Passing the baton

Sophie Samani and **Scott Sobczyk** on assignment of claims

What options do you have where funds run out, or the costs of litigation are seen as prohibitive? As lawyers representing and advising clients pursuing a dispute, you will most likely have been in the position where this situation has affected you.

Solicitors have a responsibility to advise clients on alternative methods of funding. This duty continues throughout the life cycle of the case. So whether the issue of available funds comes at the beginning or a later stage of a dispute, the question of alternative methods of funding or monetising the dispute must be discussed and explored.

The default position is usually to consider after-the-event insurance and / or third party funding, as these options are often better known and familiar. But depending on the size of the dispute and risks involved, such traditional funding options can often be far too expensive to purchase, leaving clients with a difficult decision with regards to the continuation of a dispute.

Is this the end? Are there any other options available to assist parties who wish to pursue claims? Is it possible to assign a claim to a third party?

ASSIGNMENT

Assignment is the transfer of a right or interest from one person / entity to another, whereby the assignee can exercise, claim and / or enforce such right (or interest) in place of the assignor.

It has long been established that it is possible to assign claims from one party to another in specific circumstances. However, it is also well known that a bare right to litigate is not capable of assignment due to the common law principles of champerty and maintenance, which prevent such assignments on the grounds of public policy (*Simpson v Norfolk and Norwich University Hospital NHS Trust*, CA 12 Oct 2011: 'Champerty' is where, for a division of the spoils, a party maintains or interferes with litigation, while 'maintenance', often referred to as the aggravated form of champerty, is the intermeddling in litigation with no legitimate concern and without just cause or excuse).

However, what is often overlooked is that certain claims (or 'choses in action') are validly assignable – and this covers a wide spectrum of disputes. As matters stand, the claims that are currently capable of assignment by a solvent entity without being void on grounds of public policy are:

- Debts / judgment debt (a debt - which is effectively both property and a cause of action itself - or the transfer of a lease which may carry with it the right to existing arrears of rent (*JEB Recoveries LLP v Binstock* [2015] EWHC 1063)).
- Contractual rights to performance under an existing contract (non-performance or defective performance) provided the contract is not personal to the parties or contains a non-assignment clause; and
- Proceeds under credit and insurance contracts / policies (depending on the wording of the policy).

INSOLVENCY: ASSIGNMENTS COMMON

Assignments are regularly exercised in an insolvency context, and this has been common practice for some time, with an increasingly competitive market for the commercial purchase of claims. Indeed, while it has long been the case that office holders have been able to assign claims that belong to a company prior to its administration or liquidation, the scope in respect of what claims office holders could assign was extended in October 2015 to include claims that office holders have in their personal capacity which arise out of the insolvency.

Such office holder claims include claims for wrongful trading, transfers at an undervalue and preferences. These changes, which were introduced in October 2015 by the Small Business Enterprise and Employment Act 2015, have dramatically altered the available options for office holders in the event where they were previously unable to pursue claims due to a lack of available funds. In this situation, creditors of insolvent entities have benefited from the widened ability to assign.

Given that parliament has legislated to encourage assignment of claims in the insolvency context, how is that reconcilable with the assignment of claims from a solvent entity being against public policy? The reach and applicability of champerty and maintenance is becoming less relevant given modern commercial realities, the robustness of the judicial system, and the ever growing importance of ensuring access to justice. Indeed, this is evidenced by the courts' increasingly flexible approach with regards to the validity of assignments. *Trendtex Trading Corp v Credit Suisse* (1982) AC 679 HL established that an assignment of a right of action is possible 'if the assignee has a genuine commercial interest in taking the assignment and pursuing it for his own benefit'.

More recently, the court held in *Casehub Ltd v Wolf Cola Ltd* [2017] EWHC 1169 (Ch) that 'there are strong public policy grounds in favour of upholding the assignment'. In this case, the '...claimant acquired the right to the sum in question' and the court held that '...the assignment of the right to bring a restitutionary claim to recover the sum is incidental and subsidiary to the right properly and is not a bare cause of action. The fact that liability to repay the sum is disputed does not affect its assignability'.

Outside of an insolvency context, champerty and maintenance still apply in the majority of cases. This means that assignment as an option to fund litigation is still limited and needs careful consideration - but it should be considered.

OTHER CLAIMS

What 'other claims' could a solvent entity assign? What about assigning contractual rights to performance and proceeds under credit and insurance policies?

While we see assignments being used often in respect of book debts, what is less common is assignments for contractual rights to performance and proceeds under credit and insurance contracts policies.

In our view, we are likely to see some increase in assignments, particularly after the Business Contract Terms (Assignment of Receivables) Regulations 2018, which makes any term in a relevant business contract that prohibits or restricts the assignment of receivables automatically ineffective. These Regulations apply to all relevant business contracts entered into on or after 31 December 2018. We consider that we will see a gradual increase in assignments being operated in claims which are based upon contractual rights to performance, along with proceeds due under insurance policies.

A PART OF THE PUZZLE

Assignment will not always be the right option, or indeed straightforward. However, the option to assign for certain types of claim should not be overlooked and forgotten. When clients are advised on their available funding options, where assignments are permissible, this option should be considered and provided to clients.

Where clients run out of funds, or are looking to realise value out of a claim before its conclusion, then enquiries should be made with companies that specialise in purchasing litigation.

The costs, along with the terms, should be considered side by side with other forms of traditional funding (such as ATE insurance or third-party funding). Assignments often work out as a commercially better alternative just on the numbers, due to the increased efficiency of a client that does nothing but litigate. This can be of particular importance for lower to mid value claims where traditional funding is too expensive.

One of the issues with assignments is that this does not always relieve the assigning party of their continued involvement in a case (particularly where assistance with disclosure and witness evidence will still be required). Different claims will require differing levels of input from the assignor after the date of assignment, dependent on the nature of the matters in dispute. Therefore, assignment is not a solution whereby your client may wish to completely dispose of their involvement with a claim - although sometimes that might be possible and might be attractive.

THE FUTURE

The law on what can be assigned is constantly evolving and changing. Recent changes to legislation and recent cases have made it clear that the courts are willing to adopt a flexible approach with regards to assignment of claims.

While the position in respect of assignment of claims from insolvent individuals and companies is more straightforward due to the Insolvency Act 1986 and the changes brought about by the Small Business Enterprise and Employment Act 2015, for a solvent party the option to assign remains more limited.

The prohibition on the 'bare right to litigate' still exists, although parties should explore whether assignment is a legitimate option in areas where assignments are permissible.

On the operation of assignments generally, the courts are taking an increasingly informed and commercial approach to assignments, but outside of an insolvency context, the situation is variable and there is a lack of clarity over what will 'offend public policy' and what is just a sensible commercial approach to a dispute. In this respect, the area is ripe for review by the appellate courts. Until then, the question remains as to how long the principles of champerty and maintenance will remain valid and relevant.

If you have claims which fall within the 'exemptions from champerty and maintenance', you should seek advice from a broker or funder who specialises in purchasing claims by way of assignments.

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