal claim belonging to the assignor, and prevails in the event of a competition between them. In *Three Rivers District Council v Bank of England*, Staughton LJ said in a minority judgment that 'this solution comes nearest to reconciling all the authorities'.[96] The idea has been developed by Tolhurst, who reasons that to the extent the remedy the assignee seeks involves the enforcement of legal rights, the assignor must necessarily be joined, but that there are a range of

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[90] *William Brandt's Sons & Co v Dunlop Rubber Company Limited* [1905] AC 454, 462.

[91] *Performing Rights Society Limited v London Theatre of Varieties Limited* [1924] AC 1.

[92] *Performing Rights Society Limited v London Theatre of Varieties Limited* [1924] AC 1, 37, 14.

[93] *Travis v Milne* (1851) 9 Hare 141; 68 ER 449.

[94] See M Smith QC, *The Law of Assignment* (2nd edn 2013) 233 [11.41], citing also *Les Affréteurs Réunis Société Anonyme v Leopold Walford (London) Ltd* [1919] AC 801, 801-02.

[95] eg *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825 (CA) at [60]: 'There is a rule of practice that the assignor should be joined, but that rule will not be insisted upon where there is no need, in particular if there is no risk of a separate claim by the assignor'.

[96] *Three Rivers District Council v Bank of England* [1996] QB 292 (CA) 303.

equitable remedies available to an assignee and that where one of these is claimed joinder is only a procedural requirement.[97]

Marcus Smith QC points out that this reasoning has not been adopted in any case and that there is no explanation by reference to authority how it is that equity can fashion a direct claim against the debtor vesting in the assignee.[98] The equitable remedies to which Tolhurst refers have never been made available to equitable assignees before. If they were to be made available to equitable assignees, it would then be necessary to explain (i) why it is that the debtor should be subject to claims made by someone with whom he did not contract, and (ii) why those remedies should not be made available to every beneficiary of a bare trust.

The second attempt involves the assertion that the assignee is entitled to enforce the assignor's claim but in the assignee's own name. This idea, which Marcus Smith QC advances in the second edition of *The Law of Assignment*, amounts to the claim that the law has developed such that an equitable assignment must be treated as tantamount to a transfer of the assignor's legal rights.[99] This was essentially the analysis of the Queensland Court of Appeal in *Thomas v National Australia Bank Limited*[100] which we have already discussed.

Part 3: *Barbados Trust* and anti-assignment clauses

The difference between the transfer and the encumbrance conceptions of equitable assignment also affects how we analyse the effect of anti-assignment clauses. This is illustrated by the 2007 decision of the English Court of Appeal in *Barbados Trust Co v Bank of Zambia*.[101] Although not necessary to the determination of the appeal, one of the issues which each of the three Lords Justice considered in detail was the effect of an anti-assignment clause on a declaration of trust intended to avoid the restriction.

The case involved distressed Zambian debt sold by Bank of America to the claimant vulture fund shortly before the expiry of a limitation period. An anti-assignment clause prohibited assignment other than to 'banks or other financial institution'. The claimant vulture fund was not a bank or financial institution. So, instead of using the language of assignment, Bank of America declared itself trustee of the debt for the claimant. The claimant then operated the *Vandepitt* procedure, suing the Bank of Zambia and joining the Bank of America as a defendant. The question was whether this stratagem succeeded in evading the anti-assignment clause.

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[97] GJ Tolhurst, 'Equitable assignment of legal rights: a resolution to a conundrum' (2002) 118 LQR 98. This view is also favoured by A Guest, *Guest on the Law of Assignment* (2012) 90 [3-08].

[98] M Smith, *The Law of Assignment* (2nd edn 2013) 231 [11.38].

[99] M Smith, *The Law of Assignment* (2nd edn 2013) 231-236 [11.39] – [11.47]. In the same passage Smith explains that the process by which an assignee claims may be compared to the *Vandepitt* procedure as it applies to trusts and deceased estates. This is a valid comparison but it does not explain why an equitable assignee can ever sue without joining the assignor. The beneficiary of a trust or deceased estate who invokes the *Vandepitt* procedure must always join the trustee or executor.

