Case No: 03/TLQ/1147

Neutral Citation Number: [2003] EWHC 3415 (QB)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 18 December 2003

Before:

THE HONOURABLE J. LEIGHTON WILLIAMS QC

Between:

24 Seven Utility Services Ltd

- v -

Rosekey Limited t/a Atwasl Builders

-and-

Colets Piling Ltd

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

The Honourable J. Leighton Williams QC

Judgment

1. London Power Networks ("LPN") supply electricity in Kent pursuant to a licence granted by the Secretary of State for Trade and Industry.

2. On 24 April 2001 London Electricity Group ("LEG") entered into an agreement with the claimant, called the "Variation Agreement", whereby the claimant agreed to manage LPN's network, and maintain and repair inter alia underground cables.

3. On 20 December 2001 one of LPN's underground cables at Dartford, Kent, was damaged, apparently during a pile driving operation carried on at a building site.

4. On 26 April 2002 LPN entered into an agreement with the claimant whereby they purported to assign to the claimant the right to claim from the relevant third parties the cost of the damage caused by the third parties during the period 1 January 2001 to 26 April 2001 and thereafter until 31 March 2006. The assignment therefore purported to assign to the claimant LPN's right to sue in respect of the damage caused on 20 December 2001.

5. The agreement of 26 April 2002 contains 4 recitals. Recital (A) states that LPN owns the assets forming the electricity distribution network the subject of their licence and Recital (B) states that the network suffered damage on various occasions in the period 1 January 2001 to the date of the agreement.

   Recital (C) states:

   > "24seven has repaired the damage to the Network caused by the said third parties at its own cost."

   Recital (D) states:

   > "As owner of the Network LPN wishes to assign to 24seven the right to claim the cost of the damage from the said third parties."

6. The claimant alleges that the defendants negligently damaged the underground electricity cable. I am not concerned with the merits of those allegations. In Paragraph 1 of the amended particulars of claim they claim the right to pursue the action as assignees of LPN. In para 3 they allege the repair works were carried out by the claimant "at its own expense". In para 6 they allege they suffered damage by reason of the defendants' negligence but Mr Matthewson, who appears for the claimant, has made clear that this paragraph is not intended to allege that the claimant has any direct cause of action against the defendants. Thus the claimant's right to sue the defendants depends on whether it acquired the right to bring such an action as assignee.

7. On 18 September 2003 Master Rose ordered that two questions be decided as preliminary issues:

   1 Whether the cause of action upon which the claimant sues had been validly assigned to it.

   2 Whether the amended particulars of claim discloses a reasonable cause of action notwithstanding matters pleaded at paragraphs 14/15 of the amended defence of the first defendant and paragraph 2 of the defence of the second defendant.

8. Paragraph 14 of the amended defence of the first defendant, in reliance on the wording of Recital (C) that the claimant had remedied damage to the cable at its own cost (the phrase employed is "at its own expense") alleges that LPN had no claim for damages to assign. Paragraph 15 of the amended defence of the first defendant states that as the amended particulars of claim does not allege that the claimant were under any legal obligation to repair the cable, they had remedied the damage gratuitously and therefore had no cause of action.

9. Paragraph 2 of the defence of the second defendant repeats the substance of these assertions.

10. Following pleading points taken in the first defendant's defence, the claimant served a reply stating *inter alia* that the repair works were carried out "at the request of LPN pursuant to an agreement dated 24 April 2001".

11 Before me the parties have treated Master Rose's reference to "validly assigned" as a reference to whether the assignment was possible in law and the main issues I have been invited to rule on are whether the right of action was assignable in law and the effect of the words "at its own cost" in Recital (C) on whether or not the pleadings disclose a reasonable cause of action. Mr Davies for the first defendant also, but with a little diffidence, invited me to find that the pleadings are defective as neither the amended particulars of claim nor the reply asserts a legal basis upon which the right might be assigned to the claimant: the claimant is not alleged to be in a position *vis à vis* LPN analogous to that of an insurer nor is it alleged that the claimant was under a legal obligation to repair the cable. He also complained in his skeleton argument dated 25 September 2003 that the claimant had failed to serve a copy of "the contract with LPN" (the Variation Agreement) and failed to plead the effect of any relevant clause and complained that it was not for the defendant to search in the agreement for any clause that might be relevant.

