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ASSIGNMENT, EQUITIES, *THE TRIDENT BEAUTY* AND RESTITUTION

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INTRODUCTION

MOST of the academic discussion of the *Trident Beauty*[1] has focused on its relevance to the law of restitution, in particular, restitution against third parties. This is understandable given the role restitution played in the judgments. Opinions have differed as to whether the House of Lords reached the correct result and this perhaps reflects the level of debate over what principles should govern restitutionary claims in this area.[2] The restitutionary points were not, however, the beginning and end of the matter and some important issues of assignment have been marginalised in the wake of the restitutionary debate. The assignment of contractual rights is one part of the standard contract text that still defies analysis. However, the recent spate of difficult assignment related cases,[3] evidencing its continued importance to commerce, as well as the near settlement of the modern rules of privity, suggest that the time is ripe to take it out of the too hard basket and put it on the agenda for the next decade. It is not, however, the aim of this paper to detail, much less resolve, every problem that exists within this area of the law. The much more modest aim here is to investigate the assignment issues raised by *The Trident Beauty*. The end result is that these issues resolve the restitutionary problem raised by the case if the suggested analysis is adopted. It is hoped that this paper will also show that this area of the law is simplified if there is a proper understanding of the relationship between the assignee and obligor and more time spent on construing the rights assigned to the assignee and the obligations of the obligor rather than taking refuge too quickly in phrases such as "the assignee

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1 *Pan Ocean Shipping Co Ltd* v. *Creditcorp (The "Trident Beauty")* [1994] 1 W.L.R. 161.

2 See, A Burrows, "Restitution from Assignees" [1994] R.L.R. 52 at 55–56. See also, Kit Barker, "Restitution and Third Parties" [1994] L.M.C.L.Q. 305; D. Friedman, "Restitution from an Assignee" [1994] 110 L.Q.R. 521; P Watts, 'Does a Subcontractor Have Restitutionary Rights Against the Employer" [1995] L.M.C.L.Q. 398. See further, Mason and Carter, *Restitution Law in Australia*, (Butterworths, Sydney 1995) para. 910.

3 See, *Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85; *Darlington Borough Council* v. *Wilshire Northern Ltd* [1995] 1 W.L.R. 68; *Bovis International Inc* v. *The Circle Limited Partnership* (1995) 49 Con. L.R. 12; *Investors Compensation Scheme Ltd* v. *West Bromwich Building Society* [1998] 1 W.L.R. 896; *Hendry* v. *Chartsearch Ltd*, *The Times*, Sept 16, 1998.

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takes subject to the equities" and "the assignee can be in no better position than the assignor". This paper begins with a look at the decision in *The Trident Beauty* itself.

The Facts and Speeches

The relevant facts of *The Trident Beauty* may be simplified as follows. A time charted a vessel from B, hire being payable monthly in advance. B assigned to C its right to hire payments, "free from all encumbrances and third party interests", as "security" for certain credit facilities. C gave notice of the assignment to A and A paid the hire direct to C. A payment was made to C for a period in which, it transpired, the ship was off hire for repairs. Subsequently, A elected to terminate the contract for repudiation by B, and, as B was not worth suing, claimed the amount of the instalment from C. A's claim for recovery was based on total failure of consideration.

The House of Lords decided against A, holding that A's only remedy was against B. The contract contained an express mechanism for the adjustment of payments when the ship was off hire, and also a provision for the "return" of overpaid hire. Lord Goff thought that even without an express mechanism a similar "repayment" mechanism would have been implied.[4] As this clause was operative, Lord Goff thought that a restitutionary remedy against B was unnecessary and inappropriate.[5] B remained bound to "repay" the hire as C only took an assignment of the benefit of the contract. It followed, he said, that as B only was subject to the contractual duty to repay, there could be no restitutionary claim against C because none existed against B.[6]

A second line of argument was also raised. Here it was argued that since the payment was a conditional payment as between A and B, it remained conditional in the hands of C. Lord Goff rejected this argument as a misunderstanding of what is meant by the term "conditional". He thought it simply meant the payment was not final because there was a contractual obligation to repay it if it was not earned.[7] Moreover, the obligation to pay and the obligation to repay were independent, the assignee only took the benefit, that is, the right to receive payment. The obligation to repay remained with the assignor. In those circumstances he did not think the assignment carried with it, or imposed, any "obligation" additional to the contractual obligation imposed on B.[8] He also agreed with a statement of Neill L.J. in the Court of Appeal, where he had suggested that effect must be given to the terms of the assignment which assured C that it was not

[4] [1994] 1 W.L.R. 161 at p. 164.
[5] [1994] 1 W.L.R. 161 at p. 164.
[6] [1994] 1 W.L.R. 161 at p. 165.
[7] [1994] 1 W.L.R. 161 at p. 165. He cited the judgments of Bankes and Scrutton L.JJ., in *C.A. Stewart & Co* v. *Phs Van Ommeren (London) Ltd* [1918] 2 K.B. 560 and Lord Summer in *French Marine* v. *Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 A.C. 494 at p. 517.
[8] [1994] 1 W.L.R. 161 at p. 166.

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subject to any set-off or counterclaim, and, although the payment might have been provisional as between A and B, the moneys did not retain that character in the hands of C.[9]

Lord Woolf also emphasised that the right to receive hire was independent of the obligation to give credit for hire paid but not earned.[10] He dismissed the first argument by saying:[11]

> "It is one thing to require the other party to the contract to repay if he does not provide the consideration which under the contract he was under obligation to supply, it is another to make the assignee, who was never intended to be under any obligation to supply the consideration liable to make repayment. It is conceded that there is no right to trace moneys which are paid to an assignee and there is never any question of there being any restriction on the assignee preventing him dealing with the money as his own. There is no justification for subjecting an assignee, because he has received a payment in advance, to an obligation to make a repayment because of the non-performance of an event for which he has no responsibility."

He also rejected an argument that the right of the assignee was conditional in the sense of being a "conditional benefit" as discussed by Sir Robert Megarry V.C. in *Tito* v. *Waddell (No 2)*.[12] Moreover, as to the second line of argument, he did not think the right was conditional at all, there was "nothing qualified about the right," there was only an independent right to be repaid.[13] In concluding he said; "Why should [A] have two alternative parties to whom to look for a repayment merely because [B] as part of [its] own financial arrangements, [has] assigned [its] right to receive payment to a third party, [C]." The effect of his reasoning he thought was that A was in exactly the same position it would have been in if there was no assignment.[14]

Finally, Lord Goff recognised the debate over whether in certain exceptional cases a plaintiff may have a claim in restitution when he or she has conferred a benefit on the defendant in the course of performing an obligation to a third party. However, he concluded by saying:[15]

> "[I]t is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract. Moreover, it would in any event be unjust to do so in a case such as the present where the defendant, [C], is not the mere recipient of a windfall but is an assignee who has purchased from [B] the right to

[9] [1993] 1 Lloyd's Rep. 443 at p. 449.
[10] [1994] 1 W.L.R. 161 at p. 169.
[11] [1994] 1 W.L.R. 161 at pp. 170–171.
[12] [1977] Ch. 106.
[13] [1994] 1 W.L.R. 161 at p. 171.
[14] [1994] 1 W.L.R. 161 at p. 171.
[15] [1994] 1 W.L.R. 161 at p. 166.

