Michael Bridge

The nature of assignment and non-assignment clauses

Article (Accepted version) (Refereed)

THE NATURE OF ASSIGNMENT AND NON-ASSIGNMENT CLAUSES

Michael Bridge*

F.B.A., Cassel Professor of Commercial Law, London School of Economics;

Professor of Law, National University of Singapore

A. INTRODUCTION

The purpose of this article is to examine the nature of assignment as it relates to contractual debts and contractual rights in general, before addressing problems presented by non-assignment clauses.[1] The assignment of things in action sits precariously between contract law and property law and non-assignment clauses cannot properly be understood without an appreciation of this hybrid character of assignment.[2] Non-assignment clauses pose the question whether and in what circumstances contractual rights are items of property. They also demand an examination of the doctrine of privity of contract and a response to the question whether one contracting party has the right unilaterally to vary the contract. Finally, non-assignment clauses set two primary values at odds with each other, namely freedom of contract and the free alienation of items of property. To a significant extent, the practical problems presented by non-assignment clauses will diminish when expected secondary legislation nullifying non-assignment clauses in the field of receivables (or book debts) comes into force,[3] but some of the leading cases do

* An earlier version of this article was presented at a conference on personal property law organised by the Centre of Banking & Finance Law of the National University of Singapore on 2 April 2015. Subject to the usual disclaimers, the author is grateful to James Penner for comments received.

[1] Non-assignment clauses in the case of leasehold interests in land, not considered in this article, have experienced an altogether different fate: *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; [1993] 3 All E.R. 4173 All E.R. 417.

[2] See L. C. Tham, "Notice of Assignment and Discharge by Performance" [2010] L.M.C.L.Q. 38; L.-C. Wolff, "Assignment Agreements under English Law: Lost between Contract and Property Law?" [2005] J.B.L. 473. The decision in *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68; [2001] Q.B. 825 on choice of law is a clear demonstration of the difficulties arising from the characterization of assignment.

[3] The Draft Business Contract Terms (Restrictions on Assignment of Receivables) Regulations 2015, to be made under the Small Business, Enterprise and Employment Act 2015, which received the royal assent on 26 March 2015 and will come into force on a date to be appointed.

not involve receivables and the subject therefore continues to merit attention for practical as well as for theoretical reasons.

Are contract rights also property rights?

This is not the place for a full-blown consideration of what amounts to a property right. Suffice it to say that if property is to be extended from the tangible to the intangible – and debts and contract rights are certainly intangible – then some of the devices by which rights in tangible assets are estimated as proprietary need to be moderated. The location of a debt, for example, can only be metaphorical. An intangible thing cannot be possessed in a way that factually excludes others. It cannot be enjoyed in and of itself. Consequently, others may not be excluded from the enjoyment of an intangible thing that may not in fact be enjoyed at all.

Lord Justice Scrutton once said: "Courts of equity...treated debts as property, and the necessity for an action at law to reduce the property into possession they regarded merely as an incident which followed on the assignment of the property."[4] There is some suggestion in this passage of the debt and its proceeds being conflated, a process that is evident elsewhere when courts apply the distinction between fixed and floating charges.[5] Yet, there is a conceptual distinction between a debt and its money proceeds even though the debt itself is just an abstract husk that can be opened up to reveal abstract proceeds. These in turn will generate further abstract proceeds until a tracing journey from the debt through the banking system ends with tangible goods or services. The metaphor of the tree and its fruit must be treated with some caution in the case of debts and their proceeds. In normal cases, the payment of a debt liquidates a debt at the same time as the debt gives rise to identifiable proceeds. Nevertheless, whereas the repaid principal and the debt may not coexist, the debt and periodical interest on the debt can.

[4] *Ellis v Torrington* [1920] 1 K.B. 399, 410-11; 89 L.J.K.B. 369.
[5] See *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28; [2001] 2 A.C. 710.

Assignment gives us one clear example of where payment made to an obligee creditor does not extinguish the debt. Once an obligor is notified of an assignment, the making of payment to the obligee (and assignor of the debt)[6] is not payment of the debt at all and the debt continues to exist. The power to dispose of or liquidate an item of property may be seen as a primary characteristic of a property entitlement. It no longer exists in the assignor once the assignment has been notified to the obligor, the right itself having been surrendered when the assignment was made.

What effect does assignment have on the contract creating the right?

Before we turn to non-assignment clauses, the character of assignment, particularly its relation to contract, needs to be explored. A wide variety of rights may be made the subject of an assignment but the concern of this article is with contract rights and debts.[7] Three related questions may be taken here for consideration. First, does the assignee acquire a contractual relationship with the obligor? In particular, does the assignee become a party to the contract between obligor and obligee? Secondly, does the assignor retain anything of the right that is assigned to the assignee? More particularly, does the obligee retain the right to have the obligation enforced? Thirdly, to the extent that the assignment entails a change in the obligor's performance of its obligations, how is this to be reconciled with the integrity of the contract itself? Does assignment, as opposed to novation, amount to a unilateral variation of the contract, given that the assignment is effective without the obligor's consent?

(a) the relationship between obligor and assignee

In considering the relationship of obligor and assignee, a useful comparison may be drawn with the position of a third party beneficiary with a right of enforcement under the contract. First of all, the Contracts (Rights of Third Parties) Act 1999 makes it clear that, in conferring the right to enforce a term of the contract on the third party, it does not

[6] Hereinafter, instead of a compound reference to obligee/assignor, I shall refer to the assignor. In some instances, a simple reference to the obligee is more appropriate.
[7] Hence, the questions raised here do not present themselves in cases of non-contractual assignment.

confer on the third party the status of a contracting party.[8] The Australian High Court, however, in *Coulls v Bagot's Executor & Trustee Co. Ltd*[9] treated a gratuitous joint promisee as a contracting party: the distance between a designated third party beneficiary intended to have direct enforcement rights and a joint promisee may be either insubstantial or non-existent in some cases, but here again the legislation draws a clear distinction between the third party standing dehors the contract and the promisee as contractual counterparty.[10] The third party is not treated by the legislation as a promisee, acquiring rights instead by virtue of a promise passing between the two contracting parties. In enforcing the term, however, the third party is permitted by the legislation to have recourse to any remedy that would have been available to it had it been a party to the contract. It is made clear that these remedies include discretionary equitable remedies.[11]

The non-contractual status of an assignee should be even clearer because the assignee, not mentioned in the contract, is a late entrant to the proceedings. Nevertheless, the position was said by Collins MR to be "doubtful" in what is probably the leading case on the subject of assignment, *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*.[12] Taking a firmer line, Sir John Pennycuick in a later case was adamant that assignment did not put the assignee into a contractual relation with the obligor,[13] though he carefully confined his remarks to equitable and not statutory assignment in such a way as to imply that statutory assignment might possibly be a different matter.[14] Now, although the statute provides that an assignment passes the legal right in the thing in action to the assignee,[15] it is expressed purely in proprietary terms and supplies no ground for concluding that a statutory assignee becomes a party to the contract generating the

[8] Section 2(1).
[9] [1967] HCA 3; (1967) 119 C.L.R. 460.
[10] Contract (Rights of Third Parties) Act, s. 5 (preserving the right of the promisee to enforce the term).
[11] Contract (Rights of Third Parties) Act, s. 2(5).
[12] [1902] 2 K.B. 660, 668; 71 L.J.K.B. 949, affd [1903] A.C. 414, 72 L.J.K.B. 834.
[13] cf. *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, 108; [1993] 3 All E.R. 417: obligor and assignee brought into "direct contractual relations"; G. Tolhurst, "Equitable Assignment of Legal Rights: a Resolution to a Conundrum" (2002) 118 L.Q.R. 98, 101: "[T]he assignee obtains an interest in the contract that exists between the assignor and the obligor."
[14] *Warner Bros Records Inc. v Rollgreen Ltd* [1976] Q.B. 430, 445.
[15] Law of Property Act 1925, s. 136(1).

thing in action. This is hardly surprising since things in action need not spring out of a contract and the scope of the statute transcends contractual things in action. Moreover, the authoritative view is that the statute merely creates machinery for the enforcement of an equitable right.[16] That said, the statute would give the assignee direct access to "all legal and other remedies", whereas, in the case of equitable assignment, access to specific performance, for example, would be provided only through the joinder of, and therefore through the person of, the assignor.

