

TOPIC 3: CHOSSES IN ACTION

[1] Introduction

[1.1] Is it a chose in action?

- Choses in Action: A chose in action refers to incorporeal personal property that is incapable of being the subject of actual possession and can only be protected by legal action (*Torrington v Magee* [1902]).
- Examples: Debts, contractual rights, copyrights, patents, shares in company
 - o **Equitable choses in action**
 - Equitable choses in action include:
 - A share or interest in a partnership: *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 at 447 per Barwick CJ, Stephen, Mason and Wilson JJ; *Re Bainbridge*; *Ex parte Fletcher* (1878) 8 Ch D 218; *Wilson v Commissioner of Probate Duties (Vic)* (1978) 80 ATR 799 at 804 per Murphy J.
 - The interest of a beneficiary under a trust: *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 30; *Wilson v Commissioner of Probate Duties (Vic)* (1978) 80 ATR 799 at 804 per Murphy J.
 - The interest of a legatee: *Perpetual Trustee Co Ltd v Commissioner of Stamp Duties* (1961) 61 SR (NSW) 333; *Deeks v Strutt* (1794) 5 TR 690; 101 ER 384 at 385; *Brathwait v Skinner* (1839) 5 M & W 313; 151 ER 133 at 137; *Wilson v Commissioner of Probate Duties (Vic)* (1978) 80 ATR 799 at 804 per Murphy J.
 - A reversionary interest under a will: *Re Tritton*; *Ex parte Singleton* (1889) 61 LT 301; *Wilson v Commissioner of Probate Duties (Vic)* (1978) 80 ATR 799 at 804 per Murphy J.
 - What unifies each of these specific instances of equitable choses in action is that historically they were only recognised and enforced in equity.
 - o **Legal choses in action**
 - Legal choses in action include:
 - A debt. At general law, the essence of a "debt" is that a debtor is obliged to pay money to the creditor: *King v Brown* (1912) 14 CLR 17 at 25 per Griffith CJ and at 36 per Isaacs J; *Olsson v Dyson* (1969) 120 CLR 365 at 375 per Kitto J and at 385 per Windeyer J.
 - Negotiable instruments (including bills of exchange, promissory notes and cheques): *Colonial Bank v Whinney* (1886) 11 App Cas 426.
 - A policy of insurance: *Re Moore*; *Ex parte Ibbetson* (1878) 80 Ch D 519.
 - Shares in the issued capital of a company: *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 at 156-157; *Torkington v Magee* [1902] 2 KB 427 at 430 per Channell J (for the court).
 - The benefit a creditor enjoys under a guarantee given by a guarantor: *Loxton v Moir* (1914) 18 CLR 360; *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643 at 660.

[2] Assignability

[2.1] Can it be assigned?

- Public pay

- Principle: The holder of public office cannot assign a right **to be** paid while in office. That public officer can assign a right once paid (*Mulvenna v Admiralty*).
 - Exception: If the dignity of the office or the discharge of duties would **not** be impacted, public pay is assignable (*Arbuthnot v Norton*).
 - Facts: In Norton, a public official had a right, by statute, for 6 months of salary to be paid to his estate when he died. He assigned it away when he was alive and in office.
 - Held: assignment was effective because it did not impinge upon the concerns that give rise to the prohibition: giving away the money that his estate would be awarded following his death would not impact the work he does while he is still alive.

- Bare rights to litigate

- **Introduction**: has a claim in [negligence] against Y as her [negligence] caused [loss to X's equipment]. Here, Z has acquired this right. Prima facie, you cannot assign a bare right to litigate for tort, breach of equitable obligations and rights to sue for unliquidated damages for breach of contract to another party *Ellis v Torrington*
 - Define: a bare right to litigate is a right to litigate that cannot be assigned on its own, but may be assigned if it is ancillary to the assignment of other forms of property
 - Example: A has a house. B drives through it. A has a claim in tort of negligence against B. A cannot assign this away to someone else. BUT, A could assign the whole property away to someone else, and what comes with that is the right to sue B. The right to sue is no longer bare, it is ancillary to the property A is assigning away.
 - Includes: Rights to sue for torts; Breaches of equitable obligations; Rights to sue for unliquidated (not estimated) damages for breach of contracts.
 - [HD] Rationale: the doctrines of maintenance and champerty posit that it would be undesirable for individuals to maintain litigation they have no interest in, or profiteer off of such. Though these have since been abolished in Australia, the UK decision of *Trendtex*, in the context of similar law changes, suggests the continued relevance of the prohibition.
- Exceptions:
 - **[1] Can assign property if incidental rights**: Can assign property which have incidental rights to litigate (*Ellis v Torrington*) i.e. assignment of entire business through sale with any of its rights to litigate
 - Can assign liquidated damages: Debts can be assigned, EVEN in the case where the debt was overdue (where there was a right to sue) (*Fitzroy v Cave*)
 - Can assign benefit of contract before breach has occurred: Can assign the benefit of the contract before the breach itself has occurred, however once there has been a breach, the basic common law prohibition no assigning bare rights to litigate is in force which is unassignable (*Torkington v Magee*)
 - **[2] Can assign the fruits that may come out of litigation**: Can assign any future property that may arise out of the litigation, not the cause of action itself (per Parker J at 489 in *Glegg v Bromley*)
 - Facts: G sued someone for defamation and was pursuing that claim though assigned to her husband all that she was going to get under the claim.