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> receive the contractual debt which the plaintiff, [A], is now seeking to recover from [C] in restitution despite the facts that the relevant contract imposes on the assignor [B] an obligation of repayment in the circumstances in question, and that there is nothing in the assignment which even contemplates, still less imposes, any additional obligation on the assignee [C] to repay.'

The Problem

Before going any further it may be helpful to outline the nature of the problem thrown up by the facts in the case. This can be done by asking a deceptively simple question. If, in similar facts to that in *The Trident Beauty* a contractual regime for repayment did not exist, then, if the obligor is to have a remedy, what is the correct doctrinal analysis of that remedy if the contract is discharged after a payment is made to the assignee? In terms of restitution, as against the assignor there is the obvious problem that it received no benefit, at least not in the direct sense, as payment was made to the assignee. With respect to the assignee, although it received a benefit, what would be the basis for a restitutionary response? It cannot be mistake and arguably it cannot be failure of consideration in its traditional sense because, as between the obligor and assignee, there is no agreed return. It should be noted that Lord Goff thought that in the circumstances of the case the remedy would always be against the assignor and would always be contractual, that is, by way of an express or implied term.[16]

In *McDonald* v. *Dennys Lascelles Ltd*,[17] a case involving the assignment of the right to the purchase price for a sale of land, Dixon J, in the course of describing the effects of discharge on both the purchaser and its guarantor said:[18]

> "In the present case, not only is the principal debtor relieved from personal liability to pay the instalments but the vendors' just title both to obtain and to retain the instalment altogether ceases. If there had been no assignment and if the instalment had been duly paid, it would have become the vendors' duty to repay it. It is, perhaps, uncertain whether, if the payment of the instalment had been duly made to the plaintiff, as assignee, the liability to repay it would have fallen upon it or upon its assignors, the vendors, because it is not clear that the obligation to repay it does not arise out of contractual implications by which the assignee would not be bound, as distinguished from an independent duty springing simply from the receipt of the money and the subsequent discharge of the contract. But, when the money had not been reduced into possession, the assignee's right to recover it is precisely that of the vendors and is affected by exactly the same considerations."

[16] [1994] 1 W.L.R. 161 at pp. 164–5. See also, *Stocznia Gdanska SA* v. *Latvian Shipping Co.* [1998] 1 W.L.R. 574 at p. 589 *per* Lord Goff.
[17] (1933) 48 C.L.R. 457.
[18] (1933) 48 C.L.R. 457 at pp. 480–481.

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It seems fairly clear from this statement that Dixon J. was of the opinion that if a payment is made to an assignee in circumstances analogous to those in *The Trident Beauty*, then someone must be liable to the obligor. Unlike Lord Goff, he was unsure whether liability would arise at law or in contract but seemed to be of the opinion that if liability arose at law then the assignee may be liable. He thought that if liability arose in contract the assignee would not be bound by this, and that would appear to be correct. However, Dixon J did not consider the possibility of concurrent causes of action against the assignee and assignor.

In *The Trident Beauty*, the House of Lords held that where a contractual remedial regime exists there is no need for a restitutionary response. That seems entirely logical where the contract expressly or impliedly governs the allocation of risks after discharge. However, whether the contractual regime applies to a given situation is a matter of construction. The Court seems to conclude that the regime in *The Trident Beauty* governed "repayments".[19] The effect of the decision was that a party who never received a payment was bound to "repay" it. Where a contractual regime is limited to "repayment" then effect must be given to it. There is a crucial legal distinction between duties to pay and duties to repay and if the assignor's duty was merely a duty to repay, then it was only operational if the assignor received a payment. Given that this was not the case, it would appear that the duty to repay was not operative thus making an investigation of a restitutionary response appropriate.[20] It may have been different if the contractual regime dealt with the entire field of remedies. However, even in that case there would be an argument that by limiting itself to only looking to the assignor for a remedy, the assigned right was intended to be personal and not capable of assignment. That is, in determining whether a right is personal or not, that right cannot be construed in isolation but rather as part of the contract as a whole. In some cases a related duty may impact upon the characterisation of a right.[21] For example in *Kemp* v. *Baerselman*,[22] a farmer, in return for an exclusive dealing arrangement, agreed to supply a baker with all the eggs the baker required for one year. The baker sold his business to a large company and attempted to assign his rights in the contract to the company. The farmer refused to supply eggs to the company and the court upheld his action. One reason for this decision was that the exclusive dealing arrangement, on construction, made the right personal. Since the baker's duty to deal exclusively with the farmer could not be assigned, then if the assignment was upheld, the company would take the right without being burdened by an important term of the

[19] [1994] 1 W.L.R. 161 at pp. 164, 165, 166 *per* Lord Goff, and pp. 168, 169 *per* Lord Woolf.
[20] This result may have been different if the transaction was a mere direction to pay rather than an assignment.
[21] See, *Don King Productions Inc v. Warren* [1998] 2 All E.R. 608 at p. 632 *per* Lightman J. (aff'd [1999] 2 All E.R. 218)
[22] [1906] 2 K.B. 604.

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bargain. This suggested that the right was itself personal. In *The Trident Beauty* the assignee took a right without being bound by what appeared to be an important duty. However, in any given case an alternative construction may apply, for example, the view may be taken that the reason for having a complete remedial regime that allowed recourse to only one person was because the parties envisaged the existence of an assignee at some point.

Despite the language used, perhaps the better explanation of how the House of Lords viewed the "repayment" provision was as a complete contractual remedial regime. At one point, Lord Goff did state that the contractual regime dealt with the "recovery of overpaid hire".[23] This might suggest that he thought the assignor was liable to pay and repay overpaid hire. It should be added that the obligor conceded that the "repayment" provision was operative and required the assignor to repay the overpaid sum.

Finally, if an obligation to make restitution is truly imposed by law there must always be a possibility that such an obligation will be imposed on a third party despite the existence of a related contract to which the plaintiff in the restitutionary proceedings is a party. Clearly, however, a sound legal reason is needed to give rise to that obligation, it will not be satisfied merely because some third party is involved. It is here that the investigation in this paper begins.