12. At the hearing Mr Matthewson, who did not draft the particulars of claim, acknowledged that there was some justification for complaint but he said no request had been made for further information following Mr Davies's skeleton and that the parties had been addressing the same issues at the hearing. Following completion of the hearing Mr Matthewson discovered that there had been pre-trial correspondence between the parties dealing with the contents of the pleadings and he made further written submissions to me on this correspondence, to which Mr Davies for the first defendant has made short supplementary submissions. I have received no supplementary submissions from Mr Crowley who represents the second defendants.

13. In pre-trial correspondence the claimant's solicitors asked the defendants whether they were taking any point that the Variation Agreement had not been pleaded in the amended particulars of claim and whether the reference to it in the reply was inadequate or did not sufficiently set out the terms relied on, adding that if this was "really an issue" early application would be made to re-amend the amended particulars of claim. The first defendants replied stating they did not require an amendment to exhibit the agreement but reserved their position on their assertion that the pleadings did not comply with CPR 16 PD 9.2. This position is maintained in Mr Davies's supplementary submissions where he reiterates his point that the pleadings still lack a necessary averral that LPN is under an obligation to indemnify the claimant against the costs of remedying the damage to the cable.

14 None of the parties has chosen to put in evidence and so the matters I have to decide fall to be decided on the basis of what the parties have put before me, the pleadings, and the above mentioned correspondence. I consider the material before me is sufficient to cover the issues I have to decide.

15 Is a right of action in tort assignable?

Mr Davies for the first defendant, whose arguments have been adopted by Mr Crowley for the second defendant, founded his argument on what is said on the topic in Chapter 4 of Clerk and Lindsell on Torts (18th Edition) published in 2000 where the following appears at para 4-72:

> "A right of action for damages in respect of a tort is, on grounds of public policy, not capable of assignment. Though, no doubt a chose in action in the widest sense of that term, it is not a legal chose in action within section 25 of the Judicature Act 1873 so as to allow an assignee to sue in his own name."

He referred me to *Defries v Milne* [l913] 1 Ch 98 and *Glegg v Bromley* [1912] 3 KB 260 which are cited in support and also to *May v Lane* (1894) 64 LJQB 236 and the observations of Wright J in *Dawson v Great Northern and City Railway Co* [1904] 1 KB 277. Section 25 of the 1873 Act has been replaced by section 136 of the Law of Property Act 1925 with the phrase "thing in action" replacing "chose in action".

16. In *May v Lane* (1894) 64 LJQB 236, the Court of Appeal held that an agreement by the defendant to advance

£250 to a builder was not a debt or other legal chose in action enabling the builder to assign £50 thereof to the claimant. Rigby LJ observed at p 238:

> A legal chose in action is something which is not in possession, but which must be sued for in order to recover possession of it. It does not include a right of action, such as, for instance a right to recover damages for breach of contract, or a legal right to recover damages arising from an assault, for if the argument on behalf of the plaintiff be correct, such a right would be assignable, and this sub-section of the Judicature Act would materially affect the law of champerty and maintenance."

17. *May v Lane* was followed by Wright J in *Dawson v Great Northern and City Railway* [1904] 1 KB 277. He held that a claim under the Lands Clauses Act for compensation was akin to a claim in tort and therefore not assignable but he appears to have done so with some diffidence. On appeal the Court of Appeal held the claim was assignable holding it to be "property". At p 271 Stirling LJ observed:

> "Even if the assignment be regarded apart from the conveyance of the land and buildings comprised in the deed it appears to us that it is good, but we think that great weight must be given to the circumstances that this assignment is incidental and subsidiary to that conveyance and is part of a bona fide transaction the object of which is to transfer to the plaintiff the property … Such a transaction seems to be very far removed from being a transfer of a mere right of litigation. This conclusion appears to be in accordance with the decision in *Williams v Protheroe* where it was held ... that there was no champerty in an agreement containing provisions for the purpose of enabling the bona fide purchaser of an estate to recover for rent or injuries done to it previously to the purchase."

18. In *Glegg v Bromley* [1912] 3 KB 474 the Court of Appeal upheld an assignment by a wife to her husband of monies she might recover under an action for false representation. The Court drew a distinction between an assignment of a cause of action and the proceeds of an action. Vaughan Williams LJ at p 484 stated he knew of no rule of law preventing assignment of the fruits of an action and on construing the deed of assignment in that case considered there was nothing in it resembling maintenance or champerty Parker J at pp 489 - 490 said:

> "Equity on the ground of public policy did not give validity to the assignment of what is in the cases referred to as a bare right of action and this was so whether the bare right were legal or equitable. I have looked at a good many authorities on the point, and I am satisfied that the real reason why equity did not allow the assignment of a bare right of action, whether legal or equitable, was on the ground that it savoured of or was likely to lead to maintenance … The question was whether the subject-matter of the assignment was, in the view of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity."