The third party legislation, while not treating the third party as a contracting party, nevertheless takes care to identify its position as one that cannot be superior to that of the promisee. First of all, the third party's right of enforcement is subject to any relevant contractual terms.[17] This is a broad expression that can encompass procedural requirements for the assertion of a right as well as what follows. Next, all defences and set-offs relevant to the beneficial term and arising "from or in connection with the contract" – a reference to equitable set-off and common law abatement[18] – or from an express term of the contract, that could have been raised by the promisor against the promisee, are equally available to the promisor against the third party.[19] The position here appears to be identical with that prevailing in the case of a third party assignee.[20] Finally, under the third party statute, the third party may take advantage of any remedy, including equitable remedies of injunction and specific performance, available to the promisee. [21] The same applies to equitable assignment, since the action is brought in or with the name of the assignor. As for statutory assignment, the Act explicitly provides the assignee with "all legal and other remedies".[22] Again, bars on the grant of a discretionary remedy, for

[16] *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 K.B. 660, 676; 71 L.J.K.B. 949; *Torkington v Magee* [1902] 2 K.B. 427, 435; 71 L.J.K.B. 712; *Burlinson v Hall* (1884) 12 Q.B.D. 347, 349; *Walker v Bradford Old Bank* (1884) 12 Q.B.D. 511, 515; 53 L.J.Q.B. 280.
[17] Contract (Rights of Third Parties) Act 1999, s. 2(4).
[18] As in s. 53 of the Sale of Goods Act 1979, codifying *Mondel v Steel* (1841) 8 M & W 858.
[19] Contract (Rights of Third Parties) Act, s. 4(2), (3).
[20] Although s. 136 of the Law of Property Act 1925 refers only to "equities", this should be given an expansive interpretation to include defences such as legal set-off.
[21] Contract (Rights of Third Parties) Act 1999, s. 2(5). In connection with equitable remedies, the volunteer status of the third party is to be ignored: ibid.
[22] Law of Property Act 1925, s. 136(1).

example the clean hands doctrine, based on the conduct of the promisee, should have an inhibiting effect also on the position of the assignee or the contractual third party.

In gross, the entitlement of an assignee, akin to that of a third party beneficiary, is measured by the entitlement of the assignor. This is a key difference between assignability and negotiability. Apart from defences and remedies, this same point is demonstrated in a different way by *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*,[23] which is of some considerable interest in so far as the non-assignment clause may deal with contractual performance other than the payment of sums falling due. The case concerned a long-term,[24] fixed price requirements contract for the supply of chalk to a company carrying on a cement manufacturing business on land adjoining the supplier. Although the contract imposed no maximum limit on the offtake that could be demanded by the cement manufacturer, the circumstances showed an implied restriction based on the size of the business that could be run on that adjoining land. As part of a corporate reconstruction, the rights arising under the supply contract were assigned to a new company that was substantially more capitalised than the assignor company. The supplier demanded a substantial price increase for agreeing to the assignment, but the assignee refused to pay it and insisted on delivery on the agreed contract terms. The supply entitlement of the assignee was defined by the appetite for the chalk of whoever conducted a cement business on the adjoining land, and not by the appetite displayed previously by the assignor,[25] and was therefore impliedly assignable.[26] The decision is clearly correct: the supplier could not have objected if the obligee, instead of assigning its rights under the contract, had increased the size of its business. Even if the supplier expected the manufacturing business to be carried on at the same rate for the long-term future of the contract, this expectation was merely a factual one and the law of contract does not protect mere factual expectations.[27]

[23] [1902] 2 K.B. 660; 71 L.J.K.B. 949, affd [1903] A.C. 414; 72 L.J.K.B. 834.
[24] It was 35-50 years and the dispute arose just a few years into the agreement.
[25] [1903] A.C. 414, 423-24; 72 L.J.K.B. 834. A decision, hard to justify, that goes the other way on not dissimilar facts is *Kemp v Baerselman* [1906] 2 K.B. 604.
[26] [1903] A.C. 414, 420, 72 L.J.K.B. 834. This may be seen as another way of saying that the obligation was not of a personal character in that these were not measured by the personal requirements of the obligee.
[27] See, e.g., *Kurt A. Becher GmbH & Co. KG v Roplak Enterprises SA (The World Navigator)* [1991] 2 Lloyd's Rep. 23, CA.

(b) the post-assignment position of the assignor

The position of the assignor, in relation to the obligor, is usually overlooked when the assignment of a debt or other contract right takes place. If it were the case instead of a third party beneficiary, then the legislation on third party rights is clear: the promisee's right to enforce the contract is not affected by the conferment of a right directly enforceable by the third party.[28] The legislation makes no provision for joining the third party and the promisor in proceedings against the promisor, and certainly does not require the third party to obtain the consent of the promisee to initiate proceedings. Nor does the legislation make provision for the case where both promisee and third party wish to sue, or for the case where one has sued the promisor to judgment and then the other wishes to bring proceedings. If both promisee and third party wish to sue, rules of court could bring about a consolidation of proceedings.[29] The case of consecutive actions is more difficult because the interests of both promisee and third party have to be accommodated within the principle that the promisor should not suffer double jeopardy as a result of non-performance.[30] The legislation makes available to the third party all the remedies that would have been available to it if it had been a party to the contract. This is close to saying that the remedies are those that would have been available to the promisee, but it does not mean that any damages recoverable by the third party will be identical to those that might have been recovered by the promisee. First of all, there are issues concerning the measure of damages where a breach of contract causes no appreciable harm to the promisee but injures a third party. At issue here is the question of the promisee's so-called performance interest and whether the promisee might yet recover substantial damages reflecting the third party's loss, to be held for the account of the third party.[31] Secondly, the promisee's relations with the third party might be damaged by the promisor's non-performance, which damage may be distinct from any loss suffered by

[28] Contract (Rights of Third Parties) Act, s. 5.
[29] C.P.R. r. 19.1.
[30] A similar issue could arise in a conversion action, where two eligible claimants bring successive actions for interference with chattel.
[31] In order to avoid the "black hole" problem: see *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518; [2000] 4 All E.R. 97. This issue is not dealt with in this article.

the third party and may or may not be recoverable under the remoteness of damage rule from the promisor.

A final point issuing from third party legislation concerns the position of a promisee who impedes or frustrates the receipt of benefit by the third party. This may be because the promisee colludes with the promisor in an attempted variation of contract or waiver of obligation. The legislation is clear in providing that the contracting parties may not "by agreement, rescind the contract, or vary it in such a way as to extinguish or alter the third party's entitlement under that right, without his consent".[32] It is less clear whether a promisee may not unilaterally waive performance or surrender the right to performance partially or in full, temporarily or permanently, by an estoppel. The promisee may have other benefits due under the contract and have good personal reasons for a unilateral action of this kind. Moreover, where the promisee breaches the contract so that the promisor is no longer compelled to perform, the question now is whether the promisee incurs liability to the third party. This would have to be on the basis of an implied term that the promisee will not act so as to prevent the accrual of a third party's benefit. Similarly, though less plausibly, the promisee may be constrained from waiving performance or estopping itself so as to affect the position of the third party. The Act does not confine terms that a third party can enforce to express terms, and an implied term that a promisee may not interfere with a third party's vested entitlement would certainly purport to benefit the third party, thereby raising the statutory presumption of direct enforceability.[33] The inference of such a term would nevertheless be a very debatable matter.