Discussion

The Nature of the Assigned Right

The House of Lords was no doubt correct in concluding that the right to receive payment and the obligation to repay were independent. This is true whether the repayment was due under the contract or by way of an imposed restitutionary obligation. While both Lord Goff and Lord Woolf note the independence of these obligations, Lord Goff, with respect, seems to fall into error in laying stress on the relevance of the obligation to repay in determining the conditional nature of the right assigned. It will be recalled that Lord Goff said that what was meant by the term "conditional" was simply that the payment was not final because there was a contractual obligation to repay it if it was not earned. Lord Woolf simply concluded that the right was not "conditional", meaning that it was not qualified notwithstanding the independent right to be repaid.[24] This appears to simply restate the independency of the terms and does not address the actual point, namely, the characterisation of the right assigned. Clearly, if the payment and repayment obligations are independent one cannot be conditional on the other.

[23] [1994] 1 W.L.R. 161 at p. 164.
[24] [1994] 1 W.L.R. 161 at p. 171.

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The conditional or unconditional nature of a contractual right is determined by construction. The characterisation of a right as conditional or unconditional is primarily relevant to issues of performance and the order of performance.[25] The mere fact that a right is held to be conditional does not of itself give rise to an obligation to repay after discharge, whether the obligation to repay is contractual or restitutionary. The conditional nature of a right may be important evidence for the implication of a term for repayment and the obligation upon which the right is conditional will be important in determining whether there has been a total failure of consideration in respect of a restitutionary claim.[26] However, those obligations themselves must spring from another source. The assigned right in *The Trident Beauty* was conditional because it called for payment prior to it being earned. The condition (or contingency with respect to the assignee) was simply that the ship be made available.[27] The right assigned therefore was prima facie qualified and it would appear that, despite recognition of its independent nature, the importance placed on the repayment obligation in the argument submitted to the court led everyone, unwittingly, to forget that the concern was really with performance.[28]

We generally accept that where payment falls due upon the performance of some obligation by the assignor, the assignee's right to payment may be contingent upon prior performance of that obligation by the assignor. Where this is the case, performance amounts to the fulfilment of a condition precedent. If there is no performance the condition is not fulfilled and the payment does not fall due. Where the right to receive a payment has been assigned, this can be expressed as an equity to which the assignee is subject and it is identified in terms of the nature of the right assigned, that is, by construing the contract and the assignment.[29] There is no reason for the analysis to be different if the payment is made in advance of the performance of some obligation by the assignor upon which payment is contingent. The condition is one of defeasance, so that if there is no performance the payment becomes recoverable. That contingency can also be expressed as an equity to which the assignee's rights are subject.[30]

In *The Trident Beauty* there may have been an argument that by agreeing to the "repayment" term, the obligor had made its payment obligations unconditional, that is, independent of performance. Without an express provision to that effect, however, it is unlikely that such an argument would

[25] See, J.W. Carter and G.J. Tolhurst, "Restitution: Payments Made Prior to Discharge of Contract" (1994) 7 J.C.L. 273; J.W. Carter, "Discharged Contracts: Claims for Restitution" (1997) 11 J.C.L. 130 and J. Beatson and G.J. Tolhurst, "Debt, Damages and Restitution" [1998] C.L.J. 253.

[26] See generally, *Stocznia Gdanska SA* v. *Latvian Shipping Co* [1988] 1 W.L.R. 574 and Beatson, *The Use and Abuse of Unjust Enrichment*, (Oxford 1991), chapters 3 & 4.

[27] *Leslie Shipping Co* v. *Welstead* [1921] 3 K.B. 420; *China National Foreign Trade Transportation Corp* v. *Evlogia Shipping Co SA of Panama (The "Mihalios Xilas")* [1979] 1 W.L.R. 1018.

[28] It is suggested that there is nothing in the judgments cited by Lord Goff (see note 7 above) to suggest that this is not the case.

[29] See, *Tooth* v. *Hallett* (1869) 4 Ch App. 242.

[30] See further below.

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succeed. It would produce an uncommercial result. Moreover, as Lord Goff was of the opinion that such a term would be implied in the absence of an express term, this would mean that in every equivalent contract the payment obligation would be independent of performance. Finally, as noted above, Lord Goff accepted the provisional nature of the right as against the assignor in approving the remarks of Neill L.J. For reasons that will be discussed later, it cannot be right that it lost this character in the hands of the assignee.

The Tito *v.* Waddell *Argument*

Lord Woolf was no doubt correct to reject the argument that the assigned right was conditional in the sense discussed in *Tito* v. *Waddell*. In that case, Megarry V.C. explained the "conditional benefit" principle in the following terms:[31]

> "An instrument may be framed so that it confers only a conditional or qualified right, the condition or qualification being that certain restriction shall be observed or certain burdens assumed, such as an obligation to make certain payments. Such restrictions or qualifications are an intrinsic part of the right: you take the right as it stands, and you cannot pick out the good and reject the bad. In such cases it is not only the original grantee who is bound by the burden: his successors in title are unable to take the right without also assuming the burden. The benefit and the burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit."

This principle has a number of doctrinal peculiarities and two points are worth mentioning. First, a party to a contract can always assign a contractual right and make it subject to the assignee performing a delegable duty under the contract.[32] This is merely the combination of assignment and vicarious performance. However, subject to very few exceptions,[33] the assignor remains solely liable to the obligor for the non-performance of that duty. Moreover, if the duty was not delegable, performance by the assignee would not discharge the assignor and may amount to a repudiation if the assignor has put it out of his or her power to perform.[34] However, under the principle as stated by Megarry V.C., both the grantee and grantor would be liable. Second, there may be cases where an assignee does not, by way of delegation, take on a specific duty but may be bound by a contractual burden such as an exclusion clause.[35] This may support Megarry V.C.'s asser-

[31] [1977] 1 Ch. 106 at p. 290.

[32] See, *The British Waggon Company and the Parkgate Waggon Company* v. *Lea and Co* (1880) 5 Q.B.D. 149.

[33] See e.g., *Investors in Industry Commercial Properties Ltd* v. *South Bedfordshire DC* [1986] 1 All E.R. 787.

[34] Cf., *Fratelli* v. *Sorrentino v Buerger* [1915] 1 K.B. 307; [1915] 3 K.B. 367, (C.A.).

[35] See e.g., *Britain & Overseas Trading (Bristles) Ltd* v. *Brooks Wharf & Bull Wharf* [1967] 2 Lloyd's Rep. 51. Alternatively, as noted above, such burdens may suggest the subject right is personal.