He held that as what was being assigned was future property no question of maintenance could arise. What emerges from this judgement is the importance the court attached to maintenance/champerty when deciding whether or not an assignment was valid and the court's willingness to uphold the assignment in the absence of maintenance.

19. The most positive assertion that a right of action in tort is not assignable is to be found later the same year in *Defries v Milne* [1913] 1 Ch 98 where the Court of Appeal held that a claimant let into possession of premises where the defendant had committed acts of waste during an earlier occupancy could take a valid assignment of a lease of the premises from the earlier occupant because the agreement did not purport to assign any right of action in tort in respect of the waste but only in respect of breaches of covenant. The court also held that if the assignment had purported to assign any such right the assignment would have been invalid as such a right was not assignable. Farwell LJ stated at p109:

> "Inasmuch, however as the question whether such a right of action (ie a right of action in tort) is assignable has been argued, I propose to express my opinion on it. If the deed had assigned or purported to assign this right of action for tort the assignment would have been invalid because such a right is not assignable … a right of action in tort was never assignable at law, and no case has been cited to us, nor do I think it possible to find any case, where it has ever been held to be assignable in

> equity … If the remedy rests in tort it is not assignable … The Court of Chancery would never have allowed its process to be used for the purpose of recovering damages for a tort … I think it would be exceedingly bad policy to allow a person to sell rights of action in tort which he did not care to run the risk of enforcing himself…"

Hamilton LJ said at p 112:

> "It is clear to my mind that the rule that such an assignment cannot be sustained is so well established and has been so long settled and never, so far as I know, been departed from, that it is too late to suggest, certainly to any tribunal except the highest, that the rule can be departed from now. It would be unprofitable in me to endeavour to discuss its reasons. It is a rule and I think we ought to follow it. I do not in the least dissent from any or all of the reasons given for it, but it is a rule which binds us…"

The authorities Farwell LJ cited and observations he made suggest that the objection to such an assignment lay in public policy, rules against maintenance and the fact that such a right would never have been enforced by a Court of Chancery. He held an assignment of a right of action in contract was acceptable because such would have been enforceable in a Court of Chancery. No reference was made to *Dawson v Great Northern and City Railway* where the Court of Appeal held the claim under the Lands Clauses Act for compensation was assignable holding it to be "property" and Stirling LJ's statement in that case that great weight had to be given to the circumstances. *Defries v Milne* does not appear to have been the first point of reference in subsequent cases on the subject.

20. The historical development of maintenance and champerty was reviewed by Danckwerts J in *Martell v Consett Iron Co Ltd* [1955] Ch 363 and by Steyn LJ in the Court of Appeal in *Giles v Thompson* [1993] 3 All ER 321: see, in particular pp 328 - 329. It is clear that in mediaeval times maintenance and champerty offered a necessary protection against assignments of rights of action, as a means of ensuring success in litigation, to those in favour with a far from independent judiciary. That need has long gone. Modem cases have been more sympathetic to assignments of rights to litigate. Maintenance and champerty were abolished as crimes and torts by the Criminal Law Act 1967, but the Act preserved their relevance in deciding whether or not contracts were to be treated as contrary to public policy or illegal.

21. The case which the claimant has relied on and the defendants have sought to play down is *Trendtex v Credit Suisse* [1982] AC 679. Trendtex sued CBN, a Nigerian bank, for failing to honour a letter of credit. Credit Suisse was a substantial creditor of Trendtex and guaranteed the legal costs and fees incurred by Trendtex in an action brought in England against CBN. Trendtex purported to assign its cause of action against CBN to Credit Suisse. The agreement recited that Trendtex had received an offer to buy the right of action for US$800,000, that Credit Suisse agreed to satisfy Trendtex's creditors, that Trendtex assigned all its residual rights against CBN and gave Credit Suisse authority to settle the action against CBN. Credit Suisse assigned the right of action to a third party for US$1,100,000 and the third party then settled the action for US$8,000,000. Trendtex then sought to set aside the assignment on the grounds that it was void.