Returning now to assignment, some of the same issues present themselves. The assignor might incur liability to the assignee as a result of the obligor failing to perform. There are no statutory implied terms akin to those in a sale of goods contract regarding the quality and fitness of the assigned right, but the assignee may well be under an express recourse liability in the contract of assignment. Even if the assignment exhausts all of the fruits of

[32] Contract (Rights of Third Parties) Act 1999, s. 3(1).
[33] Contract (Rights of Third Parties) Act, s. 2(1).

performance, it is important to understand that, though we speak of the assignment of contract rights (as well as of contractual debts, so far as these may be different), the failure of the assignee to succeed to the assignor's position in the contract with the obligor requires a more fastidious assessment of the position that takes account of the awkward conjunction of contract and property. Supposing the assignor has performed all of its contractual obligations, the assignment of rights owed to the assignor does not discharge the contract between obligor and assignor. Where obligations remain to be performed by the assignor, the rights accruing to the assignee are burdened by those obligations even though the assignee comes under no personal duty to perform them.[34]

If the obligor fails to perform, the assignee may resort to an action either against the obligor or, if the contract of assignment permits it, the assignor. Assuming the latter occurs, the position of the assignor against the obligor falls to be considered. The orthodox approach would be to subrogate the assignor to the rights of the assignee against the obligor if assignor and assignee have not already provided for a reassignment. Nevertheless, one drawback is that the assignor's loss arising from the obligor's default might be greater than the loss recoverable by the assignee from the assignor under a recourse provision. A better approach, it is submitted, is to recognise that, although the assignor has transferred the *propert*y in the assigned thing to the assignee,[35] the assignor retains a vestigial *contractual* right to have performance rendered by the obligor to the assignee. Consequently, upon a default on the part of the obligor, the assignor should be entitled to damages representing its own loss. That loss might include liability under a recourse provision in the contract of assignment, but it might also include other losses,[36] all claims being subject to the remoteness rule in the normal way. An assignor seeking damages for its personal loss in this way would not be enforcing the assignment but would instead be suing the obligor for breach of the contract creating the assigned right. This approach would neither detract from the assignee's rights nor add to the obligor's contractual burdens. Whether the assignor could go further and recover damages on behalf of the assignee might depend upon whether this is one of those rare cases of

[34] *Barker v Stickney* [1919] 1 K.B. 121.
[35] *Redman v Permanent Trustee Co. of NSW Ltd* [1916] HCA 47; (1916) 22 C.L.R. 84, 95.
[36] e.g., costs incurred in reimbursing the assignee.

equitable assignment[37] where the assignor acting alone could bring proceedings against the obligor.[38] In this latter case, the assignor would be seeking enforcement of the assignment. The same would be the case if specific performance were sought by the assignor.

As for the case where the assigned right does not accrue or accrue in full owing to variation, breach of contract, waiver or estoppel, there is no statutory machinery to circumscribe the behaviour of the assignor as contractual obligee. If a debt has been assigned, and the assignment has been notified to the obligor, the assignor is no longer the creditor and therefore no longer able to forgive the debt or modify it as to amount, interest or payment date. The property in the debt is vested in the assignee. If the assignment has not been notified to the obligor, the obligor should retain the benefit of any such action and ought not to be prejudiced by an undisclosed assignment. The assignor's action falls within the power to give a good discharge. In both cases, the same result should follow for other contract rights. But action of the above types might infringe the terms, express or implied, of any contract between assignor and assignee. Notifying the obligor of an assignment will afford protection to the assignee, but some assignments are for good commercial reasons carried out on a non-notification basis.

(c) the compatibility of contract and assignment

In the straightforward case of assigning a contract debt, the effect of the assignment, once notice of it has been received by the obligor, is that only by paying the assignee will the obligor be discharged. Taking the simple case of a contract to make payment by transferring funds to the assignor's designated account, this means that a direction to pay the assignee instead necessarily entails a modification of the contractual terms of payment as they concern the identity of the payee and the receptacle for payment. It is the debt that is being assigned and not the proceeds of the debt in the hands of the assignor. We have seen that no greater burden can be placed on the obligor, but the change in

[37] Not statutory assignment, given that the legal and beneficial interest have both passed to the assignee.
[38] See *Three Rivers District Council v Governor and Company of the Bank of England* [1996] Q.B. 292; [1995] 4 All E.R. 312.

payment details would not impose on the obligor an appreciable extra burden. As for the performance of other contractual obligations, suppose that the contract calls for delivery at the buyer's premises. A demand for delivery at the assignee's premises might in some cases impermissibly increase the burden, leaving the obligor free to deliver as agreed under the contract. In other cases, the change of address might not increase the burden at all.[39] A further question is whether there are circumstances in which the obligor would be entitled to refuse a different but lesser burden. Outside assignment cases, if a seller can insist to the buyer that the original delivery term continue to apply, despite the buyer's offer to substitute for it a less expensive and less exacting alternative,[40] then it must follow that an assignee is no better placed to insist upon the change. So, if a contract calls for delivery on board a vessel to be nominated by the buyer, an assignee may not demand that the goods be delivered in store at the load port, the effect of which would be to liberate the seller from the burden of obtaining an export licence, clearing customs and engaging a firm of stevedores to load the goods on board. The obligation to deliver on board remains an obligation to deliver on board, but this time the ship's master is the agent of the assignee to take delivery.

To reconcile assignment with the contract from which it springs, in a way that does not constitute a unilateral interference with that contract by the assignor, an implied term seems the most plausible approach. An implied term would be repelled by a contract of a personal character,[41] and it could not coexist with a non-assignment clause. In remaining instances, the type of implied term needs to be identified. The test of the reasonable bystander would not provide a universal justification for assignment in remaining cases,[42]

[39] Article 9.1.3 of the UNIDROIT *Principles of International Commercial Contracts* (2010), in asserting that the assignment of a non-monetary obligation must not make the obligor's burden "significantly more burdensome", thereby concedes that the burden may be increased. Two examples are provided, one of an assignment that does not increase the burden and one that amounts to an impermissible increase in the burden, but together they do not give real guidance as to where the line is quantitatively drawn. Additional costs arising from the assignment may be recovered as "compensation" from the assignor (art. 9.1.8) (on which point see also art. 11:906 of the *Principles of European Contract Law*).

[40] *Maine Shipping Co. v Sutcliffe & Co.* (1917) 87 L.J.K.B. 382.

[41] Where the right to performance may not be assigned: *Nokes v Doncaster Amalgamated Collieries* [1940] A.C. 1014; [1939] 3 All E.R. 549.

[42] In *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] A.C. 414, 420; 72 L.J.K.B. 834, the long-term character of the contract in that particular case led Lord Macnaghten to construe it "as if" it were a contract between each of the two principals as well as their successors and assigns.

least of all where the assignment, for fear of upsetting the obligor, is concealed from the obligor by taking place under a non-notification factoring agreement. A term necessary to give business efficacy to the contract does not fit the case; an implied term permitting assignment does not serve the cause of making the contract a workable commercial entity. Further, any claimed need for it is incompatible with workable contracts that contain a non-assignment clause. That leaves a term implied in law. The silence of the law on the existence of such a term comes close to an admission that assignment is not to be reconciled with contract at all. Instead, a proprietary wand is being waved to justify what would otherwise be an anomalous and unjustifiable interference with contract, with the wand staying down where the burden of change would be excessive. An acceptance of the view that assignment is fundamentally incompatible with contract has implications for non-assignment clauses.

What is assignment?

It may be rather basic to ask what is the nature of an assignment, but it is relevant to the later discussion of non-assignment clauses. The question here is whether assignment is simply a transfer of title not dissimilar from the transfer of the legal title that occurs in the case of a gift of a tangible thing, or whether it must necessarily be constituted in the form of a trust. The trust question necessarily leads to the dismissal of statutory assignment, which invests in the assignee the "legal title", thereby incorporating the beneficial title that is transferred under the equitable doctrine, since statutory assignment merely builds upon an underlying equitable assignment. Turning now to equitable assignment, there is a distinction to be drawn between the equitable assignment of a legal thing in action and the equitable assignment of an equitable thing in action.

Taking first the equitable assignment of a legal thing in action, its effect is to separate the legal and beneficial interest in the thing. The separation of these two interests can occur other than by means of a trust.[43] Moreover, although trust language is sometimes used in

[43] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669, 706-07; [1996] 2 All E.R. 961 (Lord Browne-Wilkinson of Camden).

connection with an assignment,[44] persuasive academic authority distinguishes an outright assignment and an assignment by way of a trust, noting that an assignment by way of trust in the form of a simple declaration of trust by an assignor is a rare creature.[45] A trustee has active duties towards a beneficiary, including the gathering in of trust assets and applying them in the interest of the beneficiary; an assignor has no such active duties unless these are undertaken in a contract of assignment. There may be little on a given set of facts to separate assignment and trust – and the same goes for charge – but the difference is there. Granted, the trust should in principle be open to a winding-up by the beneficiary according to and within the limits of the *Sanders v Vautier*[46] principle, which would convert it into an outright assignment, but that does not mean that the outright assignment and the assignment by way of trust were the same creature in the first place. Moreover, although there is a very close similarity between the machinery for enforcing an equitable assignment, and the Vandepitte procedure[47] that permits a beneficiary to intervene and take direct control of proceedings when a trustee fails to take steps to recover trust property, an outright assignee is always in charge of proceedings against an obligor and does not have to wait on the assignor as a beneficiary would normally have to wait on the trustee. An outright assignor, moreover, may have no practical interest in seeing to performance by the obligor in the absence of any recourse provision in the contract of assignment. The above position can be repeated for the equitable assignment of an equitable thing in action, except that the assignee does not in such a case even have to join the assignor to the proceedings.