[100] *Thomas v National Australia Bank Limited* [1999] QCA 525; [2000] 2 Qd R 448.

[101] [2007] EWCA Civ 148; [2007] 1 Lloyds Law Rep 495.

Waller and Rix LJJ thought that the stratagem did work. Broadly, their view was that since a declaration of trust does not bring the beneficiary into direct contractual relations with the debtor, but only creates an encumbrance on the trustee's own rights, an anti-assignment clause would not prohibit the declaration unless expressly worded. The clause in question was not worded in this way. Bank of America could have sued to recover the debt with a view to paying the proceeds over to its beneficiary. If that was permissible, and if the claimant could have compelled Bank of America to bring that claim, then why should both steps not be compressed into a single *Vandepitt* proceeding? Waller LJ said there 'is no reason why the court should hold that [Bank of Zambia] should be entitled to a defence which it would not have had if some longer and more tortuous form of procedure, compelling [Bank of America] to sue, had been used.'

Hooper LJ disagreed on this point. He considered that the claimant's stratagem cut directly across the anti-assignment clause: the Bank of Zambia found itself facing a vulture fund across the court notwithstanding that it had stipulated that the debt could only be assigned to a bank or other financial institution. That restriction would have achieved very little if it could be evaded by a declaration of trust. Hooper LJ did not think that special drafting should be required to prevent the claimant's stratagem. On this view, the anti-assignment clause did not prohibit the declaration of trust but it did prevent the claimant from then operating the *Vandepitt* procedure.

What was common to all of the three Lords Justice is that they all recognised a conceptual distinction between an equitable assignment and a declaration of trust, although Hooper LJ was less inclined to accord this distinction substantial effect. The same approach, differentiating equitable assignment and trust, has been taken in Australia. In *Secure Parking (WA) Pty Ltd v Wilson*,[102] Buss JA (Martin CJ agreeing) in the Court of Appeal in Western Australia said that a trust may be created in respect of a contract which is not assignable in law.

The Bank of Zambia's position was effectively the encumbrance view of equitable assignment. On that view, there is no substantive difference between (i) an assignment of a debt and (ii) a declaration of a trust coupled with the operation of the *Vandepitt* procedure. Viewed in this way, the claimant cannot evade the anti-assignment clause merely by using different words.

This approach does not ultimately resolve the issue in *Barbados Trust*. It is still necessary to construe the clause. However it sharpens the questions one asks in doing so. Does the clause prohibit the creditor from creating in a third party a beneficial interest in relation to the creditor's right (whether the process is called equitable assignment or the declaration of a trust)? If so, what is the consequence – if the creditor/trustee sues to recover the debt, does the debtor now have a defence? Or does the breach of the anti-assignment clause only give the debtor a damages claim for any loss he may have suffered? If the beneficiary himself sues, operating the *Vandepitt* procedure, does the anti-assignment clause give the debtor a defence to the claim that he would not have had if the creditor/trustee had sued?[103]

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[102] [2008] WASCA 268; (2008) 38 WAR 350, 377 [101].

[103] See further the detailed discussion in CH Tham 'The Nature of Equitable Assignment and Anti-Assignment Clauses' in J Neyers et al (eds) *Exploring Contract Law* (2009) 283.

Conclusion

The nature of equitable assignment is at a cross-roads. Until a short time ago the conception of equitable assignment adopted by the courts was modelled on the private trust. A second conception, consistent with the etymology of 'assignment', and perhaps more consistent with practical convenience, has emerged. This second conception treats equitable assignment as involving a transfer. This conception is evident in the answers given comparatively recently by the courts to a number of issues but particularly in relation to the issue of whether the assignor must always be joined and in relation to the method of analysing anti-assignment clauses. The transfer conception of equitable assignment, if it prevails, may require us to revisit some fundamental principles of equity.