- Rationale: the maintenance and champerty concerns associated with the prohibition on assigning a right to litigate (although since abolished) do not arise where control over the litigation remains with the assignor, who only passes on the fruits of the litigation. Such a right does not allow the assignee to interfere in the proceedings.
- For exam: is X assigning the fruits of the claim (Glegg v Bromley) or the right to litigate (Trendtex)?
- **[3] Can assign a course of action IF assignee has a genuine and substantial interest, or legitimate commercial interest:** (*Trendtex Trading Corp v Credit Suisse*, with the exception being recognised in *Equuscorp Pty Ltd v Haxton*) → (Note: only necessary for bare rights to litigate, not if they are ancillary).
 - Definition of sufficient legitimate interest: For a sufficient legitimate interest to arise, it does not need to pre-exist the assignment of the right to litigate (*Dover v Lewkovitz* at [23], emphasized in *Billabong v Vango Mining* at [126]). But, there must be some commercial interest which exists already or by reason of other matters, and which receives ancillary support for the assignment, though it cannot be purely profit itself (per *National Mutual Property Services (Australia) v Citibank Savings* at 540). The interest of the assignee, however, cannot be the assignment itself, but must be a 'distinct or separate' interest in the claim (*Billabong v Vango Mining* at [126]).
 - Application in Trendtex: Trendtex could assign right to litigate to Credit Suisse as Trendtex owed money to CS that resulted in the claims against the Central Bank of Nigeria and hence had legitimate interest against CBS.
 - Cannot assign bare rights in whole scheme of transaction: However, the second transfer between CS to a third party was void due to the prohibition, as the third party had no interest in the litigation. The Court treated the two elements as a single transaction and hence was invalid (*Trendtex Trading Corp v Credit Suisse*).
 - For exam: is X assigning the fruits of the claim (Glegg v Bromley) or the right to litigate (Trendtex)?
 - A legitimate interest:
 - Pre-existing interest Assignee must have a commercial interest in the litigation prior to the assignment (i.e. not just because the assignee bought the right to litigate) *Dover v Lewkovitz*
 - Pre-existing creditor: Assignee is a creditor of the assignor and has a vested interest in the litigation succeeding Trendtex
 - Not a legitimate interest:
 - Profit: Assignee is a third party and is only seeking to purchase the assignment for profit Trendtex
 - Unnecessary litigation: Could include advocacy groups trying to achieve a legal outcome Campbell's Cas
- Can assign unliquidated damages IF assignee has a legitimate interest: The claim in *Trendtex* was for unliquidated damages for breach of contract (*Trendtex Trading Corp v Credit Suisse*).
- Can probably assign tort claims IF assignee has a legitimate, commercial interest: PROVIDED that the tort claim is NOT inherently personal such as defamation or personal injury (*South Australian Management Corp v Sheahan*). The Court of Appeal in England recently indicated that even a

claim for personal injury can be assigned to someone with a genuine personal interest in the claim (*Simpson v Norfolk and Norwich University Hospital NHS Trust*). There is no applicable, similar law in Australia yet however there is a chance that this is *developing*.