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tion that the benefit and burden are annexed so that this is not the recognition of the assignment of contractual duties so much as the duty defines and delimits the right. However, the whole thrust of this part of his judgment is that the parties may frame their contract to annex benefits and burdens in this way. If that is correct, it would not be limited to negative type burdens such as exclusion clauses but also include positive duties.[36]

It is not my intention rationalise the "conditional benefit" principle with the received doctrine governing assignment because it was clearly not relevant to *The Trident Beauty*. This doctrine is only relevant when it is argued that the assignee is personally bound by some duty. It is different from the case where the assignee takes subject to some contingency, such as performance by the assignor. In this latter case the contingency may impact upon when the right may be enforced or when it comes into existence, but it does not delimit the actual right.[37] Moreover, the "conditional benefit" principle will not apply where the benefit and burden are clearly independent. It was conceded (in *The Trident Beauty*) that there had been no delegation of the contractual obligation to repay.[38] In addition, that duty and any restitutionary duty were clearly independent duties. More fundamentally, the only duty that was sufficiently connected to the assignee's right to be even the subject of such an argument was the duty to make the ship available. Clearly, without an express term, the assignee (credit provider) could not be held to have taken on such a duty as it was in no position to do so.[39]

Some Aspects of Assignment

It is necessary at this point to outline some aspects of assignment which will be important for the discussion that follows:

(a) An assignment is said to involve, "the immediate transfer of an existing proprietary right".[40] It must be kept in mind that "transfer", although a word of wide import, does have a particular legal meaning in the context of assignment. The assignee does not obtain the right held by the assignor, although the effect of the assignment

[36] See, *Aspden* v. *Seddon (No 2)* (1876) 1 Ex D. 496 (*Aspden* v. *Seddon* (1875) 10 Ch App. 394) as explained by Megarry VC in *Tito* v. *Waddell (No 2)* [1977] Ch. 106 at pp. 296–299. Cf, *Rhone* v. *Stephens* [1994] 2 A.C. 310 at p. 322 *per* Lord Templeman (a condition can only be attached to a right if it is relevant to the exercise of the right). *Quaere* whether the remarks of Lord Macnaghten in *Tolhurst* v. *The Associated Portland Cement Manufacturers (1900) Ltd* [1903] A.C. 414 at p. 419, are explicable on this basis.

[37] Although Lord Woolf came to the correct decision as regards *Tito v. Waddell*, both Lord Goff and Lord Woolf did not clearly distinguish between being bound by an obligation or burden and merely taking subject to it in holding that because the obligation to "repay" was not transfered to the assignee, any conditional or provisional aspect of the right that existed against the assignor could not exist against the assignee.

[38] See, [1994] 1 W.L.R. 161 at p. 165 *per* Lord Goff.

[39] No argument along the lines of Sir Robert Megarry V.C.'s "pure principle of benefit and burden" was referred to in the speeches.

[40] *Norman* v. *FCT* (1963) 109 C.L.R. 9 at p. 26 *per* Windeyer J.

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may be to extinguish the assignor's right to receive contract performance. At one level of sopistication all rights are personal and the assignee cannot obtain the assignor's right. In an assignment, the assignor's right is disposed of and a fresh right is created and vested in the assignee.[41] What is transferred is the *chose* in action.[42] Moreover, because assignment is considered to involve a transfer, the assignor cannot assign a right greater than the one he or she has.[43] If the chose was qualified by a contractual term, what is received by the assignee must be similarly qualified.[44] Therefore, the conclusion in *The Trident Beauty* that the assignee had taken an assignment of an independent or unqualified right must be wrong.[45] It is not possible by assignment (even for value) to change the character of the underlying contractual right without the consent of the obligor.[46] Otherwise, and contrary to the *nemo dat* rule, the assignee would be in a better position than the assignor. The suggestion in the speeches of Lord Goff and Lord Woolf to the contrary are, with respect, at odds with accepted doctrine.

(b) An assignee does not enforce an assigned contractual right by contract. The assignment does not bring the assignee and obligor into privity.[47] Under the current law, what the assignee enforces is a right of property and it is this which prevents assignment coming into conflict with the rules of privity. Moreover, when a debt is assigned and notice given to the debtor, the debtor can only obtain a good discharge by paying the assignee. After receiving notice, the debtor is bound in conscience to pay the assignee.[48] If the obligor is bound in conscience, so too is the assignee. After notice of the assignment has been given to the obligor, there is a recognised relationship between the obligor and assignee which is policed by equity.

(c) As against any claim made by the assignee, an obligor can generally rely on any defence that has accrued against the assignor at the time the obligor received notice of the assignment. Such defences include rights of set-off, but views differ as to whether it includes

[41] See Marshall, *The Assignment of Choses in Action* (Pitman & Sons, London 1949) p. 37; W. W. Cook, "The Alienability of Choses in Action" (1916) 29 Harv L.R. 816 at p. 817. See also *R v. Preddy* [1996] A.C. 815 at p. 834 *per* Lord Goff.

[42] See, *Investors Compensation Scheme Ltd* v. *West Bromwich Building Society* [1998] 1 W.L.R. 896 at p. 915 *per* Lord Hoffmann.

[43] *McDonald* v. *Dennys Lascelles Ltd* (1933) 48 C.L.R. 457.

[44] This did not mean the assignee's title to money paid was in question, see [1994] 1 W.L.R. 161 at p. 170 *per* Lord Woolf. Of course, discharge may effect a revesting of title in respect of personal property, see Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney 1995) para. 1118.

[45] Cf., A Burrows, "Restitution from Assignees" [1994] R.L.R. 52, who agrees with the finding that the assignee had taken an independent claim.

[46] See Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed., (Butterworths, Sydney 1992) para. 6.101 and the cases there cited.

[47] *Tolhurst* v. *The Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 K.B. 660 at pp. 668–669 *per* Collins M.R.

[48] *Tolhurst* v. *The Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 K.B. 660 at pp. 668–669 *per* Collins M.R.

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pure counterclaims.[49]

(d) Generally, where a claim accrues against the assignor after the obligor has received notice of the assignment, the obligor cannot rely on that claim in an action brought by the assignee. However, the obligor may rely on such a claim if it amounts to a substantive defence, such as an abatement or true equitable set-off.

(e) Finally, the assignee's right is dependent upon the continued existence of the obligor's obligation. If in a contract of hire, payment is due in advance and is not paid, then if the owner has a right to terminate at that point and exercises that right, he or she would have no claim in debt. The better analysis of this situation is not that the owner would have a prima facie claim for the accrued hire which is liable to be defeated by a defence of total failure of consideration. Rather, the better analysis is that upon termination, all unperformed primary obligations which have not unconditionally accrued are discharged.[50] The obligation to pay is a conditional unperformed primary obligation which is destroyed by termination. An assignee of the owner would therefore have no claim to payment, simply because there is no obligation to pay.[51]

There are two statements that encapsulate most of the above points. The first is that the assignee can be in no better position than the assignor was prior to the assignment. The second is that the assignee takes "subject to the equities".[52] "Equities", in this context is given a wide meaning[53] and was developed by equity to do justice to the obligor.[54] It encapsulates the fact that the relationship between the assignee and obligor is governed by good conscience.[55]

There are two further important points from what has been said above that need to be kept in mind. First, the importance of characterising the nature of the right assigned cannot be over-emphasised. With respect to the

[49] See Derham, *Set-off*, 2nd ed., (Clarendon Press, Oxford 1996) para. 13.2.3 and Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed., (Butterworths, Sydney 1992) para. 697.