22. The agreement had specified that any dispute was to be judged by the Court of Geneva and the House stayed the action to enable trial to be pursued there. The House did, however, conclude that as the agreement manifestly involved the likelihood, of Credit Suisse making a profit out of the litigation it savoured of champerty and therefore was void under English law and considered the criteria going to the validity of an assignment. Lord Roskill considered the matter at pages 702B - 703G. After pointing out that the courts had over the years adopted "an infinitely more liberal" attitude towards the supporting of litigation by a third party and referring to the modern view of "sufficiency of interest" in that branch of the law he stated at 702F:

> My Lords, just as the law became more liberal in its approach to what was *lawful* maintenance, so it became more liberal in its approach to the circumstances in which it would recognise the validity of an assignment of a cause of action and not strike down such an assignment as one only of a bare cause of action. Where the assignee has by the assignment acquired a property right and the cause of action was incidental to that right, the assignment was held effective."

He relied on *Ellis v Torrington* [1920] 1 KB 399 as an example relying on the words of Scrutton LJ in that

case that the assignee was not guilty of maintenance or champerty by reason of the assignment he took because he was buying not in order to obtain a cause of action but in order to protect the property which he had bought.

Lord Roskill added:

> "But … as I read the cases it was not necessary for the assignee always to show a property right to support his assignment. He could take an assignment to support and enlarge that which he had already acquired as, for example, an underwriter by subrogation."

He continued:

> "My Lords, I am afraid that, with respect I cannot agree with the Learned Master of the Rolls … when he said in the instant case that the old saying that you cannot assign 'a bare right to litigate' is gone. I venture to think that that still remains a fundamental principle of our law. But it is true today 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 which, as has often been said, is a branch of our law of maintenance ... For my part I can see no reason in English law why Credit Suisse should not have taken an assignment to themselves of Trendtex's claim against CBN for the purpose of recouping themselves for their own substantial losses arising out of CBN's repudiation of the letter of credit upon which Credit Suisse were relying to refinance their financing of the purchases by Trendtex of this cement from their German suppliers."

And at page 703F-G:

> "The court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance."
>
> Lords Edmund-Davies, Fraser and Keith agreed with Lord Roskill.

23. In *Giles v Thompson* [l994] 1 AC 142 Lord Mustill supported Lord Roskill's approach in a situation such as the present. He said, at page 163:

> "I accept there have evolved crystallised policies in relation to solicitors' contingent fees and the assignment of bare rights of action for tortious wrongs. I also accept that in relation to these aspects of the law of champerty it is necessary first to consider whether the transaction bears the marks of unlawful champerty and then to inquire whether it is validated by the existence of a legitimate interest in the person supporting the action distinct from the benefit he seeks to derive from it. For this purpose close regard must be paid to *Trendtex*…."

In the same paragraph he continued:

> "Meanwhile I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants. For this purpose the issue should not be broken down into steps. Rather, all the aspects of the transaction should be taken together for the purpose of considering the single question whether … there is wanton and officious intermeddling with the disputes of others where the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse."

24. *Trendtex* was also considered by the Court of Appeal in *Camdex International Bank v Bank of Zambia* [1998]

QB 22. Hobhouse LJ, citing Lord Roskill in *Trendtex* said at page 29:

> "What is objectionable is trafficking in litigation. The modern approach is not to extend the types of involvement in litigation which are considered objectionable. There is a tendency to recognise less specific interests as justifying the support of the litigation of another."

And at page 39B he summarised Lord Roskill's distinction:

> " … between assignments of a property right which are in principle valid and assignments of bare causes of action which are in principle invalid unless the assignee can show a sufficient interest in the right assigned."

25. Mr Matthewson says that although *Trendtex* was a case of assignment of a cause of action in contract the reasoning applies equally in cases of tort. He does not seek to argue that all causes of action in tort are assignable I think he would accept that where the right of action is what Clerk and Lindsell describe as essentially personal (see 18th Edition para 4-76) the cause of action cannot be assigned. But he says that where the assignee has a commercial interest in the subject matter of the assignment then the assignment should be upheld as valid. In the present case the right of action clearly concerns a commercial interest and no question of an "essentially personal" right of action arises.

26. *May v Lane* and *Glegg v Bromley* were cited in *Trendtex*: *Defries v Milne* was not cited but *Fitzroy v Cave* [1905] 2 KB 364, which was followed in *Defries v Milne* was cited. Although Lord Roskill's observations in *Trendtex* were obiter, like so many of the observations cited above in earlier cases, they were agreed by Lords Edmund-Davies, Fraser and Keith and have been subsequently confirmed. It is clear that they were no casual asides and that Lord Roskill had closely considered the historical development of the law in relation to assignments. They are binding on me.