A related question is whether consideration is necessary to give effect to an equitable assignment. Consideration is of course not needed on the part of a trust beneficiary. If equitable assignment were always cast in the form of a trust, then no consideration

[44] e.g., *Warner Bros Records Inc. v Rollgreen Ltd* [1976] Q.B. 430, 443; [1975] 2 All E.R. 105 (assignor of an option the trustee of the benefit of the option for the assignee).
[45] O. R. Marshall, *The Assignment of Choses in Action* (London: Pitman,1950), 85: "It is difficult to find abundant authority on the precise question of the assignor expressly declaring himself a trustee for the assignee." See also *Barbados Trust Co. v Bank of Zambia* [2007] EWCA Civ 148; [2007] 1 Lloyd's Rep. 495, discussed below.
[46] (1841) Cr. & Ph. 240; 41 E.R. 482.
[47] From *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] A.C. 70; (1932) 44 Ll. L. R. 41.

requirement would ever come into play. Yet, the issue of whether consideration is required has proved to be a taxing one and the cases are by no means uniform. Page Wood V-C in *Richardson v Richardson* summed up earlier case law as requiring "some further step…by the assignee to acquire the legal interest". [48] This was on the ground that an assignment in equity was merely an agreement to assign. The logic of that earlier authority seemed to point firmly in the direction of a consideration requirement, at least in the case of legal things in action, yet the supply of consideration, especially at a time when statutory assignment had not been launched, would still have been insufficient to convert the equitable into a legal assignment. The later enactment of a statutory form of assignment, where consideration is certainly not required,[49] did not in any way impair a valid equitable assignment[50] and so casts no light upon whether a voluntary equitable assignment[51] should fail for lack of consideration to support it. On balance, the preponderance of decided cases, including *Richardson v Richardson* itself, favours the view that consideration is not required for the equitable assignment of a legal thing in action.[52] Apart from which of these views is the correct one, the very existence of this controversy attests to the separate characters of outright assignment and assignment by way of trust. It should not be supposed, however, that those courts denying the relevance of consideration to equitable assignment are concurrently asserting that all equitable assignments amount to trusts of the thing in action.

At the heart of the consideration question is the well-known decision in *Milroy v Lord*,[53] which we shall return to later. In that case, a number of shares in a bank were purportedly transferred by a voluntary deed but the transfer was never registered and could not therefore take effect at law. The settlor had not done everything in his power to give

[48] (1867) L.R. 3 Eq. 687, 693; 36 L.J. Ch. 653. *Meek v Kettlewell* (1842) 1 Hare 464; 66 E.R. 1114 "and that line of cases" were cited.
[49] *Harding v Harding* (1886) 17 Q.B.D. 442; 55 L.J.Q.B. 462; *Re Westerton* [1919] 2 Ch. 104; 88 L.J. Ch. 392; *Holt v Heatherfield Trust* [1942] 1 K.B. 1, 5; [1942] 1 All E.R. 904.
[50] *Wm Brandt's Sons & Co. v Dunlop Rubber Co.* [1905] A.C. 454, 461; *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] A.C. 414, 424; 72 L.J.K.B. 834.
[51] viz., one made without consideration.
[52] *Kekewich v Manning* (1851) 1 De G. M. & G. 176, 188-89; 42 E.R. 519; *Richardson v Richardson* (1867) L.R. 3 Eq. 687, 695; 36 L.J. Ch. 653; *Holt v Heatherfield Trust* [1942] 1 K.B. 1, 3, 15; [1942] 1 All E.R. 404; *Re McArdle* [1951] 1 Ch. 669, 674, 676-77; 1 All E.R. 905; *Tsu Soo Sin v Oei Tjiong Bin* [2008] SGCA 46; [2009] 1 S.L.R.(R.) 529.
[53] (1862) 4 De G.F.& J. 264; 45 E.R. 1185.

effect to the transfer. It was not argued that there had occurred an equitable assignment of the shares, even supposing that the rules on equitable assignment are capable of being applied to shares.[54] Instead, the argument was that the failed transfer gave rise to a trust. This was dismissed because of equity's refusal to perfect an imperfect gift and because equity would not recognise a trust as having been constituted in circumstances where the settlor had sought to effect a transfer by other means.

This takes us to the question whether, apart from share transfers, where a form of transfer is prescribed, a voluntary equitable assignment of a legal thing in action should be recognised if it does not take the form of a trust and does not comply with any legal form. In principle, the answer should be a firm yes. Equity may follow the law but the case of equitable assignment of a legal thing was not one of equity imposing itself on the conscience of an assignor, who had failed to comply with the appropriate legal form, to do what was necessary to complete the transaction. Rather, the common law repudiated the very practice of assignment so that there was no legal form for the assignor to follow.[55] Nor did principles of contract have to be invoked so as to give rise to a compulsion on the assignor to abide by that legal form. Equity's proprietary expression is not confined to the trust and outright voluntary equitable assignment is capable of standing on its own feet. These various concerns about equity and its relation with law do not even come into play where the equitable assignment concerns an equitable thing in action.

B. NON-ASSIGNMENT CLAUSES

A non-assignment clause[56] in a contract may take various forms. It may bar assignments of contract debts and rights completely; it may limit assignments to companies in the same group as the assignor; it may forbid assignments without the consent of the obligor;

[54] As was surprisingly asserted by Clarke L.J. in *Pennington v Waine* [2002] EWCA Civ 227 at [81]-[83]; [2002] 1 W.L.R. 2075.
[55] The fact that the common law might be circumvented by the grant of a power of attorney is a different matter.
[56] See generally G. McMeel, "The Modern Law of Assignment: Public Policy and Contractual Restrictions on Assignment" [2004] L.M.C.L.Q. 483; G. McCormack, "Debts and Non-Assignment Clauses" [2000] J.B.L. 422.

and it may forbid assignments without the obligor's consent, such consent not to be unreasonably refused. This article will not deal with issues relating to consent where the clause requires this but will focus on the core case of an outright bar on assignment.

Before turning to the cases, it is useful to recite some of the practical considerations lying behind the use of non-assignment clauses. An obligor might have a personal preference for dealing with the obligee rather than with a third party assignee;[57] or might wish not to staunch the flow of set-off rights against the obligee;[58] or might not wish to deal with two parties, raising a set-off defence against one and asserting an additional counterclaim against the other;[59] or might desire to ward off the inconvenience of dealing with multiple assignees;[60] or might not wish to become embroiled in a dispute between assignor and assignee under the contract of assignment; or might seek to avoid the risk of paying the assignor instead of the assignee, thereby failing to get a good discharge. These are all solid commercial reasons for insisting on a non-assignment clause.

Two nineteenth century authorities, followed by a long silence until the issue erupted again in modern times, set the scene. In *Tom Shaw & Co. v Moss Empires Ltd*,[61] a contract engaging the services of a comedian forbade him to assign his earnings. It also prohibited him from suffering those earnings to be taken in execution of any judgment against him. The comedian assigned a portion of his earnings to his agent. Although Darling J. is reported to have said that the clause "could no more operate to invalidate the assignment than it could to interfere with the laws of gravitation", the ruling in this

[57] e.g., the "vulture fund" example.
[58] After notice of an assignment is given, this affects legal set-off rather than equitable set-off. An assignee of contractual rights takes subject to the way the contract defines and measures those rights against the performance rendered in fact by the obligee. If the obligee assigns those rights before rendering defective performance or not rendering performance at all, the assignee's rights are correspondingly measured by the equitable set-off available to the obligor. An earlier notice of assignment does not expand the assignee's rights.
[59] e.g., *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All E.R. 262, 266; 76 L.G.R. 735. See also *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, 106; [1993] 3 All E.R. 417.
[60] e.g., the contract rights may have been divided among a number of assignees.
[61] (1890) 25 T.L.R. 190.

briefly reported case is unclear.[62] The presence of the execution prohibition might suggest that the effect of the clause as a whole was merely to mark out conduct amounting to a breach of contract by the comedian. The comedian would have been in no position to prevent execution being levied against his earnings if the occasion arose, prohibition or no prohibition. If the non-assignment clause went only to breach of contract, the assignment would be effective but the assignor would be liable to pay the obligor damages for breach of contract (in a far from certain amount). The assignment having been executed, there would be no scope for an injunction to issue preventing it.

