Liabilities are not assignable

Articles, Commercial Contracts

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Liabilities may not be assigned, although they may be novated or limit assigned rights.

Section 12 of the *Conveyancing Act 1919* (NSW)

Conveyancing Act 1919 (NSW) section 12 provides that:

> Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed)

> power to give a good discharge for the same without the concurrence of the assignor: Provided always that if the debtor, trustee, or other person liable in respect of such debt or chose in action has had notice that such assignment is disputed by the assignor or anyone claiming under the assignor, or of any other opposing or conflicting claims to such debt or chose in action, the debtor, trustee or other person liable shall be entitled, if he or she thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he or she may, if he or she thinks fit, pay the same into court under and in conformity with the provisions of the Acts for the relief of trustees.

Similar legislation has been enacted in other states as follows *Property Law Act 1958* (Vic) section 134, *Property Law Act 1974* (Qld) section 199, *Property Law Act 1969 (WA)* section 20, *Law of Property Act 1936 (SA)* section 15, *Conveyancing and Law of Property Act 1884 (Tas)* section 86, *Civil Law (Property) Act 2006 (ACT)* section 205 and *Law Of Property Act 2000 (NT)* section 182.

In each case the legislation refers to the assignment of debts, and either 'choses in action' or synonymously 'things in action'. The *Civil Law (Property) Act 2006 (ACT)* section 205 defines a chose in action as (with examples) 'an intangible personal property right recognised and protected by the law. Examples include debts, money held at a bank, shares, rights under a trust, copyright, and the right to sue for breach of contract'.

The common element is that these are assignable *rights*, whereas the *liability* to pay a debt is not assignable. It is perhaps unhelpful that 'debt' is used in isolation in section 12 of the *Conveyancing Act 1919* (NSW), being synonymous with 'liability'.

This may be due to the absurdity of assigning liabilities. If liabilities were assignable, any and every liability might be assigned to a shelf company or agreeable homeless person. However less absurd, but still invalid would be the purported transfer of creditor rights to a phoenix company to maintain

Novation

If the obligee, obligor and proposed transferee of a liability are in agreement, liabilities may be transferred by a novation deed or agreement, to which they are all parties.

In *Elias Konstas and Georgina Konstas v Southern Cross Pumps and Irrigation Pty Limited and Ssorc (Aust) Pty Limited* [1996] FCA 1601 at 11, Justice Tamberlin J stated:

> 11. It is clear that the benefit of a contract is a chose in action and generally it can be assigned both in equity and by virtue of s12 of the *Conveyancing Act 1919* (NSW). In the present case no argument has been raised as to the application of s12. No doubt this is because the burden of a contract on its own is not a chose in action. The only way in which a contractual obligation may be transferred from one person to another is by novation whereby the parties to the original contract and the party assuming the obligation agree that such a transference of liability is to take place.

A novation of liabilities to a phoenix company may nonetheless be subject to a voidable transaction claim by a liquidator, perhaps as an uncommercial, unreasonable director related or creditor-defeating disposition, under sections 588FB 588FDA or 588FDB of the *Corporations Act 2001* (Cth).

Assignments of rights subject to equities

As above, Section 12 of the *Conveyancing Act 1919* (NSW) makes assignment of rights 'subject to all equities…' which may include contractual liabilities and

assignor, rather than being able to sue the assignee.

In *Franks v Equitiloan Securities Pty Limited* [2007] NSWSC 812 Justice Brereton refused as futile leave for an obligor to amend a cross claim to substitute an assignee as cross-defendant. At paragraph 33, his honour stated:

> 33. The preserving of the "equities", by s 12, means that the obligor can raise against an assignee all matters that he could have raised against the assignor in extinguishment or reduction of the liability. This ensures that the obligor does not become liable to pay the assignee a sum which, because of an available set-off or counter-claim, it would never have had to pay to the assignor. But that is not to say that the obligor should be better off. The obligor retains its rights against the assignor, who remains primarily liable on any counter-obligation. This leaves the obligor in no worse position than would have been the case in the absence of an assignment. As against the assignee, the obligor retains the benefit of the defences it would have had against the assignor. That extends to defences by a way of cross-claim, which can be set off in extinguishing or reduction of the obligor's liability, but it does not extend to improving the obligor's position by creating new rights to sue the assignee, in circumstances where those rights lie against the assignor. Liabilities, unlike assets, are not capable of assignment. It is consistent with this that the idea of an equity, in this context at least, is that while it impeaches the right of the assignee, it does not create a right in the obligor. Although it is not directly on point, some observations of Lush J in *Provident Finance Corporation Pty Ltd v Hammond* [1978] VR 312 also illuminate the position. His Honour said (at 319):
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> *The essential concept of an equity in this context is that it is a transaction or event or circumstance which entitles the debtor to say that it is unjust that the debt should be enforced against him without bringing into account his cross-claim arising from the transaction, event or circumstance. In some cases, e.g.* Athenaeum Life Assurance Society v Pooley *(1858) 3 De G and J 294, the*

> *dealt with in the Chancery courts, even if the chose sued upon was a legal chose.*
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> 34. This tends to show that the equities spoken of are defensive, being matters which justice requires be brought to account in permitting a claim to be enforced. It does not support the view that the equities are "offensive" ones creating new rights or improving the position of the obligor.

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