[50] See, *Photo Production Ltd* v. *Securicor Transport Ltd* [1980] A.C. 827 at p. 849 *per* Lord Diplock. Cf., *Hyundai Heavy Industries Co Ltd* v. *Papadopoulos* [1980] 1 W.L.R. 1129 at p. 1141 *per* Lord Edmund-Davies. See further, Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney 1995) para. 1129.

[51] The assignee's right is not dependent upon the continued existence of that right in the assignor as the assignor disposes of the right upon assignment. Finer distinctions, of course, must be made where the assignment concerns an equitable assignment of a legal interest.

[52] It may be that these are just two ways of saying the same thing, see, *Re Harry Simpson & Co Ltd and Companies Act* [1964–5] N.S.W.R. 603 at p. 605 *per* Jacobs J.

[53] See e.g., *Mangles* v. *Dixon* (1852) 3 H.L.C. 702; 10 E.R. 278.

[54] See Goode, *Legal Problems of Credit and Security*, 2nd ed., (1988) p. 165.

[55] Similar uses of the word "equities" can be found in relation to part performance where, if the requirements of part performance are made out, the defendant is charged upon the equities rather than the contract, meaning that it would be unconscientious for the defendant to rely on the statute, see *Maddison* v. *Alderson* (1883) 8 App. Cas. 467 at p. 475. See also *J.C. Williamson Ltd* v. *Lukey and Mulholland* (1931) 45 C.L.R. 282 and *McBride* v. *Sandland* (1918) 25 C.L.R. 69. As to the "equity of restitution" in relation to relief against forfeiture, see *Stockloser* v. *Johnson* [1954] 1 Q.B. 476 at p. 491 *per* Denning L.J.

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assignment of contractual rights this will be dependent on the construction of the principal contract (as well as the contract of assignment). Second, assignment, as we have come to know it, is substantially the creation of equity and is governed by principles of equity. Rights which are the subject of an assignment can only be enforced (or denied) to the extent that it is conscionable to do so. For example, the phrase "subject to the equities" is generally used to describe situations where the obligor can raise a right he or she has against the assignor in defence of an action brought by the assignee. The extent to which this may be done depends upon what is conscionable. This is not an idiosyncratic notion of justice, what is conscionable depends on the nature of the right assigned and the legitimate expectations of parties in respect of that right. Inasmuch as the assignor cannot assign a right greater than he or she has, the assignee must also accept the "state" of the right at the time notice is given to the obligor. He or she cannot in good conscience do otherwise. The position of the assignee prior to notice being given to the obligor is sometimes thus said to be subject to the state of account between the assignor and obligor.[56] If the assignor promised more than the assignee received then he or she may be answerable to the assignee but that does not affect the position between the assignee and obligor. Once the obligor has received notice of the assignment, it would then be unconscionable for him or her, together with the assignor, to do anything to delimit the rights assigned to the assignee.[57] It follows that after notice the type of defences that may be raised against the assignee are circumscribed so that it would only amount to unconscionable conduct for the assignee to deny what amounts to a substantive defence. The obligor is not, however, limited to raising defences he or she may have against the assignor. If the assignee engages in unconscionable conduct the obligor may have a direct claim against the assignee.

The relevance of these principles with respect to contractual rights can be seen in the following examples:

(1) Assume that in a contract of hire the hire is payable in arrears and the hired goods are not available in the relevant period. If we assume for the moment there was no issue of assignment, clearly the owner of the goods cannot recover. If the contract was not discharged, that is, if the parties went on with it despite the breach, the owner could not recover because the right to recover would never have accrued. If the contract was discharged, the owner could not recover because discharge would prevent the obligation to pay from ever coming into existence. An assignee of the right to the hire could not bring an action in debt against the obligor for that

[56] See, Marshall, *The Assignment of Choses in Action* (1950) p. 181. See further, *The Southern British National Trust Ltd* v. *Pither* (1937) 57 C.L.R. 89 at p. 108 *per* Dixon J.
[57] *Roxburghe* v. *Cox* (1881) 17 Ch D. 520.

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period. But why should the assignee be affected by the requirement that the debt must accrue or the rules of discharge when he or she is not a party to the contract? The answer flows simply from the nature of the right assigned. It is a conditional right and the precondition for its enforceability has not been met.[58] Arguably, when the effect of discharge or electing to go on with the contract is simply that the relevant obligation never accrues, this denies the assignee's right to recover and can be directed at the assignee by the obligor. It is not necessary to see it as a defence the obligor has against the assignor to which the assignee is subject. This is not meant to suggest, however, that the assignee is bound by the condition in the sense of having to perform it or that the assignee's right is delimited by the condition. It merely means that the right is subject to a condition and the non-occurrence of that condition can be raised directly against the assignee.

(2) Assume a situation like that in *The Trident Beauty* but in addition to the ship not being available, the advance payment was never made. Would the assignee have a claim to the hire given that the assignment concerned a present right to payment? The answer must be no, because discharge would destroy the unperformed primary obligation before it ever became unconditional.[59] There is simply no obligation to enforce. What if the parties did not terminate the contract but went on with it in respect of future months? Clearly the owner could not bring an action in debt for the first period as it was not earned. If the owner were to frame its action in respect of that period as an action for breach of contract, its failure to provide the ship or to be ready and willing to provide it could be raised by way of set-off.[60] Surely, an assignee could not bring an action to recover hire after the end of the relevant hire period when it is clear that it was never earned. This follows from the conditional nature of the right assigned. In respect of an action for damages by the assignee prior to the end of the relevant period, or after it (if the parties go on with the contract) the assignee will be subject to the claims the obligor has against the assignor which can be raised by way of defence or set-off. Why then should the result be any different if, in this case, the payment is made up front? Symmetry suggests the result should be the same. However, in the latter case, the obligor cannot resort to the doctrinal argument that

[58] *Westralian Farmers Ltd* v. *Commonwealth Agricultural Service Engineers Ltd* (1936) 54 C.L.R. 361 at pp. 379–380 *per* Dixon and Evatt J.J..

[59] An assignee's rights may also be subject to other remedies available to the assignor, see *Investors Compensation Scheme Ltd* v. *West Bromwich Building Society* [1998] 1 W.L.R. 896 at p. 917 *per* Lord Hoffmann (rescission).