More significant is the case of *Re Turcan*,[63] where a life insurance policy provided that "it should not be assignable in any case whatever". The insured, Turcan, had previously entered into a matrimonial settlement containing a covenant to settle all future property on the trust of the settlement. The holding was that Turcan was prevented by the clause from dealing with the legal interest but remained free to deal with the beneficial interest.[64] Consequently, the court decreed that the moneys received on the policy should be handed over by Turcan's executor to the trustees of the settlement. The case is unclear. On the one hand, the court was of the view that the covenant could have been enforced in the lifetime of Turcan; on the other hand, it stated that he could not have assigned the policy but could give the trustees the benefit of the money when it was received. *Re Turcan* certainly supports the view that a non-assignment clause does not prevent an assignor from agreeing to hold the proceeds of a contract right or debt for the assignee.[65] It may not go any further than that, apart from the intriguing hint in the case that the non-assignment clause in the policy, which took the form of a special proviso, might have been inserted in the policy at the behest of Turcan himself so as to evade his covenant to

[62] One possible interpretation of the case was given in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, 108; [1993] 3 All E.R. 417, that it dealt only with an accounting of moneys received by the assignor to the assignee.
[63] (1888) 40 Ch. D. 5.
[64] Even though the covenant required him to "convey or assign his estate or interest" to the trustees of the marriage settlement.
[65] This is the point conventionally extracted from the case. See e.g. *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, 106; [1993] 3 All E.R. 417: "Re Turcan…held that although [Turcan] could not assign the benefit of the policy so as to give the trustees the power to recover the money from the insurance company, he could validly make a declaration of the trust of the proceeds which required him to hand over such proceeds to the trustees." In *Re Turcan*, the former possibility did not arise because the proceeds were already in the hands of the executor when the assignee trustees claimed them.

assign.[66] A non-assignment clause may always be waived by the obligor but there is also a case for saying that it should have no effect if the obligor lacks a material interest in its enforcement.[67] The assignor should be estopped from invoking the non-assignment clause, certainly when the assignment takes place after the transaction with the obligor and quite possibly when the order of events is reversed.[68]

In modern times, the contract in *Helstan Securities Ltd v Hertfordshire County Council*[69] contained a clause prohibiting a building contractor from "assign[ing] the contract or any part thereof or any benefit or interest therein or thereunder" without the written consent of the council employer. The clause, considered broad enough by the court to capture contract debts, was held in quite cursory terms to render the assignment "invalid". The decision was later affirmed in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*,[70] where effect was given to a clause prohibiting the assignment of "this contract" without the employer's consent. Given the extensive understanding that contractual burdens may not be assigned, the clause meant that no thing in action arising under the contract (as opposed to the entire contract) could be assigned. As well as the right to future performance under the contract, it also captured contractual benefits such as causes of action that had already accrued before the assignment. Although the court recognised that restricting a free market in land was against public policy, it said there was no rule of public policy to prevent a prohibition on assigning things in action. Given that the issue of the public interest was absent from the arguments in the case,[71] this was a pronouncement that did not need to be made. Moreover, the vital importance of facilitating cash flow in businesses through outright and security assignments, together

[66] See the argument of counsel for the trustees at (1888) 40 Ch. D. 5, 8.
[67] This point may be relevant to a factual variation of *Foamcrete (UK) Ltd v Thrust Engineering Ltd* [2002] B.C.C. 221, where sums due under an agreement containing a non-assignment clause were captured by a previously executed floating charge. Suppose the non-assignment clause is inserted in the contract at the behest of the obligee in order to restrict the reach of the floating charge.
[68] See R. Goode, "Contractual Prohibitions against Assignment" [2009] L.M.C.L.Q. 300, 308 (asserting that only the obligor may invoke a prohibition against assignment).
[69] [1978] 3 All E.R. 262; 76 L.G.R. 735; R. Goode (1979) 42 M.L.R. 553. In reaching its conclusion that the prohibition clause was effective, the court relied upon the equivocal case of *Re Turcan* (1889) 40 Ch. D. 5.
[70] [1994] 1 A.C. 85; [1993] 3 All E.R. 417. Lord Browne-Wilkinson gave a judgment in which the other members of the court concurred.
[71] [1994] 1 A.C. 85, 107; [1993] 3 All E.R. 417.

with the endemic problem of raising finance for small to medium enterprises, would have provided some scope for arguments to rebut that public policy pronouncement. The overall tenor of the case was that overturning a non-assignment clause would interfere with the legitimate expectations of the party at whose behest the clause was inserted in the contract.[72] Freedom of contract therefore trumped property. It was open to the court to hold that the assignment was effective, though nevertheless in breach of contract on the part of the assignor, but the court did not so hold. Had it done so, the way would have been open to consider the importance of the term and whether its breach would have permitted the obligor to terminate the contract. Termination would have no real impact on debts that had fallen due, but it would empty an assignment of executory contract rights.

Nevertheless, the House of Lords in *Linden Gardens* thought it "hypothetically possible" that a clause might bar the assignment of a right to future performance but not an assignment of the fruits of performance.[73] This is no tentative hypothesis but a perfectly conventional possibility, especially if these fruits take the form of money received. Suppose, however, that the contract in question did seek to prevent the obligee from contracting to assign the proceeds of a contract right or debt to the assignee. The court stated that a non-assignment clause would not "invalidate" the assignment contract between assignor and assignee; even if it did, it might be ineffective on the ground of public policy.[74] This passage is odd and unsatisfactory. First, its focus is on contract and not property. Between a willing assignor and assignee, the invalidation of their contract should not necessarily invalidate a proprietary transfer.[75] Secondly, how can one contract "invalidate" the making of another? In the event of the first contract seeking to do so, there would still be a perfectly valid contract concluded between the obligee as assignor and the assignee. The making of this contract of assignment would amount to a breach of the first contract by the assignor and might also render liable the assignee in the tort of inducement of breach of contract. An injunction might also be issued preventing performance of the second contract, but this would be unlikely in the absence of

[72] [1994] 1 A.C. 85, 108; [1993] 3 All E.R. 417.
[73] [1994] 1 A.C. 85, 105; [1993] 3 All E.R. 417.
[74] [1994] 1 A.C. 85, 108; [1993] 3 All E.R. 417.
[75] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669; [1996] 2 All E.R. 961.

appreciable harm to the obligor, which is hard to conceive. Even if the first contract did seek to preclude the making of the assignment contract, this might in the court's view be against public policy.[76] Taking the above passages in gross, they give no or little comfort to any attempt to strike down a contract to assign the fruits, or proceeds, of a contractual right or debt. Nor do they impugn the imposition of a constructive trust of the proceeds of an unassignable right or debt in the hands of the assignor. This is a matter of significance when we come to the trust approach to non-assignment clauses.

If water pressure is strong enough, damming its flow will cause it to seek and find an outlet elsewhere. As effective as a non-assignment clause may be to prevent the assignment of contract rights and debts, a declaration of trust of those rights and debts has been held to survive a non-assignment clause in the underlying contract. Before the relevant cases are considered, we should remark the absence in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* of any discussion of contract rights as items of property. Trusts of promises have long been recognised, and assignment itself testifies to contractual promises as property between an assignor and an assignee. It is perfectly possible for a right to be "a personal thing, incapable of uncontrolled transfer", yet nevertheless an item of property.[79] Insolvency legislation with its extensive definition of property[80] ensures that value can be extracted from rights that are not freely transferable.[81] A non-assignment clause that places restrictions on assignment, concerning the seeking of the obligor's consent or the identity of the assignee, should not therefore prevent the contract right or debt from acquiring the status of a property right.