- **[HD analysis] Corrosion of Prohibition on Bare Rights to Litigate — through Litigation Funding example:** The prohibition however may have corroded due to the abolition of the legal doctrines of maintenance in champerty in the *Maintenance, Champerty and Barratry Abolition Act 1993*. It is noted however that, although they may have been abolished, paragraph 2(2) of Schedule 2 in the *Civil Liability Act 2002* states that the abolition does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal. Furthermore, the UK decision of *Trendtex*, in the context of similar law changes, suggests the continued relevance of the prohibition.
 - In Australia, the HCA in *Campbells Cash and Carry v Fostif* held that litigation funding was not an abuse of process, but the HC did not determine whether the bare rights to litigate could be assigned to a litigation-funder and so the precise limits on bare rights to litigate remained unclear in Australia.
 - In New Zealand, where laws of maintenance and champerty continue, the case of *Waterhouse v Contractors Bonding [2013] NZSC*, accepts that litigation funding may have a legitimate purpose, provided that it is not an abuse of process which would breach the prohibition on bare rights to litigate. However, the case does not constitute a permissible or impermissible bare right to litigate. In *PwC v Walker [2017]*, the NZSC states that the underpinning concern of the prohibition on assignment is that the assignee would obtain control, a right to interfere and right the profits.
 - However the court stated that it is a matter of balance and that some element of profit sharing and control of proceedings can be legitimate. This is important as this would suggest that in Australia, where maintenance and champerty are not laws, there is a possibility that the prohibition on the assignment of bare rights to litigate will not survive, however that is not yet clear.

Assignability: contractual prohibition on assignment

- **Introduction:** It is not possible for X to assign the whole contract that X has with Y to Z, without the consent of Y. Generally, benefits of contract can be assigned BUT the burdens cannot, and hence the whole contract can never be assigned without the consent of the other party, which will give rise to novation (*Linden Gardens Trust Ltd v Lenesta Sludge Disposals [1994]* at 103).
- However there can be prohibitions on assigning benefits: There may be reasons which preclude assignment (*Pacific Brands Sport & Leisure Pty Ltd v Underworks [2006]*).
 - **Statutes:**
 - Depending on construction of statute, Parliament can override contractual prohibition: The statute must expressly state that it is permissible to sell choses in action (*Owners of Strata Plan 5290 v CGS & Co Pty Ltd [2011]*).
 - Application: The court held that the statute had not changed the underlying prohibition, as it only stated that liquidators could sell property of the company including a choses in action but not unassignable choses in action, and therefore the benefit of that building contract could not be assigned (*Owners of Strata Plan 5290 v CGS & Co Pty Ltd [2011]*).
 - Facts: A term in a building contract said neither party could assign it. When the company went bust, liquidator purported to assign the benefit of the right to be paid under the contract to someone else, despite the clause, stating that the Corporations Act has a provision in it that says a liquidator

can assign a company's property, including choses in action.
Rejected by Court of Appeal: the statute only means that you can assign choses in action that are available to assign.

○ **Prohibitions of assignment in contract:**

- Generally: If there is a contractual prohibition on assignment, then it is not assignable (per Lord Browne-Wilkinson at 107-108 in *Linden Gardens*).
 - Application: In *Linden Gardens*, a property owner engaged a company to remove asbestos. The contract had a clause in it that said the property owner could not assign the contract without the written consent of the company. The company did a poor job, and the property owner had a claim against the company for breach of contract. The property owner then assigned the building to another party, along with the claim for damages, without the consent of the company. The new owner was unable to claim damages for breach of contract.
- However:
 - Fruits assignable: However, this does not preclude the assignment of the fruits of a contract when it has been received. This is a contract that is enforceable against the assignor of the fruit, but not against the other contracting party because the contractual rights themselves have not been assigned (*Bluebottle UK Ltd v Deputy Commissioner of Taxation*).
 - Facts: A company's constitution had a clause stating that the company only needs to pay dividends to its shareholders. A shareholder assigned, not the share itself, but the right to receive dividends from the shares. HC: the company does not have to pay the dividend to the assignee, though you can still assign it away → When the shareholder receives the dividend, however, they can be required to hold the dividend for the assignee
 - Trust not prevented: A contract prohibition on the assignment of contract rights does not necessarily prevent someone from creating a trust (*explored later*)

○ **Personal service contracts**

- Unassignable: Generally, benefits of a personal service contract cannot be assigned unless the old contract is terminated by notice or by mutual consent and a new contract of service is entered into by agreement (Viscount Simonds LC in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940])
 - Employee: The benefit of a contract for rendering personal services (i.e., payment / work) cannot be assigned without consent of the employee (*Nokes*)
 - In *Nokes*, Lord Atkin (at 1026) stated that an employee should have the right to choose for himself whom he would serve and hence the benefit of that contract had not been effectively assigned given it was a personal service contract.
 - Facts: In this case *Nokes* was employed by a coal miner. His employer company was transferred to a new company. He then skipped work and received a fine for skipping work. It was held that you cannot transfer the benefit of a contract for personal services without the consent of the employee.
 - If identity of other person important, cannot assign benefit: where the identity of the other party is vital, then the assignment of a benefit

held under the contract cannot occur (*Pacific Brands Sports & Leisure Pty Ltd v Underworks Pty Ltd*).

