Claims as Commodities

Paying for Claims

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Claims as Commodities – when can claims be bought and sold?

• It is now established that any private law right of action (eg claim in tort, for breach of contract, in restitution, or claim for property) is a chose in action.

• Law of Property Act 1925 section 136: ‘Any absolute assignment by writing under the hand of the assignor ... of any debt or other legal thing 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 claim such debt or thing in action, is effectual in law’.

• However, this (and its predecessor, s 25(6) Supreme Court of Judicature Act 1873) are essentially procedural and do not render assignable choses in action not previously capable of assignment in equity (Torkington v Magee [1902] 2 KB 427).
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• When can a claim, a cause of action, be assigned?

• There remains historical prohibition on assignment of choses in action which are essentially personal in nature. However this prohibition is more limited in nature than may at first appear.

• ‘The critical question for these purposes is whether the identity of the person to whom the obligation is owed is an essential aspect of it: see Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd [1902] 2 KB 660 at 676-677. Thus in Peters v General Accident Fire and Life Assurance Corp Ltd [1938] 2 All ER 267 a policy of motor insurance was held, not surprisingly, to be personal to the original policyholder and incapable of being assigned to a purchaser of the vehicle in respect of which it had been issued, since the identity of the insured was material to the risk undertaken by the insurer.’ Simpson v Norfolk NHS Trust [2011] EWCA Civ 1149, [2012] 1 All ER 1423 per Moore-Bick LJ
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• Thus a claim for personal injury was capable of assignment: ‘the obligation to pay compensation, which arises by operation of law, is not one that is personal in the sense that it depends upon the identity of the claimant’.

• There might be practical complications (statements of truth, disclosure etc); but these are inherent in any procedure under which an assignee can sue (ie. in his own name without joining the assignor).
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- These considerations are however really only preliminary to what is generally likely to be the real issue: ie. the extent to which it is still true that ‘you cannot assign a bare right to litigate’?

- In *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL) T assigned claim to C, who had given T financial support in the litigation. However the assignment expressly contemplated that C might sell the claim to a third party. Held: assignment void as savouring of champerty.

- ‘... it is today true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty ...‘ per Lord Roskill
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• However: ‘The vice, if any, of the agreement lies in the introduction of the third party. ... This manifestly involved the possibility, and indeed the likelihood of a profit being made, either by the third party or possibly also by Crédit Suisse, out of the cause of action. In my opinion this manifestly "savours of champerty", since it involves trafficking in litigation, a type of transaction which, under English law, is contrary to public policy.’ per Lord Wilberforce
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- In *Simpson v Norfolk NHS Trust* [2011] EWCA Civ 1149, [2012] 1 All ER 1423 C assigned to S his negligence claim against N. S’s husband had contracted MRSA at the same hospital. S said she had a legitimate interest in forcing the hospital to confront its failure to implement adequate procedures to control infection.

- Held: S ‘does not have an interest in [C]’s claim of a kind that the law should or does recognise as sufficient to support an assignment of what would otherwise be a bare right of action and is therefore guilty of wanton and officious intermeddling with the disputes of others.’
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- In this context ‘wanton and officious intermeddling with the disputes of others’ [the phrase classically used to characterise unlawful maintenance or champerty] ‘is liable to be a little misleading. It can easily be taken to suggest that the person concerned is acting in an arbitrary and capricious manner, but I doubt whether in this context it should be understood to mean anything more than that he or she does not have a sufficient interest in the subject matter of the claim to justify taking an assignment.’
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• ‘Access to justice is not a consideration, since there is no reason to think that Mr Catchpole could not have pursued his claim as easily as Mrs Simpson, if he wished to do so’

• ‘There is a real risk that to regard a collateral interest of this kind as sufficient to support the assignment of a cause of action for personal injury would encourage the purchase of such claims by those who wished to make use of them to pursue their own ends.’
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- Might the outcome have been different if access to justice was an issue?
- *Simpson* was concerned with a tortious cause of action.
- Assignment of a cause of action which is incidental to a property right is permitted: *Ellis v Torrington* [1920] 1 KB 399.
- Debts have historically been treated as a distinct category and regarded as assignable property.
- Contractual rights are generally capable of assignment, but difficulty can arise where a cause of action alone is being assigned.
Paying for Claims

- The present position: Solicitors Code of Conduct, outcomes (9.1, 9.2, 9.4, 9.5, 9.7):
  - your independence and your professional judgement are not prejudiced by virtue of any arrangement with another person;
  - your clients' interests are protected regardless of the interests of an introducer or fee sharer or your interest in receiving referrals;
  - clients are informed of any financial or other interest which an introducer has in referring the client to you;
  - clients are informed of any fee sharing arrangement that is relevant to their matter;
  - where you enter into a financial arrangement with an introducer you ensure that the agreement is in writing.
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- Lord Justice Jackson’s *Review of Civil Litigation Costs: Final Report* (Chapter 20) recommended that referral fees for personal injury claims should be banned (or alternatively capped at a modest figure, £200 suggested).

- Serious consideration should be given to the question whether referral fees should be banned or capped in other areas of litigation.

- The lifting of the ban on referral fees in 2004 had not proved of benefit either to claimants or the providers of legal services. The only winners were the recipients of referral fees.
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- Part 2 of the Legal Aid Sentencing & Punishment of Offenders Bill (LASPO) deals with the implementation of some of the Jackson proposals.

- Clauses 57 to 61 regulate referral fees. Referral fees will be prohibited in respect of ‘prescribed legal business’.

- The Government has announced that Part 2 of the Bill will not now be implemented until April 2013.

- The Bill had its third reading in the House of Lords on 27 March, after completing the House of Lords Report Stage. The Bill has now returned to the House of Commons for MPs to consider amendments made by the Lords.
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- A ‘regulated person’ is in breach of clause 57 if that person either pays or is paid for referrals of ‘prescribed legal business’.

- Payment would include any form of consideration; but would not include provision of hospitality that is reasonable in the circumstances.

- Regulated persons include barristers, solicitors and those regulated to provide claims management services.

- ‘Prescribed legal business’ means business that involves provision of legal services which ‘relate to a claim or potential claim for damages for personal injury or death’, or business of a description prescribed by the Lord Chancellor.
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- The relevant regulators will be obliged by clause 58(1) to ensure ‘appropriate arrangements for monitoring and enforcing’ the restrictions.

- However breach will not be an offence or give rise to an action for breach of statutory duty, nor make anything void or unenforceable except the contract to make or pay the referral fee itself.
Paying for Claims

- Solicitors can now enter into alternative business structures.
- That enables third parties, non-lawyers, including claims management companies, to take equity in a solicitor’s firm and thus share in the profits.
- So even if a referrer cannot charge a referral fee, it can thereby receive the equivalent as its share in the law firm’s profit.
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