More difficult is the effect of an outright non-assignment clause. Does *Linden Gardens* mean that contract rights and debts in such cases are not property rights? The answer should be no.[82] If the answer were yes, there could be no trust of the unassignable right or

[76] Quite possibly as a restraint on alienation. According to R. Goode, "Contractual Prohibitions against Assignment" [2009] L.M.C.L.Q. 300, 306, the obligor would be "invading the field of property law".
[79] *Bombay Official Assignee v Shroff* (1932) 48 T.L.R. 443, 445 (membership of a stock exchange).
[80] Insolvency Act 1986, s. 436(1).
[81] e.g. *Swift v Dairywise Farms Ltd* [2000] 1 W.L.R. 1177; [2000] 1 All E.R. 320, affd [2001] EWCA Civ 145; [2003] 1 WLR 1606 (Note).
[82] *Don King (Productions) Inc. v Warren* [2000] Ch. 291, 334-35; [1999] 2 All E.R. 218 (Morritt L.J., and cases therein cited); According to R. Goode, "Contractual Prohibitions against Assignment" [2009]

debt, a proposition refuted in the cases that follow. If the obligee has a property right, then it ought to follow that the property right may be assigned. The consequences of that assignment in relation to the obligor are a different matter and will be discussed below. The proprietary effect of the transaction is clearer in the case of a declaration of trust, since it involves no transfer of a subsisting right[83] any more than a charge connotes a transfer.[84] The treatment of a right subject to a non-assignment clause as a property item permits the useful inference of a duty on the assignor to account to the assignee for the proceeds received of a thing in action purportedly assigned in breach of a non-assignment clause.[85] This matter will be developed further below, as also will be the effect of a more expansive clause that seeks to prohibit declarations of trust.

Whether the non-assignment clause bars assignment completely, or conditionally or on terms, it should either exclude or bar the incorporation of any implied term in the contract generating the contractual right that would otherwise effect a reconciliation of contract and property.[86] A non-assignment clause confines the obligor's contractual commitments to the obligee. Now, this does not quite explain why the contract right or debt might not

---

L.M.C.L.Q. 300, 306: where non-assignment clauses are valid, "contract rights do…constitute property…in the relations between assignor and assignee". But cf. *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] A.C. 1014, 1023-24; [1940] 3 All E.R. 549 (contracts of personal service); *Pacific Brands Sport and Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40 at [32] (fifth proposition) (Finn and Sundberg JJ); (2006) 230 ALR 56, citing *Jack v Smail* [1905] HCA 25; (1905) 2 C.L.R. 684, 704-05. The argument that a non-assignment clause renders a contractual right personal in character is recited by Waller L.J. in *Barbados Trust Co. v Bank of Zambia* [2007] EWCA Civ 148 at [41]; [2007] 1 Lloyd's Rep. 495. See also G. Tolhurst, Equitable Assignment of Legal Rights: a Resolution to a Conundrum" (2002) 118 L.Q.R. 98, 117: "[A]lthough the parties may not be able to make something property that the law would not otherwise recognize as such, they are able to mould its characteristics and even to rob it of those characteristics that make it property."

[83] See the Law of Property Act 1925, s, 53(1)(c) and the line of cases flowing from it.

[84] *Swiss Bank Corp v Lloyds Bank Ltd* [1982] A,C. 584; [1981] 2 All E.R. 449; *National Provincial & Union Bank v Charnley* [1924] 1 K.B. 431; *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch. 207; [1984] 1 All E.R. 155.

[85] In *Barclays Bank Ltd v Willowbrook International Ltd* [1987] B.C.L.C. 717; [1987] F.T.L.R. 386, the proceeds of a valid assignment were held on a constructive trust by the assignor for the assignee. The same should apply where the assignment is invalid or ineffectual because of a prohibition on assignment: equity looks on that as done which ought to be done. In this latter case, see too *Barbados Trust Co. v Bank of Zambia* [2007] EWCA Civ 148; [2007] 1 Lloyd's Rep. 495 at [77] (Rix L.J.), relying upon *Re Turcan* (1888) 40 Ch. D. 5 and *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, 106; [1993] 3 All E.R. 417.

[86] See *Sacks v Neptune Meter Co.* (1932) 258 N.Y.S. 254, 261-62; 238 App. Div. 82: the non-assignment limitation conditions the obligor's duty to perform. Hence, the condition governs the right acquired by the assignee in that the obligor need account only to the assignor: G. Tolhurst and J. Carter, "Prohibitions on Assignment: a Choice to Be Made" [2014] C.L.J. 405, 414.

still be the subject of equitable assignment (as opposed to a statutory assignment),[87] since the assignor will be a party to this action and thus nominally the claimant.[88] One response to this is to say that the process of joinder gives rise to complications and possibly additional legal expense on the part of the obligor and, anyway, the joinder of an unwilling assignor as co-defendant strips away the semblance of an action being brought by that same assignor. That said, it is submitted that it is possible to respect a non-assignment clause yet at the same time give effect to an equitable assignment in the following way. The equitable assignee might be treated as acquiring rights that are limited by the non-assignment clause.[89] This limitation might deny the assignee the right to demand payment or performance from the obligor, and thus also the power to give a good discharge. In addition, legal set-off rights should continue to toll as between obligor and obligee. If the obligor failed to make payment or render performance to the obligee, the limitation on the assignee's entitlement imposed by the non-assignment clause should not preclude the assignee from implementing the machinery of equitable assignment to have judgment rendered in favour of the assignor, who would then hold the proceeds on a constructive trust for the assignee. If this is correct, at this point the assignee's right to payment or performance begins to resemble a right to the proceeds of payment or performance, which for reasons stated above should be beyond the reach of a non-assignment clause. This outcome is also very similar to the outcome that prevails where the obligee declares himself trustee of rights in favour of a third party beneficiary. If the objection is made that this invades the obligor's decision not to perform, the response is that the obligor has no right to resist performance in the absence of defences and set-offs that may equally be asserted against both assignor and assignee.

The above modification of the joinder procedure would at the same time permit the obligor to insist that performance must comply with the contract and permit the obligee to dispose of the contract right or debt as an item of property, but one that is not exigible

[87] *Barbados Trust Co. v Bank of Zambia* [2007] EWCA Civ 148 at [88] (Rix L.J.); [2007] 1 Lloyd's Rep. 495.

[88] Nevertheless, any distinction between statutory and equitable assignment in respect of the effect of non-assignment clauses was rejected by Millett L.J. in *R. v Chester and North Wales Legal Aid Area Office (No 12)* [1998] 1 W.L.R. 1496, 1501; [1998] B.C.C. 685.

[89] In the same way that the extent of contract rights available for assignment might be limited by an equitable set-off available to the obligor.

directly against the subject matter of the assignment. In support of this, suppose that a contract contains a clause requiring the obligor's consent to an assignment, and that the assignor assigns the same debt twice, the first time without, and the second time with, the obligor's consent. Suppose also that the first assignee notifies the obligor of the unpermitted assignment.[90] It may well be that, as a matter of contract, the obligor can insist on paying the second assignee but that, as a matter of property, the second assignee must hold the proceeds on a constructive trust for the first assignee. As a matter of property, the assignor divested himself of the property in the debt on the first assignment, the notification of that assignment then depriving the assignor of the power to invest the second assignee with a higher ranking property right.

Turning now to these trust developments, the starting point is *Don King (Productions) Inc. v Warren*,[91] where a preliminary issue arose concerning assignments under a first partnership agreement of the benefit of certain management and promotion contracts. The assignments were ineffectual, *inter alia*, because of a non-assignment clause. The question was whether the failed assignments might yet take effect as a "declaration of trust" of the contractual rights themselves. Since this first partnership agreement did not involve an express declaration of trust or any language from which a genuine intention to create trust might have been inferred, the so-called declaration of trust in this instance could only be a constructive trust imposed by operation of law.[92] Lightman J.[93] answered the question in the affirmative in this way: "It is clear that a purported assignment of a contract or the rights arising under a contract may be ineffective as such because the contract involves the rendering of personal services or prohibits their assignment. The question arises whether a purported assignment for valuable consideration, ineffective as an assignment for the above reasons, may be effective as a declaration of trust or as imposing fiduciary duties on the assignor."[94] This passage, it should be noted, refers to