[60] See *The Teno* [1977] 2 Lloyd's Rep. 289; *Federal Commerce & Navigation Co Ltd.* v. *Molena Alpha Inc* [1978] 1 Q.B. 927. Cf., the position in respect of voyage charters, see Derham, *Set-off*, 2nd ed., (Clarendon Press, Oxford 1996) para. 1.7.14

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> the primary obligation to pay remains unperformed at the time of discharge.

We then come to the actual facts of *The Trident Beauty* but first, what would have been the result in this case if the assignee thought the obligor owed it a further sum and it commenced an action for its recovery? Arguably its claim (if successful) would have been subject to the contractual right to off-set payments (as opposed to the contractual right of repayment) if it were operative.[61] Moreover, if such a provision did not exist, any claim for damages that the obligor may have had against the owner for failing to provide the ship in the relevant period could be raised by way of set-off. Whether a restitutionary claim against the owner (should one exist) may be raised by way of set-off against the assignee is more problematic. It is an independent claim, and would in this example relate to an earlier payment and may not impeach the right of the assignee to the payment. A right to restitution arising after notice of the assignment has been given, being an independent obligation, will rarely impeach the claim of the plaintiff as the assignor's liability to make restitution would usually not have brought about or contributed to the defendant's liability to the plaintiff.[62] If this contract had not ended at the point it did, then, if there was no contractual right to adjust payments, whether the charterer could set-off the earlier payment against a payment owed for a later period very much depends on the circumstances.[63]

In the case itself, the relevant payment was made in advance and there could be no issue of set-off as that requires counter-demands, and the assignee did not make one. Moreover, title to the payment was vested and this title is unlikely to be impeached by any right or event arising after discharge. We also know that there had been no delegation of the duty to repay and the Court did not think there was an independent right of restitution against the assignee (although the arguments put before the court were limited to a common law claim based on failure of consideration).[64] However, it may be noted that Lord Goff's introductory remarks as to the

[61] See *Mangles* v. *Dixon* (1852) 3 H.L.C. 702; 10 E.R. 278.

[62] There are, however, cases in which a restitutionary claim has been relied upon successfully by way of set-off: see eg, *Hanak* v. *Green* [1958] 2 Q.B. 9. See the criticism of this case in Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed., (Butterworths, Sydney 1992) para. 3710, see also *Guinness* v. *Saunders* [1988] 1 W.L.R. 863, (C.A.) (affirmed without ref [1990] 2 A.C. 663 (H.L.)). For a full discussion on the meaning of "impeachment," see Derham, *Set-off*, 2nd ed., (Clarendon Press, Oxford 1996) para. 1.7.1. The issue may arise in quantum meruit claims. Where, however, a defendant resists a claim on the basis of total failure of consideration, that is a defence and not a monetary cross-claim and therefore not relevant to set-off. Where a party makes a money claim on the basis of failure of consideration, often there will not be a claim by the other party to give rise to an issue of set-off. But where there is such a claim it would be rare for one to impeach the other, although a less stringent test for set-off may bring about that result: see Derham, *Set-off*, 2nd ed., (Clarendon Press, Oxford 1996) para. 1.7.2.

[63] For the position in respect to periodic payments and set-off see Derham, *Set-off*, 2nd ed., (Clarendon Press, Oxford 1996) para. 1.7.12.

[64] See further, A. Burrows, "Restitution from Assignees" [1994] R.L.R. 52 at pp. 53–54.

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role of restitution in this area do not appear to hit the mark.[65] This was not a case of a plaintiff (obligor) conferring a benefit on a defendant (assignee) in the course of performing an obligation to a third party (assignor). Rather it was a case of a plaintiff (obligor) conferring a benefit on a defendant (assignee) while performing an obligation, which by virtue of the assignment, was owed to that defendant. As explained above, (and leaving aside any technicalities that arise in the case of an equitable assignment of a legal interest) the effect of an assignment is that the obligation is no longer owed to the assignor, his or her primary right to performance is disposed of by the assignment and the assignee enforces a personal right of property. There is therefore a distinction between the analogy that has been drawn between this case and a claim by a sub-contractor against an owner.[66] That analogy appears to confuse an issue that arises at the margins of restitution and contract with an issue that arises at the margins of restitution and personal property.

The arguments set out in the last paragraph do not exhaust the avenues available to the obligor. The starting point is the nature of the right assigned. The assignee's rights on the analysis suggested were subjected to ultimate performance by the assignor. Moreover, as already noted, once notice of the assignment was given to the obligor, both parties were in a recognised legal relationship and bound not to engage in unconscionable conduct. It seems unconscionable for the assignee to insist on its prima facie right to the payment, which always remained conditional, and then effectively deny the conditional nature of the right when it turns out that it was not earned. The nature of the right provides the reason to act if it is being or has been exercised unconscionably. The obligor had agreed to make advance payments, it protected itself by negotiating for that right to be conditional, in addition to contracting for express "repayment" obligations. Without consent it finds itself obligated to a third party and (subject to the argument referred to above concerning the personal nature of the right) it must accept this because the law allows for certain contractual rights to be assigned and it did not negotiate for a clause prohibiting assignment.[67] However, the obligor had a legitimate expectation that the nature of the right assigned would be respected by the assignee. The denial of this expectation by the assignee without good cause is, it is submitted,

[65] See above.

[66] Burrows, however, has argued that this case is analogous to the position that prevents a subcontractor bringing a claim for restitution against the owner, that is, it would undermine the contract between the owner and head contractor. Similarly he says 'if A sells a ship to B requiring B to pay the purchase price to C—as part of a contractual purchase deal between A and C—B could not normally recover the price from C for failure of consideration in the event of non-delivery of the ship because this would undermine the contractual relationship between A and C: A. Burrows, "Restitution from Assignees" [1994] R.L.R.52 at pp. 53–54. See also, P. Watts, "Does a Subcontractor Have Restitutionary Rights Against the Employer" [1995] L.M.C.L.Q. 398.

[67] As to the efficacy of such clauses see, *Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85; *Hendry* v. *Chartsearch Ltd*, *The Times*, Sept 16, 1998. See also, R.M. Goode, "Inalienable Rights?" (1979) 42 M.L.R. 554. Cf. Unidroit Convention on International Factoring, Article 6.

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unconscionable conduct.[68] The case is not the same as where an owner simply directs that payment be made to a third party. In those cases (unless they amount to an assignment) the person in the position of the obligor will usually only have rights against the owner. There is no relationship between the obligor and the third party as there is with an assignment.[69]

There remains an issue as to whether there was any circumstance which would make it unconscionable for the obligor to insist on repayment. Before turning to that there are a couple of doctrinal loose ends that must be tied up for all this to hang together.