- Following **Pacific Brands**: [company] was only ever agreeing to deal with [person].
 - Per the facts, it appears as though the identity of [person]'s was important. This is because X.
 - This resembles the circumstances in *Pacific Brands*, whereby a contract gave Underworks the exclusive right to use the trademarks, but in return, Sara Lee had a lot of control over the quality of what Underworks sold. However, under the contract, Underworks was not agreeing to anyone else having that level of control over its business. It was, therefore, sufficiently important to the parties that each was only dealing with the other party and that the rights were not assignable.
 - Hence, there could be no assignment without consent, which was not given.
 - This is opposed to the case of *Tolhurst*, whereby... [see below].
- **[COMPARE]** Per the facts, it appears as though the identity of [person]'s was not overly important. This is because X.
 - The present facts more closely resemble the case of *Tolhurst*, where *Tolhurst* entered into a contract with a company who agreed to pay for 750 tonnes of chalk every week for 50 years at a particular price. After the company assigned the contract to another company, *Tolhurst* argued that who it was concerned with who they dealt with. But, the court found that who bought the chalk did not matter, provided they pay *Tolhurst*.
- Identity of other person important in debtor-creditor relationship: The Court in *Fitzroy v Cave* has suggested that it has generally not refused to recognise a debt as an assignable choses in action, however suggested that if the identity of the debtor is important due to a particular relationship then that may not be assignable.
 - If relationship important, just contractual prohibition: Parties make contractual prohibition
 - Indeed, demonstrating the importance of debts to commerce, Parliament has made the prohibition of assignability ineffective against third parties → Statute: *Personal Property Securities Act 2009 (Cth)*, s 81(2) stipulates that:
 - Creditor assigns the relationship to another creditor: the prohibition is enforceable against the assignor in that if the assignor assigns the debt when there is a prohibition on assignment, the debtor can sue the assignor for damages rather than the assignee.
- Exception to the exception: Assignable Situations: Change in ownership; Change in management; Supply contracts where identity is irrelevant
 - Identity of company preserved, management changed: The replacement of directors and managers or a change in ownership, which change the identity of the 'master', would not yield the same prohibition as the identity of the company is preserved (Lord Atkin at 1030 in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940])

- When identity irrelevant, can be assigned: In a situation where the identity of the contracting party is not important, such as the supply of goods where only the supply of such goods are of central concern to the contract, then the assignment will not be prohibited by personal services contract argument (*Tolhurst v Associated Portland Cement Manufactures*).
- Exception to the exception: Negative obligations/ covenants: *Mid-City Skin Cancer & Zahedi Anaki* held that in a situation where the obligation that generates the benefit is negative in nature, there can be an exemption to the general prohibition against assignment of personal service contracts.
 - Rule: Campbell J held that although the entire employment contract COULD NOT be assigned, it is possible sometimes for some parts of the employment contract to be assigned even if the other parts cannot, PROVIDED THAT the assignment does not infringe the principle that underpins the personal service contracts rule and the parts is severable so that it makes sense on its own.
 - Application: In this case, Dr Zahedi had an obligation not to misuse the documents he obtained from his previous employer at his new job. This was an implied term in his prior employment contract that could operate on its own because the obligation is simply to not do anything with those documents. Therefore the **NEGATIVE obligations were assigned effectively to the plaintiff**, and the plaintiff could sue.
 - Facts: The doctor worked in medical practice which was sold, though used documents to contact former patients.
 - **Per the facts**, it is possible that Y acquired the benefit of the negative covenant in the contract between A and X, whereby A agreed [not to act on any similar film project for two years]. The benefit of such negative stipulations can potentially be assigned, notwithstanding that the contract is one for personal service and so the benefit of it cannot be assigned in general, provided the negative stipulation is severable from the rest of the contract (*Mid-City Skin and Laser Centre*)

END OF SAMPLE