[90] So as to prevent the second assignee from gaining priority under the rule in *Dearle v Hall* (1828) 3 Russ. 1.
[91] [2000] Ch. 291. The judgment of the Court of Appeal in the same case, *ibid*, appears broadly to have endorsed the approach of Lightman J. For criticism, see A. Tettenborn at [1998] L.M.C.L.Q. 498 and [1999] L.M.C.L.Q. 353; G. McCormack, "Debts and Non-Assignment Clauses" [2000] J.B.L. 422.
[92] The language of the second agreement, in cl 7.1, 2, comes closer to a trust but still seems to fall short.
[93] Citing *Devefi Pty Ltd v Matefi Pearl Nagy Pty Ltd* [1992] FCA 338; [1993] R.P.C. 493, 505.
[94] *Don King (Productions) Inc. v Warren* [2000] Ch. 291, 318; [1999] 2 All E.R. 218.

contract rights and not the fruits of contract rights in the hands of the purported assignor. The judge went on to say that a trust of the benefit of a contractual obligation differed in character from an assignment of the benefit of a contract.[95] It would thus not be captured by a non-assignment clause.[96]

One objection to the inference of a trust of contractual rights notwithstanding a non-assignment clause is that the trust might bring about the very thing that the obligor sought to avoid, namely, becoming involved in relations with a third party. Lightman J.'s response was that the facility given to a beneficiary to enforce the trust by joining the trustee as co-defendant in Vandepitte proceedings[97] might not be allowed "in a commercial context where it has no proper place".[98] Since the due payment of debts lies at the very heart of commerce, and since this does not involve any "intrusion into the personal mutual dealings of contracting parties",[99] it is unclear why this procedure should have no place in commercial contexts. A majority in the Court of Appeal in *Barbados Trust Co. v Bank of Zambia* saw Vandepitte proceedings as appropriate in debt recovery cases.[100] The exclusion of Vandepitte would also seem to contradict Lightman J.'s assertion that trust and assignment are not the same thing. That exclusion would also reduce the trust of a contract right or debt to the level of an assignment of the proceeds of that right or debt, and equate it with a constructive trust of the proceeds of a failed assignment in the hands of the assignor.

Suppose now that instead of a trust of contractual rights or debts there is a trust of the proceeds or fruits of that right or debt. The question is whether the trustee is as bound to act to gather in trust property as a trustee of contract rights. Although there can be a trust

[95] [2000] Ch. 291, 317; [1999] 2 All E.R. 218.
[96] "A declaration of trust in favour of a third party of the benefit of obligations or the profits obtained from a contract is different in character from an assignment of the benefit of the contract to that third party": [2000] Ch. 291, 319; [1999] 2 All E.R. 218. See also *Explora Group Plc v Hesco Bastion Ltd* [2005] EWCA Civ 646; (2005) 149 S.J.L.B. 924; *Barbados Trust Co. v Bank of Zambia* [2007] EWCA Civ 148; [2007] 1 Lloyd's Rep. 495 (discussed below).
[97] See *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] A.C. 70, 79.
[98] [2000] Ch. 291, 321; [1999] 2 All E.R. 218. How significant is the absence of a comma after "context"?
[99] *Barbados Trust Co. v Bank of Zambia* [2007] EWCA Civ 148 at [110] (Rix L.J.); [2007] 1 Lloyd's Rep. 495.
[100] [2007] EWCA Civ 148 at [29] (Waller L.J.) and [107], [110] (Rix L.J.); [2007] 1 Lloyd's Rep. 495. See below for the way a Vandepitte judgment might be framed.

of a contingent interest in property,[101] such a trust must be predicated on the existence of that property. Proceeds cannot have any existence until the right generating them has arisen and has been dealt with so as to give birth to proceeds. It should not therefore matter whether any supposed right has yet been created, or if created is due or overdue for performance. Unless and until the obligation supporting the right has been performed, the proceeds do not exist and a trust in respect of them, as opposed to a contractual undertaking to create a trust, cannot be constituted. So, there can be no Vandepitte proceedings in respect of these latent proceeds. Even if the so-called trustee is contractually bound to gather in the proceeds, so that the obligor has to deal with an obligee acting under compulsion, the Vandepitte procedure will not come into play.

A further difficulty concerns the exclusion of the trust device by an extended non-assignment clause. In Lightman J.'s view, although a non-assignment clause should be read as *prima facie* limited to assignment,[102] an appropriately drafted clause might be effective in prohibiting a trust.[103] At this point, the inaptness of the expression "declaration of trust", as used in this case, becomes an acute matter, suggesting as it does an express trust. Recall that, in the case of the first partnership agreement, the trust was a constructive trust arising by operation of law out of a failed assignment. This is a critically important point. A clause might well prohibit the obligee from assigning a right; an extended clause might be effective in preventing an express declaration of trust; but an extended clause, despite stretching from assignment to trust, may not prevent a constructive trust arising from a failed assignment if that is indeed the consequence of a failed assignment.[104]

In *Barbados Trust Co. v Bank of Zambia*,[105] a non-assignment clause in an oil import facility agreement allowed an assignment to be made by the obligee (Masstock) to

[101] *Underhill and Hayton: Law of Trusts and Trustees* (eds D. Hayton, P. Matthews and C. Mitchell), (London: LexisNexis,18th edn, 2010), para. 10.01.
[102] [2000] Ch. 291, 319-20; [1999] 2 All E.R. 218.
[103] [2000] Ch. 291, 319; [1999] 2 All E.R. 218. See also *Clarence House Ltd v National Westminster Bank Plc* [2009] EWCA Civ 1311; [2010] 1 W.L.R. 1216.
[104] cf. *Barbados Trust Co. v Bank of Zambia* [2007] EWCA Civ 148 at [88] (Rix L.J.); [2007] 1 Lloyd's Rep. 495.
[105] [2007] EWCA Civ 148; [2007] 1 Lloyd's Rep. 495.

another bank or financial institution if the respondent borrower's permission were obtained, such permission not to be unreasonably refused. If no response was made by the obligor within a stated period, the consent would be deemed to be given so that an assignment could subsequently be made by the assignor. The assignment made in this case (to Bank of America) was nevertheless premature and therefore invalid under the terms of the permission clause. Sub-assignments followed, the ultimate sub-assignee being the appellant Barbados Trust (a "vulture fund"). Some years later, Bank of America made an express declaration of trust in favour of Barbados Trust. Since this declaration of trust had been made by the assignee (Bank of America) and not by the assignor (Masstock), and since the assignee was claiming under what turned out to be an invalid assignment, the effect of a declaration of trust of a right to be paid did not fall for decision. A majority of the court, nevertheless, went on to give its opinion that the non-assignment clause did not on its proper construction preclude such a declaration of trust.

The same ambiguity about the meaning of a declaration of trust, present in Lightman J.'s judgment in *Don King*, appears to some lesser extent in this case. *Barbados Trust* concerned an express declaration of trust, so it naturally concentrated on the meaning of that phrase in its express sense. Rix L..J. does not rule out the meaning of the phrase as used by Lightman J.: "On the question of construction, then, there is in my judgment good authority for the proposition that a failed assignment may take effect as a declaration of trust between its immediate parties. This is certainly true so far as a declaration of trust which is limited to the *proceeds of a claim (or the fruits of a contract) when received* (original emphasis)."[106] This is a less than confident view that a trust arising out of a failed assignment is confined to the fruits in the hands of the trustee. Yet, if a trust of a right could indeed in Rix L.J.'s view arise out of a failed assignment, then the head assignment between Masstock and Bank of America would have given rise to a trust.[107] Consequently, Bank of America's later express declaration of trust in favour of

[106] *Barbados Trust Co. v Bank of Zambia* [2007] EWCA Civ 148 at [77]; [2007] 1 Lloyd's Rep. 495, relying upon *Re Turcan* (1888) 40 Ch. D. 5. To the same effect is *Explora Group Plc v Hesco Bastion Ltd* [2005] EWCA Civ 646 at [104] (Rix L.J.); (2005) 149 S.J.L.B. 924.
[107] I am indebted to Sandra Booysen for this point.

Barbados Trust ought to have been effective as a sub-trust leading to a different outcome in the case.[108]

According to Waller L.J., an equitable assignment and a declaration of trust are not the same thing.[109] It is true that a declaration of trust, unlike at least some equitable assignments, cannot be converted into a statutory assignment, and it is true that the two are conceptually different, but that difference is a subtle one.[110] A sub-category of equitable assignment is assignments by way of trust.[111] Moreover, it may on a given set of facts be difficult to distinguish between an intention to make an outright assignment and an intention to make an assignment by way of trust. In addition, the fineness of the distinction between them would be accentuated if a "failed assignment" were allowed to "take effect as a declaration of trust between its immediate parties".[112] In the result, the distinction has to be made if only to explain the difference between the joinder process in equitable assignment, where the consent of the assignor need not be sought for the initiation of proceedings by the assignee, and the Vandepitte procedure, where a beneficiary may bring a direct action, joining the trustee as co-defendant, only if the trustee fails to take steps to gather in trust property. Even so, where the assignor is unwilling to be joined as co-claimant, its joinder as co-defendant results in a form of proceedings that is very similar to Vandepitte proceedings.