It is important to understand where the notions that an assignee can recover no more than the assignor and that an assignment may not vary the obligations of the obligor fit into this scheme. Starting with the latter, it is generally understood that the obligations of the obligor are not determined by what he or she was doing (in fact) for the assignor at the time of the assignment. The extent of the obligor's obligations are determined by construction. Therefore, in *Tolhurst* v. *The Associated Portland Cement Manufacturers (1900) Ltd*,[70] the mere fact that the assignee was a larger company than the assignor and may have made more demands on the obligor was alone not enough to suggest that the effect of the assignment was to vary the obligations of the obligor. The obligor had contracted to supply chalk for 50 years and by construction this was only limited by the extent of his quarry and the size of any cement factory that could be constructed on the subject land. It was therefore inherent that demand for chalk could vary over the term of the contract. However, in *The Trident Beauty*, by holding that the assignee could enjoy the assigned right as if it was not conditional, the House of Lords effectively sanctioned an increase in the obligor's burden in a manner outside the presumed intention of the parties. Arguably, the attempt to assign the right independent of the contingency rendered the assignment ineffective from its inception.

This leads on to the assignee's remedies for breach. The notion that an assignee can recover no more than an assignor is often repeated in cases as a rule of assignment. It was recently suggested that this must apply in respect of breaches committed both before and after the assignment because this rule is based on the "principle" that the obligor is not to be put in any worse position by reason of the assignment.[71] Viewed from the position of the assignee, this may be seen as the price the assignee must pay for having to its advantage the rule that contractual burdens cannot be assigned. However, stated in such strict terms, this "rule" can produce

[68] See generally, P. Finn, "Unconscionable Conduct" (1994) 8 J.C.L. 37.

[69] Cf., A. Burrows, "Restitution from Assignees" [1994] R.L.R. 52 at pp. 53–54 and D. Friedman, "Restitution from an Assignee" [1994] 110 L.Q.R. 521. See also, P. Watts, "Does a Subcontractor Have Restitutionary Rights Against the Employer" [1995] L.M.C.L.Q. 398.

[70] [1903] A.C. 414.

[71] *Bovis International Construction Inc* v. *The Circle Partnership* (1995) 49 Con L.R. 12 at p. 22, c.f., Millett L.J. at p. 31.

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some strange results. Consider the position in *Tolhurst's* case if 35 years down the road the obligor breached the contract. Are the damages recoverable by the assignee to be based on some fictional loss the assignor may have suffered if it still existed and was in the position of the assignee when the contract between the assignor and obligor in that case allowed for an assignment in which the obligor would take instructions from the assignee?[72] The obligor was obliged to provide chalk to whatever cement factory occupied the relevant land and took an assignment of the right to supply. In being obligated to supply the assignee with an increased demand for chalk, the obligor would have to accept that a failure to supply that chalk may cause the assignee more loss than that of the previous owner, the assignor. This is not a variation of the obligor's duty. It would not be right to limit the assignee to some figure the assignor may have recovered at some time in the past, such an approach strains logic.

The better view may be that the assignee's right to damages is governed by the nature of the right assigned and the extent of the duty of the obligor. It is suggested that the obligor is not placed in any worse position (in law) by reason of the assignment as long as the assignee exercises only those powers inherent in the assigned right and the obligor's duty is not varied.

In the case of a breach occurring prior to the assignment, the nature of the right assigned will usually limit damages to that loss suffered by the assignor.[73] Generally, an assignor who suffers no substantial loss cannot confer on an assignee a right to substantial damages by assigning the relevant contractual right.[74] The reason for this result is that the nature of the right assigned is that of a secondary right to damages. The primary right to performance from which the assessment of damages is derived is at all relevant times vested in the assignor. It would therefore follow that where it is possible to assign the primary right to performance despite a previous

[72] The more usual construction is such that a "contract that A will build a house for B, and follow his instructions cannot be converted by assignment into an obligation to follow the instructions of C", *Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd* (1992) 57 B.L.R. 57 at p. 77 *per* Staughton L.J. (on appeal [1994] 1 A.C. 85) citing *Kemp* v. *Baerselman* [1906] 2 K.B. 604. See also, *Bovis International Inc* v. *The Circle Ltd Partnership* (1995) 49 Con L.R. 12 at p. 22 *per* Staughton L.J.

[73] See, *Dawson* v. *Great Northern and City Railway Company* [1905] 1 K.B. 260, *GUS Property Management Ltd* v. *Littlewoods Mail Order Stores Ltd*, 1982 S.L.T. 533. Moreover, given the assignee owns the relevant right, he or she may in this case keep the full sum recovered even if that amounts to a greater sum than that paid in settlement to the assignor, see *Compania Colombiana De Seguros* v. *Pacific Steam Navigation Co.* [1965] 1 Q.B. 101 and *British Union & National Insurance Co.* v. *Rawson* [1916] 2 Ch. 476.

[74] *Darlington Borough Council* v. *Wiltshire Northern Ltd* [1995] 1 W.L.R. 68 at p. 72 *per* Dillon L.J. There has been a spate of recent cases suggesting that where an assignee or third party suffers substantial damages but is not privy to the relevant contract, the assignor, although not suffering substantial damages (in fact) may bring an action for the recovery of such damages: see *Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85; *Darlington Borough Council* v. *Wiltshire Northern Ltd* [1995] 1 W.L.R. 68; *Bovis International Construction Inc* v. *The Circle Partnership* (1995) 49 Con. L.R. 12; *Alfred McAlpine Construction Ltd* v. *Panatown Ltd* (1998) 58 Con. L.R. 46.

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breach, the assignee should be able to recover for its own loss.[75] Moreover, in the case of a breach after assignment, so long as demands made on the obligor are within the construction of its duty then the assignee should be able to recover for its loss. In that circumstance, the obligor is not any worse off by virtue of the assignment, it simply failed to perform a duty, which, although the original assignor may never have requested, was still within the promised performance.

There is still, however, the issue of the obligor being placed in a worse position (in fact) by reason of the assignment. For example, when the right is assigned to an especially vulnerable assignee. As noted above, however, there is no privity of contract between the assignee and obligor and although the assignee's rights may stem from taking the assignment of a contractual right they are not enforced in contract but rather they are personal rights of property, the obtaining of which depended upon the "institution" of assignment. It follows that the assignee can only recover to the extent it is conscionable to do so. It is this that should protect the obligor in the case of an assignment to an especially vulnerable assignee. In addition, it must follow that in cases of breaches occurring after assignment, the obligor should generally get the benefit of an assignee who suffers less damage than the assignor would have suffered.

Recently in *Bovis International Inc* v. *The Circle Limited Partnership*,[76] Millett L.J. suggested that an assignment cannot vary the heads of damage but it may make the contract breaker liable for a greater measure of loss. This seems correct and although it is not possible to vary the burden of the obligor, this should not be seen as being analogous to the suggestion that an assignment may not have the effect of varying the liability of the obligor.[77] The duties of the obligor are based on a contractual agreement and cannot be varied without his or her consent. However, the secondary obligation to pay damages and the measure of those damages are not based on agreement. The equitable nature of the relationship between the assignee and obligor dictates that the liability of the obligor should not be governed by strict rules as to quantum.