27. In the light of the above the assignment has to be considered in the light of the "totality of the transaction". I have been referred to the Variation Agreement between LEG and the claimant. In his opening Mr Matthewson drew my attention to clause 5.1 by which the claimant undertook to do all things necessary to provide services and carry out projects as defined, clause 6 whereby the claimant undertook to maintain necessary electrical connections and clause 12 whereby LEG agreed to pay "the Charges", which are defined as charges payable by LEG to the claimant pursuant to Schedule 3. The provisions in Schedule 3 are complex.

28. I was told at the outset that both LPN and the claimant have recently been taken over by Electricité de France. No-one has provided me with any evidence of the terms of any take over. Nor have I been provided with any evidence dealing with whether any agreement or understanding has been reached by LPN and the claimant concerning the relationship of the assignment and the provisions of Variation Agreement. Nor have I been provided with any evidence of what, if anything has been done about reimbursement for the cost of the repairs to the cable damaged in this case, beyond the fact that Recital (C) of the agreement of 26 April 2002 states that the claimant has repaired damage to the network caused by third parties "at its own cost". On the face of it the claimant may charge for its services under the Variation Agreement which, *prima facie*, would include repair works necessary as a result of any negligence by the defendants. If the assignment is upheld, the claimant may sue the defendants for those costs. The defendants say who knows what arrangements may exist behind the scenes but they have not questioned the claimant to discover whether such arrangements exist and, if so, what they are. I do not propose to speculate on any agreement arrangement or understanding which may have been reached.

29. The defendants do not suggest that the claimant did not repair the cable at its own cost. Indeed they make it part of their case that they did. I see no reason to reject the assertion in recital (C) of the agreement of 26 April 2002 that the claimant has repaired damage to the network "at its own cost".

30. I conclude that LPN as owners of the network assets (see recital (A) had, prior to the assignment the right to sue in negligence those responsible for damaging their cable. It has not been the defendants' case that they could not in law have a right to sue. Their argument has been that because the claimant had done the repairs "at its own cost" LPN had suffered no loss and therefore *in this instance* had no right to assign, even if a right

of action in tort were assignable.

31. On the basis of the above I can see no good reason why I should not uphold the assignment made on 26 April 2002 LPN's right of action is a valuable right or interest, and in my judgement, a thing in action within section 136 of the 1925 Act. The claimant has established to my satisfaction that, in the words of Lord Roskill, it has "a genuine commercial interest in taking the assignment and in enforcing it for his own benefit". I can see no reason in the present case why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.

32. Does the particulars of claim disclose a reasonable cause of action?

The allegation that the particulars of claim discloses no reasonable cause of action relies on the wording of Recital (C) and asserts that as the claimant had remedied the damage to the cable at its own cost (the phrase employed is "at its own expense"), LPN had not had to pay and therefore had no claim for damages to assign, and that as the claimant was not under any legal obligation to repair the cable, it had remedied the damage gratuitously and therefore had no cause of action.

33. To deal with the latter point first. The claimant is not asserting any direct cause of action against the defendants. But it is stretching credulity to state that the claimant repaired the cable "gratuitously". It requires no great leap of the imagination to conclude that it did so because of a contractual obligation to do so under the April 2001 agreement and that it would wish to recover its outlay. It hopes to do so with the aid of the assignment but should the assignment fail, it will be able to fall back on the April 2001 agreement and claim from LEG; LPN will then have to sue in its own name.

34. As to the first point I am prepared to assume it is correct that thus far the claimant has not charged LPN the cost of remedying the damage. That may be because it anticipated an assignment and/or because of the existence of the assignment. But that does not mean they cannot or will not do so. On the face of it LPN have an obligation to pay under the terms of the agreement of April 2001. The limitation period for any claim under the agreement has not yet passed and even if it had I am not sure that would remove anything capable of being assigned, given that limitation does not destroy a liability but is merely a defence. I agree with Mr Matthewson's submission that the defendants are attaching an unjustifiable significance and meaning to the words "at its own cost". I read those words as meaning merely that the claimant has met the cost so far, not that it has met the cost gratuitously without any intention of seeking reimbursement. I am not satisfied that LPN had nothing to assign on 26 April 2002.

35. I am not satisfied that at this stage in the proceedings it can properly be said that the particulars of claim disclose no reasonable cause of action.

36. I therefore find for the claimant on both preliminary points.