Despite the similarities between the two sets of proceedings, there is this further important difference. Assuming that the Vandepitte procedure is unlikely to be disallowed in simple cases of debt collection, judgment in the beneficiary's favour in a Vandepitte action could and should compel payment to the trustee, who would then have to account to the beneficiary for the proceeds. This outcome would not interfere with the

[108] The Bank of America was joined in the proceedings.
[109] *Barbados Trust Co v Bank of Zambia* [2007] EWCA Civ 148 at [43]; [2007] 1 Lloyd's Rep. 495. See also *Don King (Productions) Inc. v Warren* [2000] Ch 291, 319; [1999] 2 All E.R. 218.
[110] *Barbados Trust Co v Bank of Zambia* [2007] EWCA Civ 148 at [111] (Rix L.J.: declaration of trust "akin" to an equitable assignment); [2007] 1 Lloyd's Rep. 495.
[111] See O.R. Marshall, *The Assignment of Choses in Action* (London: Pitman, 1950), 84; *Fulham v M'Carthy* (1848) 1 H.L.C. 703, 722; 9 ER 937, 945.
[112] *Barbados Trust Co. v Bank of Zambia* [2007] EWCA Civ 148; [2007] 1 Lloyd's Rep. 495 at [77] (Rix L.J.).

terms of the contract or other instrument under which the obligation arose. The obligor's expectation of counting upon a supine obligee is but a mere factual expectation unprotected by the law of contract. An obligee contractually bound not to assign would be completely free to contract with a third party to take all effective steps to enforce the contract duties owed by the obligor. Furthermore, the obligor would be unable to resist enforcement by the executors of a deceased obligee or by the insolvency representatives of an insolvent obligee if such a case were to arise. A modification of the proceedings for an equitable assignment, leading to a judgment requiring payment by the obligor to the assignor, who then would have to turn it over to the assignee, would render it unnecessary to have recourse to the trust approach. A statutory assignee of a non-assignable debt, seeking to achieve the same outcome, could waive the statute and treat the assignment as an equitable one. The hypothetical modification of proceedings in this way would be attractive because it would not suffer from one particular flaw that is present in the trust device. In view of the decision in *Milroy v Lord*,[113] the conclusion that a failed assignment gives birth to a declaration of trust is controversial. Equity does not redeem failed gifts by inventing express trusts and should therefore be wary of redeeming failed equitable assignments for value by conjuring up a constructive trust.

It was never inevitable that non-assignment clauses should be recognised to the extent of rendering assignments ineffectual. They could, as stated earlier, have been interpreted as making an assignment a breach of contract sounding in damages and termination in an appropriate case.[114] The obligor's vital interests can be protected, as argued for above, by a modification of equitable assignment proceedings. The assignor would still be in breach of contract, though the measure of damages would be unlikely to be substantial. This prompts the question whether an obligor might seek instead to argue that an assignee or beneficiary takes a property right encumbered by a burden that restrains that assignee or beneficiary from dealing with the property right by a direct assertion of it against the

[113] (1862) 4 De G. F. & J. 176, 188-89.
[114] See generally on this subject G. Tolhurst and J. Carter, "Prohibitions on Assignment: a Choice to Be Made" [2014] C.L.J. 405. The authors find the view that assignment in breach of a non-assignment clause is to be treated only as a breach of contract "manifestly uncompelling": ibid, 423.

obligor. Despite a famous dictum of Knight Bruce L.J.,[115] covenants do not run with personalty, especially intangible personalty, so as to bind a third party taking with notice. In any case, an assignee may not have in all cases notice of a non-assignment clause.

A final point arising out of *Barbados Trust* concerns the court's guarded willingness to recognise clauses barring trusts.[116] It will be recalled that Lightman J. in the *Don King* case conceded that a non-assignment clause might on its proper construction also prevent a declaration of trust of contractual rights and benefits. He may – but this is not clear – here have meant an express declaration of trust, though elsewhere in his judgment he uses the expression more expansively. He seems not to have had in mind trusts of the fruits of the contract as received by the trustee.[117] The court in *Barbados Trust* seems also to have had express trusts in mind. One considerable objection to this view is that the contract right or debt remains an item of property in the hands of the obligee. An obligee declaring a trust might do so in breach of contract but this should not affect the proprietary outcome of its action. Apart from this point, if a contractual provision cannot prevent a so-called declaration of trust arising constructively from a failed assignment, its effect is at best very limited. Though the attributes of a property right may be restricted from its inception, the recognition of a trust arising by operation of law suggests there will always be an irreducible core of entitlement in a property right that survives contractual restrictions.

C. CONCLUSION

[115] *De Mattos v Gibson* (1858) 4 D. & J. 276, 282; 45 E.R. 108: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."

[116] [2007] EWCA Civ 148 at [43] (Waller L.J.: the court should be slow to interpret a clause as preventing a declaration of trust) and [112] (Rix L.J.: "the public interest in freedom of contract and the freedom of markets could be severely prejudiced" by clauses "destroying all alienability"); [2007] 1 Lloyd's Rep. 495.

[117] See the above discussion of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85; [1993] 3 All E.R. 417.

The outcome of this difficult line of cases appears to be that the recognition of non-assignment clauses has been compromised, certainly by one development and possibly by two. The first development is the recognition of the trust device as falling outside the scope of a non-assignment clause. It has not yet been put to the test whether a clause prohibiting a trust will be effective in preventing an express trust, though a dictum in *Don King*[118] supports the view that it will be. The contrary view is that a trust is not an assignment and an obligor carrying out its promises ought never come into contact with the beneficiary. The obligee might then freely deal with its property while the essential interests of the obligor are respected, even though the obligee would commit a breach of contract, giving rise to an uncertain measure of damages, when expressly declaring the trust. Furthermore, it hardly lies in the mouth of a defaulting obligor to insist that a contractual obligation not to declare an express trust should be respected.

The second development, based mainly on the judgment of Lightman J. in *Don King*, is the possible willingness to infer a constructive trust of contract rights and debts (as opposed to their proceeds or fruits) out of a failed assignment. If this conclusion is correct, one awkward consequence should be noted. Since a trust by operation of law can be extracted from a failed assignment, it should follow that it can also be extracted from a failed express trust, which is a curious conclusion. The safest interpretation of the *Don King* case is therefore to read the so-called declaration of trust as limited to the fruits of performance in the hands of the assignor. The clear way to a trust is through an express declaration, which, as argued above, should still be permitted notwithstanding a contractual undertaking to the obligor not to take this proprietary action. An understanding of assignment has always been bedevilled by its status as lying between contract and property. The position taken in this article is that assignment leans more towards property than contract.

It would therefore seem, as the law stands at the moment, that the trust mechanism has the capability of restoring marketability to contract rights and debts that are subject to non-assignment clauses. It has not yet been settled that an express trust can be prevented

[118] [2000] Ch. 291, 321; [1999] 2 All E.R. 218.

by an extended clause barring a trust, so the road to an express trust remains open. It cannot confidently be asserted that a constructive trust of contract rights and debts will arise out of a failed assignment, but there is firm authority that puts a trust of the fruits out of the reach of an obligor seeking to bar it.[119] The obligor in such a case, as stated above, would be safe from Vandepitte proceedings. As matters stand, there is plentiful legal uncertainty to inhibit any attempt to deal with contract right and debts, in disregard of clauses preventing assignments or both assignments and trusts. Expected secondary legislation nullifying non-assignment clauses will restore marketability in the area of receivables financing, so that any resort to and development of the trust mechanism will become redundant. In other cases, legal uncertainty prevails and needs to be dispelled.

[119] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, 108; [1993] 3 All E.R. 417; *Barbados Trust Co. v Bank of Zambia* [2007] EWCA Civ 148 at [77]; [2007] 1 Lloyd's Rep. 495.