This is an important point in the assessment of *The Trident Beauty*. If the rule is truly that on breach an assignee can only ever recover an amount

[75] This may appear at odds with the law of contract but it must be kept in mind that an assignment involves a dealing in personal rights of property. The rules governing the transfer aspect of the transaction are rules of personal property. Contract doctrine is important in determining the characteristics of the assigned right and informing remedial consequences. A possible example may be where there is a re-assignment of an interest originally assigned by way of mortgage and where the breach occurred during the period of the mortgage, see *Bovis International Construction Inc* v. *The Circle Partnership* (1995) 49 Con. L.R. 12. In the context of actions in tort, see, *Masters* v. *Brent London Borough Council* [1978] 1 Q.B. 841.

[76] (1995) 49 Con. L.R. 12 at p. 31.

[77] Cf., *National Carbonising Co Ltd* v. *British Coal Distillation Ltd* (1936) 54 R.P.C. 41 at p. 46 *per* Clauson J. It may be added, that if the potential for increased liability was an impediment, equity may have never upheld the assignment of part of a debt. In such a case, arguably the obligor's liability is increased even though there are procedural safeguards in place to prevent that occurring in fact.

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that could be recovered by the assignor, then that may be viewed as the quid pro quo for limiting the obligor to any personal remedies he or she may have against the assignor, especially when the assignment occurred prior to any personal claim arising against the assignor. If that is right, then arguably *The Trident Beauty* is doctrinally sound because you do not get to the stage of considering the conduct of the assignee in retaining the payment because the prior issue of characterising the conditional or unconditional nature of the right is itself insulated by this rule. That is, when the conduct giving rise to the matter is a failure on the part of the assignor, the rule prevents investigation of direct claims against the assignee. However, for the reasons given above that "rule" appears to be more a statement of the result in many cases rather than a statement of principle itself. Moreover, it would lead to the practical result that the assignor could assign something greater than he or she actually had.

Turning finally to arguments in favour of the assignee. Perhaps the House of Lords would hold that the arguments for repayment were offset by the redistribution of risks it would entail as well as the undermining effect such a decision would have on "security". However, even assuming the relevance of such arguments in respect of a matter that appeared to be concerned purely with correcting the position between the obligor and assignee, the "security" would not have been undermined by ordering the repayment. In fact, it was in the very nature of the "security" taken. Arguably, there would have been no redistribution of risk because the assignee took an assignment of a conditional right and was therefore always subject to the risk. It has always been held that the duty is on the assignee to inform itself of these facts.[78] As already noted, Lord Woolf thought that the effect of the decision was to place the obligor in exactly the same position it would have been in if there had been no assignment. That is, it has its rights against owner. The existence of the assignment simply introduced a third party to the relationship who happened to be able to pay. However, that argument does not take account of the point that the presence of the third party brought into existence a legal relationship which allowed for the possibility of an alternative cause of action which is imposed by law if the assignee is guilty of unconscionable conduct.[79]

The strongest argument for the assignee was that the obligor had contracted itself out of this action by agreeing to look only to the assignor for repayment. If there is an all encompassing remedial regime that deals with the allocation of risks after discharge then it is doubtful whether the obligor could argue that the act of the assignee retaining the payment is unconscionable. This was no doubt the finding of the Court but it depends on the view one takes of the "repayment" terms of the contract.[80] When there is

[78] See, *Mangles* v. *Dixon* (1852) 3 H.L.C. 702; 10 E.R. 278.
[79] Cf., [1994] 1 W.L.R. 161 at p. 166 *per* Lord Goff, and at p. 171 *per* Lord Woolf.
[80] See above.

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no such regime then there exists the possibility, on the analysis given, that the obligor may have actions against both the assignor and assignee. In that case, apart from having to make sure that the obligor does not recover twice, there may be much to be said for the view that the obligor must first exhaust his or her remedies against the assignor. This would prevent the obligor benefitting (in fact) from the assignment: this was one of the concerns Lord Woolf had if the obligor was allowed to recover against the assignee. If the obligor does that and has still not recovered the full value of its claim, it would be unconscionable for the assignee to then deny the claim of the obligor.

On a more general level, the result in the case may suggest that the rules governing the assignment of contractual rights do not apply to the assignment of debts. Although lawyers are adept at making sure they talk about the assignment of contractual rights rather than contracts, this is not generally reflected in discussions about debts. We do not generally talk about rights in debts.[81] Moreover, the existence of a debt is not dependent upon the continued existence of a contract and the commercial world trades in debts in ways that are simply not reflected with respect to other contractual rights.[82] However, the law generally concerns itself with rights in (or of) property rather than with the actual tangible or intangible piece of property.[83] It is difficult to formulate doctrinal reasons why debts should be treated differently.

Conclusion

The reasoning in *The Trident Beauty* seems to perpetuate, in another context, the analogous position that exists in respect of entire obligations and the different results that may flow from the simple matter of whether payment is made in advance or not. That problem flows from the common law's requirement of *total* failure of consideration. The problem in *The Trident Beauty* flowed from an error in characterising the assigned right as unconditional and an apparent lack of argument on the nature of the relationship between the obligor and assignee. There is perhaps no real problem in classifying the obligor's claim as an equity the assignee took subject to but there is probably no reason to have to resort to that language because, on the analysis suggested, the obligor has a direct claim against

[81] For example, in the recent decision in *Investors Compensation Scheme Ltd* v. *West Bromwich Building Society* [1998] 1 W.L.R. 896 at p. 915, Lord Hoffmann said, "Assignment of a "debt or other thing in action" was made possible at law by section 136 of the Law of Property Act 1925. In each case, however, what is assignable is the debt or other personal right of property. It is recoverable by action, but what is assigned is the *chose*, the thing, the debt or damages to which the assignor is entitled."

[82] See e.g., Unidroit Convention on International Factoring, Article 10, which limits the recourse a debtor has against the factor to situations where the factor has not discharged an obligation to make payment to the supplier in respect of the receivable or where the factor has made such a payment but at the time knew of the supplier's non-performance or defective or late performance as regards the goods to which the debtor's payment relates. See further, UNCITRAL, Draft Convention on Assignment in Receivables Financing, Article 12.

[83] See generally, Lionel D. Smith, *The Law of Tracing*, (1997) pp. 48–57.

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the assignee. Given this result, it follows that the normal limitations that would result from the fact the relevant claim arose after notice of the assignment do not arise here. Moreover, there is no doubt that this result can be analysed in restitutionary terms with unconscionability being the relevant basis for restitution, although, the policing of the relationship between the assignee and obligor to prevent unconscionable conduct does not exist solely for the purposes of reversing unjust enrichments.

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